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## THE WTO DISPUTE SETTLEMENT REPORTS

The *Dispute Settlement Reports* of the World Trade Organization (the "WTO") include panel and Appellate Body reports, as well as arbitration awards, in disputes concerning the rights and obligations of WTO Members under the provisions of the *Marrakesh Agreement Establishing the World Trade Organization*. The *Dispute Settlement Reports* are available in English, French and Spanish. Starting with 1999, the first volume of each year contains a cumulative index of published disputes.

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## TABLE OF CONTENTS

*Page*

**Australia - Subsidies Provided to Producers and  
Exporters of Automotive Leather - Recourse to  
Article 21.5 of the DSU by the United States  
(WT/DS126)**

Report of the Panel..... 1189

**Mexico - Anti-Dumping Investigation of High  
Fructose Corn Syrup (HFCS) from the  
United States (WT/DS132)**

Report of the Panel..... 1345

**United States - Tax Treatment for "Foreign Sales  
Corporations" (WT/DS108)**

Report of the Appellate Body..... 1619



**AUSTRALIA - SUBSIDIES PROVIDED TO PRODUCERS AND EXPORTERS OF AUTOMOTIVE LEATHER -**

**Recourse to Article 21.5 of the DSU by the United States**

**Report of the Panel  
WT/DS126/RW\***

*Adopted by the Dispute Settlement Body  
on 11 February 2000*

**TABLE OF CONTENTS**

	Page
I. INTRODUCTION AND FACTUAL BACKGROUND.....	1190
II. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES .....	1192
III. PROCEDURAL MATTERS .....	1192
A. Working Procedures Concerning the Descriptive Part of the Panel Report.....	1192
B. Procedures Governing Business Confidential Information.....	1193
C. Working Procedures as Regards Third Parties.....	1194
IV. THIRD PARTY STATEMENTS.....	1194
V. REQUEST BY THE UNITED STATES FOR PRELIMINARY RULING CONCERNING INFORMATION FROM AUSTRALIA.....	1195
VI. FINDINGS.....	1198
A. Is the 1999 Loan within the Panel's Terms of Reference? .....	1198
B. Existence or Consistency of Measures Taken to Comply with the Recommendation of the Dispute Settlement Body .....	1200
1. Arguments of the United States .....	1200
2. Arguments of Australia.....	1202
3. The Meaning of "Withdraw the Subsidy" in Article 4.7 of the SCM Agreement .....	1203
4. Has Australia Withdrawn the Prohibited Subsidies in this Case?.....	1213
VII. CONCLUSION .....	1214

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\* WT/DS126/RW/Corr.1.

**LIST OF ANNEXES***Annex 1: Submissions of the United States*

1-1:	First Submission of the United States (dated 27 October 1999).....	1215
1-2:	Rebuttal Submission of the United States (dated 15 November 1999) .....	1229
1-3:	Oral Statement of the United States (dated 23 November 1999).....	1241
1-4:	Final Oral Statement of the United States (dated 24 November 1999).....	1248
1-5:	United States' Answers to Written Questions of the Panel (dated 1 December 1999) .....	1249
1-6:	United States' Comments on New Factual Information from Australia (dated 3 December 1999) .....	1259

*Annex 2: Submissions of Australia*

2-1:	First Submission of Australia (dated 3 November 1999) .....	1261
2-2:	Rebuttal Submission of Australia (dated 15 November 1999) .....	1276
2-3:	Oral Statement of Australia (dated 23 November 1999) .....	1291
2-4:	Final Oral Statement of Australia (dated 24 November 1999) .....	1299
2-5:	Australia's Answers to Written Questions of the Panel and the United States (dated 1 December 1999) .....	1303
2-6:	Australia's Comments on New Factual Information from the United States (dated 3 December 1999) .....	1326

*Annex 3: Submissions of the European Community*

3-1:	Oral Statement of the European Community (dated 23 November 1999).....	1327
3-2:	European Community's Answers to Written Questions of the Panel (dated 1 December 1999).....	1331

<i>Annex 4: Procedures Governing Business Confidential Information .....</i>	<i>1338</i>
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**I. INTRODUCTION AND FACTUAL BACKGROUND**

1.1 On 16 June 1999, the Dispute Settlement Body ("the DSB") adopted the report and recommendations of the Panel in the dispute *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather* (WT/DS126/R) ("*Australia - Automotive Leather*"). In that report, the Panel found that payments under a grant contract between the Government of Australia, and Howe and Company Proprietary Ltd. ("Howe") and Howe's parent company Australia Leather Holdings, Ltd. ("ALH") were subsidies within the meaning of Article 1 of the Agreement on Subsidies and Countervailing Measures ("the SCM Agreement") contingent upon export perform-

ance within the meaning of Article 3.1(a) of that Agreement<sup>3</sup>, The Panel accordingly recommended, pursuant to Article 4.7 of the SCM Agreement, that Australia withdraw those subsidies without delay, which the Panel specified to be within 90 days.<sup>4</sup>

1.2 On 6 July 1999 Australia submitted a communication to the Chairman of the DSB pursuant to Article 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), regarding "surveillance of implementation of recommendations and rulings- time-period for implementation" (WT/DS126/6). In that communication, Australia stated that the United States had been informed at a bilateral meeting in Canberra on 25 June 1999 that Australia intended to implement the DSB recommendations, and that Australia intended to implement the DSB recommendations within the time-frame provided for in the panel report.

1.3 On 17 September 1999, Australia submitted to the Chairman of the DSB a "status report by Australia" to inform the DSB of Australia's progress in implementing the recommendations and rulings in the dispute (WT/DS126/7). In that communication, Australia stated that on 14 September 1999, Howe had repaid the Australian Government \$A8.065 million, an amount which covered any remaining inconsistent portion of the grants made under the grant contract. Australia further stated that the Australian Government had also terminated all subsisting obligations under the grant contract. Australia concluded that this implemented the recommendations and rulings in the dispute to withdraw the measures within 90 days.

1.4 On 4 October 1999, the United States submitted a communication seeking recourse to Article 21.5 of the DSU (WT/DS126/8). In that communication, the United States indicated its view that the measures taken by Australia to comply with the recommendations and rulings of the DSB were not consistent with the SCM Agreement and the DSU. In particular, in the view of the United States, Australia's withdrawal of only \$A8.065 million of the \$A30 million grant, and Australia's provision of a new \$A13.65 million loan on non-commercial terms to Howe's parent company, ALH, were inconsistent with the recommendations and rulings of the DSB and Article 3 of the SCM Agreement. The United States further stated that because there was "a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB" between the United States and Australia, within the terms of Article 21.5 of the DSU, the United States sought recourse to Article 21.5 in the matter and requested that the DSB refer the disagreement to the original panel, if possible, pursuant to Article 21.5.

1.5 At its meeting on 14 October 1999, the DSB decided, in accordance with Article 21.5 of the DSU, to refer to the original panel the matter raised by the United States in document WT/DS126/8. The DSB further decided that the Panel should have standard terms of reference as follows:

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\* Please note that, due to a typographical error, there are no footnotes numbered 1 or 2 in the Panel's report, pages 1-21 of the document. Instead, the footnote numbering, which should have started with footnote 1, starts with footnote 3.

<sup>3</sup> *Australia- Automotive Leather* WT/DS126/R, DSR 1999:III, 951, para. 10.1(b).

<sup>4</sup> *Australia- Automotive Leather*, *supra*, footnote 3, paras. 10.3, 10.7.

"To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS126/8, 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".

- 1.6 The Panel was composed as follows:  
Chairperson: H.E. Carmen Luz Guarda  
Members: Mr. Jean-François Bellis  
Mr. Wieslaw Karsz
- 1.7 The European Communities ("the EC") and Mexico reserved their rights to participate in the Panel proceedings as third parties.
- 1.8 The Panel met with the parties on 23-24 November 1999, and with the third parties on 23 November 1999.
- 1.9 The parties having agreed to dispense with the interim review stage, the Panel submitted its report to the parties on 14 January 2000.

## II. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

- 2.1 The **United States** requests the Panel to "determine that Australia has not withdrawn its illegal subsidy without delay, and thus has not complied with Article 4.7 of the SCM [Agreement] and the Panel's recommendations".
- 2.2 The United States also requests the Panel to make a preliminary ruling that Australia produce by 29 October 1999 authentic copies of certain documents, as well as certain information, for review by the Panel and the United States.
- 2.3 **Australia** requests the Panel to "find that in withdrawing \$8.065 m. from Howe by 14 September 1999: Australia has fully implemented the recommendation of the DSB of 16 June 1999 (WT/DS126/5)".

## III. PROCEDURAL MATTERS

### A. *Working Procedures Concerning the Descriptive Part of the Panel Report*

3.1 The Panel adopted its working procedures for this dispute after consulting with the parties. With the agreement of the parties, these procedures provide that, in lieu of the traditional descriptive part of the Panel report setting forth the arguments of the parties, the parties' submissions will be annexed in full to the Panel's report. Accordingly, the submissions of the United States are set forth in Annex 1, and the submissions of Australia are set forth in Annex 2. The third party oral statement and the written submission of the EC containing answers to questions posed by the Panel are set forth in Annex 3. Mexico, the other third party, did not make a written submission nor did it present a written version of its oral remarks made at the third party session.<sup>5</sup>

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<sup>5</sup> See para. 4.2 for a summary of Mexico's oral remarks.

*B. Procedures Governing Business Confidential Information*

3.2 As part of its working procedures, the Panel established, in consultation with the parties, additional procedures governing business confidential information ("BCI"). The BCI procedures are set forth in Annex 4. In the original dispute, the Panel had adopted similar procedures.

3.3 Under the BCI procedures, either party may designate as "business confidential" information that it submits. Only "approved persons" may have access to such information. "Approved persons" are those who have provided a signed "Declaration of Non-Disclosure" to the Chair of the Panel, and have thereby agreed to abide by the established BCI procedures. A party submitting business confidential information also must submit a non-confidential version or summary thereof, which can be disclosed to the public.

3.4 In a letter to the Panel dated 8 November 1999, the EC objected to the BCI procedures established by the Panel. In particular, the EC noted that the procedures provide that certain portions of the parties' written submissions can be withheld if they are considered to contain business confidential information, and if the relevant officials of the third party have not signed a Declaration of Non-Disclosure. In the view of the EC, this requirement is not in conformity with the DSU. The EC argued that EC officials are not allowed to enter into personal commitments to third country governments concerning the conduct of dispute settlement proceedings, and that such obligations may only be undertaken by the EC. The EC further argued that EC officials are bound by the EC Treaty and their terms of employment not to disclose confidential information, including business confidential information, and that the EC is bound to protect the confidentiality of such information under the DSU. The EC therefore requested that the Panel ensure that the EC received complete copies of the parties' written submissions, as requested by the DSU.

3.5 In a response to the EC dated 11 November 1999, the Panel noted that Australia had already submitted business confidential information, expressly on the basis of the procedures established by the Panel concerning such information (*see* para. 5.9, *infra.*), and that Australia also had submitted, and the EC had been provided with a copy of, a non-business confidential letter describing that information. The Panel recalled that the BCI procedures had been adopted by the Panel in consultation with the parties, in recognition of the parties' concerns over the protection of business confidential information, and that similar procedures had been adopted in the original dispute. The Panel indicated that, while respecting the obligations undertaken by EC officials with respect to confidentiality, it continued to conclude that in this case special procedures for the submission and handling of business confidential information were appropriate. The Panel concluded therefore that to obtain access to any business confidential information in this dispute, the EC would need to provide signed Declarations of Non-Disclosure, in accordance with the relevant procedures established by the Panel.

3.6 At the third party session, the EC reiterated its objection to this aspect of the Panel's working procedures.<sup>6</sup>

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<sup>6</sup> Annex 3-1 at paras. 9-10.

C. *Working Procedures as Regards Third Parties*

3.7 The working procedures adopted by the Panel provide, *inter alia*, for only one meeting with the parties, in conjunction with which the third party session was held. The procedures also provide for third parties to receive only the first submissions, and not the rebuttal submissions, of the parties.

3.8 In its 8 November 1999 letter to the Panel, the EC objected to this aspect of the Panel's working procedures. The EC recalled that Article 10.3 of the DSU provides that:

"Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel".

The EC stated that since in this case there was to be only one meeting of the Panel, at which the Panel would be considering both submissions of each party, the EC should, in accordance with Article 10.3 of the DSU, receive all of the parties' submissions. The EC claimed that it is only in this way that it would be able to make known its views on the issues that the Panel was actually considering at its meeting, rather than having to express views on the incomplete positions of the parties that would have been developed and might have changed in the further submissions that the Panel would have before it at the meeting. The EC therefore asked the Panel to clarify the working procedures so as to ensure that the EC received all written submissions made before the meeting of the Panel.

3.9 In its 11 November 1999 response to the EC, the Panel indicated that it had decided not to change the existing working procedures which provide for third parties to receive the first written submissions of the parties, but not the rebuttals. The Panel stated that if it had decided to hold two meetings with the parties, as is the normal situation envisioned in Appendix 3 of the DSU, third parties would have received only the written submissions made prior to the first meeting, but not rebuttals or other submissions made subsequently. Thus, in the more usual case, third parties would be in the same position as they were in this case with respect to their ability to present views to the panel. In the view of the Panel, the procedure it had established conformed more closely with the usual practice than would be the case if third parties received the rebuttals, and was in keeping with Article 10.3 of the DSU in a case where the Panel holds only one meeting.

3.10 At the third party session, the EC reiterated its objection to this aspect of the Panel's working procedures.<sup>7</sup>

#### IV. THIRD PARTY STATEMENTS

4.1 As indicated, the full text of the EC's oral statement is attached at Annex 3. In addition, the Panel had invited third parties to answer several questions, should they choose to do so. The EC's written answers to those questions are also attached at Annex 3.

4.2 In its oral remarks at the third party session, **Mexico** regretted that there had been no translation of the submissions and stated that the lack of translation made it

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<sup>7</sup> Annex 3-1 at paras. 2-8.

impossible for Mexico to react in a prompt manner to the parties' arguments, and that Mexico was therefore not in a position to make a submission. Mexico noted that under the Panel's working procedures, Mexico had no further opportunity to present its views. Mexico had a systemic interest in how Article 21.5 panels are carried out in practice. Mexico stated that it had sent the Panel's written questions to its capital, but noted that the Chair had recalled that third parties are not obliged to answer such questions.

## **V. REQUEST BY THE UNITED STATES FOR PRELIMINARY RULING CONCERNING INFORMATION FROM AUSTRALIA**

5.1 In its first written submission,<sup>8</sup> the United States asked the Panel to request that Australia produce, by 29 October 1999, authentic copies of the following documents, as well as the following information, for review by the Panel and the United States:

- "1. Any agreement, whether by formal agreement or by correspondence with Howe or its related entities, under which Howe agreed to repay, or repaid, \$A8.065 million of the \$A30 million provided in 1997 and/or 1998.
2. Any correspondence between the Government of Australia and Howe or its related entities that refers to the agreement to repay, or to the repayment of, the \$A8.065 million referred to in request 1 above.
3. (a) Any written calculation of the \$A8.065 million communicated to or by Howe or its related entities to or by the Australian Government.  
(b) An explanation of how the \$A8.065 million was calculated.
4. Any document by which the Grant Contract was terminated and any document terminating any performance requirements by Howe pursuant to that Grant Contract.
5. The loan contract between the Australian Government and Australia Leather Holdings providing for the "additional loan of \$13.65 million" to Australian Leather Holdings referred to in Australia's Joint Media Release 99/291, dated September 15, 1999.
6. Any documents referring to or related to the loan contract or the loan referenced in request 5 above, including but not limited to any correspondence between Howe or its related entities and the Australian Government.
7. (a) Any written calculation of the amount of the \$A13.65 million loan communicated to or by Howe or its related entities to or by the Australian Government.  
(b) An explanation of how the \$A13.65 million was calculated or determined.

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<sup>8</sup> Annex 1-1 at para. 54.

8. Any documents created by the Australian Government related to the authorization of the Australian Government to (a) issue a new \$A13.65 million loan referenced in request 5 above, and/or (b) terminate the Grant Contract and request repayment of \$A8.065 million of the subsidy".

5.2 The United States argued that this information and documentation were crucial to the Panel's determination under Article 21.5 of the DSU. The United States had relied in its first submission on published statements and submissions of the Australian Government to establish that (a) Australia's method of determining the prospective portion of the grant was arbitrary and resulted in inappropriately putting most of the grant beyond the reach of the SCM Agreement remedies; and (b) the loan was simply a reimbursement on non-commercial terms of the purported withdrawal of the \$A8.065 million repaid by Howe.

5.3 According to the United States, the information and documents requested contained facts and information with a direct bearing on the issues in this proceeding; they should reveal in detail the circumstances under which the repayment by Howe was made, how that amount was agreed to or calculated, and whether there was any reimbursement or *quid pro quo* for the repayment. Similarly, given that the loan was obviously linked to the partial repayment of the grant, documentation and information pertaining to the loan were critical to a clear understanding of its relationship to the grant and grant repayment at issue. In addition, the exact terms of the loan, and the conditions for its issuance, were highly relevant to whether, and the extent to which, Australia was simply funding Howe's reimbursement out of its own pocket.

5.4 The United States recalled that it had requested these documents and information of Australia at the first organizational meeting of the Panel, on 18 October 1999, but had received nothing as of the filing deadline for the United States' first submission. In the view of the United States, therefore, the request should have come as no surprise to Australia, and Australia should have no trouble meeting the deadline proposed by the United States. It was important that these documents and information be provided on this schedule to permit the United States to review them prior to Australia's first submission, so that relevant information could be incorporated into the United States' second submission.

5.5 The **Panel** sought the views of Australia with regard to the United States' request for preliminary ruling concerning its information request. The Panel stated that if Australia did not object to providing some or all of that information, it should so indicate, and that in that case, the Panel would request that any such documents be submitted no later than the deadline for Australia's first written submission. If Australia objected to the United States' request or any part thereof, its response should set forth the basis for any such objection.

5.6 **Australia** replied that, as a general point, the United States had laid no foundation for most of the putative material, in particular about the 1999 loan, sought in its request for a preliminary ruling. However, according to Australia, most of the material did not exist. Australia noted that it had informed the United States orally about the details of both the withdrawal and the loan prior to 14 September 1999 and had told the United States that a media release was being issued on the matter. Nonetheless, during the six weeks between 14 September and the 18 October organizational meeting of the Panel, the United States had not requested any documents or

any further explanation or details. While, at the behest of the United States, Australia had waived the normal requirement for consultations prior to establishment of the Panel, the United States had had plenty of time and opportunity to approach Australia about the matter, but had chosen not to. As a normal procedure, Australia considered that the United States should have to lay some foundation for requiring specific information, rather than launching such a request through seeking an immediate ruling by the Panel.

5.7 Regarding the withdrawal of subsidies required by the DSB, Australia indicated, in response to the United States' requests 1 and 4, that it would include the Deed of Release and confirmation of payment of the \$A8.065 million in the context of Australia's first submission. In response to request 2, Australia indicated that the letter from the Government to ALH could be provided, although no foundation had been laid about its relevance to the dispute. In response to request 3 (a), Australia stated that there was no written calculation of the \$A8.065 million communicated to or by Howe or its related entities to or by the Australian Government, and that the issue had been resolved at meetings. In response to request 3 (b), Australia indicated that the explanation of how the \$A8.065 million had been calculated would be provided in its first submission.

5.8 Regarding the 1999 loan generally, Australia indicated that the Australian Government was entitled to provide new subsidies, including in the form of an unconditional concessional loan to ALH, and was not constrained in this by the DSB recommendation on automotive leather. Australia therefore considered that the matter was not before the Panel and that the United States had not laid the necessary foundation for using this Panel process for seeking such information. Australia stated that, based on the argument at paragraph 50 of the US first submission,<sup>9</sup> the United States was not arguing that the loan was WTO inconsistent, which it could hardly do given the Panel's finding on the 1997 loan, which was for automotive leather purposes, while the 1999 loan was unconditional to ALH. According to Australia, there was nothing covert about the 1999 loan except that it dealt with the business of a single, small company. Rather than going on a fishing expedition, the United States should first have to establish the need for such additional information to argue its case, which appeared on the basis of its first submission to be one of trade effect rather than WTO rules.

5.9 Regarding the United States' request 5, Australia indicated that, if the Panel considered that it needed to see the Loan Agreement, Australia was willing to provide it, so long as there was an assurance from other parties that the BCI procedures set out by the Panel would be adhered to. In this regard, Australia requested the Panel to inform the United States and the third parties that, as a condition for receiving business confidential information, consistent with paragraph XII:1(i) of the BCI procedures, Australia required that all business confidential information, including notes taken under paragraph VII:2 of the BCI procedures, be returned promptly to Australia.

5.10 Regarding the United States' request 6, Australia indicated that the letter from the Government to ALH could be provided. Regarding request 7, Australia indicated

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<sup>9</sup> Annex 1-1 at para. 50.

that there was no written calculation of the amount of the \$A13.65 million loan communicated to or by Howe or its related entities to or by the Australian Government, and that there were lengthy consultations with ALH about the size of a new concessional loan. A wide range of options in respect of ALH and its shareholders had been considered. The decision in favour of a loan had been based solely on the Panel's finding in favour of the 1997 loan to ALH and Howe for automotive leather purposes. The terms of the loan had been derived from those in the 1997 loan, but without any connection to automotive leather. The final amount had been accepted by ALH in the context of its assessment of all factors, including resolving the case, the effect on ALH's balance sheet, tax implications for ALH, and ALH's judgement of future interest rates. Regarding request 8, Australia indicated that these documents were referred to in its response concerning requests 1 and 6.

5.11 The **Panel** concluded that, based on Australia's comments on the United States' request, Australia was willing to submit all of the information either on its own, or in the event that the Panel considered it necessary, to the extent that documents existed and subject to proper handling in accordance with the BCI procedures. The Panel observed that it had every expectation that parties and third parties would abide by the relevant procedures established by the Panel, if they wished to have access to such information. In this regard, the Panel had requested the United States and the third parties to sign and return to the Panel Secretary the non-disclosure forms, so that a list of approved persons could be established to enable the parties and third parties to provide only approved persons with copies of business confidential information. The Panel informed Australia that it did consider necessary the submission of all of the information requested by the United States, and therefore expected Australia to submit all relevant information in conjunction with Australia's first written submission.

5.12 In conjunction with its first submission, Australia submitted certain documents and information requested by the United States.

## VI. FINDINGS

### A. *Is the 1999 Loan within the Panel's Terms of Reference?*

6.1 Australia argues that the 1999 loan is not within the scope of the Panel's terms of reference. In this regard, Australia argues that the 1999 loan is not part of the implementation of the DSB's ruling and recommendation, noting that it was not notified to the DSB in the document submitted in this regard by Australia (WT/DS126/7). In Australia's view, the Panel's terms of reference "relate to the implementation of the recommendation of the Report, i.e. to withdraw the grant payments from Howe".<sup>10</sup>

6.2 The United States argues that, under Article 21.5 of the DSU, the Panel's task is to determine the existence or consistency of measures taken to comply with the DSB's ruling. In the United States' view, it is clear that if the Panel can determine the

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<sup>10</sup> Annex 2-1 at para. 51.

"existence" of measures taken to comply with the ruling, it can consider whether the measures purportedly taken to comply were effectively rendered non-existent.<sup>11</sup>

6.3 We note that this Panel is operating under standard terms of reference, which authorize the Panel

"To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS126/8, 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".<sup>12</sup>

Consequently, as in the original dispute, the Panel's terms of reference are defined by the "request for establishment", that is, document WT/DS126/8. That document provides, in pertinent part:

"On 15 September 1999, the Australian government announced in a media release that it had implemented the Panel report's recommendation by terminating the grant contract with Howe and that Howe had repaid \$A8.065 million of the \$A30 million grant. Australia stated that this repayment constituted the "prospective element" of the grant because it was "the proportion of grant monies found to be applied to the sales performance targets contained in the Grant Contract for the period from 14 September 1999 until the end of the Grant Contract on 30 June 2000".

Australia further stated in the same media release that it was providing a new loan of \$A13.65 million to Howe's parent company, Australian Leather Holdings Ltd. The United States understands that this loan was granted on non-commercial terms.

The United States believes that **these measures** taken by Australia to comply with the recommendations and rulings of the DSB are not consistent with the SCM Agreement and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In particular, **Australia's withdrawal of only \$A8.065 million** of the \$A30 million grant, and **Australia's provision of a new \$A13.65 million loan** on non-commercial terms to Howe's parent company, are inconsistent with the recommendations and rulings of the DSB and Article 3 of the SCM Agreement". (emphasis added).

6.4 In general, it is the complaining Member in WTO dispute settlement which establishes the scope of the measures before a panel. A "matter" before a panel consists of the "measure(s)" at issue, and the claims relating to those measures, as set out in the request for establishment.<sup>13</sup> In this case, the United States' request for establishment clearly identifies both the repayment by Howe and the 1999 loan as the

<sup>11</sup> Annex 1-2 at para. 30.

<sup>12</sup> WT/DS126/9 (1 November 1999).

<sup>13</sup> See, *Guatemala - Anti-Dumping Investigation regarding Portland Cement from Mexico (Guatemala-Cement)*, WT/DS60/AB/R (*Guatemala-Cement AB Report*), adopted 25 November 1998, para. 76.

measures at issue. For us to rule, as suggested by Australia, that we are precluded from considering the 1999 loan, would allow Australia to establish the scope of our terms of reference by choosing what measure or measures it will notify, or not notify, to the DSB in connection with its implementation of the DSB's ruling. Australia has not made any argument or advanced any reasoning to support its position beyond stating its own view that the 1999 loan is not relevant to this dispute.

6.5 Even assuming that a panel may conclude that a measure specifically identified in the request for establishment is not properly before it in a proceeding under Article 21.5, a question we do not here decide, in this case we see no basis for such a conclusion. The 1999 loan is inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature. In our view, the 1999 loan cannot be excluded from our consideration without severely limiting our ability to judge, on the basis of the United States' request, whether Australia has taken measures to comply with the DSB's ruling. In the absence of any compelling reason to do so, we decline to conclude that a measure specifically identified in the request for establishment is not within our terms of reference.

6.6 We note that this view is consistent with the conclusion of the Panel in *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador*.<sup>14</sup> In that case, the Panel observed that its terms of reference comprised the measures and claims specified by Ecuador in requesting the Panel's establishment.<sup>15</sup>

6.7 Therefore, we find that the 1999 loan is within our terms of reference, and we may consider it in determining the existence or consistency of measures taken by Australia to comply with the DSB's ruling in this dispute.

*B. Existence or Consistency of Measures Taken to Comply with the Recommendation of the Dispute Settlement Body*

*1. Arguments of the United States*

6.8 The United States asserts that Australia has failed to take measures to comply with the recommendation and ruling in this dispute, that is, that Australia has failed to withdraw the subsidies determined to be inconsistent with Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). In addition, the United States asserts that the measures taken by Australia are not consistent with the SCM Agreement and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

6.9 In the United States' view, in order to comply with the recommendation to "withdraw the subsidy" in this dispute, Australia was required to withdraw the "prospective portion" of the prohibited subsidies found to have been provided to Howe. The United States notes that in our original determination, we found that the payments under the grant contract constituted prohibited subsidies, recommended that Australia withdraw the subsidies, and that the measures be withdrawn within 90

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<sup>14</sup> WT/DS27/RW/ECU (12 April 1999), DSR 1999:II, 803.

<sup>15</sup> *Ibid.* para. 6.7. See also paras. 6.8-6.10, where the Panel concluded that Article 21.5 did not establish any limitations on the measures that might be brought before a panel under that provision.

days. The United States observes that Article 1.1 of the SCM Agreement provides that a subsidy exists if there is a direct transfer of funds from the government and a benefit is thereby conferred. Therefore, the United States asserts that what must be withdrawn, in order to comply with the recommendation, is that portion of the funds provided by the Government of Australia that continues to confer a benefit to Howe after the adoption of the Report in this dispute, that is, after 16 June 1999.

6.10 The United States calculates what it refers to as the "prospective portion" of the subsidy to be withdrawn by allocating the amount of the grant payments over the useful life of Howe's production assets, and calculating the amount allocable to the period following adoption of the report on 16 June 1999. To the amount thus calculated as the "prospective portion" of the subsidy, the United States adds interest accruing after the date of adoption of the report.<sup>16</sup> The United States finds support for its approach to this calculation in the practice of Members, in particular its own practice and that of the EC, in calculating subsidy amounts under Part V of the SCM Agreement, which provides for countervailing measures as a unilateral remedy in cases of injurious subsidies, and also points to the Report of the Informal Group of Experts.<sup>17</sup> That report, which concerned recommendations for calculating the *ad valorem* rate of subsidization in the context of certain serious prejudice cases under Part III of the SCM Agreement, recommends that large non-recurring subsidies should normally be allocated over the useful life of the recipient's assets.

6.11 The United States argues that large non-recurring grants can be used to purchase productive assets, or free up other funds to purchase assets, and thus provide benefits which last a long time - generally, over the life of those assets. In the absence of an allocation, the United States argues that a subsidy would have to be attributed to some shorter period of time, which would ignore economic reality, and would, in many cases, place subsidies in the form of large, non-recurring grants beyond the reach of panel recommendations under Article 4.7 of the SCM Agreement.

6.12 A fundamental principle underlying the United States' approach is that the recommendation required under Article 4.7 of the SCM Agreement "that the subsidizing Member withdraw the subsidy without delay," calls only for prospective corrective action, and therefore requires the withdrawal only of the "prospective portion" of a prohibited subsidy. In this regard, the United States refers to Article 19.1 of the DSU which provides 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 that agreement". In the United States' view, this recommendation requires only prospective corrective action by Members, not retrospective action. The United States also notes the decision of the Appellate Body in *Guatemala-Cement*, which states that "It is, therefore, only in the specific circumstance where a provision of the DSU and a special or additional provision of another covered agreement are mutually inconsistent that the special or

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<sup>16</sup> The result of this calculation, that is, the amount that the United States argues should be withdrawn in order to withdraw the "prospective portion" of the prohibited subsidy, is \$A26, 346,154.

<sup>17</sup> Informal Group of Experts on Calculation Issues Related to Annex IV of the Agreement on Subsidies and Countervailing Measures, Report to the Committee on Subsidies and Countervailing Measures, G/SCM/W/415/Rev.2, 15 May 1998.

additional provision may be read to *prevail* over the provision of the DSU".<sup>18</sup> In the United States' view, there is no inconsistency between withdrawal without delay of the prospective portion of a subsidy under Article 4.7 of the SCM Agreement and bringing the subsidy into conformity with a Member's obligations under Article 19 of the DSU.

6.13 Moreover, the United States argues that, to the extent Australia may be considered to have withdrawn part of the subsidy, any such withdrawal is vitiated by the simultaneous provision of the 1999 loan, conditioned upon the repayment by Howe of \$A8.065 million. The United States argues that the 1999 loan amount was sufficient to enable Howe to repay \$A8.065 million, invest the remainder, and have sufficient funds at the end of the loan period to repay the outstanding amount. The United States also argues that the 1999 loan "steps into the shoes" of the prohibited subsidy Australia was required to withdraw, and is therefore itself inconsistent with Article 3.1(a) of the SCM Agreement.

## 2. *Arguments of Australia*

6.14 Australia, like the United States, contends that only a "prospective" remedy is envisioned under Article 4.7 of the SCM Agreement. In this regard, Australia considers that terminating all subsisting obligations under the grant contract, thus terminating the sales performance requirements on Howe under that contract, would be sufficient to implement the recommendation to withdraw the subsidy in this dispute. Australia maintains that it is not the provision of money that was found to be prohibited, but the combination of the provision of the money and the export contingency. Therefore, Australia argues that, by terminating the grant contract and all obligations on Howe under that contract, in particular with respect to the sales performance targets, it has brought the subsidy into conformity with Article 3.1(a) of the SCM Agreement by eliminating the prohibited export contingency.

6.15 Australia argues that elimination of the tie to the sales performance targets transforms the payments under the grant contract from prohibited subsidies to subsidies consistent with the requirements of Article 3.1(a) of the SCM Agreement. In Australia's view, a prohibited subsidy that is "brought into conformity" with Article 3.1(a) has been withdrawn in the sense of Article 4.7 of the SCM Agreement. Australia acknowledges that in some circumstances, "it is difficult to see how the subsidy could be withdrawn...without withdrawing money",<sup>19</sup> but contends that this case does not present such circumstances.

6.16 While Australia maintains, in the first instance, that no repayment is necessary in order to comply with the recommendation in this dispute, it decided, in order to "ensure an end to this dispute",<sup>20</sup> to require Howe to pay \$A8.065 million. Australia calculated this amount as the portion of the subsidy allocable to the period after the end of implementation period (*i.e.*, 14 September 1999), until the end of the sales performance targets under the grant contract (*i.e.*, 30 June 2000). Australia's argument in the alternative appears to be based on the same principle as that underlying

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<sup>18</sup> *Guatemala - Cement AB Report, supra*, footnote 13, para. 66 (emphasis in original).

<sup>19</sup> Annex 2-5, answer to question 13(b) from the Panel.

<sup>20</sup> Annex 2-1 at para. 20.

the United States' position, namely that any repayment need only be of the "prospective portion" of the subsidy. However, Australia differs from the United States with respect to the calculation of the amount to be repaid in order to effectuate repayment of the "prospective portion" of the subsidy. Australia's view is that, in this case, the payments under the grant contract must be allocated over the period for which the sales performance targets set forth in the grant contract were to be in effect, that is, to the period 1 April 1997 to 30 June 2000, less any amounts allocable to sales other than exports of automotive leather. Australia bases this view on its understanding that the grant payments were found to be prohibited subsidies because they were tied to the sales performance targets, which the Panel considered to be, effectively, export performance targets. The amount to be repaid under Australia's calculation is the amount allocable to export sales of automotive leather during the period from 14 September 1999, the end of the implementation period, to 30 June 2000, the end of the performance targets under the grant contract.<sup>21</sup>

6.17 With respect to the 1999 loan, Australia argues that it is not part of the implementation of the recommendation in this dispute. Moreover, Australia asserts that the 1999 loan is not inconsistent with Article 3.1(a) of the SCM Agreement.

### 3. *The Meaning of "Withdraw the Subsidy" in Article 4.7 of the SCM Agreement*

6.18 We are required to determine whether Australia has taken measures to comply with the recommendation and ruling of the DSB in this dispute. Our recommendation and ruling, adopted by the DSB, was made pursuant to Article 4.7 of the SCM Agreement, and called upon Australia to "withdraw the subsidies identified in paragraph 10.1(b)" of the Report within 90 days. The "subsidies identified in paragraph 10.1(b)" of the Report are "the payments under the grant contract [which we had determined] are subsidies within the meaning of Article 1 of the SCM Agreement which are contingent upon export performance within the meaning of Article 3.1(a) of that Agreement". The question before us is the existence or consistency with a covered agreement of measures taken to comply with that recommendation. In order to resolve this question, it is in our view imperative to know what that recommendation means, which in turn requires interpretation of the phrase "withdraw the subsidy" in Article 4.7.

6.19 Both parties, and the EC as third party, appear to be of the view that our task in this dispute is to choose between the parties' respective positions and either conclude, as Australia argues, that Australia has fully complied with the DSB's ruling, or conclude, as the United States argues, that **because** Australia did not withdraw from Howe the sum that the United States calculates should have been withdrawn, it has failed to take measures to comply with the DSB's ruling. In response to a question

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<sup>21</sup> Australia presents two alternative calculations, depending on whether the allocation is based on the aggregate sales performance target, or the interim targets set forth in the grant contract. The first basis yields an amount of \$A6.602 million to be withdrawn, and the second yields an amount of \$A8.065 million. (Annex 2-1 at paras. 46-49, footnotes 22-24, and Attachment A.) Australia considers the lower amount to be based on the appropriate approach (*Ibid.* at para. 47), but required the repayment of the higher amount.

from the Panel, both parties argue that the possibility that "withdraw the subsidy" under Article 4.7 of the SCM Agreement should be interpreted to mean "repay in full" the financial contribution to the recipient was not an issue in dispute between the parties, and therefore is not an issue which we need to address.<sup>22</sup> Our view differs. That neither party has argued a particular interpretation before us, and indeed, that both have argued that we should not reach issues of interpretation that they have not raised, cannot, in our view, preclude us from considering such issues if we find this to be necessary to resolve the dispute that is before us. A panel's interpretation of the text of a relevant WTO Agreement cannot be limited by the particular arguments of the parties to a dispute.

(a) Recommendation of a Remedy Having Exclusively "Prospective" Effect

6.20 The parties have gone to some lengths to argue that "withdraw the subsidy" is a recommendation with exclusively "prospective" effect. The United States argues that "withdraw the subsidy" requires some repayment in this case, but that the repayment can only be "prospective".<sup>23</sup> The United States argues that the "prospective portion" of a one-time subsidy paid in the past can be identified by allocating the subsidy over the useful life of the recipient's productive assets and then drawing a line at the date of adoption of the panel report finding the subsidy to be prohibited. According to the United States, repayment is a prospective remedy with no retrospective effect if it is limited to that portion of the subsidy benefit allocated to the period following adoption of the panel report, plus interest accruing between the date of adoption of the panel report and the end of the implementation period.

6.21 Australia also argues, in the alternative to its primary argument (*see* para. 6.46 *infra.*), that repayment of the "prospective portion" of the subsidy is a prospective remedy. Australia calculates the prospective portion as that portion of the subsidy allocated to the period from the end of the implementation period to the end of the period covered by the sales performance targets under the grant contract. Australia argues that in this case, the subsidies must be allocated in full to the sales performance targets set forth in the grant contract, that is, to the period 1 April 1997 to 30 June 2000, less any amounts allocable to sales other than exports of automotive leather. Australia bases this position on its understanding that the Panel itself so allocated the grant payments by ruling that those payments were prohibited subsidies because they were tied to the sales performance targets, which the Panel considered to be, effectively, export performance targets.<sup>24</sup>

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<sup>22</sup> Annex 1-5 (United States) and Annex 2-5 (Australia), answer to question no. 2 for both parties.

<sup>23</sup> It is supported in this view by the EC. (Annex 3-2, answer to Panel questions 1 and 2.)

<sup>24</sup> Australia's calculation methodology is based on a fundamental misunderstanding of our original determination finding the payments under the grant contract to be prohibited subsidies. Contrary to Australia's understanding, we did not conclude that the subsidies in question were "tied to" particular export sales during a particular period, specifically, the sales performance targets in the grant contract. Rather, we concluded that the subsidy payments under the grant contract "are in fact tied to Howe's actual or anticipated exportation or export earnings. These payments are conditioned on Howe's agreement to satisfy, on the basis of best endeavours, the aggregate performance targets". *Australia - Automotive Leather, supra*, footnote 3, para 9.71. The sales performance targets were an

6.22 While we understand the conceptual framework advanced by the United States<sup>25</sup>, as well as that underlying Australia's alternative position, we do not find meaningful the distinction proposed by the parties between repayment of "prospective" and "retrospective" portions of past subsidies in the context of Article 4.7 of the SCM Agreement. We do not agree that it is possible to conclude that repayment of the "prospective portion" of prohibited subsidies paid in the past is a remedy having only prospective effect. In our view, where any repayment of any amount of a past subsidy is required or made, this by its very nature is **not** a purely prospective remedy. No theoretical construct allocating the subsidy over time can alter this fact. In our view, if the term "withdraw the subsidy" can properly be understood to encompass repayment of **any** portion of a prohibited subsidy, "retroactive effect" exists.

6.23 The EC, as third party, argues that there can be no obligation on a Member to remedy violations with retroactive effect. In the EC's view, any such obligation would be ineffective, since it would result in interference with private rights, giving rise to domestic legal claims. However, this concern would equally arise if repayment of a putative "prospective portion" of a subsidy is required, as the United States proposes, with the support of the EC. Indeed, even the cessation of subsidy payments in the future, a remedy more clearly "prospective" in effect, may interfere with private rights and give rise to domestic legal claims. Many situations can be envisioned, and not only in the subsidies area, in which a Member's actions to implement a ruling of the DSB might result in some interference with private rights, and result in domestic legal claims. This possibility does not, in our view, limit our interpretation of the text of the SCM Agreement.

(b) May "Withdraw the Subsidy" be Understood to Encompass Repayment?

6.24 In this case, we must consider whether the recommendation to "withdraw the subsidy" in Article 4.7 of the SCM Agreement can properly be understood to encompass repayment. In order to answer that question, we must first determine what is meant by the term "withdraw the subsidy" as used in Article 4.7 of the SCM Agreement. In particular, we must consider whether that term is limited to a recommendation with purely prospective effect, or whether it also encompasses repayment.

6.25 The Appellate Body has repeatedly observed that, in interpreting the provisions of the WTO Agreement, including the SCM Agreement, panels are to apply the

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important factual element in our finding, but as we stated, it was our consideration of **all** of the facts that led us to the conclusion that the payments under the grant contract were prohibited subsidies. The specific details of the factual evidence underlying the conclusion that the subsidies were in fact contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement and therefore prohibited do not, in our view, determine what is required in order to "withdraw the subsidy" within the meaning of Article 4.7 of the SCM Agreement.

<sup>25</sup> We note that the concept of allocation of certain subsidies over time has been used and/or recommended in the context of countervailing measures and serious prejudice, because in those contexts, particular subsidy amounts must be attributed to particular sales of particular goods at particular moments in time for calculation of per unit or *ad valorem* subsidization of specific products to be possible. In our view, these issues simply do not arise where the question is what is meant by "withdrawal" of prohibited subsidies.

general rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties. These rules call, in the first place, for the treaty interpreter to attempt to ascertain the ordinary meaning of the terms of the treaty in their context and in the light of the object and purpose of the treaty, in accordance with Article 31(1) of the Vienna Convention. The Appellate Body has also recalled that the task of the treaty interpreter is to ascertain and give effect to a legally operative meaning for the terms of the treaty. The applicable fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility.<sup>26</sup>

6.26 Article 4.7 of the SCM Agreement sets forth the recommendation that a panel is to make in a dispute involving a prohibited subsidy:

"If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay".

In order to ascertain the meaning of "withdraw the subsidy" in Article 4.7, we will consider first the ordinary meaning of the term. We will then consider the meaning of the term in its context, and in the light of the object and purpose of the SCM Agreement. Finally, we will consider whether an interpretation of "withdraw the subsidy" as providing exclusively a prospective remedy would render the recommendation and remedy in prohibited subsidy cases ineffective.

#### (i) Textual Analysis

6.27 Turning first to the ordinary meaning of the term, the word "withdraw" has been defined as: "pull aside or back (withdraw curtain, one's hand); take away, remove (child from school, coins from circulation, money from bank, horse from race, troops from position, favour etc. from person); retract (offer, statement, promise)".<sup>27</sup> This definition does not suggest that "withdraw the subsidy" necessarily requires only some prospective action. To the contrary, it suggests that the ordinary meaning of "withdraw the subsidy" may encompass "taking away" or "removing" the financial contribution found to give rise to a prohibited subsidy. Consequently, an interpretation of "withdraw the subsidy" that encompasses repayment of the prohibited subsidy seems a straightforward reading of the text of the provision.

#### (ii) Context

6.28 As regards the context of Article 4.7, we note that the term "withdraw the subsidy" appears elsewhere in the SCM Agreement. We consider these references to "withdrawal" of subsidies to be relevant for our understanding of the term. In the case of "actionable" subsidies, Members whose trade interests are adversely affected may, under Part III of the SCM Agreement, pursue multilateral dispute settlement in order to establish whether the subsidy in question has resulted in adverse effects to

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<sup>26</sup> *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at 21; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 106.

<sup>27</sup> Concise Oxford Dictionary, sixth edition, (1976).

the interests of the complaining Member. If such a finding is made, the subsidizing Member "shall take appropriate steps to remove the adverse effects **or shall withdraw the subsidy**".<sup>28</sup> Alternatively, a Member whose domestic industry is injured by subsidized imports may impose a countervailing measure under Part V of the SCM Agreement, **"unless the subsidy or subsidies are withdrawn"**.<sup>29</sup> In both cases, withdrawal of the subsidy is an alternative, available to the subsidizing Member, to some other action. Repayment of the subsidy would certainly effectuate withdrawal of the subsidy by a subsidizing Member so as to allow it to avoid action by the complaining Member. In the practice of at least one Member, the United States, "withdraw the subsidy" as used in Article 19.1 of the SCM Agreement encompasses repayment.<sup>30</sup> Thus, the use of the term "withdraw" elsewhere in the SCM Agreement further supports the suggestion that it may encompass repayment.

6.29 The United States, Australia, and the EC as third party all argue that an interpretation of Article 4.7 of the SCM Agreement which would allow a retroactive remedy is inconsistent with Article 19 of the DSU and customary practice under the GATT 1947 and the WTO. We note also Article 3.7 of the DSU, which provides in pertinent part:

" The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. **In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements**". (emphasis added).<sup>31</sup>

6.30 It might be argued that because Article 3.7 of the DSU appears to equate "bring the measure into conformity", the recommendation provided for in Article 19.1 of the DSU, with withdrawal of the inconsistent measure, "withdraw the subsidy", the recommendation provided for in Article 4.7 of the SCM Agreement, should also be equated with "bring the subsidy into conformity".<sup>32</sup> As the parties have argued, the recommendation to "bring the measure into conformity" under Article

<sup>28</sup> SCM Agreement Article 7.8 (emphasis added).

<sup>29</sup> SCM Agreement Article 19.1 (emphasis added).

<sup>30</sup> *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, circulated 23 December 1999, pp. 248-249 (Second Submission of the United States, 30 June 1999, paras. 40-49). We recognize that the United States' position in that case is consistent with its position concerning repayment of the "prospective portion" of a subsidy, being based on allocation of the subsidy over time, and repayment of the "net present value of the outstanding benefit stream" *Ibid.* at p. 249, para. 49. However, this does not alter the fact that US practice acknowledges that "withdraw the subsidy" in Article 19.1 of the SCM Agreement encompasses repayment.

<sup>31</sup> In contrast, Article 26.1 of the DSU provides that after a finding of non-violation nullification or impairment, "there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment".

<sup>32</sup> This appears to be Australia's position, as it repeatedly referred to "bringing the subsidy into conformity with Article 3.1(a)" in its arguments before us.

19.1 is generally understood to require a Member found to have violated a provision of the WTO Agreements to "withdraw the measure" in a prospective sense. Thus, it might be argued that "withdraw the subsidy" should also require a Member to do so only in a prospective sense.

6.31 However, we do not believe that Article 19.1 of the DSU, even in conjunction with Article 3.7 of the DSU, requires the limitation of the specific remedy provided for in Article 4.7 of the SCM Agreement to purely prospective action. An interpretation of Article 4.7 of the SCM Agreement which would allow exclusively "prospective" action would make the recommendation to "withdraw the subsidy" under Article 4.7 indistinguishable from the recommendation to "bring the measure into conformity" under Article 19.1 of the DSU, thus rendering Article 4.7 redundant.

6.32 Finally, to argue, as the United States and Australia do, that the customary practice under the GATT/WTO has been to recommend prospective remedies, does not address, much less resolve, the question of what is meant by the term "withdraw the subsidy", a special or additional rule of dispute settlement which is new to the SCM Agreement and has not before been interpreted by a panel. Indeed, Article XVI.1 of the Marrakesh Agreement provides that the WTO, including dispute settlement panels interpreting the terms of WTO Agreements, "shall be guided" by the customary practice of the GATT 1947 "**Except as otherwise provided under this Agreement or the Multilateral Trade Agreements**" (emphasis added). We are of the view that "withdraw the subsidy" in Article 4.7 of the SCM Agreement is a provision that "otherwise provides", and therefore customary practice under GATT 1947 and the WTO Agreement does not require us to conclude that "withdraw the subsidy" must be read to allow prospective action only.

### (iii) Object and Purpose

6.33 Turning to the object and purpose of Article 4.7 of the SCM Agreement, we observe that the SCM Agreement as a whole establishes disciplines on subsidies. The SCM Agreement categorizes subsidies as non-actionable, actionable, or prohibited.<sup>33</sup> In the case of non-actionable and actionable subsidies, Members are only allowed to take certain prescribed steps in the event that their trade interests are harmed by another Member's subsidies. Part II of the SCM Agreement, however, establishes an absolute prohibition on certain types of subsidies: Members are obligated, under Article 3.2 of the SCM Agreement, to "neither grant nor maintain" such subsidies. While the trade effects of prohibited subsidies may be countered under Parts III and V of the SCM Agreement, Part II of the SCM Agreement establishes special and additional rules for rapid dispute settlement in cases involving such subsidies. Article 4.7 of the SCM Agreement establishes a specific remedy to be recommended in the case of a violation - withdrawal of the subsidy.

6.34 In our view, the architecture of the SCM Agreement discussed above provides further support for the conclusion that the remedy provided for prohibited subsidies, withdrawal, encompasses repayment. This specific remedy, withdrawal of the

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<sup>33</sup> We note that, pursuant to Article 31 of the SCM Agreement, the provisions of Articles 6.1 (presumption of serious prejudice), and 8 and 9 (non-actionable subsidies) shall apply for five years from the date of entry into force of the WTO Agreement unless extended for a further period.

prohibited subsidy, does not merely counteract adverse trade effects, but is intended to enforce the absolute prohibition on the grant or maintenance of such subsidies. In our view, terminating a programme found to be a prohibited subsidy, or not providing, in the future, a prohibited subsidy, may constitute withdrawal in some cases. However, such actions have no impact, and consequently no enforcement effect, in the case of prohibited subsidies granted in the past. Thus, an interpretation of "withdraw the subsidy" which encompasses repayment is consistent with the overall structure of the SCM Agreement, as well as with the explicit prohibition of certain subsidies and special dispute settlement procedures provided for in such cases. In this regard, we recall that repayment is a means of "withdrawing" a subsidy by which the possibility of an importing Member imposing countervailing measure on imported subsidized goods can be avoided.

(iv) Effectiveness of the Remedy

6.35 We believe it is incumbent upon us to interpret "withdraw the subsidy" so as to give it effective meaning. A finding that the term "withdraw the subsidy" may not encompass repayment would give rise to serious questions regarding the efficacy of the remedy in prohibited subsidy cases involving one-time subsidies paid in the past whose retention is not contingent upon future export performance. For instance, Australia argues in this case that no repayment is required, and that elimination of the export contingency in the grant contract would have been sufficient to withdraw the subsidy. Under Australia's approach, the only effect of a panel recommendation to "withdraw the subsidy" would be a prospective change in the terms of the subsidy. As a result, prohibited export subsidies paid in the past, and for which there is no continuing export contingency, would be beyond the effective reach of a recommendation to "withdraw the subsidy", no matter how clear the violation of Article 3.1(a) of the SCM Agreement might be.

6.36 Under Article 1.1 of the SCM Agreement, a subsidy is deemed to exist if there is a financial contribution by a government, and a benefit is thereby conferred. A subsidy may take the form of a one-time financial contribution conferring a benefit, or it may take the form of a programme or practice pursuant to which financial contributions conferring a benefit are provided on a recurrent basis.<sup>34</sup> For "withdraw the subsidy" to be a meaningful remedy, that is, for it to effectuate the prohibition on the grant or maintenance of certain types of subsidies, it must be effective regardless of the form in which a prohibited subsidy is found to exist. An interpretation of Article 4.7 which would provide an effective remedy only in some cases would not, in our view, be appropriate.

6.37 We note that the EC, as third party, has argued that the absence of a remedy for past and consummated violations is and has always been a well-known feature of the GATT/WTO system, under which in some cases there is no remedy at all for a complaining party. The EC cites the Panel decision in the *Trondheim Toll Equipment* dispute, in which a government contract was awarded in violation of provisions of

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<sup>34</sup> See *Brazil - Export Financing Programme for Aircraft*, WT/DS46/R, adopted as modified by WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1221, paras. 7.1-7.3.

the Government Procurement Agreement.<sup>35</sup> The panel in that dispute realized that the "usual" GATT remedy of "bring the measure into conformity" was less than satisfactory, but declined to recommend an alternative remedy.<sup>36</sup> However, unlike the Panel in *Trondheim*, in this case we are considering a specific recommendation to "withdraw the subsidy", which is a special provision unique to the SCM Agreement. We decline to read "withdraw the subsidy" in a manner that does not give it an effective meaning merely because in some cases under other WTO Agreements, the general remedy under Article 19.1 of the DSU of bringing the measure into conformity may not be effective.

6.38 If we were to accept the conclusion that "withdraw the subsidy" does not encompass repayment, then that recommendation, far from providing a remedy for violations of Article 3.1(a) of the SCM Agreement, would grant full absolution to Members who grant export subsidies that are fully disbursed to the recipient before a recommendation to withdraw the subsidy is issued in dispute settlement, and for which the export contingency is entirely in the past. We do not believe that the drafters of the SCM Agreement would have established in Article 3.1(a) the strict prohibition against subsidies contingent on export performance, including one-time subsidies contingent in fact on export performance, only to undermine that prohibition by providing a remedy which is ineffective in the case of such subsidies.

#### (v) Conclusion

6.39 Based on the ordinary meaning of the term "withdraw the subsidy", read in context, and in light of its object and purpose, and in order to give it effective meaning, we conclude that the recommendation to "withdraw the subsidy" provided for in Article 4.7 of the SCM Agreement is **not** limited to prospective action only but may encompass repayment of the prohibited subsidy.

6.40 The United States and Australia both look to Article 19.1 of the DSU as a principal element to be considered in interpreting Article 4.7 of the SCM Agreement, arguing that Article 4.7 of the SCM Agreement should be read consistently with Article 19.1 of the DSU.

6.41 However, Article 19.1 of the DSU is not the basis of the recommendation in a case involving prohibited subsidies, such as this one. Rather, the recommendation to "withdraw the subsidy" is required by Article 4.7 of the SCM Agreement, which is a special or additional rule or procedure on dispute settlement, identified in Appendix 2 to the DSU. It is Article 4.7 which we must interpret and apply in this dispute. In this respect, we note Article 1.2 of the DSU, which provides:

"The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. **To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the spe-**

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<sup>35</sup> *Norway - Procurement of Toll Collection Equipment for the City of Trondheim*, GPR/DS.2/R, adopted 13 May 1992.

<sup>36</sup> *Ibid.* at paras. 4.21 -4.25.

**cial or additional rules and procedures in Appendix 2 shall prevail...**" (emphasis added).

Thus, to the extent that "withdraw the subsidy" requires some action that is different from "bring the measure into conformity", it is that different action which prevails.<sup>37</sup>

6.42 "Withdraw the subsidy" is, as discussed above, different from "bring the measure into conformity", the recommendation required under Article 19.1 of the DSU. This conclusion is consistent with the observation of the Appellate Body in *Brazil - Aircraft*:

"Article 4.7 [of the SCM Agreement] contains several elements which are different from the provisions of Articles 19 and 21 of the DSU with respect to recommendations by a panel and implementation of rulings and recommendations of the DSB. For example, Article 19 of the DSU requires a panel to recommend that the Member concerned bring its measure "into conformity" with the covered agreements. In contrast, Article 4.7 of the *SCM Agreement* requires a panel to recommend that the subsidizing Member *withdraw* the subsidy".<sup>38</sup>

That a "retrospective" remedy might not be permissible under Article 19.1 of the DSU (a question which we do not here decide) does not preclude us from concluding, on the basis of the text of Article 4.7 of the SCM Agreement, that "withdraw the subsidy" is **not** limited to purely prospective action, but may encompass repayment of prohibited subsidies.

(c) If Repayment is Necessary to "Withdraw the Subsidy", Can Partial Repayment be Sufficient?

6.43 Having concluded that the recommendation to "withdraw the subsidy" in Article 4.7 of the SCM Agreement encompasses repayment, we must further consider whether such repayment must be of the full amount of the prohibited subsidy, or whether a lesser amount, a partial repayment, may suffice.

6.44 As discussed above, we do not view the distinction drawn by the parties between the "prospective" and past portions of a subsidy to be meaningful. Thus, this distinction provides no basis for a conclusion that repayment of less than the full amount of the prohibited subsidy would suffice to satisfy a recommendation to withdraw the subsidy. In this regard, we note that the United States' line of reasoning in calculating the "prospective" benefit of past subsidies raises a number of questions. In the first place, taking back the full amount of the prohibited subsidy necessarily eliminates the benefit conferred. Moreover, as is evident in this dispute, the valuation of the benefit of a subsidy, its allocation over time, and the calculation of the "prospective portion" thereof, are complicated questions, for which there are no guidelines in the SCM Agreement.<sup>39</sup> It seems to us unlikely that the negotiators of the

<sup>37</sup> See *Guatemala-Cement AB Report*, *supra*, footnote 13, para. 65.

<sup>38</sup> *Brazil - Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, para. 191 (emphasis in original).

<sup>39</sup> While some Members have developed methodologies for the valuation of subsidy benefits in the context of countervailing duty procedures, these are not universally accepted or consistent. Moreo-

SCM Agreement intended "withdraw the subsidy" to involve these complex questions of allocation over time without some indication in the text of the Agreement to that effect. The parties have made no other arguments which would support a conclusion that anything less than full repayment would satisfy the requirements of Article 4.7.

6.45 Having concluded that Article 4.7 of the SCM Agreement encompasses repayment, we can find no basis for concluding that anything less than full repayment would suffice to satisfy the requirement to "withdraw the subsidy" in a case where repayment is necessary.

(d) Repayment in Full of the Prohibited Subsidy  
Necessary in this Case?

6.46 Australia argues in the first instance that no repayment is required in this case, and that it could have fully complied with the recommendation to withdraw the subsidy in this case by releasing Howe from the remaining obligations under the grant contract. In Australia's view, this action would have eliminated the export contingency on which was based the determination that the subsidies granted to Howe were prohibited, and would bring the prohibited subsidies into conformity with Article 3.1(a) of the SCM Agreement, thus "withdrawing" the prohibited subsidies.

6.47 We are not persuaded by Australia's argument that it is possible to change, *ex post facto*, the export contingency associated with the prohibited subsidy in this case. Our determination of the existence of in fact export contingency was based on the "facts that existed at the time the contract establishing the conditions for the grant payments was entered into".<sup>40</sup> Where, as here, the prohibited subsidy is a one-time, past event, and its retention is not contingent upon export performance yet to be achieved, it is a logical impossibility to change the facts and circumstances surrounding the decision to provide the subsidy which led to the conclusion that the subsidy was prohibited. While in this case, the period covered by the sales performance targets has not yet ended, releasing Howe from any obligations with respect to those targets cannot change the fact that there was a close tie between anticipated exportation and the grant of the subsidies **at the time the subsidies were provided**. We noted in our original determination that the fact that anticipated exports did not come to pass in the volumes anticipated did not affect the conclusion that the subsidies were contingent upon export performance. Similarly, the removal of the sales performance targets today cannot change the fact that, at the time the subsidies were provided, they were contingent upon anticipated export performance. The purely prospective remedy proposed by Australia of changing after the fact the conditions on which the subsidy was provided, essentially by erasing the sales performance targets from the grant contract, in our view would be completely ineffective in this case.

6.48 Thus, we conclude that, in the circumstances of this case, repayment is necessary in order to "withdraw" the prohibited subsidies found to exist. As discussed above, we do not find any basis for repayment of anything less than the full subsidy.

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ver, their relevance and applicability in the context of the Article 4.7 recommendation is not apparent.

<sup>40</sup> *Australia - Automotive Leather*, para. 9.68.

We therefore conclude that repayment in full of the prohibited subsidy is necessary in order to "withdraw the subsidy" in this case.

6.49 In our view, the required repayment does not include any interest component. We believe that withdrawal of the subsidy was intended by the drafters of the SCM Agreement to be a specific and effective remedy for violations of the prohibition in Article 3.1(a). However, we do not understand it to be a remedy intended to fully restore the *status quo ante* by depriving the recipient of the prohibited subsidy of the benefits it may have enjoyed in the past. Nor do we consider it to be a remedy intended to provide reparation or compensation in any sense. A requirement of interest would go beyond the requirement of repayment encompassed by the term "withdraw the subsidy", and is therefore, we believe, beyond any reasonable understanding of that term.

#### 4. *Has Australia Withdrawn the Prohibited Subsidies in this Case?*

6.50 Australia withdrew A\$8.065 million from Howe on 14 September 1999. On the same date, Australia provided a loan of A\$13.65 million on non-commercial terms (the 1999 loan) to Howe's parent company, ALH.<sup>41</sup> In light of the facts and circumstances surrounding the provision of the 1999 loan and the repayment by Howe, we find that they are inextricably linked elements of a single transaction. The documents concerning the loan make clear that the repayment and the provision of funds pursuant to the loan occurred at the same time, and that the provision of the loan funds was **specifically conditioned** on the repayment.<sup>42</sup> Moreover, the total loan amount was sufficient to fund the repayment, with enough left over to invest, at an unexceptional rate of return, so as to yield a sufficient sum to allow repayment in full of the loan on the due date.<sup>43</sup> In our view, in the particular circumstances of this case, the provision of the 1999 loan nullifies the repayment by Howe of \$A8.065 million.

6.51 We emphasize that we do **not** determine that the 1999 loan is inconsistent with Article 3.1(a) of the SCM Agreement. Nor do we consider that Australia is precluded from providing subsidies to Howe simply because it has been determined that the payments under the grant contract are prohibited subsidies. We simply find that

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<sup>41</sup> While the specific terms of the 1999 loan are business confidential information, Australia has acknowledged that it is a subsidy. Annex 2-2, para. 8.

<sup>42</sup> We note Australia's argument that the 1999 loan was provided to ALH, Howe's parent company, while the repayment was made by Howe. However, the provision of the 1999 loan by Australia was expressly conditioned on repayment. In these circumstances, we do not believe the distinction between the two corporate entities insisted upon by Australia undermines our conclusion that the provision of the 1999 loan vitiates the repayment. Moreover, the entire history of transactions between the Government of Australia, ALH, and Howe in connection with this matter indicates that the legal distinctions between the two corporate entities do not preclude the conclusion that cooperative behaviour between the two with respect to the repayment and the use of the 1999 loan is likely and expected.

<sup>43</sup> This conclusion is based on the United States' calculations concerning the loan amount and the repayment amount in this regard. Australia did not dispute either the calculation or the interest rate relied on by the United States in those calculations. We therefore conclude that the interest rate derived by the United States was one which would be obtainable on the investment of the funds remaining after repayment of the \$8.065 million.

because of the loan, in the circumstances of this case, no repayment, and consequently, no withdrawal of the prohibited subsidies, has effectively taken place.

## **VII. CONCLUSION**

7.1 Based on the foregoing, we determine that Australia has failed to withdraw the prohibited subsidies within 90 days, and thus has not taken measures to comply with the DSB's recommendation in this dispute.

**ANNEX 1-1****FIRST SUBMISSION OF THE UNITED STATES**

(27 October 1999)

**TABLE OF CONTENTS**

	Page
I. INTRODUCTION .....	1215
II. PROCEDURAL HISTORY .....	1217
III. AUSTRALIA HAS NOT WITHDRAWN THE SUBSIDY WITHIN 90 DAYS.....	1218
A. The Amount that Howe Repaid is not a Full Withdrawal of the Subsidy .....	1218
1. To Comply Article 4.7 of the SCM Agreement and the Panel's Recommendation, Australia Should Have Recovered the Full, Prospective Portion of the Subsidy ....	1218
2. The Prospective Portion of the Subsidy Must be Determined on a Reasonable Economic Basis.....	1219
3. Howe's Partial Repayment does not Amount to a Withdrawal of the Subsidy.....	1223
4. The "Prospective" Element of the Subsidy Withdrawn Should be Calculated as of the Date of Adoption of the Panel Report.....	1224
B. Howe's Repayment was not a Withdrawal of the Subsidy to the Extent it was Reimbursed by a Non-Commercial Loan.....	1225
IV. REQUEST FOR PRELIMINARY RULING THAT THE PANEL SEEK INFORMATION FROM AUSTRALIA.....	1226
V. CONCLUSION .....	1227
LIST OF EXHIBITS.....	1228

**I. INTRODUCTION**

1. This Panel already decided that Australia has provided a prohibited A\$30 million export subsidy to its sole automotive leather company, and recommended that the subsidy be withdrawn without delay. Such a decision is meaningless unless Australia complies with the Panel's recommendations. Under Article 21.5 of the Dispute Settlement Understanding ("DSU") the Panel's task is to determine whether Australia has taken measures to comply with the Panel's recommendations and rulings and whether those measures are consistent with the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The answer in this case is clearly no.

2. Purporting to withdraw the subsidy, Australia agreed to accept a repayment of only a modest prospective portion of the grant. In so doing, Australia has arbitrarily and unreasonably relegated the lion's share of its substantial and illegal capital infusion to the past, declaring it out of the reach of this Panel and the SCM Agreement. But that is not

all. Australia has reimbursed even this modest repayment with an even larger, non-commercial loan.

3. In its submission to the Dispute Settlement Body ("DSB") on recourse to Article 21.5 (document WT/DS126/8), the United States cited the actions noted above, and stated:

The United States believes that these measures taken by Australia to comply with the recommendations and rulings of the DSB are not consistent with the SCM Agreement and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In particular, Australia's withdrawal of only \$A8.065 million of the \$A30 million grant, and Australia's provision of a new \$A13.65 million loan on non-commercial terms to Howe's parent company, are inconsistent with the recommendations and rulings of the DSB and Article 3 of the SCM Agreement.

Accordingly, because "there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB" between the United States and Australia, within the terms of Article 21.5 of the DSU, the United States seeks recourse to Article 21.5 in this matter and requests that the DSB refer the disagreement to the original panel, if possible, pursuant to Article 21.5.

4. The terms of reference for this Panel are standard terms of reference as provided in Article 7. As the panel found in Ecuador's recourse to Article 21.5 of the DSU on the EC's banana regime, even in an Article 21.5 proceeding, the panel's terms of reference are defined by the measures and claims specified by the complaining party in its request for establishment of a panel.<sup>1</sup> Moreover, both of the measures cited by the United States in WT/DS126/8 were clearly "taken to comply" with the DSB's recommendations, as they both concern the subsidies received by the sole Australian automotive leather producer and exporter, Howe and Company Proprietary, Ltd. ("Howe"). In addition, a Panel determination concerning the consistency with the SCM Agreement of both of these measures will promote the prompt settlement of disputes, as noted by the panel in the Ecuador 21.5 proceeding.<sup>2</sup>

5. Thus, the task that faces this Panel is to determine whether Australia has taken measures to comply with the DSB's recommendations and rulings, and whether the measures listed in WT/DS126/8 are consistent with the SCM Agreement. The answer to these questions no.

6. This Panel's findings on these points are critical if its Panel Report is to have any practical meaning. The United States urges the Panel to find that Australia has not withdrawn its illegal subsidy and thus has not complied with the Panel's recommendations.

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<sup>1</sup> European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador, WT/DS27/RW/ECU, DSR 1999:II, 803, para. 6.7.

<sup>2</sup> *Ibid.* at para. 6.9.

## II. PROCEDURAL HISTORY

7. The United States requests that this Panel, established pursuant to Article 21.5 of the Dispute Settlement Understanding ("DSU"), review whether Australia has implemented the Panel's recommendations in Australia - Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126/R, Report of the Panel, Adopted 16 June 1999 ("Panel Report"). The parties have agreed that they will unconditionally accept this Panel's report and that there will be no appeal of this report. Both parties have also agreed to cooperate to ensure that this Panel can circulate its report within 90 days of its establishment. See Exhibit US-1.

8. This is a dispute with a long and troubling history.<sup>3</sup> In October 1996 - over three years ago - the United States requested consultations with the Australian Government regarding export subsidies made available to the Australian automotive leather industry under two programmes, the Australian Textiles, Clothing and Footwear Import Credit Scheme and the Export Facilitation Scheme. As a result of these consultations, the Australian Government agreed to remove automotive leather from eligibility for these export subsidy programmes, effective 1 April 1997.

9. On 9 March 1997, however, the Australian Government replaced these subsidy programmes with a A\$30 million grant, also contingent on export performance<sup>4</sup> to Howe, the sole Australian automotive leather producer and exporter. The United States once again requested consultations, this time with respect to the grant. Unable to reach a satisfactory resolution with Australia, the United States requested the establishment of a panel on 11 June 1998, to examine the consistency of Australia's grant with the SCM Agreement.

10. On 25 May 1999, the Panel issued a report sustaining the US view that Australia had bestowed a prohibited export subsidy - the A\$30 million grant - on Howe in 1997-1998. In accordance with the SCM Agreement, the Panel recommended that Australia withdraw the subsidy without delay. The Panel gave Australia 90 days to comply. The Panel Report was adopted by the DSB on 16 June 1999, and was not appealed.

11. In a 20 September 1999, communication to the Chairman of the DSB, Australia claimed to have implemented the Panel recommendation by arranging for Howe to repay A\$8.065 million of the A\$30 million grant - just under 27 per cent - which Australia contended "covered any remaining inconsistent portion of the grants made under the Grant Contract"<sup>5</sup> Exhibit US-2. According to an Australian Government media release issued on 15 September 1999, the repayment amount covered what Australia considered to be the "prospective element" of the grant - namely, the "proportion of the grant monies found to be applied to the sales performance targets contained in the Grant Contract for the period from 14 September 1999 until the end of the Grant contract on 30 June 2000". Exhibit US-3.

12. In the very same press release, however, Australia announced that it intended to provide a new, A\$13.65 million loan to Howe's parent holding company. This loan, which the United States understands is on non-commercial terms, effectively reimburses

<sup>3</sup> The facts of the procedural history are recounted in the Panel Report, paras 2.1-3.2.

<sup>4</sup> Australia also provided a loan to the company in 1997, which is not relevant to this Article 21.5 compliance proceeding.

<sup>5</sup> WT/DS126/7.

Howe and its parent for the grant repayment and, to this extent, turns Australia's purported withdrawal of the subsidy into a sham.

13. The United States submits to the Panel that Australia has not complied with the Panel's recommendations, in that (1) the A\$8.065 million repayment, which accounts for less than 27 per cent of the prohibited export subsidy, does not amount to a full withdrawal of the subsidy; and (2) this small amount was not even a partial withdrawal of the subsidy, to the extent it was reimbursed by the Australian Government through a loan on non-commercial terms.

### **III. AUSTRALIA HAS NOT WITHDRAWN THE SUBSIDY WITHIN 90 DAYS**

A. *The Amount that Howe Repaid is not a Full Withdrawal of the Subsidy.*

1. *To Comply with Article 4.7 of the SCM Agreement and the Panel's Recommendation, Australia should have Recovered the Full, Prospective Portion of the Subsidy*

14. This Panel found that "[t]he payments under the grant contract are subsidies within the meaning of Article 1 of the SCM Agreement which are contingent upon export performance within the meaning of Article 3.1(a) of that Agreement.<sup>6</sup> Article 3.1(a) of the SCM Agreement provides that such subsidies "shall be prohibited"; Article 3.2 provides that "[a] Member shall neither grant nor maintain subsidies referred to [Article 3.1]." This Panel recommended, in accordance with Article 4.7 of the SCM Agreement, that Australia withdraw the prohibited subsidies - i.e., the "payments under the grant contract" - without delay.<sup>7</sup>

15. There is no disagreement between the parties that the provisions of Article 4.7 of the SCM Agreement and the recommendations in the Panel Report call for Australia to withdraw only the prospective portion of the illegal subsidy. And indeed, this position is supported by the SCM Agreement and the DSU. Article 4.7 of the SCM Agreement provides that "if the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay." However, Article 19 of the DSU provides 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 that agreement." The use of the phrase "bring the measure into conformity" indicates that the recommendations contemplated by Article 19 of the DSU include only recommendations calling for prospective corrective action by Members, not retrospective action. As the Appellate Body has stated in its decision in the Guatemala Cement dispute, "It is... only in the specific circumstance where a provision of the DSU and a special or additional provision of another covered agreement are mutually inconsistent that the special or additional provision may

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<sup>6</sup> Panel Report, para. 10.1(b).

<sup>7</sup> Panel Report, para. 10.3.

be read to prevail over the provision of the DSU.<sup>8</sup> There is no inconsistency between withdrawal without delay of the prospective portion of a subsidy under Article 4.7 of the SCM Agreement, and bringing the subsidy into conformity with the obligations of Australia under Article 19 of the DSU.

16. Where there is considerable disagreement, however, is over Australia's claim that Howe's partial A\$8.065 million repayment should be viewed as a complete withdrawal of the prospective portion of the subsidy. It was only 18 to 30 months ago that Howe received the full A\$30 million capital infusion. The benefit to Howe - and the resulting distortion to trade - will be felt in a substantial way for many years to come.

17. Australia has arbitrarily assigned the lion's share of its prohibited subsidy to the past, in an effort to declare it out of reach of the Panel and the SCM Agreement. It is worth recalling that in 1997 Australia sought to deal with US complaints regarding its blatantly illegal export subsidy by engaging in consultations, agreeing to remove the export subsidy from the automotive leather industry, and then simply swapping it for another equally illegal export subsidy. Now that the United States has proceeded through a full round of additional consultations and panel proceedings, and now that the Panel has ruled that the A\$30 million grant is a prohibited export subsidy, Australia is seeking the Panel's permission to declare its illegal subsidy largely irremediable.

18. This cannot be permitted. The great bulk of Australia's A\$30 million subsidy is attributable to the period after the adoption of the Panel Report. It is that amount that Australia must withdraw.

## 2. *The Prospective Portion of the Subsidy must be Determined on a Reasonable Economic Basis*

19. The Panel Report, at paras. 10.1(b) and 10.1(3), identifies the subsidies to be withdrawn "without delay" as "[t]he grant payments under the grant contract". Article 1.1 states, in parts relevant to this discussion, that a subsidy exists if (a) a government practice involves a direct transfer of funds (e.g., grants) and (b) a benefit is thereby conferred.

20. What should be withdrawn, therefore, is that portion of the Australian Government funds that continues to benefit the recipient after the adoption of the Panel Report. As discussed below, the SCM Agreement recognizes that significant, non-recurring grants must be allocated over time - generally over the useful life of production assets. A significant grant, which is available to purchase production assets (or to free up other funds to purchase such assets), provides a benefit that lasts over the life of those assets. Attributing all of such a grant entirely to the year of receipt, or to some other, arbitrarily short period, ignores economic reality.<sup>9</sup> It also would have the unintended result in many cases of placing such grants beyond the reach of panel recommendations under SCM Article 4.7. It could thus reduce SCM Articles 3 and 4 to inutility in the case of grants,

<sup>8</sup> *Guatemala - Anti-dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/AB/R, DSR 1998:IX, 3767, para. 66.

<sup>9</sup> By contrast, on-going, recurring subsidies provide only current benefits that are not allocated to future production. In the terminology of subsidy calculations, such recurring subsidies are "expensed" - attributed entirely to the period in which they are received - and are not allocated forward in time. See *infra*, note 11.

and would convey the message to subsidizing Members that they can bestow any amount of subsidies, even explicitly conditioned on exports, with virtual impunity as long as the subsidies are in grant form.

21. The "prospective" portion of the benefits that Australia provided to Howe are those that are attributable to the period after the adoption of the Panel Report, which is the date on which Australia was to have withdrawn the subsidy "without delay". The United States submits that those benefits should be determined by allocating the grant over the useful life of Howe's production assets and by adding interest, which is also a benefit conferred with the grants, for the period 16 June 1999, to the date of repayment.

22. There is considerable support under the SCM Agreement for this approach. The practice of certain Members, including the United States, in calculating subsidy amounts under Part V (Countervailing Measures) of the SCM Agreement is instructive.<sup>10</sup> In calculating the amount of the subsidies in investigations conducted under Part V, the United States regulations require the allocation of significant, non-recurring grants over the number of years corresponding to the average useful life of the renewable physical assets. 19 CFR 351.<sup>11</sup>

23. Similarly, the EC recently notified its "Guidelines for the Calculation of the Amount of Subsidy in Countervailing Duty Investigations", G/SCM/N/1/EEC/2/Suppl.2 (8 January 1999), in which it states, at 9:

For *non-recurring* subsidies, which can be linked to the *acquisition of fixed assets*, the total value of the subsidy has to be spread over the normal life of the assets (Article 7(3)(of Regulation 2.26/97). Therefore the amount of the subsidy from, for example, a grant (*for which it is assumed that it is used by the beneficiary to improve its competitiveness in the long term*, and thus to purchase product assets of one kind or another), can be spread over the normal period used in the industry involved for the depreciation of assets. (Latter emphasis added).

24. The consequence of this approach is that "[a]s many subsidies have effects for a number of years, subsidies granted before the investigation period should also be inves-

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<sup>10</sup> Although the export subsidies in this proceeding were not pursued under Part V, Part V does provide that Members are to calculate the "amount of the subsidy" and impose countervailing duties that do not exceed the amount of the subsidy. Article 19 of the SCM Agreement. Where the same terms and concepts are used throughout the SCM Agreement, they should be interpreted consistently throughout the Agreement. The Appellate Body in *Canada - Measures Affecting The Export Of Civilian Aircraft*, WT/DS70/AB/R, DSR 1999:III, 1377, Report of the Appellate Body, adopted 20 August 1999 (para. 158), in considering whether certain measures were prohibited export subsidies, used principles set out in Part V, Article 14, to determine whether the measures constituted a subsidy under Article 1.1, describing Article 14 as "relevant context in interpreting Article 1.1(b)."

In particular, where Members have set out detailed rules for calculating the amount and duration of the subsidy, pursuant to Article 14 of the SCM Agreement, such rules should be taken into account by the Panel in determining the prospective portion of the subsidy that should be withdrawn.

<sup>11</sup> G/SCM/N/1/USA/1/Suppl. 4 (29 March 1999), pages 129-131. For the sake of consistency, the United States uses the same assumptions regarding asset lives in the subsidies context as for other purposes such as the Federal income tax. The average useful life used is presumptively that listed in the US Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (Rev. Proc. 77-10, 1977-1 C.B. 548 (RR-38)), as updated by the Department of Treasury. 19 CFR 351.524 (d)(2)

By contrast, 19CFR 351.524(a) provides that the Department of Commerce "will allocate (expense) a recurring benefit to the year in which the benefit is received."

tigated in order to determine what portion of such subsidy is attributable to the investigation period." *Ibid.*

25. Of note, under these approaches, is the fact that in applying the general principle that a significant, non-recurring grant should be allocated over the useful life of production assets, neither the EC nor the United States inquires whether the grant was actually used to purchase such assets. Rather, it is presumed that the grant is used to enhance the long-term competitiveness of the company, either because it is in fact applied to the purchase of such assets, or because the grant money frees up other corporate money for such purposes. Given the fungibility of money, it is unproductive and unrealistic to attempt to trace the use of grants in order to determine how they should be allocated.

26. The principles that Members have developed to calculate the amount of the subsidy (and its allocation over time) are revealing, not only because they recognize that grantees can reap long-term competitive benefits from significant, non-recurring grants, but also because these principles address a concern similar to that present in this proceeding. If significant grants can be allocated purely to the year in which they are bestowed (or on some other arbitrarily short period), Members would be precluded from imposing countervailing duties "in the amount of the subsidy" for any grant provided prior to the investigation period.

27. Similarly, if this Panel were to countenance the allocation of Australia's illegal A\$30 million export subsidy over an arbitrarily short period of time, most of it in the past, as urged by Australia, the remedy of "withdrawal of the subsidy" would be severely undercut.

28. The SCM Agreement itself recognizes the principle that grants should be allocated to take account of their future effects. Paragraph 7 of Annex IV of the SCM Agreement (which provides guidance on the calculation of *ad valorem* subsidies in the context of determining the 5 per cent "serious prejudice" benchmark in cases of actionable subsidies (Part III)) provides that "[s]ubsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization."

29. The Informal Group of Experts ("IGE"), charged with recommending clarifications to Annex IV, stated, at para. 11 of their 1997 report, that large non-recurring subsidies should be allocated over time because such subsidies continue to have an impact beyond the year of bestowal: they will either be used to purchase fixed assets, or will free up company funds to do the same. The IGE recommendations continue, at para. 13.

As a general matter, it is recommended that the average useful life of all of the recipient's operational assets should be used as the allocation period for all types of subsidies except long-term loans, and possibly equity infusions.

30. In short, there is a consistent and well-accepted view under the SCM, both in the text of the Agreement and in Member practice, that significant non-recurring grants should be allocated over time based on the useful life of the production assets. When the grant at issue in this case is so allocated, it is apparent that most of the subsidy is attributable to the future. This is the portion of the grant that Australia must withdraw.

31. Howe received three payments in 1997 and 1998 worth A\$30 million - one-time, non-recurring grants that amounted to approximately one-third of Howe's 1997 sales.<sup>12</sup> With this money, Howe was able to construct a new tannery and a new finishing plant, increasing its efficiency and export capacity.<sup>13</sup> Howe used the grant to more than double its production capacity<sup>14</sup> and to install state-of-the-art equipment. According to Howe's managing director, "[t]he [Rosedale] plant has been built around the latest computerized equipment, which gives us complete control over every step in the production process.<sup>15</sup> The new finishing facility at Thomastown was also completely automated, with new patterns fed into the computer and cut on the same day<sup>16</sup>. Howe's parent corporation predicted that the new processing facility "will enable [Howe] to make considerable savings in labour, raw materials, and working capital, and to have fewer rejects and re-works which will give higher yields.<sup>17</sup>

32. Plainly, the benefit of this significant A\$30 million export subsidy - and, indeed, the distortive impact it has on trade - extends at least over the life of Howe's production assets.

33. Available information for Howe suggests that the useful life of its assets is 13 years. Exhibit US-10. The useful life of production assets in the leather industry, according to US Internal Revenue depreciation tables used by the US Department of Commerce to estimate useful life for the purpose of allocating subsidies, is consistent with this estimate, at 9-13 years. Exhibit US-11. Because Howe received A\$17.5 million in July 1997 and A\$12.5 million in July 1998<sup>18</sup> the prospective portion as of July 1999 (the month following the adoption of the Panel Report) can be calculated based on the ratio of 11/13 of the A\$17.5 million (since two years have now elapsed, and 11 remain) - or A\$14,807,692 - plus 12/13 of the second grant of A\$12.5 million, or A\$11,538,462 - for a total of A\$26,346,154.

34. Under a reasonable allocation of these grants, therefore, A\$26,346,154, represents the "prospective portion" of the subsidy as of July 1999 that Australia must withdraw. To this amount should be added interest, at Howe's 1997 borrowing cost of 11.6 per cent for the period from July 1999 until Australia complies with the Panel's recommendation.<sup>19</sup> Six months' interest, for instance, assuming Australia complies by the end of

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<sup>12</sup> "Sacred Cows vs The Hide of Howe," *The Weekend Australian*, 20-21 Sept. 1997 (reporting that Howe's sales in 1997 were expected to be A\$88.6 million). Exhibit US-4.

<sup>13</sup> Panel Report, para. 2.3 n.4.

<sup>14</sup> Australian Leather Holdings Ltd., *Australian Leather Holdings* (c. 1995) ("Howe Leather turns out more than 10,000 premium quality hides every week for market throughout Australiasia, Asia, the United States and Europe"); Howe, *Howe Leather*, Dec. 1994, at 2 (noting a total automotive capacity of 600,000 hides per year, or 11,538 hides per week); "Picking Winners," *Business Review* 1997, 13 Oct. 1997 ("The new facility will allow the value of exports to increase to nearly \$200 million and the company will be able to process 1.1 million cattle hides..."). Exhibits US-5, US-6, and US-7.

<sup>15</sup> "Howe Impressive", *Leather*, Aug. 1998, at 29, Exhibit US-8.

<sup>16</sup> *Ibid.* The plant utilized 14 different types of new equipment, as well as an automatic conditioning system which sprayed fine droplets of moisture into the atmosphere when the relative humidity fell below requisite levels.

<sup>17</sup> Schaffer Corporation, Ltd., Chairman's Address, 19 Nov. 1997, Exhibit US-9.

<sup>18</sup> These are approximate dates, relying on the facts as set forth in Panel Report, para. 2.3.

<sup>19</sup> Howe's borrowing cost is derived from the 1997 financial statements of Australia Leather Holdings, Ltd., at pages 7 and 9. Total interest and financial charges divided by borrowings is A\$3,647,000/A\$31,373,000 = 11.6 per cent interest rate. Exhibit US-12.

this year, would be A\$1,528,077 (11.6 per cent of A\$26,346,154 divided by two, to account for the half year) for a total of A\$27,874,231.

35. By contrast to this reasonable allocation, Australia has entered into an agreement with Howe that requires Howe to repay a mere A\$8.065 million.

3. *Howe's Partial Repayment does not Amount to a Withdrawal of the Subsidy.*

36. Australia informed the DSB on 20 September 1999, that it had implemented the Panel's recommendation ("to withdraw the measures within 90 days") by accepting a repayment from Howe of A\$8.065 million, which, according to Australia, "covered any remaining inconsistent portion or the grants made under the Grant Contract." The Australian Government also stated that it had "terminated all subsisting obligations under the Grant Contract."<sup>20</sup>

37. Although there was no explanation whatsoever in the 20 September communication of how the amount of repayment was determined, a media release issued on 15 September 1999, explained that A\$8.065 million is the amount that Howe *agreed* to pay, and elaborated that:

This amount reflects the prospective element of the grant payment. It is the proportion of the grant monies found to be applied to the sales performance targets contained in the Grant Contract for the period from 14 September 1999 until the end of the Grant Contract on 30 June 2000. Exhibit US-3.

38. The US understands from this explanation that, because the grants were contingent on Howe's best efforts to achieve certain performance targets, including sales performance targets for the periods 1 April 1997, through 30 June 2000, the Australian Government deemed the subsidy to be in effect only during the roughly three-year period that the performance targets were in place, and then "withdrew" that proportion of the subsidy attributable to the period 14 September 1999 to 30 June 2000.

39. Australia's explanation confuses two legally distinct concepts: the elements of a subsidy and the duration or allocation of the subsidy. The Panel correctly found that the grants were an export subsidy because, *inter alia*, "[t]he sales performance targets set out in the grant contract, in conjunction with the other facts enumerated above, therefore [led the Panel] to the conclusion that the grant of the subsidies was conditioned on anticipated exportation".<sup>21</sup>

40. The grants amounted to an export subsidy because they were contingent on export performance. The export-contingent feature of the subsidy, however, is not a useful tool for measuring how the subsidy should be allocated.

41. In particular, the time period established in a grant contract for performance requirements is not a reasonable measure of how long the benefits conferred by the subsidy lasts or for calculating the "prospective" portion. First, there is no necessary relationship between the criteria for an export subsidy - such as export performance requirements - and the actual duration of the benefit. Inventing such a relationship makes export subsidies open to manipulation. For instance, a Member could bestow a signifi-

<sup>20</sup> WT/DS126/7, dated 20 September 1999 (Exhibit US-2).

<sup>21</sup> Panel Report, para. 9.71.

cant prohibited subsidy - sufficient for the recipient to build a large manufacturing facility with a useful life of 25 years - contingent on exports for a two-year period. By the time a dispute settlement panel could recommend that the subsidy be withdrawn, the two-year period could have lapsed. Yet the benefit of the subsidy would persist for over two decades. Under Australia's approach, there would be no "prospective portion" to withdraw. Members could structure their export subsidies in just this way, or through a series of smaller short-term subsidies, thus evading the disciplines imposed by the SCM Agreement.

42. Second, with respect to the grants at issue here, the Panel found that the sales (*i.e.*, export) performance targets, "*in conjunction with the other facts enumerated above*" led the Panel to conclude that the subsidy was conditioned on anticipated exportation.<sup>22</sup> The "other facts" included that the expanded production resulting from the grants and from the "required capital investments" would translate into increased exports.<sup>23</sup> Plainly, such increased exports resulting from the required capital investments are not limited to the period of the sales performance targets. In addition, the grants were contingent on "best endeavours" to achieve the sales performance targets, and not purely on the achievement of those target.<sup>24</sup> Both of these factors, specific to this case, militate against Australia's allocation of the grants over the sales performance targets.

43. In sum, the benefit to a recipient of receiving a significant grant cannot be calculated with reference to the criteria for qualifying for the grant. The "prospective" portion of the subsidy must be calculated in an economically reasonable manner that more accurately reflects the extent to which the subsidy persists over time. The subsidy should be allocated over the useful life of Howe's production assets, and the portion of that allocation that is subsequent to the adoption of the Panel Report should be repaid.

4. *The "Prospective" Element of the Subsidy Withdrawn Should be Calculated as of the Date of Adoption of the Panel Report*

44. Article 4.7 of the SCM Agreement provides that if a prohibited subsidy is found, the subsidy should be withdrawn "without delay". The Panel Report, recommending that the subsidy be withdrawn without delay, was adopted on 16 June 1999. The Panel gave Australia 90 days to "withdraw the measures".<sup>25</sup> On that date, the DSB declared Australia's grants to be a prohibited export subsidy for purposes of the SCM Agreement.

45. Although the Panel accorded Australia 90 days in which to comply, Australia was free to comply at any time within that period. Instead, Australia used the entire 90-day period, waiting until 14 September to put its remedy in place and then claiming that its withdrawal would be effective from that day forward.

46. The United States submits that the 90-day compliance period did not provide Australia with an additional three months during which it could continue to provide the prohibited export subsidy with impunity. Such an interpretation would reward - and encourage - delay in carrying out the Panel's recommendations. Rather, the date from which the prospective element of the subsidy should be derived is the date of the Panel

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<sup>22</sup> Panel Report, para 9.71.

<sup>23</sup> *Ibid.*, para. 9.67.

<sup>24</sup> *Ibid.*, para. 2.3.

<sup>25</sup> Panel Report, para. 10.7.

Report. This approach, which would not discourage early compliance, would give effect to the express intent of Article 4.7, which calls for panels to recommend that the Member concerned withdraw the prohibited subsidy "without delay."

47. Consequently, any calculation of the so-called "prospective period" of the subsidy should start on 16 June 1999, the date of adoption of the Panel Report.

*B. Howe's Repayment was not a Withdrawal of the Subsidy to the Extent it was Reimbursed by a Non-Commercial Loan.*

48. By recouping from Howe a small fraction of the grant monies, Australia claims that it has now fully withdrawn the prohibited subsidy. But the small sum which Australia collected with one hand it immediately reimbursed with the other, through the extension of loan to Howe's parent holding company, Australia Leather Holdings, Ltd. ("ALH"), for a far greater amount.

49. The United States understand that this loan was provided on non-commercial terms, which is not surprising, given the history of Australia's actions in this dispute, as well as the governmental, as opposed to commercial, source of the funds. Under these circumstances, Australia cannot be credited with having "withdrawn" any portion of its prohibited export subsidy. It has simply restructured a small portion of the subsidy by providing a loan with concessionary repayment terms. Australia's actions defeat the purpose of Article 4.7, which calls for prohibited subsidies to be withdrawn in order to ensure that subsidy recipients no longer enjoy their benefits. In this instance, Australia has not so much removed the any part of the benefits it provided through its A\$30 million grants as modified part of them through the replacement of one form of subsidy by another: Article 1.1 of the SCM Agreement defines subsidies to include loans, as well as grants, that confer a benefit.

50. Australia asserts in its media release that its earlier loan to ALH "was not found in breach of the WTO", presumably implying that this new loan is not contrary to the SCM Agreement. However, the issue is not whether the loan itself should be condemned as a prohibited subsidy, but whether its bestowal nullifies Australia's purported withdrawal of the subsidy that this Panel found to be inconsistent with the SCM Agreement. The simultaneous announcement of both the partial repayment by Howe and the much larger loan back to Howe's parent holding company, tied together in the same media announcement, demonstrates that the non-commercial loan is linked to - indeed, intended to - offset the so-called "withdrawal".

51. Australia's lame declaration in its media announcement that the loan has no "link" to automotive leather is difficult to credit. The recipient of the loan is none other than Howe's holding company parent, which, since it is a holding company, does not produce anything itself. It bears repeating that Howe is not just any Australian manufacturer randomly selected to receive government largess. Howe became a major automotive leather exporter precisely because of a series of blatantly SCM-illegal subsidy programmes.

52. Moreover, the link to Howe's illegal subsidy is made plain by the fact that Australia announced the loan in the same document, indeed on the same page, as its announcement of the partial subsidy repayment. Tellingly, Australia provided no independent reason for the loan, leaving little doubt that it was intended to offset the partial grant repayment.

53. Together, these facts and circumstances dictate the conclusion that Australia has not fully complied with its obligation to "withdraw" its subsidy. Australia's non-

commercial loan to ALH should be seen for what it is - a partial or complete perpetuation of the prohibited subsidy that this Panel condemned.

#### **IV. REQUEST FOR PRELIMINARY RULING THAT THE PANEL SEEK INFORMATION FROM AUSTRALIA**

54. The United States requests, pursuant to paragraph 17 of the working procedures in this proceeding and Article 13 of the DSU, that the Panel request Australia to produce authentic copies of the following documents and the following information for review by the Panel and the United States, no later than Friday, 29 October 1999:

1. Any agreement, whether by formal agreement or by correspondence with Howe or its related entities, under which Howe agreed to repay, or repaid, A\$8.065 million of the A\$30 million provided in 1997 and/or 1998.
2. Any correspondence between the Government of Australia and Howe or its related entities that refers to the agreement to repay, or to the repayment of, the A\$8.065 million referred to in request 1. above.
- 3.(a) Any written calculation of the \$A8.065 million communicated to or by Howe or its related entities to or by the Australian Government.  
(b) An explanation of how the \$8.065 million was calculated.
4. Any document by which the Grant Contract was terminated and any document terminating any performance requirements by Howe pursuant to that Grant Contract.
5. The loan contract between the Australian Government and Australia Leather Holdings providing for the "additional loan of \$13.65 million" to Australian Leather Holdings referred to in Australia's Joint Media Release 99/291, dated 15 September 1999.
6. Any documents referring to or related to the loan contract or the loan referenced in request 5 above, including but not limited to any correspondence between Howe or its related entities and the Australian Government.
- 7.(a) Any written calculation of the amount of the \$A13.65 million loan communicated to or by Howe or its related entities to or by the Australian Government.  
(b) An explanation of how the \$A13.65 million was calculated or determined.
8. Any documents created by the Australian Government related to the authorization of the Australian Government to (a) issue a new A\$13.65 million loan referenced in request 5 above, and/or (b) terminate the Grant Contract and request repayment of A\$8.065 million of the subsidy.

55. This information and documentation are crucial to the Panel's determination under Article 21.5 of the DSU. The United States has relied in this first submission on published statements and submissions of the Australian Government to establish that (a) Australia's method of determining the prospective portion of the grant is arbitrary and results in inappropriately putting most of the grant beyond the reach of the SCM Agreement remedies; and (b) the loan was simply a reimbursement on non-commercial terms of the purported withdrawal of the A\$8.065 million repaid by Howe.

56. The information and documents listed above contain facts and information that have a direct bearing on the issues in this proceeding. The information and documents should reveal in detail the circumstances under which the repayment by Howe was made, how that amount was agreed to or calculated, and whether there was any reimbursement or *quid pro quo* for the repayment. Similarly, given that the loan is obviously linked to the partial repayment of the grant, documentation and information pertaining to this loan are critical to a clear understanding of its relationship to the grant and grant repayment at issue. In addition, the exact terms of the loan, and the conditions for its issuance, are highly relevant to whether, and the extent to which, Australia is simply funding Howe's reimbursement out of its own pocket.

57. The United States requested these documents and information of Australia at the first organizational meeting of the Panel, on 18 October 1999, but has received nothing as yet, despite today's deadline for the filing of the US first submission. Therefore, this request should come as no surprise to Australia, and Australia should have no trouble meeting a Friday, 27 October 1999, deadline. It is important that these documents and information be provided on this schedule, to permit the United States to review them prior to Australia's first submission, so that relevant information can be incorporated into the United States' second submission.

## V. CONCLUSION

58. The United States urges this Panel to determine that Australia has not withdrawn its illegal subsidy without delay, and thus has not complied with Article 4.7 of the SCM and the Panel's recommendations.

59. The United States further urges the Panel to request that Australia provide the information and documents described in section III above by Friday, 27 October 1999.

**LIST OF EXHIBITS**

- Exhibit US-1 Agreement Between US And Australia On Article 21.5 Procedures, WT/DS/126/8, 4 October 1999
- Exhibit US-2 Status Report By Australia, WT/DS/126/7, 20 September 1999
- Exhibit US-3 Media Release: "Automotive Leather Dispute", 15 September 1999
- Exhibit US-4 "Sacred Cows vs The Hide of Howe," *The Weekend Australian*, 20-21 Sept. 1997
- Exhibit US-5 Australian Leather Holdings Ltd., *Australian Leather Holdings* (c. 1995)
- Exhibit US-6 Howe, *Howe Leather*, Dec. 1994
- Exhibit US-7 "Picking Winners," *Business Review* 1997, 13 Oct. 1997
- Exhibit US-8 "Howe Impressive", *Leather*, Aug. 1998
- Exhibit US-9 Schaffer Corporation, Ltd., Chairman's Address, 19 Nov. 1997
- Exhibit US-10 Calculation of Average Useful Life Of Assets for Howe
- Exhibit US-11 US Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (Rev. Proc. 77-10, 1977-1 C.B. 548 (RR-38)), as updated by the Department of Treasury
- Exhibit US-12 Australia Leather Holdings Ltd, 1997 Financial Statement (exerpt)

## ANNEX 1-2

## REBUTTAL SUBMISSION OF THE UNITED STATES

(15 November 1999)

REDACTED AUSTRALIAN BUSINESS CONFIDENTIAL INFORMATION  
INDICATED BY DOUBLE BRACKETS - [[ ]]

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1229
II. THE \$8.065 MILLION REPAYMENT IS NOT A WITHDRAWAL OF THE SUBSIDY .....	1230
"[I]t is illogical to claim that the allocation of the subsidy can be done in two different ways for the same case." .....	1233
"either subsidies are 'tied to' exports or they are not." .....	1233
"if they are subsidies contingent upon export performance (i.e. prohibited export subsidies in law or in fact), then they are expensed in achieving the contingent export sales." .....	1234
III. AUSTRALIA SHOULD WITHDRAW THE GRANT AS OF THE DATE OF ADOPTION OF THE PANEL REPORT .....	1236
IV. THE NEW LOAN NULLIFIED THE PARTIAL WITHDRAWAL OF \$8.065 MILLION .....	1238
V. CONCLUSION .....	1240

## I. INTRODUCTION

1. The first submission of the United States demonstrated that Australia failed to withdraw its export subsidy, as recommended by this Panel. Instead, Australia recovered only a modest repayment of the grant from the beneficiary, Howe and Company Proprietary, Ltd. ("Howe"), and then immediately reimbursed even that meager sum. In response, Australia argues that the minor repayment that Howe made was both unnecessary and more than sufficient to withdraw the subsidy. Australia also argues that only the repayment, but not its reimbursement by the Government of Australia, was part of the implementation of the recommendations, so that the reimbursement is not "covered by the Panel's terms of reference." Australia is wrong on both counts.

2. Australia's interpretation raises fundamental questions about the continued viability of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Australia's position could, if sustained, effectively render the obligations in Article 4.7 of the SCM Agreement meaningless. Australia's interpretation means that Members who provide significant illegal, prohibited export subsidy grants can easily relegate most or all of those grants to the past, declaring them outside the reach of the SCM Agreement remedies. Further, such Members are, according to Australia, free to "comply" with the requirement that such subsidies be withdrawn by engaging in any number

of bookkeeping manoeuvres to which panels would be required to turn a blind eye. For example, under Australia's approach, Members in breach of their export subsidy obligations may "comply" with those obligations by having the recipient of the subsidy repay an arbitrary part of the subsidy, at least on paper, while the government simultaneously pays the recipient the same or greater amounts of money. This new payment may even be expressly linked to the repayment of the subsidy, according to Australia, but panels must ignore this linkage.

3. Australia's interpretation is not supported by the SCM Agreement and should not be endorsed by this Panel. This Panel should determine that Australia has not complied with the SCM Agreement and the recommendations of the Dispute Settlement Body ("DSB").

## **II. THE \$8.065 MILLION REPAYMENT IS NOT A WITHDRAWAL OF THE SUBSIDY**

4. The first submission of the United States, filed 27 October 1999, explained that (1) Howe should repay the entire amount of the \$30 million grant that is prospective as of the date of adoption of the Panel report and that (2) to determine the prospective portion of the grant, the grant should be allocated in an economically reasonable manner, such as over the useful life of Howe's production assets. This means that most of the \$30 million grant remains prospective and must be repaid.<sup>1</sup> The amount that should be repaid, as calculated in the US first submission, is \$26,346,154, plus interest.<sup>2</sup>

5. In contrast, Australia claims that, less than two years after providing \$30 million in illegal export subsidy grants to Howe, it has fully withdrawn the subsidy by recouping *just one quarter* of the amount it provided.

6. In fact, Australia also claims, at para. 20, but does not seriously argue, that it need not have recovered a single dollar, since, according to Australia, merely terminating Howe's sales performance requirements under the Grant Contract would have been sufficient to implement the DSB's recommendations. This view is wrong, and not even Australia seems to credit it, since Australia's submission then proceeds to determine what Australia itself calls the "required" repayment amount.<sup>3</sup> Nonetheless, to prevent any confusion, the United States responds to Australia's assertion in the footnote below.<sup>4</sup> Aus-

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<sup>1</sup> See US First Submission, paras 19 - 35. For the sake of brevity, these explanations will not be restated here.

<sup>2</sup> *Ibid.*, paras. 34 - 35. All dollar amounts in this submission are in Australian dollars.

<sup>3</sup> *E.g.*, Australian First Submission, paras. 38, 42.

<sup>4</sup> Australia states, at para. 20 of its first submission, that

"the termination of all subsisting obligations under the Grant Contract, and hence the termination of any sales performance requirement on Howe, would have been sufficient for Australia to implement the recommendations adopted by the DSB, given that there is now no obligation on Howe in respect of sales."

This assertion is illogical and contrary to the SCM Agreement. First, the DSB's recommendation under Article 4.7 of the SCM Agreement was that Australia should withdraw the subsidy - which the Panel defined as the grant - without delay. *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, Report of the Panel, Adopted 16 June 1999 ("Panel Report"), DSR 1999:III, 951, paras. 10.1(b) and 10.3. On its face, this calls for Australia to remove the subsidy itself, not certain of the export-related elements associated with the subsidy.

Australia's assertion, in addition to being contrary to the plain language of the SCM Agreement and the DSB's recommendation, would produce a perverse result. If Australia's view were to be credited, not only would the recipient of an illegal non-recurring subsidy be entitled to retain the entire benefit conferred by the subsidy, it would be able to enjoy a further benefit - namely, relief from any obligations imposed as a condition of the subsidy. Such a result is plainly at variance with the notion of "withdrawal" of the subsidy, which necessarily contemplates the removal of benefits, not the conferral of further benefits.

Second, as this Panel has recognized, the decision whether a grant is contingent on export performance, and therefore is an export subsidy, must be made on the basis of the facts that existed at the time that the contract establishing the conditions for the grant payments was concluded. Panel Report, para. 9.68. The \$30 million grant is an export subsidy because the grant was contingent, *at the time it was provided*, on export performance. The prospective "termination of any sales performance requirements on Howe" cannot change the fact that, when the \$30 million was provided, it was contingent upon export performance, and therefore illegal. Attempting to change some of the obligations now does not affect the nature of the illegal subsidy, and it does not, by itself, withdraw the subsidy. This conclusion is reinforced by the fact that, regardless of what Australia says about sales performance requirements, Howe has already used the illegal export subsidy to make significant capital improvements that will benefit Howe's exports for many years to come.

Moreover, even if it were possible to withdraw the prohibited export subsidy by removing, *ex post facto*, the export-contingent features of the subsidy, Australia has not succeeded in doing so in this case. The \$30 million grant was contingent on exports, not based solely on the sales performance requirements of the grant contract, but also based on various other facts, "weighed together". Panel Report, para. 9.71. The Panel also noted the capital investment performance requirements that Australia imposed on Howe, observing that the expanded production resulting from the grants and from the "required capital investments" necessarily translated into increased exports. Howe apparently completed most of these required capital investments - aimed at promoting exports - before the Panel Report was adopted. Panel Report, para. 2.3 n.4. These investments, required by the illegal export subsidy grant, will continue to support exports regardless of what happens to Howe's sales performance requirements.

In addition, the Panel also found that:

(1) Howe had earned significant benefits from its exports of automotive leather pursuant to two automotive and textile export incentive programmes - programmes from which Howe was excluded following a US request under the SCM Agreement for consultations regarding the programs - and that the \$30 million was to compensate Howe for these lost benefits (Panel Report, para.9.65);

(2) Australia was aware that the overwhelming majority of Howe's sales were for export, thanks to the benefits of the export incentive programs, and sought, through the provision of the grant, to ensure that Howe remained in business after its exclusion from the export incentive programs (this point alone made it clear to the Panel that "continued exports, that is, anticipated exportation, was an important condition in the provision of the assistance") (Panel Report, para. 9.66); and

(3) The grant money was provided to the one Australian leather company that exported, while other Australian leather producers were excluded (Panel Report, para. 9.69).

Howe's sales performance targets under the grant contract were, therefore, only one of several factors that led the Panel to conclude that the \$30 million subsidy is "in fact tied to Howe's actual or anticipated exportation or export earnings." Panel Report, para. 9.71. Even if Australia could somehow withdraw the subsidy by removing its export contingent nature, Australia has not achieved that result simply by relieving Howe of its sales performance requirements. Australia did nothing to address the other factors that led to the Panel's conclusion.

Finally, Howe's obligation under the Grant Contract was to make "best endeavours" to achieve the sales targets. Panel Report, para. 2.3. In other words, Howe did not have to achieve the sales targets in order to receive the grant money, but only had to *try* to achieve them. Further, Australia itself conceded that "the grant funds cannot be taken back by the government once the payments are made" and that "a change in Howe's level of exports would not affect the disbursement of the funds". Panel Report, para. 9.70. In light of these facts, Australia has not "implemented" anything by terminating "the sales performance requirements on Howe," so that "there is now no obligation on Howe in respect of sales." Under the

tralia suggests that for purposes of calculating how much it was required to recoup from Howe, the \$30 million grant should be allocated exclusively over the period that the performance requirements were to be in effect. Based on Australia's view, only the portion of the \$30 million that is attributable to the period that the performance requirements were to remain in effect after the end of Australia's compliance period has to be withdrawn.<sup>5</sup> Australia calculates that amount as either \$8.065 million or \$6.602 million, depending on whether the allocation is weighted by the sales target quantities set in the Grant Contract.<sup>6</sup> Not surprisingly, under Australia's theory, the requisite withdrawal amount is quite modest, since most of the sales performance period fell prior to the 14 September 1999, compliance deadline.

7. Australia supports its view by stating that the Panel itself made a "finding that the allocation of the grant payments was in respect of sales performance targets and hence applied over the period 1 April 1997 to 30 June 2000."<sup>7</sup> Australia states that "the Report explicitly linked the grant payments to the sales performance targets<sup>8</sup> and "[t]he Report considered that the grant payments were tied to export performance in the period 1 April 1997 to 30 June 2000 because of the sales performance targets, and were to be used, *i.e.*, expensed, in achieving those targets."<sup>9</sup>

8. In fact, however, the Panel made no findings whatsoever on how the export subsidy should be allocated and never addressed how the grants should be expensed. Plainly, the sales performance requirements were an important factor - one among several - that led the Panel to find that the \$30 million grant was a prohibited export subsidy. Only in this sense did the Panel "link" the sales performance targets to the \$30 million subsidy. The Panel did not say, however, that this link should be the basis on which to determine how the grant should be allocated for purposes of calculating the amount that Australia was required to withdraw.

9. In fact, it appears that Australia draws its conclusion, not from any finding of the Panel, but purely through semantic confusion and the inappropriate melding of two distinct concepts. The core of Australia's argument appears in paragraph 29 of its First submission:

[I]t is illogical to claim that the allocation of the subsidy can be done in two different ways for the same case. The USA is saying that the conditions on which a subsidy is provided are critical to determining whether it is in breach [*sic.*] SCM Article 3.1(a), but that, once that subsidy has been found to be in breach, the conditions and nature of the subsidy suddenly change when the issue of remedy is addressed... Either subsidies are "tied to" exports or they are not. If they are subsidies contingent upon export performance (*i.e.* prohibited export subsidies in law or in fact), then they are expensed in achieving the contingent export sales.

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Grant Contract, Howe could apparently keep the \$30 million regardless of its actual sales performance. The situation after Australia's so-called implementation is unchanged.

<sup>5</sup> *E.g.*, Australian First Submission, paras. 20, 37 - 49.

<sup>6</sup> *Ibid.*, paras 37 - 49.

<sup>7</sup> *Ibid.*, para. 20.

<sup>8</sup> *Ibid.*, para. 21.

<sup>9</sup> *Ibid.*, para. 25.

10. As the United States stated in its First submission, at para. 39, the Australian position confuses two legally distinct concepts: the elements of an export subsidy and the duration or allocation of the subsidy. If, in the words of the Panel, a subsidy is conditioned on anticipated exportation, it is an illegal export subsidy. That legal conclusion does not address the wholly separate question of how the subsidy is allocated over time, which is at issue in this Article 21.5 proceeding but was not relevant in the earlier proceeding. Australia has provided no basis for its assertion that the allocation of the illegal export subsidy - which is the key question in determining how much of this subsidy must be withdrawn - can be determined solely on the basis of one of the export elements associated with the subsidy.

11. Because Australia's paragraph 29, quoted above, appears to encapsulate Australia's argument in this proceeding, the United States responds below to each of the points in that paragraph.

**"[I]t is illogical to claim that the allocation of the subsidy can be done in two different ways for the same case."**

12. Contrary to Australia's characterization, the United States does not claim that there are two different ways to allocate the \$30 million grant at issue. The United States is presenting only one way of allocating this grant for withdrawal purposes, and that is the economically reasonable way explained by the United States in its first submission. What Australia deems a second allocation method in fact has nothing to do with allocation. Rather, it is the threshold inquiry into whether a grant is an export subsidy, based on whether it is provided because of actual or anticipated exportation.

**"Either subsidies are 'tied to' exports or they are not."**

13. With this statement, Australia simply interjects semantic confusion. The Panel used the phrase "tied to" to analyze whether the grant at issue was an export subsidy (which was the only issue before it).<sup>10</sup> The Panel was not opining - and indeed there was no reason for it to opine - on whether the grant was to be allocated over the time-period associated with one of the performance targets established under the Grant Contract.

14. The nature of the Panel's enquiry, and of its findings, is obvious from the language of Article 3.1(a) itself. Article 3.1(a) defines prohibited export subsidies as those "contingent, in law or in fact, upon export performance." The "in fact" language is explained in footnote 4 to Article 3.1(a) as follows:

This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is *in fact tied to* actual or anticipated exportation or export earnings.

It is plain that the "tied to" language in Article 3.1(a) footnote 4 is directed at the issue of whether the subsidy is, in fact, "contingent" upon export performance, and, therefore,

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<sup>10</sup> E.g., Panel Report, para. 9.71.

prohibited. It is not directed at the issue of how a subsidy should be allocated or expensed.<sup>11</sup>

**"If they are subsidies contingent upon export performance (i.e. prohibited export subsidies in law or in fact), then they are expensed in achieving the contingent export sales."**

15. There is no basis for the assertion that grants contingent upon export performance must be allocated over the period set for achieving those sales. Australia more fully articulates this argument, at para. 32, asserting that the prohibition on export subsidies arises

because the subsidies contingent upon export performance are presumed to be expensed on actual exports, paid either in advance or in arrears. The grant payments are necessarily allocated to the sales performance targets on which they were contingent, i.e. to the period 1 April 1997 to 30 June 2000.<sup>12</sup>

Once again, Australia points to no authority in the SCM Agreement or elsewhere for either its presumption or its conclusion. Nor can it, because, as discussed above, Australia continues to confuse the allocation of a grant with the conditions that make it an export subsidy. Yet, Australia immediately draws from its own, unfounded conclusion to assert that if an allocation based on sales performance targets is not appropriate in this case, it would never be appropriate, no matter how different the circumstances.<sup>13</sup>

16. Again, there is no basis for that conclusion. Some export subsidy programmes may pay small sums on a recurring basis. For such programmes, withdrawal might mean simply ceasing the export contingent payments, *i.e.*, withdrawing the subsidy programme. Under such a program, there may be no need for any allocation over time because the export subsidy may be expensed as the sales occur. There can be a wide variety of export subsidy programmes. For purposes of determining whether or how the subsidy is to be allocated over time in any particular case, WTO panels will need to undertake a fact-specific review of the subsidy's structure and implementation, based on the specific facts and the specific programme before the panel. The purpose of this Article 21.5 proceeding is not to determine how all subsidies should be allocated or withdrawn, but simply to

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<sup>11</sup> The Appellate Body has been very clear that "the legal standard expressed by the word 'contingent' is the same for both *de jure* or *de facto* contingency. There is a difference, however, in what *evidence* may be employed to prove that a subsidy is export contingent." *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Report of the Appellate Body, (adopted 20 August 1999), DSR 1999:III, 1377, para 167. Indeed, the Appellate Body (in para. 171) has explicitly stated that the phrase "tied to" relates to whether the subsidy is contingent or conditioned upon exports: "The ordinary meaning of 'tied to' confirms the linkage of 'contingency' with 'conditionality' in Article 3.1(a)." The phrase "tied to" exportations or export earnings means conditioned or contingent upon export performance, not allocated over specific anticipated exports.

<sup>12</sup> Australian First Submission, para. 32.

<sup>13</sup> Australia's reference to the US Foreign Sales Corporation law in this regard is of course not relevant. The programme is not an export subsidy. Furthermore, not only are there no adopted DSB recommendations or rulings on this law, the United States has already indicated an intention to appeal the panel report in that dispute.

determine whether Australia's non-recurring \$30 million grant to Howe has been withdrawn.

17. Indeed, Australia goes a step farther in arguing that export subsidies must be allocated over a specific sales period. Australia is apparently asserting that the *only way* a significant lump sum grant can be contingent upon export performance, in the sense of Article 3.1(a) of the SCM Agreement, is for it to be specifically contingent on particular export levels over a particular period of time. This is the only possible explanation for Australia's assertion that an export grant has to be allocated or "expensed on actual exports."<sup>14</sup> This position is clear from Australia's unsupported claim, at para. 26, that

[I]f the money was not allocated over the period 1 April 1997 to 30 June 2000 on the basis of anticipated export in this period, then it would not have been in breach of SCM Article 3.1(a). Such subsidies would have been a case for Parts III or V of the SCM Agreement, not Part II.

18. Nowhere does the SCM Agreement impose such a requirement. Nor does the SCM Agreement suggest that an export subsidy remains illegal only for so long as any export sales performance goals associated with the subsidy subsist. Under the SCM Agreement, a measure is an illegal export subsidy if, at the time of its bestowal, it is contingent upon actual or anticipated export performance - which might or might not be directly and specifically linked to specific sales quantities or over a particular period of time.

19. Further, it is untrue that "but for" a purported allocation of the grant over the period April 1997-June 2000, there would have been no finding of an export subsidy. First, as stated above, there was no Panel finding that money was allocated over the performance period on the basis of anticipated exports in this case. Second, the sales performance targets were based on "best efforts" and were one of many facts which, weighed together, led the Panel to conclude that the \$30 million was an export subsidy.<sup>15</sup> Contrary to Australia's claim, therefore, it was *not* just the sales performance requirements over a specific period of time that led the Panel to find an export subsidy. Several other facts were considered as well. Further, the Panel's conclusion, stated at several points in its report, was that "the grant of the subsidies was conditioned on *anticipated exportation*,"<sup>16</sup> not conditioned directly and exclusively on exports in specific amounts through June 2000.

20. As the United States pointed out in its first submission, para. 41, there is no necessary relationship between the criteria for an export subsidy - such as export performance requirements - and the allocation of the subsidy for purposes of determining how it is to be withdrawn. Imposing such a relationship only invites abuse. A Member could grant a significant subsidy, sufficient to build a large manufacturing facility with a useful life of 25 years, but make it contingent on export increases over the first two years. The Member could be confident that it had "jump-started" long-term export increases over the useful life of the assets, but because it chose only to monitor the first two years of exports, it escapes the SCM Agreement entirely. By the time a dispute settlement panel could recommend that the subsidy be withdrawn, the two-year period would likely have

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<sup>14</sup> Australian First Submission, para. 32.

<sup>15</sup> See *supra*, note 4.

<sup>16</sup> Panel Report, para. 9.71.

lapsed.<sup>17</sup> Yet the subsidy - which the SCM Agreement prohibits in its entirety - would have a financial and economic impact for over two decades. Under Australia's view, however, no portion of that subsidy would need to be withdrawn.

21. For these reasons, the subsidy that should be withdrawn in this case cannot be calculated with reference to the sales performance targets, which was only one of the facts that made the grant an export subsidy. Rather, the "prospective" portion of the subsidy must be calculated in an economically reasonable manner that accurately reflects the extent to which the subsidy persists over time. The subsidy should be allocated over the useful life of Howe's production assets, and Howe should repay that portion attributable to the period after the adoption of the Panel Report.

22. Finally, although the United States does not wish to give any credence to the various creative allocation calculations advanced by Australia at paras. 37 - 49, it is plain that Australia's suggestion that the amount of repayment can be reduced by 10 per cent, a figure representing assumed domestic sales, is completely unsupported. The Panel found that the domestic market could not expand, so that the \$30 million grant was contingent on export performance.<sup>18</sup> The Panel did not find that 90% of the \$30 million was an export subsidy; it found that 100 per cent of the \$30 million was an export subsidy. Therefore, there is no basis for claiming that only 90 per cent of the prospective amount of the export subsidy need be repaid.

### **III. AUSTRALIA SHOULD WITHDRAW THE GRANT AS OF THE DATE OF ADOPTION OF THE PANEL REPORT.**

23. Australia claims, at para. 33, that to require the repayment of the prospective portion of the grant as of the date of adoption of the Panel Report is to impose "retroactive action" and that

[t]he rationale for requiring the repayment of money is that that money has not been expensed at the time of implementation and so needs to be repaid to bring the Member into conformity at that date, not the date of adoption of the Panel Report. To interpret it otherwise, would be to make the concept of the implementation period meaningless.

24. Not at all. The Panel recommendation under the SCM Agreement was that the subsidy should be withdrawn "without delay". It is reasonable, as Australia says, to allow some implementation period in which the offending Member can take the necessary measures to withdraw the subsidy. This does not, however, mean that, when considering what portion of the grant is "prospective", the implementation period can "eat away" at the prospective portion that should be withdrawn.<sup>19</sup> Nor does it mean that, should the Panel agree in this Article 21.5 proceeding that the grant should be allocated over the

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<sup>17</sup> Australia's position would also appear to be that if, during the period established by a panel pursuant to Article 4.7 of the SCM Agreement, the Member were to amend the export sales requirements so that they all expired before the end of that period, then the subsidy would have been "withdrawn," an equally illogical result.

<sup>18</sup> Panel Report, para. 9.67.

<sup>19</sup> Indeed, Australia's approach implies that a Member would be free to continue to provide new subsidy amounts, or even to increase the amount of the subsidy, during this period of time. There is no basis for such an approach in the text of the SCM Agreement.

useful life of production assets, the prospective portion would then be calculated as of the date of the Panel's report in this proceeding. It is entirely reasonable to allow a Member time to implement its withdrawal. It is not reasonable to allow that time to reduce the amount of the subsidy that should be withdrawn.<sup>20</sup>

25. Further, it is reasonable to calculate the illegal subsidy that must be withdrawn as including interest on the amount that should be withdrawn starting on the date of adoption of the Panel report until the amount is repaid. Plainly, the subsidy that should be withdrawn is not only the face value of the subsidy, but also the interest that the company would otherwise have to pay - but did not - to obtain those funds in the market. Both of these elements are part of the prohibited benefit to Howe and are therefore part of the repayment of the prohibited benefit.

26. Withdrawing the grant as of the date of adoption of the Panel Report is not "retroactive action". The amount withdrawn is prospective, in that it is the amount allocated to the time-period after the date of adoption of the Panel report. The amount is "retroactive" only in the sense that it is allocated in part to a period prior to the implementation deadline. The implementation period, however, is only a practical necessity to allow the party to take the necessary action to comply. It is not a "free pass" that allows even more of the subsidy to escape withdrawal.

27. Australia is wrong in arguing, at para. 35, that the US position - that the withdrawal amount should be calculated as of the date of adoption of the Panel Report - would apply to all other cases under the WTO, and would require, for instance, that illegal tariffs collected after the panel report adoption date be refunded. First, the SCM Agreement, unlike other agreements under the WTO, provides as a remedy that the offending Member should "withdraw the subsidy." By contrast, disputes under other agreements require that the Member's measure be brought into compliance, and do not require that anything be "withdrawn."

28. Second, even with respect to disputes under the SCM Agreement, cases involving a significant, non-recurring export subsidy grant are different from cases involving recurring subsidies in which the subsidy might not be allocated over a period of time, but might be expensed when received.<sup>21</sup> In the latter case, it may be that a subsidy can be withdrawn fully by withdrawing the subsidy programme itself, *i.e.*, discontinuing the provision of subsidies.<sup>22</sup> In the case of significant, non-recurring grants, by contrast, simply promising not to provide more significant grants is not a withdrawal, because the grant already provided endures over a period of years. In such a case, "withdrawal" can be effected through the refund of the prospective portion of the grant. In this case, but not necessarily in the case of recurring subsidies, the issue arises of what event triggers the "prospective" portion. In the case of grants, this event is the adoption date of the Panel report.

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<sup>20</sup> The United States emphasizes that such decisions as to how particular subsidies should be withdrawn, and how the withdrawal amount should be calculated, are fact-specific. What might be appropriate in the case of one subsidy, such as the lump-sum grants at issue here, may be entirely inappropriate in other cases.

<sup>21</sup> This distinction between non-recurring and recurring subsidies is recognized, for instance in the practice of the United States and the EC in connection with subsidy investigations under SCM Agreement, Part V. See US First Submission, paras. 22 - 23.

<sup>22</sup> Given the wide variety of possible subsidy programmes, a determination of how such a subsidy should be withdrawn should be arrived at based on the particular facts at issue.

**IV. THE NEW LOAN NULLIFIED THE PARTIAL WITHDRAWAL OF \$8.065 MILLION.**

29. Australia claims, at paras. 50-54, that the 1999 Loan was not part of the implementation of the Panel's recommendations (because it was not notified to the DSB) and is not part of the Panel's terms of reference, "which relate to the implementation" of the Panel's recommendations. Australia also asserts that the 1999 Loan is simply a legal subsidy that replaced an illegal one, and must be considered on its "individual merits" without reference to the illegal subsidy.

30. Australia's claims are wrong. The DSB's recommendation, in accordance with SCM Agreement Article 4.7, was that Australia should withdraw the subsidy. Under Article 21.5, this Panel is to consider "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings." Plainly, if this Panel can determine the "existence" of measures taken to comply with the recommendations, it can consider whether the measures purportedly taken to comply were effectively rendered non-existent.

31. In this case, the repayment of the \$8.065 million was part of Australia's implementation of the Panel's recommendations, and the concessional 1999 Loan was a critical and necessary part of that repayment package. Without the 1999 Loan, there would have been no repayment, and without the repayment, there would have been no 1999 Loan.<sup>23</sup> That Australia *chose* to notify the DSB of only a part of its implementation package has no bearing on what, in fact, the full implementation package was.

32. The simple facts - hinted at in public statements but conspicuously omitted from the DSB notification - are that (1) Australia negotiated a modest repayment amount of \$8.065 million with Howe's holding company parent, Australian Leather Holdings ("ALH")<sup>24</sup> in a transaction in which ALH acknowledged receiving "valuable consideration" in exchange for the repayment<sup>25</sup> (2) on the very same day, and [[ ]], Australia agreed to provide a highly concessional \$13.654 million loan to that same company, ALH, [[ ]]<sup>26</sup> (3) the 1999 Loan Agreement makes specific that the \$13.654 million [[ ]]<sup>27</sup> and (4) these arrangements were made between the identical two parties: the Australian Government on the one hand, and ALH, on the other.<sup>28</sup>

33. Under these facts, it is plain that there was no repayment of \$8.065 million. In substance, on the day that the DSB recommendations and rulings were to be implemented by withdrawing the subsidy, ALH repaid \$8.065 million to the Australian Government, and, [[ ]], the Australian Government transferred \$8.065 million right back to ALH. Under these circumstances, for Australia to say that the \$8.065 repayment was part of Australia's implementation, but that the [[ ]] reimbursement was not, is specious. There would not have been one without the other. Both are part of Australia's so-

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<sup>23</sup> Among other things, this is apparent from Australia's Media Release on this subject, Exhibit US-3.

<sup>24</sup> Note that, although Australia makes much of the fact that the repayment was by Howe and the 1999 Loan was to ALH, the actual documents show that the agreement to repay was made by ALH as well as Howe. Exhibit AUS-1, page 5 (execution of repayment agreement by ALH).

<sup>25</sup> Exhibit AUS-1, para. 2.

<sup>26</sup> Exhibit AUS-BCI-3, [[ ]].

<sup>27</sup> Exhibit AUS-BCI-3, para. 2.3.

<sup>28</sup> Exhibits AUS-1, US-3.

called "implementation", and the reimbursement cancels out the repayment such that no part of the subsidy was withdrawn.

34. Australia claims that the 1999 Loan has to be considered on its own merits, citing Panel statements that "each subsidy has to be evaluated on its own terms in deciding consistency with the SCM Agreement" and the Panel's "agreement" that a prohibited subsidy can be replaced with a non-prohibited subsidy.<sup>29</sup> Australia also tries to "bootstrap" the 1999 Loan onto the 1997 Loan that the Panel had found not to be an export subsidy in the underlying proceeding.

35. Australia conveniently neglects to remind the Panel that, immediately following the language it cites, the Panel analyzes the totality of the circumstances surrounding the \$30 million export subsidy grant, including the fact that it was paid to compensate Howe for its exclusion from two previous export incentive programmes.<sup>30</sup> On the basis of all of these facts, the Panel determined that the \$30 million was an export subsidy. Plainly, in considering whether a subsidy is an illegal subsidy, the Panel may look, not just to the subsidy measure in isolation, but at the totality of the circumstances giving rise to the subsidy measure.

36. Similarly, it is not sufficient for Australia to say that the 1999 Loan was "modelled" on the 1997 Loan that the Panel found not to be an export subsidy, and that, therefore, the 1999 Loan is similarly "legal". First, the US does not believe that the Panel has to reach a conclusion that the 1999 Loan is, itself, an export subsidy in order to find that Australia has not complied with the Panel's recommendations. To comply with the Panel's recommendation that the subsidy be withdrawn, Australia should have required the repayment of the correct prospective portion of the subsidy. It did not do this: it set up a paper transaction under which ALH appeared to, but did not, repay part of the subsidy. This is plainly not compliance with the Panel's recommendations.

37. Second, neither in form nor in substance is the 1999 Loan similar to the 1997 Loan. [[ ]]. One crucial difference is that the 1999 Loan is [[ ]]. If the \$8.065 million portion of the \$30 million is contingent on export performance, and the \$13.654 million 1999 Loan [[ ]], it follows logically that the 1999 Loan is contingent on export performance and is, therefore, a prohibited export subsidy under SCM Article 3.1(a). In this sense, the 1999 Loan is very different from the 1997 Loan. The Panel found no direct links to export contingencies in the 1997 Loan; the 1999 Loan, by contrast, is directly contingent on export performance through the reimbursement of the export subsidy.

38. As noted above, under Article 21.5, this Panel is to consider "the existence *or consistency with a covered agreement* of measures taken to comply with the recommendations and rulings." Plainly, as discussed above, the 1999 Loan was part and parcel of the measures taken to comply with the recommendations of the DSB. The question is therefore properly before the Panel whether the 1999 Loan itself is a prohibited export subsidy under SCM Article 3.1(a). Australia appears to admit - as it must - that the 1999 Loan is a subsidy.<sup>31</sup> This Panel has already determined that the \$30 million grant was a prohibited export subsidy, because it was "in fact tied to Howe's actual or anticipated

<sup>29</sup> Australian First Submission at para. 53.

<sup>30</sup> See, e.g., Panel Report, para. 9.65, 9.71.

<sup>31</sup> Australia argues only that it is entitled to provide subsidies to ALH, and concedes that the 1999 Loan is "concessional". See, e.g., Australian First Submission, paras. 6 and 12. See also AUS-BCI-3, [[ ]].

exportation or export earnings".<sup>32</sup> The \$8.065 million repayment was part of that \$30 million. The \$13.065 million 1999 Loan, which Australia admits - as it must - was a subsidy, is a direct replacement for the export subsidy, [[ ]]. That 1999 Loan, therefore, steps into the shoes of the export subsidy that the Panel has already analyzed and is itself a prohibited export subsidy.

39. In light of the above facts, this Panel should find that the 1999 Loan is part of the measures taken by Australia to comply with the DSB's recommendations, and that the 1999 Loan improperly nullifies Australia's purported withdrawal of \$8.065 million and itself provides a replacement export subsidy which is inconsistent with SCM Agreement Article 3.1(a).

## V. CONCLUSION

40. For the above reasons, this Panel should conclude that the measures taken by Australia to comply with the DSB's recommendation are not in compliance with that recommendation and are inconsistent with the SCM Agreement.

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<sup>32</sup> Panel Report, para. 9.71.

**ANNEX 1-3**

**ORAL STATEMENT OF THE UNITED STATES**

(23 November 1999)

1. Good morning. My name is Dan Mullaney. I am Assistant General Counsel at the Office of the United States Trade Representative, and I am appearing today on behalf of the United States.

2. The Panel's task is to decide whether the requirement under SCM Article 4.7 to "withdraw the subsidy" means anything at all in the case of large, lump-sum grants. Australia says no. Australia says that after having provided a prohibited export subsidy - the worst and most trade-distorting form of subsidy there is - it can simply arrange for temporary repayment of a small portion of that subsidy and then immediately pay it back. That is why we are here: the United States urges the Panel to give real meaning to the Article 4.7 remedies in this case and to reject Australia's invitation to make it toothless.

**The Allocation of the Grant**

3. I'd like to turn to the question of how the \$30 million grant should be allocated for purposes of withdrawal. But first, I'd like to clear up one point. The issue of how the grant should be allocated is important because the remedy for an illegal export subsidy is that it has to be "withdrawn". Webster's Third New International Dictionary defines "withdraw" as "to take back or away (something bestowed or possessed). The portion of a significant export subsidy grant that is allocated to prospective periods has to be removed, taken away, "withdrawn" from the recipient. It is only the prospective portion that has to be withdrawn, because the nature of the WTO remedies is prospective.

**"Withdrawal"**

4. Australia has done and argued everything conceivable to avoid this obvious and straight-forward remedy of withdrawal of the subsidy. Australia has even argued, despite the specific remedy in the SCM Agreement, that the appropriate remedy is that the subsidy measure should be brought into conformity, and has specifically avoided talking about the only remedy at issue here: withdrawal, without delay, of the subsidy. Instead, virtually all of Australia's arguments are designed to show that the subsidy has somehow been brought into conformity with the agreement, *not* that it has been withdrawn.

5. Australia says that it does not matter that an Article 3.1(a) subsidy is irremediable. It says that remedies are not the issue, that the issue is only "conformity with a rule" and "how a Member can reconfigure assistance to be consistent with SCM Article 3.1(a)." Australia's position is wrong.

6. SCM Article 4 is entitled "Remedies". Article 4.7 specifically provides for the "remedy" of withdrawal of the subsidy without delay, not "reconfiguration of the assistance" and not "bringing the measure into conformity." Article 1.2 of the DSU is very clear that Article 4.7, as a special rule, prevails. Therefore, the normal DSU approach - that the measure be brought into conformity - is *not* the remedy in this case, and it is *not* what the Panel recommended. Article 4.7 could have, but did not, provide that the measure should be brought into conformity. Instead, it provides very specifically that the subsidy be withdrawn.

7. We understand why Australia wants to avoid the required SCM remedy of withdrawal of the subsidy. It is a strong remedy reserved for the most serious form of impermissible subsidy. Nevertheless, it is not a "punitive" measure imposed on an individual company. Under Article 1.1 of the SCM Agreement, by definition, a subsidy provides a benefit to a recipient. Plainly, then, what must be withdrawn is the benefit conferred on the recipient. This is not a punishment; the government is required to take back what should not have been bestowed in the first place. It is hard to conceive of any company, particularly in this instance, having a legitimate expectation of being able to keep an illegal subsidy. ALH and Howe have been on notice, since at least October 1996, that the United States regarded the export benefits it was receiving as illegal export subsidies. It took the \$30 million subsidy anyway, obviously aware that it would come under scrutiny as an export subsidy.

8. In any case, the SCM Agreement says that the subsidy should be withdrawn, and this means effectively - not nominally - withdrawn from the recipient.

### **Allocation Period**

9. So, the subsidy must be withdrawn. The issue in this proceeding is exactly *how much* of the subsidy should be withdrawn. This is determined by how this grant is allocated over time, because only that portion of the grant attributable to prospective periods is withdrawn. The exercise is only to calculate the value of what the recipient still has. That is what needs to be withdrawn. To the extent that Australia admits that anything at all has to be withdrawn, this appears to be a principle on which both parties agree. The evolution of Australia's reasoning on the allocation issue in this case is interesting. In the original proceeding, Australia argued that there was no tie whatsoever between the \$30 million subsidy and export performance: I quote from Australia's argument in the Panel Report: "the money is gone and there is *no connection* with future sales, including sales for export". Now, Australia is asserting that the \$30 million grant is *so specifically connected* to export performance that each dollar of the \$30 million can be directly attributed to specific export sales. The truth is at neither extreme: the subsidy was contingent on export performance, and was therefore a prohibited export subsidy; but it was not attributed specifically to individual sales or to a particular time-period.

10. It is our position that, for these purposes, this grant must be allocated over the useful life of Howe's assets. Why? Because that is how long the benefit of the subsidy lasts. When a company purchases a significant capital asset, it does not charge the entire cost of that asset to its financial statement in the year of purchase. Rather, recognizing that the asset will last for a period of some years, the company depreciates the asset - that is, allocates the cost of the asset - generally, over its useful life. Similarly, when a company receives a grant significant enough to use in capital investments to enhance its long-term competitiveness, that grant continues to benefit the recipient over the life of those assets. In the absence of this grant, the company would have had to pay for the asset itself and depreciated that cost on its books over the life of the asset. Thus, from the point of view of the recipient, the subsidy lasts for the useful life of the asset.

11. This accounting treatment is common sense: The benefit of a subsidy that permits a company to make a significant capital investment, lasts, from the point of view of the recipient, for as long as the capital asset does. Further, Article 3.1(a) does not exist in a vacuum. The reason that export subsidies are prohibited is that they presumptively distort trade. An export subsidy that permits capital investments endures and distorts trade for as long as the resulting asset remains in use.

12. This key point distinguishes a significant grant from a smaller, recurring subsidy. When a government makes a small subsidy payment for each unit of exports, each such payment only distorts trade with respect to that particular unit: it does not necessarily impact other exported units at all, or extend into the future. Such a subsidy would not be allocated over time for purposes of withdrawal.

13. That is why, as we described in our First Submission, the expert opinion and Member practice under the SCM Agreement is that small recurring subsidies are not allocated, but that significant lump sum grants are allocated over the useful life of assets. Significant grants are allocated this way because such an allocation reflects the economic reality of how long such a subsidy lasts and how long it will affect exports. Conversely, a recent significant grant, if *not* allocated over the useful life of assets, could completely escape the SCM remedies, even though the recipient continues to benefit from it.

14. These are *precisely* the reasons for allocating the \$30 million grant at issue in this case in the same way.

15. Australia, in its second submission, articulates why it believes the \$30 million - which it once argued had no connection whatsoever to future sales - now is so directly linked with the sales performance targets that it is "expensed" in achieving those targets. Australia's main argument appears to be that the \$30 million grant was a replacement, as of April 1, 1997, for the ICS export subsidy programme, which was scheduled to provide export subsidies through 30 June 2000. Australia also asks rhetorically why it should make a difference to the allocation whether Australia paid the export subsidy as a recurring subsidy, in each quarter through 30 June 2000, or paid the entire amount up front.

16. Let's examine this argument. The \$30 million was provided in part to compensate Howe for being excluded from the ICS *and* EFS export subsidy programmes. The EFS programme lasts through 31 December 2000, and the ICS programme lasts through 30 June 2000. Nothing in the grant, however, says that, because the grant was given in part instead of ICS and EFS export subsidies, that the "duration" of the grant itself was somehow limited by those previous programmes. Indeed, Australia argues that the duration of the grant was limited by the duration of the ICS programme alone, but, curiously, *not* the EFS programme. The only conclusion one can draw from these facts, and the only conclusion this Panel reached, is that Howe was excluded from the ICS and EFS programmes, and that the \$30 million grant was provided to compensate Howe for this exclusion. Nothing in this conclusion limits the "duration" of the \$30 million subsidy to 30 June 2000.

17. Finally, it is not helpful to speculate on what the result in this case would have been had Australia paid the \$30 million little by little instead of in lump sums. If the subsidy were structured differently the result in this case may well have been different. If Australia had decided to provide quarterly benefits based purely on export performance targets, Australia might have provided smaller quarterly benefits over a longer period of time than through 30 June 2000, and Howe might have received less grant money before the compliance deadline than the U.S. has calculated. Further, there might have been no capital investment performance requirements under such a hypothetical programme, since the payments would not have been large enough to justify such a requirement. The point is that, yes, if Australia had established a subsidy programme different from significant lump-sum payments, the manner in which a withdrawal of the subsidy could be effected under SCM Article 4.7 might be different. But that is not our situation.

18. In any case, taking Australia's hypothetical at face value, there is a big difference to a recipient between receiving a lump sum payment today, which is immediately avail-

able to purchase major capital assets - in fact, earmarked for such capital assets - and receiving periodic payments of much smaller amounts over a longer period of time.

19. What else is wrong with Australia's proposed allocation method? Because it is divorced from economic reality, it is subject to abuse. What if Australia had provided the \$30 million subsidy contingent on best efforts to achieve export and investment targets through 16 June 1999, instead of through 30 June 2000? The same \$30 million would have been provided; it plainly would have been, in its entirety, an export subsidy; the same amount would have been invested in capital assets, and Howe would have benefited to the same extent as it has now. In terms of the prohibited benefit to Howe, that \$30 million export subsidy would be indistinguishable from the \$30 million export subsidy we are considering today. Yet, under Australia's interpretation, there would be nothing whatsoever to withdraw in the former case, because it all would have been "expensed" as of 16 June 1999. The same prohibited subsidy, the same impact on Howe, but a completely different result from the point of view of Article 4.7 remedies.

20. Obviously, Australia's position is a virtual blueprint for how to grant significant export subsidies without having to worry about the WTO consequences.

### **The Reimbursement Through The Subsidy of the 1999 Loan.**

21. Let's talk now about the 1999 Loan, which Australia admits is a subsidy. Picture, if you will, this scenario. ALH and the Australian Government meet in a conference room on 14 September to discuss how to comply with the Panel's recommendations. The Australian Government says: "We're sorry, but we have to take back part of the \$30 million grant, because the WTO Panel said we had to withdraw the subsidy". ALH protests, "but we don't want to repay this money, we need it for our automotive leather operations". The Australian Government replies, "don't worry, just hand the \$8 million to us, and we'll hand it right back to you. We'll even sign an agreement to that effect. ALH, quite rationally, agrees, and the deal is done.

22. When ALH and the Australian Government walk out of that conference room, would anyone seriously argue that ALH had repaid \$8 million of the subsidy, or that the Australian Government had withdrawn that portion of the subsidy? No. Yet, in substance, that is *precisely* what happened here.

23. I'm going to simplify the discussion by talking about round numbers. The Australian Government agreed to give ALH \$13 million, *specifically conditioned* on ALH giving the Australian Government \$8 million, and asks only that ALH pay back the \$13 million in 13 years, with no interest. ALH takes \$13 million, returns \$8 million to the Government, and invests the balance at a modest 7.5 per cent rate of return. In 2012, ALH has enough money to pay the Australian Government back in full. These transactions, which all happened on the same day, 14 September 1999, are the exact equivalent of the "conference room" scenario I just described.

24. Now, Australia will tell you that this is not what happened. They say that *Howe* received the \$30 million and paid back \$8 million of it, and that *ALH*, a completely different company with a broader product line, received the loan subsidy. They say that the \$13 million loan is a "separate measure" from the grant or its repayment. They say that the \$13 million loan is identical in conditions to the \$25 million loan in 1997 that the Panel found not to be an export subsidy, and is therefore perfectly WTO-consistent.

25. None of these assertions is accurate.

26. ALH is a common party throughout these transactions; it is a holding company, and Howe is its wholly-owned subsidiary. ALH received the original \$30 million grant

to use for its automotive leather operations. ALH was the recipient of the \$13 million loan. ALH arranged for the repayment of the \$8 million grant, and it was ALH that agreed with the Australian Government that the 1999 Loan subsidy would be conditioned on the repayment. Technically, the \$8 million came out of Howe's funds (and was then immediately reimbursed), because that is where the subsidy went. Australia simply cannot credibly argue that the repayment and its reimbursement are two separate transactions involving two separate parties.

27. Second, the \$13 million non-commercial loan is plainly not a measure that is separate from the grant repayment. Far from it. This loan is directly and specifically contingent on the grant repayment. There would not have been one without the other. By Australia's logic, if the Panel saw me go to a restaurant for dinner tonight, it would have to conclude that I was receiving a free dinner. My payment to the restaurant at the end of the meal, by Australia's logic, would be a completely separate transaction that the Panel would be urged not to take into account.

28. Third, and finally, Australia cannot plausibly claim that the 1999 Loan is just like the 1997 Loan, and is, therefore, a separate WTO-consistent measure. As I have said, the 1999 Loan subsidy was a directly contingent reimbursement for the repayment of the \$8 million subsidy. This alone makes it very different from the 1997 Loan, because the 1999 Loan was intended to, and did, reimburse and therefore nullify the partial repayment.

29. In addition, however, since the \$13 million loan subsidy was a direct reimbursement of the \$8 million repayment, and was specifically contingent on the repayment that loan steps into the shoes of the \$8 million grant repayment. In the conference room scenario I described a few minutes ago, ALH repays \$8 million to the Australian Government, and the Australian Government, by prior arrangement, pays it back. Nothing has happened to the \$8 million portion of the export subsidy to make it any less of an export subsidy. It was an export subsidy when it was returned to Australia, and it remains an export subsidy when the Australian Government gives it back.

30. Australia would probably respond that, when the export subsidy was returned to ALH, it was returned (1) as a loan subsidy and (2) without the same export-related strings attached. This is the same, however, as Australia's argument that all it had to do to withdraw the subsidy was remove the sales performance obligations. Australia is attempting to "cleanse" the original subsidy by removing, *ex post facto*, the export conditions for that subsidy. This does not implement the Panel's recommendations because Article 4.7 says to withdraw the subsidy, not remove some of the features of the subsidy.

31. Another way of looking at this is that because the \$8 million portion of the export subsidy was contingent on export performance, the subsidy provided through the 1999 Loan is also contingent on export performance, because it is linked to, and, but for accounting differences, becomes the same as, the original export subsidy. In this respect, the subsidy provided through the 1999 Loan is, itself, an export subsidy.

32. In addition, Australia itself noted that the facts and circumstances surrounding the 1997 Loan examined in the underlying proceeding were identical to those surrounding the \$30 million grant, except for a specific link to export performance. This link to export performance, according to Australia, was the difference that made the \$30 million grant an illegal export subsidy and the 1997 Loan not. The 1999 Loan, unlike the 1997 Loan, has a direct link to export performance, in that it is linked specifically to the repayment of an export subsidy. Therefore, the 1999 Loan is itself inconsistent with Article 3.1(a).

33. Either way one looks at the reimbursement represented by the 1999 Loan subsidy, it is plain that Australia has not complied with the recommendation of this Panel and the DSB that the subsidy be withdrawn.

### **Starting date for the "prospective portion"**

34. I want to turn now to the issue of the starting date for calculating the prospective portion of the grant - that portion that must be withdrawn. The SCM Agreement calls for withdrawal of the subsidy "without delay". The Panel Report making this recommendation in this case was adopted on 16 June 1999. In our view, in the case of the withdrawal of the prospective portion of a grant, this is the starting date for calculating the "prospective portion": grant monies allocated to periods on or after 16 June 1999, should be withdrawn. In this way, the entire prospective portion of the subsidy is withdrawn, and no Member benefits by delaying implementation.

35. Australia's response is instructive. Australia believes that, after a formal export subsidy finding is made, with every day that passes, more and more of the prohibited subsidy becomes untouchable by the SCM remedies. Revealingly, Australia says that the measure "comes into conformity" automatically at the end of the allocation period as a consequence of the monies having been expended. In other words, even after the formal finding of a prohibited export subsidy, a Member can avoid withdrawing anything at all simply by delaying implementation and waiting out the clock.

36. There is no reason for this result under the SCM Agreement and it only rewards postponing implementation. In some cases, there is a practical need for some period of time in which a Member decides how to implement the withdrawal of an allocated grant. No matter how long that time-period is, however, the prospective portion to withdraw should be calculated as of the date of adoption of the Panel Report. The obligation to withdraw the subsidy becomes effective on that date. There is no reason that the amount to be withdrawn should decline with every day that passes after the DSB adopts a Panel Report finding an export subsidy.

37. Australia protests that if the amount is never withdrawn, then at the end of the allocation period, the Member would still have to withdraw the original amount outstanding, together with interest. This is precisely true. If the Member does not withdraw the subsidy as recommended, that Member should not receive a credit against withdrawing the subsidy, simply because of the passage of time. In other words, the lapse of time does not excuse a Member from its obligation, which accrued on the adoption date of the Panel Report, to withdraw the subsidy. This is not "punitive action", as Australia characterizes it. It is the remedy - that the subsidy be withdrawn without delay - that the SCM Agreement mandates.

38. As for Australia's claim that, if the Member does not withdraw the subsidy, it would be subject to retaliation or compensation forever, this raises a question that is not at issue here. This proceeding is not under Article 22.6, and is not about appropriate countermeasures.

39. Australia also says that the withdrawal should not include interest, and disparages the use of ALH's actual borrowing rate in 1997 to calculate this interest. This criticism is misplaced. Plainly, the subsidy that should be withdrawn prospectively includes not only the allocated portion of the grant, but also the interest that the company saved by not having to borrow the money. That is the total benefit to ALH that should be withdrawn. The 1997 borrowing cost is no accident: Since ALH received \$30 million in 1997 - 98

for free, in lieu of having to borrow it at its 1997 cost of borrowing, the interest saved currently is the interest that ALH would have incurred to borrow the funds in 1997.

**Conclusion**

40. To sum up, this Panel is called upon to decide a very important issue, which is whether an export subsidy is effectively irremediable, which is the upshot of Australia's arguments, or whether it has to be meaningfully withdrawn, as required by the SCM Agreement.

41. Thank you very much for your attention.

**ANNEX 1-4**

**FINAL ORAL STATEMENT OF THE UNITED STATES**

(24 November 1999)

1. As we said at the outset of this meeting yesterday, the Panel's task in this proceeding is to decide whether the requirement under SCM Article 4.7 to "withdraw the subsidy" means anything at all in the case of large, lump-sum grants. Under Australia's interpretation of the Agreements, it does not. Under Australia's interpretation, the issue is whether its previously bestowed grant can somehow be brought into conformity with the agreement, or reconfigured, or revised *ex post facto*, to remove the export contingency. Respectfully, none of these possible responses is appropriate. Article 4.7 simply and expressly requires that the subsidy be withdrawn. Further, the Member must *really* withdraw the subsidy, not simply go through the motions.
2. We submit that there are only a few key issues that the Panel need analyze in reviewing Australia's compliance in this proceeding.
3. First, Article 3.1(a) only provides that, if a subsidy is contingent on export performance, it is a prohibited export subsidy. Article 3.1(a) does not and cannot define how an export-contingent grant is allocated over time.
4. Second, a significant grant which is an export subsidy should be allocated over time on some reasonable economic basis that reflects the length of time that the subsidy, and its benefits to the recipient, last. This allocation period should be based on meaningful, objective criteria. The allocation period should *not* be defined by the subsidizing Member's own arbitrary view - contained in the grant contract or elsewhere - on how long the grant subsidy should be deemed to last. The allocation period certainly should not be defined by only one of the several conditions - the sales performance targets - that made the grant an export subsidy in this case. A large, lump-sum grant objectively provides a benefit to the recipient that lasts over the useful life of the recipient's production assets, and its allocation should reflect this.
5. Third, the 1999 Loan subsidy to ALH, which was directly contingent on ALH's arranging for the repayment of part of the export subsidy, effectively nullified any purported withdrawal of a small portion of the \$30 million export subsidy. It rendered what might have been a partial withdrawal completely non-existent.
6. Finally, the obligation to withdraw the subsidy accrued the day this Panel Report was adopted. On that day, Australia's obligation with respect to the prospective portion of the principal amount of the \$30 million grant was fixed, and on that day, the prospective portion of the subsidy to be withdrawn started to include the interest that the recipient saved by virtue of not having to borrow the principal amount. Delays in withdrawing the subsidy do not decrease the amount to be withdrawn; indeed, because of the interest component of the benefit, the prohibited benefit increases over time.
7. The answer to these few questions will determine whether an export subsidy is effectively irremediable, which is the upshot of Australia's arguments, or whether it has to be meaningfully withdrawn, as required by the SCM Agreement.

**ANNEX 1-5**

**UNITED STATES' ANSWERS TO WRITTEN QUESTIONS  
OF THE PANEL**

(1 December 1999)

**ANSWERS TO QUESTIONS FROM THE PANEL  
TO THE UNITED STATES**

Question 1

*The United States agreed, in the original dispute, that a Member is permitted to replace a prohibited subsidy with a non-prohibited subsidy, and that the consistency of the new subsidy would need to be judged on its own merits. How does the US reconcile this with its new argument that the 1999 loan should be judged on the basis of the Panel's original finding concerning the grant?*

Answer 1

This Panel, consistent with Article 4.7 of the SCM Agreement, recommended that Australia withdraw the subsidy - the \$30 million grant. Under Article 21.5 of the DSU, this Panel is to review the existence or consistency with a covered agreement of measures taken by Australia to comply with the recommendation of the Panel that the subsidy be withdrawn. The 1999 Loan is a subsidy (because it was concessionary) that was provided contingent on the repayment of a portion of the \$30 million grant - part of the measures purportedly taken by Australia to comply with the recommendation of the Panel. The question presented to the Panel is whether these measures taken by Australia - the partial repayment and its simultaneous reimbursement - withdrew the subsidy. These measures taken to comply have to be examined in connection with the grant the Australia is required to withdraw. Whether the \$8 million "repayment" implements the Panel's recommendations obviously can only be determined by considering the nature of the \$30 million export subsidy and Australia's obligation to withdraw it. In the same way, the impact of the 1999 Loan on Australia's implementation can only be understood through its connection with the \$8 million partial repayment and the original \$30 million grant. Therefore, in the context of an Article 21.5 proceeding, in which the Panel examines the "measures taken to comply" with its recommendations, the 1999 Loan subsidy must be analyzed as part of the set of measures taken to comply with Australia's obligation to withdraw the \$30 million subsidy. In this sense, analyzing the 1999 Loan subsidy in this Article 21.5 proceeding is different from analyzing it in the context of an original dispute. Australia is subject to different obligations in this Article 21.5 proceeding - to withdraw the subsidy - than it would be in a normal dispute, and the 1999 Loan must be analyzed in the light of these obligations. Specifically, Australia was obligated to take back part of the export subsidy, and, partially through the benefit of the 1999 Loan subsidy, did not.

In addition, even in the case of the original dispute, this Panel found that it was required to "examine all of the facts that actually surround the granting or maintenance of the subsidy in question, including the terms and structure of the subsidy, and the circumstances under which it was granted or maintained." Panel Report, para. 9.56. There is no reason that the Panel should turn a blind eye to the facts and circumstances sur-

rounding a subsidy provided as part of a "measure taken to comply" in an Article 21.5 proceeding. In this case, the facts and circumstances include that the 1999 Loan subsidy was a direct and contingent replacement for the portion of the \$30 million that was withdrawn.

#### Question 2

*The US argues that the task facing the Panel is to determine whether Australia has taken measures to comply with the DSB's recommendations, and whether the measures are "consistent with the SCM Agreement". Is the US argument that the 1999 loan is inconsistent because it, like the grant, is an export subsidy? Or, is the US arguing that the 1999 loan, because it cancels out the grant repayment, turns the repayment into a sham? If the US is making both of these arguments, are they arguments in the alternative?*

#### Answer 2

Under either theory - whether the 1999 Loan subsidy is itself an export subsidy that replaces part of the \$30 million export subsidy or whether it nullifies and renders nonexistent Australia's purported withdrawal - Australia has not complied with the recommendations of the Panel to withdraw the subsidy.

#### Question 3

*Is the US arguing that there is a distinction between measures examined in an original dispute and all steps related to implementation in the context of Article 21.5 DSU? Please explain fully.*

#### Answer 3

There is a distinction between the measures examined in an original dispute and all steps related to implementation in the context of Article 21.5 of the DSU. As a result of adoption of the Panel Report by the DSB in this Article 21.5 proceeding, Australia has an obligation that was not present in the original dispute: to withdraw the prohibited export subsidy. The Panel must examine all of the steps related to the implementation of this obligation taken by Australia to determine whether Australia has complied with the recommendations. In this case, Australia purported to withdraw only a small portion of the \$30 million grant, but even that modest transaction was in fact a sham, since the grant monies were immediately replaced by the contingent 1999 Loan subsidy.

#### Question 4

*On what grounds does the US justify relying on its own and the EC's countervail practice, and the Informal Group of Experts' report which is not adopted and pertains to serious prejudice calculations, as the basis for its proposed methodology for determining the amount of the subsidy that should be "withdrawn" to comply with the DSB's recommendation in this prohibited subsidy case? On what specific basis does the US argue that Article 14 of the SCM Agreement can give guidance regarding questions of subsidy allocation in general (as argued in footnote 10 of the US first submission), and regarding withdrawal of a subsidy in the context of Article 4 SCM?*

## Answer 4

One of the issues in this proceeding is how to determine what portion of the subsidy's benefit remains as of the date of adoption of the Panel Report - that is, how much of the benefit to the recipient is attributable to the time period after the date of adoption. That is the portion of the subsidy that should be withdrawn. The determination by Members and by recognized experts as to how grants are allocated over time is, therefore, directly relevant to the issue of how much of the grant should be withdrawn.

The SCM Agreement applies to subsidies, and contains a general "Definition of a Subsidy" in Article 1. The work of Members and of the Informal Group of Experts in interpreting such subsidies is instructive, regardless of the particular Part of the SCM Agreement being studied. The focus, both of the Members and of the Informal Group of Experts, is on an economically meaningful way of determining how long a significant lump-sum grant lasts, that is, the period over which it should be allocated. That this practice and expert advice has been applied in the context of actionable subsidies (Part III of the SCM Agreement) or countervailing measures (Part V of the SCM Agreement) does not detract from its value: nothing about the nature of actionable subsidies or countervailing measures would make the allocation principles for grants specific to those situations, and inapplicable in the case of export subsidies. In fact, there are identical concerns with respect to the effectiveness of the SCM Agreement remedies: In each of the situations at issue - prohibited export subsidies, actionable subsidies, and countervailing measures - if the grant is not allocated on an economically reasonable basis, such as over the useful life of assets, it escapes the SCM Agreement remedies, because it can be relegated inappropriately to the past.

Further, the Informal Group of Experts was created by the Committee on Subsidies and Countervailing Measures to clarify the calculation of subsidies. The experts were chosen by the Committee based on their substantive experience in subsidy calculation methodology. Their status and expertise in subsidy calculations should therefore be carefully considered by the Panel. Further, although the Informal Group of Experts noted that there were grey areas of subsidy allocation that would have to be analyzed on a case-by-case basis, the Experts held a consistent view throughout the report about how large non-recurrent grants should be allocated. The general rule is as the United States has stated it: such grants should be allocated over time on an economically reasonable basis, such as over the useful life of assets.

With respect to the application of Article 14 of the SCM Agreement, that Article provides that Members shall determine the method of calculating the benefit to the recipient of subsidies. Under US and EC practice, determining the benefit conferred by a grant may involve an analysis of how long the benefit of the subsidy to the recipient lasts - *i.e.*, the allocation of the subsidy over time. This is because Part V provides that Members are to calculate the "amount of the subsidy" and to impose countervailing duties that do not exceed the amount of the subsidy. Article 19 of the SCM Agreement. Article 14 sheds light on the meaning of the term "benefit".

Further, the Appellate Body has specifically used Article 14 to interpret Article 1 in a prohibited subsidy case. In *Canada - Measures Affecting The Export Of Civilian Aircraft*, WT/DS70/AB/R, Report of the Appellate Body (2 August 1999), adopted September 1999 (para. 158), in considering whether certain measures were prohibited export subsidies, the Appellate Body used principles set out in Part V, Article 14, to determine

whether the measures constituted a subsidy under Article 1.1, describing Article 14 as "relevant context in interpreting Article 1.1(b)."

The United States emphasizes that, despite Australia's complaints that it had relied on the Panel Report in determining how the grant was to be allocated, there was nothing in the Panel Report that suggested that the grant should be allocated over sales performance targets.<sup>1</sup> By contrast, the allocation of grants over the useful life of assets is an established and well-publicized method of allocation. Australia cannot, therefore, claim to have "relied" on the Panel Report in deciding on its implementation measures. Further, the United States rejects Australia's claim that its allocation period can only be rejected if it is a "contrivance". The issue is not whether a Member's own self-designated allocation period is a contrivance; the issue is the proper allocation for significant grants.

#### Question 5

*Does the US agree with the following statement from para. 7 of Australia's second submission: "the measure comes into conformity automatically at the end of the allocation period as a consequence of all of the monies having been expensed"; and with the following statement from para. 13 of that submission: "As time passes, the amount to be withdrawn becomes smaller and goes to zero at the end of the period over which the subsidy is allocated. [The existence of] compensation or retaliation rights until the measure comes into conformity cannot increase, or halt the reduction over time of, the amount of subsidy to be withdrawn to bring the measure into conformity"? If the US disagrees, how does it reconcile that disagreement with its proposed subsidy allocation methodology, which seems to involve definition of a finite period over which subsidy benefits exist and are "expensed" with the passage of time?*

#### Answer 5

The United States disagrees with the statement that the "measure comes into conformity automatically at the end of the allocation period." It is not clear how such a measure "comes into conformity" simply through the passage of time; rather, it would seem that the subsidy remains a prohibited export subsidy, but is simply a past export subsidy. More important, however, the issue in this proceeding is *not* whether the measure comes into conformity. The issue in this proceeding is how much of the subsidy is allocated to the time following the date of adoption of the Panel Report, and whether Australia has withdrawn that portion of the subsidy, as required by Article 4.7. Once a significant grant is found to be a prohibited export subsidy in an adopted Panel Report, it should be withdrawn, and the amount to be withdrawn does not decrease simply because the Member has delayed implementation. Further, it is not accurate to say that the existence of "compensation or retaliation rights" halts the reduction over time of the amount of subsidy that should be withdrawn. It is the adoption by the DSB of a Panel Report finding a prohibited export subsidy grant that fixes the amount that must be withdrawn:

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<sup>1</sup> In any event, as the United States has noted in its submissions, Australia's position ignores that there is a difference between the criteria for finding an export subsidy and its allocation over time.

at that point, the entire prospective amount of the significant grant must be withdrawn.<sup>2</sup> The amount to be withdrawn does not decline because a Member delays implementation.

#### Question 6

*In the view of the United States, would a subsidy in the form of a one-time grant to a company, contingent on exportation of a given product, still need to be "withdrawn" if the recipient company completely exited that product market and no new export contingency were established in respect of other products produced by that company? If so, how would the US propose that such a withdrawal would be effectuated?*

#### Answer 6

In the view of the United States, whether a significant grant is an export subsidy is determined based on the conditions in place at the time the subsidy was bestowed. Subsequent events would not impact this determination. *See* Panel Report, para. 9.68. If a Panel were requested to rule in such a situation, in which there are no exports, the subsidy would still have to be withdrawn; however, the specific means of effecting the withdrawal would depend on the facts of the case.

#### Question 7

*Does the US agree with Australia's characterization of the US approach, reflected in para. 19 of Australia's second submission:*

*"[I]f the USA's punitive approach on interest were to be adopted, [the amount to be withdrawn would never decline, but rather] would increase. This would mean that at the end of the allocation period, even though there would no longer be any benefit to the company involved, the Member would still have to withdraw the original outstanding amount, together with interest, to bring the measure into conformity."*

#### Answer 7

The United States agrees that, if a Member does not withdraw a significant grant after it has been found to be a prohibited export subsidy, the amount to be withdrawn does not decline over time. Further, after the grant is found to be a prohibited subsidy, if it is not withdrawn, the benefit includes the interest that the recipient saves by not having to borrow the funds from which it is benefitting. The United States does not agree that this is punitive. It is simply a withdrawal of the prohibited subsidy, as required by Article 4.7 of the SCM Agreement, that Member have agreed not to grant in the first place.

#### Question 8

*Put another way, if a dispute were not brought until after the end of an allocation period, and the US agreed that the allocation period used was the correct one, would any remedy still be available? That is, would the subsidizer have to take any action to "withdraw" the subsidy? Or, because under the US approach the benefits of the*

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<sup>2</sup> Of course, prior to the adoption of the Panel Report, the amount to be withdrawn does decline over time.

*subsidy would have ceased by then, would it be the US view that no remedy was necessary?*

Answer 8

The United States does not rule out the possibility that, in a particular case, a country could delay bringing an action such that there might be little or no remaining subsidy to be withdrawn. This is not the case here. The United States has acted quickly in requesting that the DSB review prohibited export subsidies, and is entitled to a meaningful remedy of withdrawal. A Member that acts expeditiously should not be greeted with the response that most of the significant subsidy has been relegated to the past and is therefore untouchable by the SCM remedies, which is upshot of Australia's position.

Question 9

*How does the US respond to Australia's arguments at para. 25 in Australia's second submission that "to bring the grant payments into conformity, Australia did not have to impose a punitive measure on an individual company, be it Howe or ALH. This matter is about Australia's rights and obligations as a Member"; and in para. 26 of that submission that "[t]he impact on Howe or ALH or any other Australian company is irrelevant: they are not Members, Australia is"?*

Answer 9

The SCM Agreement requires that the subsidy be withdrawn. In this case, this means from the recipient who received the subsidies. Australia's argument is one that would apply to any type of WTO remedy, and has specifically been rejected. Arbitrator Beeby noted in the dispute concerning *Indonesian Automotive Measures*:

In virtually every case in which a measure has been found to be inconsistent with a Member's obligations under the GATT 1994 or any other covered agreement, and therefore, must be brought into conformity with that agreement, some degree of adjustment by the domestic industry of the Member concerned will be necessary.<sup>3</sup>

This does not make the required withdrawal punitive. First, given that Members have agreed not to provide prohibited export subsidies, it follows that their firms would not have a legitimate expectation of retaining such subsidies. This is particularly true here, where all those involved were on notice from the beginning that the \$30 million grant was potentially a prohibited export subsidy. Second, only the prospective portion of the prohibited export subsidy must be withdrawn, not the past portion. Such a withdrawal can hardly be said to be punitive. The recipient firm is no worse off after the withdrawal than before it received the subsidy; indeed, it is better off, since it retains some portion - the "retrospective portion" - of the prohibited export subsidy.

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<sup>3</sup> *Indonesia - Certain Measures Affecting the Automotive Industry*, WT/DS54/15 et al., Award of the Arbitrator (7 December 1998), DSR 1998:IX, 4029, para. 25.

Question 10

*How does the United States reconcile its view that the remedy of "withdraw the subsidy" is prospective with the fact that it interprets that term to require repayment of some amount?*

Answer 10

The grant is paid in a lump sum, but for purposes of assessing how long the subsidy lasts, and how long it provides a benefit, it must be allocated on some reasonable economic basis, such as the useful life of production assets. In the U.S. view, Australia is required to withdraw that portion of the grant allocable to the period after the Panel Report is adopted by the DSB.

Question 11

*The United States argues that the Panel should calculate the remaining benefit to be withdrawn in an export subsidy case based on allocation methodology applied in countervailing duty cases to determine the amount of benefit that may be countervailed in any given period. However, if Australia were to have withdrawn A\$28 million in this case, there would still be a A\$2 million benefit to the company that could be countervailed under Part V of the SCM Agreement. It seems, therefore, that the only way to avoid the possibility that the recipient of the prohibited subsidy retains some benefit that could be countervailed, would be to withdraw the entire amount originally provided. Please comment.*

Answer 11

In the context of both countervailing measures and actionable subsidies, Members and experts have considered that significant lump-sum grants should be allocated over the useful life of the recipient's production assets. This determination is based on an economically and financially reasonable assessment of how long the grant lasts. This assessment is no less pertinent in the context of prohibited export subsidies than in the context of countervailing measures and actionable subsidies. The inquiry is the same in all cases: how long does the significant grant last and continue to provide benefits to the recipient.

This is a different issue from whether the retrospective portion of the grant - a grant whose prospective portion has been withdrawn under SCM Part II - is still potentially subject to countervailing measures under Part V. Nothing in the SCM Agreement precludes Members from determining that a withdrawal under Article 3.1(a) is a withdrawal under Part V, making countervailing duties unnecessary.<sup>4</sup> Therefore, it is unclear that the whole amount would have to be withdrawn in order to avoid countervailing duties.

Question 12

*Is it the United States' position that an export subsidy, which the United States would consider to be non-allocable, granted prior to the adoption of the Panel's report,*

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<sup>4</sup> See, e.g., Part V, Article 19 of the SCM Agreement, which provides that countervailing duties may be imposed unless the subsidy is withdrawn.

*is beyond the reach of remedies under Part II of the SCM Agreement, and can only be reached under Parts III and V of that Agreement? If not, please explain.*

Answer 12

In general, the types of subsidies that the United States would view as "non-allocable" are those that are "recurring". If a programme providing recurring subsidies was found to be a prohibited export subsidy programme, a possible remedy would be to change or withdraw the underlying programme itself. Thus, the export subsidy programme would not be beyond reach of the Part II remedies, even though the subsidies previously bestowed under the programme might not have to be repaid. It is possible, moreover, that a small grant, if provided on a one-time basis and not allocated to the period following the adoption of a panel report, would not have to be repaid. This is not the case here.

### **ANSWERS TO QUESTIONS FROM THE PANEL TO BOTH PARTIES**

Question 1

*Both parties have proposed a calculation methodology to determine what they refer to as the "prospective" amount of the subsidy to be repaid. Given that the subsidy itself was entirely paid before the Panel's report was adopted, in what sense can any amount of repayment be considered "prospective"?*

Answer 1

The benefits conferred on a recipient by this significant lump sum grant continue to accrue over the average life of the production assets. The portion of the grant attributable to the period after the adopted panel report should be regarded as prospective in nature. In this sense, the repayment of that amount is "prospective", even though the grant was paid before the Panel Report was adopted.

Question 2

*On what legal basis do the parties base the argument that the phrase "withdraw the subsidy" has "prospective" effect only. One interpretation of the phrase "withdraw the subsidy", which is not argued by either party, would be that it means "repay in full" or "take back" the financial contribution to the recipient. Please comment on this possible interpretation, with specific reference to the text, context, and object and purpose of Part II of the SCM Agreement.*

Answer 2

The issue in this proceeding is whether Australia has implemented the Panel's recommendation that the subsidy be withdrawn without delay. The United States submits that Australia has not done so. The question of whether Australia must withdraw the entire \$30 million grant, or only the \$26,346,154 prospective portion of that grant (plus interest), is less important than this Panel's determination of whether - irrespective of the method for calculating the prospective portion of the grant - Australia has complied with the Panel's recommendation. Neither the United States, nor Australia, nor any third party, has argued that the withdrawal should be retrospective and that the whole \$30 million should be withdrawn, and there is no need for the Panel to reach this issue. Since Aus-

tralia has not even withdrawn the prospective portion of the subsidy, the Panel does not have to decide whether Australia should withdraw the retrospective portion of the subsidy. The Panel need only decide whether or not Australia has complied with the recommendation of the Panel.

That WTO remedies are not retrospective, but only prospective, is reflected in several places in the DSU itself, which generally speaks in terms of the requirement that Members "bring a measure into conformity" with a covered agreement. e.g., DSU Articles 19 and 22.1. The specific rule in Article 4.7 of the SCM Agreement - that the subsidy be withdrawn - requires, in the context of a significant grant, that something be removed or taken back. Consistency with the prospective nature of DSU, however, means that what should be taken back is that portion of the subsidy that is attributable to prospective periods. Viewed in this way, the remedy prescribed by Article 4.7 would be both consistent with general prospective principles of the DSU and meaningful.

Given the prospective nature of WTO remedies, if there had been a contrary intention in Article 4.7 of the SCM Agreement - an intention to make the withdrawal retrospective instead of prospective - that intention would have been specified somewhere in the SCM Agreement, either in a preamble or in Article 4 itself. In the absence of a specific textual basis for reading the SCM Agreement to require a retrospective withdrawal the Panel should decline to so interpret the SCM Agreement.

#### Questions 3 & 4

*In European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, the Panel noted that "any assessment of the level of nullification or impairment presupposes an evaluation of consistency or inconsistency with WTO rules of the implementation measures taken by the European Communities, i.e. the revised banana regime, in relation to the panel and Appellate Body findings concerning the previous regime." WT/DS27/ARB, 9 April 1999, at para. 4.3. The Panel further noted that both parties accepted that it was the consistency or inconsistency with WTO rules of the new EC bananas regime - and not of the previous regime - that had to be the basis for the assessment of the equivalence between the nullification suffered and the level of the proposed suspension, Ibid. at para. 4.5, and that it would be the WTO-inconsistency of the revised EC regime that would be the root cause of any nullification or impairment suffered by the United States. Ibid. at para 4.8. Is there any relationship, or should there be, between the concept of "equivalence" of the nullification or impairment of benefits to the suspension of concessions under Article 22 of the DSU, and calculation of the relevant amounts, and the calculation of the amount to be withdrawn in accordance with Article 4.7 of the SCM Agreement?*

*Further to the preceding question, would your answer change in light of the provisions of Article 4.10 of the SCM Agreement? That is, Article 4.10 of the SCM Agreement provides for "appropriate countermeasures" in the event a recommendation of the DSB is not followed, that is, the subsidy found to be prohibited is not withdrawn. Article 9 provides that "appropriate" countermeasures does not allow countermeasures that are disproportionate in light of the fact that the subsidies in question are prohibited. Does or should this have any relation to or consequences for the calculation of the amount to be withdrawn?*

Answer 3 & 4

The United States submits that, at this stage, the Panel should focus on whether its recommendations were implemented, not on the "appropriate countermeasures" or on equivalence of nullification or impairment.

Question 5

*Australia has argued, based on the Panel's original decision, that it is entitled to replace a prohibited export subsidy with a WTO-consistent subsidy, and that the 1999 loan at most falls into this category of replacement. Assuming the 1999 loan is not inconsistent with the SCM Agreement, it might nonetheless be argued that once the DSB had adopted a decision that a subsidy was inconsistent, that ruling could not be implemented simply by replacing the inconsistent subsidy with a consistent one. To implement a recommendation to "withdraw the [prohibited] subsidy" by repayment, and then immediately replace it with a WTO-consistent subsidy has no remedial effect, because the harmful trade effects presumed to have been caused by the prohibited subsidy in the first instance will necessarily continue. Would the parties please comment on this proposition.*

Answer 5

The United States agrees that the directly contingent reimbursement of a withdrawal payment nullifies, and makes non-existent, the putative withdrawal measure. This is precisely what the 1999 Loan subsidy does, through its significant concessionary features. Therefore, regardless of whether the 1999 Loan subsidy is itself WTO-consistent, it nullifies the withdrawal. It is therefore directly relevant to the Panel's Article 21.5 task to review "the existence... of measures taken to comply with the recommendations" of the Panel.

ANNEX 1-6

UNITED STATES' COMMENTS ON NEW FACTUAL  
INFORMATION FROM AUSTRALIA

(3 December 1999)

1. The Panel's question 4 to Australia was as follows:  
Australia, although arguing that Howe's interest rate is irrelevant to this dispute, criticizes the US's estimate of that rate, derived from 1997 financial statements of Howe Leather (Australia's second submission at para. 51). **What in Australia's view would be the commercial interest rate and loan terms that Howe would have been able to obtain on the market for long-term borrowing during each of the past three years? Please provide a full explanation and supporting documentation.**
2. In lieu of responding to the Panel's question, Australia repeats its criticism of the U.S. calculation of interest, which is based on the published audited consolidated financial statements of ALH (which includes Howe), and notes that ALH's interest rate for bills of exchange was 7.5 per cent and its overdraft rate 9.25 per cent. As "supporting documentation", ALH submitted two tables whose provenance and context were not identified.
3. This new information is not responsive. First, it is not the commercial interest rates and loan terms for long-term borrowing from Howe. To the contrary, rates for bills of exchange and overdrafts are a particular and very selective form of *short-term* borrowing and, since they are apparently reported with respect to ALH alone, they do not represent the cost of borrowing by Howe. Second, the "documentation" provides no support for how the interest rates were calculated, whether non-interest-bearing liabilities were excluded, or whether the rates were the actual rates paid, or simply rates available. In short, the Panel does not really know what these interest rates represent, except that they are plainly not long-term commercial interest rates and loan terms that Howe would have paid on the market, as requested by the Panel.
4. Australia states in its response that there is public information on the "full details" of all loans and the average interest rates for those loans. This is the information that the Panel requested with respect to Howe for each of the years 1997-99, and this is the information that should have been provided, but was not. The limited amount of information submitted by Australia, and its obvious inadequacy as a measure of Howe's long-term borrowing costs, cannot substitute for the interest rate information provided by the United States. The Appellate Body recently stated, in connection with Canada's refusal to provide information with respect to export subsidies:

Clearly, in our view, the Panel had the legal authority and the discretion to draw inferences from the facts before it - including the fact that Canada had refused to provide information sought by the Panel.

\* \* \*

The continued viability of [the dispute settlement] system depends, in substantial measure, on the willingness of panels to take all steps open to them to induce the parties to the dispute to comply with their duty to pro-

vide information necessary for dispute settlement. In particular, a panel should be willing expressly to remind parties - during the course of dispute settlement proceedings - that a refusal to provide information requested by the panel may lead to inferences being drawn about the inculpatory character of the information withheld.<sup>1</sup>

5. The US method of calculating the interest rate is accurate. First, it is based on audited, published financial statements, which should be presumed to be correct. Second, it is based on a consolidated financial statement, meaning that (1) it specifically includes Howe's market costs of funds, and (2) it excludes any intra-company borrowing at non-market rates that might skew the true "market" cost of funds. Third, since it is based on actual interest expenses paid, the US method results in an actual, historical, and not a theoretical, cost of borrowing. Finally, although, in theory, a massive retirement of debt during the course of the fiscal year might influence this calculation, in the absence of any indication of such an extraordinary circumstance, the Panel should not assume it. This is particularly true here, since Australia was given an opportunity to provide what it considers to be more accurate information, but declined to do so.

6. In this connection, the United States notes that the 1997 interest rate calculation is corroborated by the 1999 consolidated financial statements of Schaeffer Corporation, ALH's parent company.<sup>2</sup> The 1999 interest rate is 11.36%, compared to the originally submitted 1997 interest rate of 11.6 per cent.

Fiscal year "borrowing cost paid":	\$ 1,884,000
Fiscal year "non-current bank loan - secured":	\$16,583,000
$\$ 1,884,000 / \$16,583,000 = 11.36\%$	

7. The consistency between this 1999 interest rate and the 1997 interest rate strongly suggests that, contrary to Australia's assertions, the 1997 interest rate was not distortive.

8. Plainly, the information provided by the United States is the most accurate information available on what Howe's borrowing cost is.

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<sup>1</sup> *Canada - Measures Affecting The Export Of Civilian Aircraft*, WT/DS70/AB/R, Report of the Appellate Body adopted 20 August 1999, DSR 1999:III, 1377 (paras. 203 - 204).

<sup>2</sup> 1999 Financial Statements for ALH were unavailable.

**ANNEX 2-1****FIRST SUBMISSION OF AUSTRALIA**

(3 November 1999)

**TABLE OF CONTENT**

EXECUTIVE SUMMARY .....	1261
I. INTRODUCTION .....	1262
II. PRELIMINARY RULING .....	1264
III. WITHDRAWAL OF SUBSIDIES UNDER THE GRANT	
CONTRACT.....	1264
Who should repay the money? .....	1264
Time period for the allocation of the \$30m of grant payments .....	1264
Time period for determining unexpensed subsidies ("Withdrawal Period") .....	1269
Calculation of amount required to be withdrawn .....	1270
Options for calculation .....	1270
IV. 1999 LOAN.....	1272
V. CONCLUSION .....	1273
ATTACHMENT A - Calculation of amount to be withdrawn .....	1274

**EXECUTIVE SUMMARY**

1. Australia has implemented the recommendations of the Panel Report Australia - Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126/R) ("the Report") in good faith on the basis of the reasoning and findings of the Report itself. Australia implemented the Report's recommendations on 14 September 1999 by withdrawing \$8.065m<sup>1</sup> from Howe and Co. ("Howe"). At the same time it terminated all obligations under the Grant Contract of March 1997 ("Grant Contract"), including those under the sales performance targets. This termination was contingent upon the repayment of the \$8.065m. by Howe.

2. Australia considered that the termination of all obligations under the Grant Contract would by itself have been sufficient to bring Australia into conformity. However, to provide greater certainty in resolving this case, Australia also withdrew \$8.065m. from Howe. This amount exceeded the amount required to be withdrawn for implementation. Australia has complied with its obligations under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

3. The Report found the grant payments under the Grant Contract to be contingent upon export performance on the basis of the sales performance targets in the Grant Con-

<sup>1</sup> Australian dollars are used throughout this submission.

tract over the period 1 April 1997 to 30 June 2000. These sales performance targets applied to all sales by Howe, not just sales of automotive leather and so certainly were not limited to exports of automotive leather. Accordingly, they included not only domestic sales of automotive leather by Howe but also all other sales by Howe. The grant payments were tied to those sales and the amount withdrawn, \$8.065m., exceeded the unexpensed part of the \$30m. attributable to automotive leather exports at the implementation date of 14 September 1999.

4. The Report found that the concessional loan provided in 1997 to Howe and ALH ("1997 Loan") is consistent with SCM Article 3.1(a). The "factor" that distinguished between the findings on the 1997 Loan and the grant payments was the sales performance targets under the Grant Contract. The Report found that the grant payments were tied to actual and anticipated exports because of the sales performance targets, which the Report found were effectively export performance targets.<sup>2</sup> Without the "factor" of the sales performance targets the Report found that for the 1997 Loan " ... there is not a sufficiently close tie between the loan and anticipated exportation or export earnings."<sup>3</sup> The Report clearly considered that the grant payments were tied to export performance in the period 1 April 1997 to 30 June 2000 and so were to be expensed in achieving these export targets arising from the sales performance targets.

5. The loan provided to Australian Leather Holdings Ltd (ALH) in 1999 ("1999 Loan") is not within the terms of reference of the Panel. If the Panel decides to consider the 1999 Loan, then clearly it is consistent with SCM Article 3.1(a) and the USA has not sought to prove otherwise.

6. Australia is entitled to provide subsidies to ALH, so long as they are consistent with the WTO. Even if the 1999 Loan were to be regarded as replacing all or part of the subsidies to Howe, despite them being different entities with ALH's subsidiaries as a whole producing a broader product range, there would be nothing wrong with that under WTO rules. The Report says that "[I]t is, therefore, necessary that each subsidy be evaluated on its own terms in deciding whether it is consistent with the SCM Agreement"<sup>4</sup> and that no conclusion can be drawn about the status of a subsequent subsidy from the status of the preceding one.<sup>5</sup>

7. Therefore, Australia has complied with the DSB's recommendation by withdrawing \$8.065m. from Howe by 14 September 1999, and, as a separate matter, the 1999 Loan is consistent with the WTO.

## I. INTRODUCTION

8. Australia has implemented the recommendations of the Panel Report Australia - Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126/R) ("the Report") in good faith on the basis of the reasoning and findings of the Report itself. Australia decided that the best way of resolving this dispute was to accept the Report (without making an appeal) and to implement on the basis of the Report.

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<sup>2</sup> At paragraph 9.71 of the Report.

<sup>3</sup> At paragraph 9.75 of the Report.

<sup>4</sup> At paragraph 9.61 of the Report

<sup>5</sup> At paragraph 9.64 of the Report.

9. The Report was adopted by the Dispute Settlement Body (DSB) on 16 June 1999 and so Australia had 90 days, i.e. until 14 September 1999, to implement the recommendations and rulings adopted by the DSB. It did so by having Howe and Co. ("Howe") repay \$8.065m. of the grant payments on 14 September 1999. At the same time it terminated all obligations under the Grant Contract of March 1997 ("Grant Contract"), including those under the sales performance targets. This termination was contingent upon the repayment of the \$8.065m. by Howe. The Deed of Release and the letter confirming receipt of the \$8.065m. are at Exhibits 1 and 2.

10. The \$8.065m. repaid by Howe exceeds the amount required to be withdrawn for implementation. As shown below this amount represents more than the portion of the grant payments unexpensed at 14 September 1999 on the basis of the sales performance targets contained in the Grant Contract.

11. Accordingly, Australia requests the Panel to find that it has fully implemented the recommendations of the DSB of 16 June 1999 (WT/DS126/5).

12. A concessional loan ("1999 Loan") of \$13.654m. was made to Australian Leather Holdings Ltd (ALH) with terms derived from those for the 1997 Loan.

13. The terms of reference of the Panel under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) limit it to the examination of whether Howe has repaid a sufficient amount of money, since the recommendation of the Report was limited to the issue of withdrawal of the grant payments to Howe. The 1999 Loan to ALH is not covered by the terms of reference of the Panel.

14. The USA has not provided any argument that the 1999 Loan to ALH is inconsistent with Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Indeed at paragraph 50 of the USA's first submission, it says that "the issue is not whether the loan itself should be condemned as a prohibited subsidy." The USA could hardly argue otherwise, since the 1999 Loan clearly is consistent. In any case on the basis of the Report's conclusion on the Loan provided in 1997 to Howe and ALH ("1997 Loan") there could be no inconsistency with SCM Article 3.1(a). Moreover, consistent with the Report, a Member is permitted to provide a new subsidy without prejudice to its WTO status and the WTO consistency of any such subsidy has to be assessed on its own terms.<sup>6</sup> The issue of whether Australia has brought itself into compliance in respect of the grant payments under the Grant Contract and the consistency of the 1999

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<sup>6</sup> The Report at paragraph 9.64 says:

"... WTO Members cannot be prevented from replacing purported prohibited export subsidies with other measures that are not prohibited, thereby bringing themselves into compliance with their multilateral obligations under the SCM Agreement. We agree that, even assuming the ICS and EFS were prohibited export subsidies (a question on which we draw no conclusions), this would not, *ipso facto*, mean that any subsequent subsidy granted to a company that had previously benefited from those programmes would be a prohibited export subsidy."

The Report at paragraph 9.61 says:

"We agree with Australia that we must consider the challenged measures individually to determine their consistency with the SCM Agreement. Merely because all the challenged subsidies form part of a single "package" of assistance to Howe does not mean that all of them are perforce either prohibited export subsidies or not. In this regard, we note that, in our view, it is perfectly possible for a Member to construct a package of subsidies to aid domestic industry, of which some are consistent with the SCM Agreement, and others are not. It is, therefore, necessary that each subsidy be evaluated on its own terms in deciding whether it is consistent with the SCM Agreement."

Loan are separate issues and need to be addressed individually. Accordingly, the 1999 Loan does not affect the matter of implementation before the Panel.

## II. PRELIMINARY RULING

15. At the request of the Panel under its preliminary ruling on 2 November 1999, Australia has provided as exhibits documents on the 1999 Loan and a letter from the Department of Industry, Science and Resources to ALH. These are provided under the protection of the Business Confidential Information (BCI) procedures for this panel and without prejudice to Australia's view that the 1999 Loan does not come within the Panel's terms of reference and that the USA has not laid adequate foundation why it should be considered by the Panel.

## III. WITHDRAWAL OF SUBSIDIES UNDER THE GRANT CONTRACT

16. The amount of \$8.065m., which was withdrawn from Howe, exceeds the amount required for implementation. The following sets out the requirements on Australia for implementation.

*Who should repay the money?*

17. The Report is clear that it considered the money to have been paid to Howe, e.g. at paragraphs:

"9.62 ... the terms of the grant contract are specifically directed at Howe, and more particularly at Howe's automotive leather operations. ...."

and

"9.63 ... the fact that the government of Australia was providing assistance to Howe ...."

18. Accordingly, consistent with the Report, Australia withdrew the money from Howe.

*Time-period for the allocation of the \$30m of grant payments*

19. In its first submission, the USA states that withdrawal of a subsidy under the SCM Agreement does not mean that all of a subsidy has to be repaid by way of a retrospective remedy.<sup>7</sup> Moreover, the USA's position in the Brazil Aircraft Panel was that

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<sup>7</sup> At paragraph 15 of the USA's first submission:

"There is no disagreement between the parties that the provisions of Article 4.7 of the SCM Agreement and the recommendations in the Panel Report call for Australia to withdraw only the prospective portion of the illegal subsidy. ..."

subsidies should be withdrawn in respect of the period to which they are "*properly allocated*".<sup>8</sup>

20. Australia considered that the termination of all subsisting obligations under the Grant Contract, and hence the termination of any sales performance requirements on Howe, would have been sufficient for Australia to implement the recommendations adopted by the DSB, given that there is now no obligation on Howe in respect of sales. However, to ensure an end to this dispute, Australia withdrew a substantial sum on money from Howe based on the Report's finding that the allocation of grant payments was in respect of the sales performance targets and hence applied over the period 1 April 1997 to 30 June 2000. Accordingly, Australia decided to withdraw an amount that would cover the "anticipated exports" over the remaining period from the date of implementation to the end of the sales performance requirements under the Grant Contract on 30 June 2000.

21. The Report explicitly linked the grant payments to the sales performance targets under the Grant Contract.<sup>9</sup> The period covered by the sales performance targets under the Grant Contract's was 1 April 1997 to 30 June 2000.<sup>10</sup> The Report found that the grant payments were contingent upon export performance because of the sales performance targets and the linkage of those payments to the sales performance targets.<sup>11</sup> The Report's

<sup>8</sup> See paragraph 5.26 of WT/DS46/R:

"... The United States agrees with the proposition that remedies in the WTO dispute settlement system are not retroactive. However, in the case of a subsidy that is properly allocated over several years (as appears to be the case with respect to PROEX subsidies in question), the withdrawal of that portion of the subsidy allocated to future time periods would not constitute a retroactive remedy or retroactive implementation. ....

<sup>9</sup> For example, the Report at paragraph 9.62 says:

"... the terms of the grant contract are specifically directed at Howe, and more particularly at Howe's automotive leather operations. The contract provides for an aggregate sales performance target for the period 1 April 1997 - 31 December 2000, broken down into four interim sales targets. [*Footnote 207: Howe is obligated to submit reports of its performance against the interim performance targets for each of the periods ending 30 June 1997, 1998, 1999 and 2000, as well as final report in September 2000.*] ..."

<sup>10</sup> Note that in the reference in Footnote 9, the Report said 1 April 1997 to 31 December 2000 rather than 1 April 1997 to 30 June 2000. This is clearly a typographical error given that Footnote 207 of the Report (also incorporated in Footnote 9) specifies the correct date of 30 June 2000 with the final report under the Grant Contract being due in September 2000.

<sup>11</sup> In the Report see, for example:

"9.67 ... Therefore, we conclude that, in order to expand its sales in a manner that would enable it to reach the sales performance targets (interim targets and the aggregate target) set out in the grant contract, Howe would, of necessity, have to continue and probably increase exports. At the time the contract was entered into, the government of Australia was aware of this necessity, and thus anticipated continued and possibly increased exports by Howe. In our view, these facts effectively transform the sales performance targets into export performance targets. We thus consider that Howe's anticipated export performance was one of the conditions for the grant of the subsidies. ..."

"9.68 We note that confidential business information provided by Australia indicates that, in fact, the proportion of Howe's sales going to export has not increased. However, we must make our determination on the facts that existed at the time the contract establishing the conditions for the grant payments was entered into. Thus, the fact that the anticipated exports may not have come to pass in the volumes anticipated does not affect our conclusion. ..."

"9.71 ... these sales performance targets are, in our view, effectively, export performance targets."

finding was that the anticipated exports were those imposed by the sales performance targets. Those targets applied only to the period 1 April 1997 to 30 June 2000.

22. The Report found that the 1997 Loan is consistent with SCM Article 3.1(a)<sup>12</sup> and this conclusion has been adopted by the DSB. This conclusion was based on the Report's finding that:

"There is nothing in the loan contract that explicitly links the loan to Howe's production or sales, and therefore nothing in its terms, the design of the loan payment, or the repayment provisions that would tie the loan directly to export performance, or even sales performance."<sup>13</sup>

Moreover, although "other factors" in relation to the granting of the assistance package to Howe were

"relevant to our consideration of the nature of the loan contact... there was nothing in the terms of the loan contract itself which suggests a specific link to actual or anticipated exportation or export earnings, as there is in the terms of the grant contract."<sup>14</sup>

This led the Panel to the view that there

"is not a sufficiently close tie between the loan and anticipated exportation or export earnings."<sup>15</sup>

This conclusion was accepted by the USA, since it did not appeal it.

23. The Report concluded that the concessional 1997 Loan was not contingent upon export performance, either in law or in fact. Under the 15 year 1997 Loan, no interest was payable for the first 5 years. Thus the first payment of interest is on 1 February 2003 far beyond the end of the period for the sales performance targets of 30 June 2000. While the interest payable after the 5 year grace period is 2 per cent above the 10 year government bond rate, that rate was considered by the USA to be concessional.<sup>16</sup> This was not disputed by Australia and was not questioned by the Panel in the Report. The existence of an ongoing subsidy to Howe in respect of automotive leather after 30 June 2000 was thereby found not to be contingent upon export performance. It was only the grant payments that were found to be tied to exports of automotive leather and that depended critically on the sales performance targets, which only ran to 30 June 2000.

24. The Panel looked at all the facts surrounding the provision of the subsidies to Howe.

"In our view, the concept of 'contingent... in fact ... upon export performance', and the language of footnote 4 of the SCM Agreement, require us to examine all the facts that actually surround the granting or maintenance of the subsidy in question."<sup>17</sup>

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<sup>12</sup> The Report at paragraph 10.1(a) says:

"The loan from the Australian government to Howe/ALH is not a subsidy which is contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement".

<sup>13</sup> At paragraph 9.74 of the Report.

<sup>14</sup> At paragraph 9.75 of the Report.

<sup>15</sup> At paragraph 9.75 of the Report.

<sup>16</sup> At paragraphs 2.4 and 7.48-7.50 of the Report.

<sup>17</sup> At paragraph 9.56 of the Report.

It was the Panel's consideration of all these facts that contributed to the Report's findings, but it was the sales performance targets that tipped the scales and led to the grant payments being found to be export subsidies. All the other facts combined applied equally to the 1997 Loan but without the sales performance targets they were not considered by the Report to represent a "sufficiently close tie" to anticipated exports.

25. The fundamentally different findings on the grant payments and the loan subsidies result from the existence of the sales performance targets. The findings mean that any argument by the USA that the grant payments should be allocated over a period beyond 30 June 2000 is not sustainable. The Report considered that the grant payments were tied to export performance in the period 1 April 1997 to 30 June 2000 because of the sales performance targets, and were to be used, i.e. expensed, in achieving those targets. It does not make sense to say that a subsidy is tied to exports over a specific period, then, having found the subsidy to be in breach because of that fact, expense it over a much longer period.

26. The USA sought to argue before the original Panel both that the subsidies extended over a long time and that they were directly tied to the sales performance targets.<sup>18</sup> Australia pointed out that the USA could not have it both ways.<sup>19</sup> If the money was not allocated over the period 1 April 1997 to 30 June 2000 on the basis of anticipated exports in this period, then it would not have been in breach of SCM Article 3.1(a). Such subsidies would have been a case for Parts III or V of the SCM Agreement, not Part II. The issue of implementation of the Panel's recommendations is not one of trade or production effect but one of complying with WTO rules. The USA has to seek remedy against measures it considers to be in breach of a Member's obligations on the basis of WTO rules.

27. The Report accepted the USA's argument that the grant and loan subsidies were a replacement for the Import Credit and Export Facilitation Schemes, which terminate in 2000. The main scheme for automotive leather was the Import Credit Scheme, which terminates on 30 June 2000 to be replaced by new assistance arrangements for the textiles, clothing and footwear industries: this is why the grant payments and the sales performance targets only ran until 30 June 2000.

28. The Panel concluded that the three tranches of grant payments were paid in advance of performance of actual and anticipated sales performance for the period 1 April 1997 to 30 June 2000.<sup>20</sup> This is supported by the USA in paragraph 40 of its first submission, which reads:

<sup>18</sup> For example, at paragraph 7.290 of the Report, the USA said:

'... as the Australian government itself indicates, the continued payment of the grant was tied to the volume of "sales." ...'

<sup>19</sup> At paragraphs 7.67 and 7.68 of the Report.

<sup>20</sup> At paragraph 9.71 the Report says:

"All of the facts, weighed together, lead us to conclude that the three subsidy payments under the grant contract are in fact tied to Howe's actual or anticipated exportation or export earnings. [Footnote 215: ] We note that our conclusion matches the understanding of the recipient of the subsidy payments. In March 1997, Schaffer Corporation, the parent of Howe and ALH, reported that the Australian government had "finalised a compensation package" for Howe/ALH, consisting, inter alia of "A grant of [A]\$30 million based on projected exports and paid on performance criteria". Schaffer Corporation Limited Half Yearly Results to December 1996, Exhibit 1 to United States first submission, at page 2.]

"The grants amounted to an export subsidy because they were contingent on export performance."

The USA then goes on to claim that:

"The export-contingent feature of the subsidy, however, is not a useful tool for measuring how the subsidy should be allocated."

29. The point being made in those statements by the USA is not clear but it is illogical to claim that the allocation of the subsidy can be done in two different ways for the same case. The USA is saying that the conditions on which a subsidy is provided are critical to determining whether it is in breach SCM Article 3.1(a), but that, once that subsidy has been found to be in breach, the conditions and nature of the subsidy suddenly change when the issue of remedy is addressed. There is nothing in the WTO to support that view and the USA certainly has not presented anything to do so. Indeed the USA recognizes in paragraph 15 of its first submission that, to the contrary, the issue for implementation is one of coming into conformity with the rule that has been breached. Either subsidies are "tied to" exports or they are not. If they are subsidies contingent upon export performance (i.e. prohibited export subsidies in law or in fact), then they are expensed in achieving the contingent export sales. If they are not contingent on exports, then they are expensed in other ways and are subject to different disciplines and remedies under the SCM Agreement.

30. The only way to try to make some sense of the USA's approach is to assume that only monies allocated to the period 1 April 1997 to 30 June 2000 were found to be inconsistent with SCM Article 3.1(a) while monies allocated on the basis of the USA's 12.8 year scheme to the period after 30 June 2000 were not. This would mean that all Australia was required to do was withdraw the monies allocated to the remaining "prohibited subsidy" period (15 September 1999 to 30 June 2000). This would amount to some \$1.9m<sup>21</sup>, which Australia has exceeded.

31. There is some confusion between the USA's approach on allocating on the basis of assets life and on the other hand its comment at paragraph 25 of its first submission where it says:

"... Given the fungibility of money, it is unproductive and unrealistic to attempt to trace the use of grants in order to determine how they should be allocated."

32. There is a prohibition on export subsidies because they are contingent upon export performance, i.e. tied to export performance. The prohibition arises because the subsidies contingent upon export performance are presumed to be expensed on actual exports, paid either in advance or in arrears. The grant payments are necessarily allocated

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These payments are conditioned on Howe's agreement to satisfy, on the basis of best endeavours, the aggregate performance targets. The second and third grant payments are, in addition, explicitly conditioned on satisfaction, on a best endeavours basis, of interim sales performance targets. Given the export-dependent nature of Howe's business, and the size of the Australian market, these sales performance targets are, in our view, effectively, export performance targets. The sales performance targets set out in the grant contract, in conjunction with the other facts enumerated above, therefore lead us to the conclusion that the grant of the subsidies was conditioned on anticipated exportation. ..."

<sup>21</sup> \$30m. x [290/366]/12.8 = \$1.9m. This is based on the 12.8 year period claimed by the USA. The period 15 September 1999 to 30 June 2000 is 290 days.

to the sales performance targets on which they were contingent, i.e. to the period 1 April 1997 to 30 June 2000. The income from any one type of export subsidy programme is no more or less fungible than the income from any other type of export subsidy programme. There would be no more reason for treating the grant payments in the way suggested by the USA than export subsidies under a programme such as the USA's Foreign Sales Corporations. The Panel in the Report on which this implementation dispute is based found that the grant payments were contingent upon sales performance over the period 1 April 1997 to 30 June 2000. Accordingly, the allocation period was 1 April 1997 to 30 June 2000 for the purpose of implementing the DSB's recommendations.

*Time-period for determining unexpensed subsidies ("Withdrawal Period")*

33. The USA has argued in paragraphs 44-47 of its first submission that that the monies unexpensed at the date of adoption of the report have to be withdrawn rather than the amount unexpensed at the date of implementation. To require the withdrawal of monies that have been allocated prior to the date of withdrawal would be retroactive action. The rationale for requiring the repayment of money is that that money has not been expensed at the time of implementation and so needs to be repaid to bring the Member into conformity at that date, not the date of adoption of the Panel Report. To interpret it otherwise, would be to make the concept of the implementation period meaningless. This is also the only interpretation consistent with paragraph 15 of the USA's first submission, which interprets SCM Article 4.7 in light of DSU Article 19. The DSU provides that the obligation is for a Member to bring a measure into conformity within a specified period provided for in DSU Article 21, and for the SCM Agreement, SCM Article 4.7.

34. The USA's argument is based on SCM Article 4.7, which applies to all prohibited subsidies. If it were to be found that the Withdrawal Period for the grant payments should start at the date of the adoption of a Panel Report, then the finding would apply to all prohibited subsidies and would also require the withdrawal of all monies paid between that date and the date of implementation for any prohibited subsidy programme. This would mean that for an export subsidy programme where payments are made after the performance, e.g. the USA's Foreign Sales Corporations, all monies paid between adoption of the Panel Report and the termination of the legislation would have to be repaid.

35. Since the USA has argued at paragraph 15 of its first submission that this is an issue of bringing into conformity, the same reasoning would also apply to many other cases under the WTO. For example, by analogy in the case of an illegal tariff, all monies collected between the date of adoption and the date of implementation would have to be refunded. Indeed it would be much easier for a government to repay monies in the tariff example than to recover monies from industry in a subsidies case, but that has not been required under GATT 1947 and WTO practice and law. There is no basis for singling out subsidies contingent in fact upon export performance for such punitive treatment.

36. Accordingly, all monies allocated to the period on or before 14 September 1999 have been expensed for the purpose of implementation by 14 September 1999. Thus the period for determining the amount to be withdrawn is 15 September 1999 to 30 June 2000 ("Withdrawal Period") for the purpose of this Panel.

*Calculation of amount required to be withdrawn*

37. The amount of \$8.065m. withdrawn from Howe does not represent the amount that Australia considers was required to be withdrawn, but rather a figure that exceeded all sensible options. Australia recognized that there may be differing views on what the appropriate level should be, and so negotiated a high figure with Howe in order to finalize this dispute.

38. The parameters used were:

- the period for allocation of the \$30m. is 1 April 1997 to 30 June 2000
  - This has been demonstrated above.
- the unexpensed amount for 15 September 1999 to 30 June 2000 was to be withdrawn
  - This has been demonstrated above.
- only the amount allocated to exports of automotive leather was required to be withdrawn.

*Only the amount allocated to exports of automotive leather was required to be withdrawn*

39. Since the \$30m. was allocated over 1 April 1997 to 30 June 2000 and since the amount allocated to the period 1 April 1997 to 14 September 1999 had been expensed for the purpose of implementation, the issue is how much was allocated to the Withdrawal Period (15 September 1999 to 30 June 2000).

40. Since the case is about subsidies contingent upon exports of automotive leather, only those subsidies tied to exports of automotive leather were found to be inconsistent. Accordingly, only the unexpensed proportion of such subsidies were required to be withdrawn. Paragraph 9.67 of the Report concluded that:

" ... in order to expand its sales in a manner that would enable it to reach the sales performance targets (interim targets and the aggregate target) set out in the grant contract, Howe would, of necessity, have to continue and probably increase exports. ... "

It was the subsidy attached to those exports (of automotive leather) that was found to be in fact tied to exports. The monies paid in respect of actual or anticipated domestic sales of automotive leather (or indeed any other sales by Howe) could not have been inconsistent with SCM Article 3.1(a) in respect of automotive leather.

*Options for calculation*

41. The above leaves two important questions to be answered:

- (a) what portion of the \$30m. is to be allocated to the period 15 September 1999 to 30 June 2000 (the "Withdrawal Period")
- (b) what portion of that should be allocated to exports of automotive leather.

42. Taken together, these will give the amount required to be withdrawn.

43. At paragraph 9.67 the Report says:

"... we conclude that, in order to expand its sales in a manner that would enable it to reach the sales performance targets (*interim targets and the aggregate target*) set out in the grant contract, Howe would, of necessity, have to continue and probably increase exports. At the time the contract was entered into, the government of Australia was aware of this necessity, and thus anticipated continued and possibly increased exports by Howe. In our view, these facts effectively transform the *sales performance targets into export performance targets*. ... " [Emphasis added.]

44. Again at paragraph 9.71 the Report says:

"... These payments are conditioned on Howe's agreement to satisfy, on the basis of best endeavours, the *aggregate performance targets*. The second and third grant payments are, in addition, explicitly conditioned on satisfaction, on a best endeavours basis, of *interim sales performance targets*. Given the export-dependent nature of Howe's business, and the size of the Australian market, these sales performance targets are, in our view, effectively, *export performance targets*. ... " [Emphasis added.]

45. Moreover, the Report says at paragraph 9.68 that:

"... However, we must make our determination on the facts that existed at the time the contract establishing the conditions for the grant payments was entered into. Thus, the fact that the anticipated exports may not have come to pass in the volumes anticipated does not affect our conclusion. ... "

46. Thus the Report concluded that the obligation on Howe was in respect of the aggregate of the sales performance targets over 1 April 1997 to 30 June 2000. The Withdrawal Period is 290 days and 1 April 1997 to 30 June 2000 is 1186 days. This means that the portion of the \$30m. allocated to the Withdrawal Period is 30 times 290/1186, i.e. about \$7.336m.

47. While this seems to Australia be the appropriate approach most in line with the Report, Australia also considered the alternative of allocating the \$30m. on the basis of the schedule of sales performance targets. Taking that approach, the amount of the \$30m. allocated to 1999-2000 (July-June) is \$11.31m. and so the amount allocated to the Withdrawal Period is \$8.961m.<sup>22</sup>

48. The second question was how to allocate this to exports of automotive leather. As the Report notes, the sales performance targets were not achieved for automotive leather. Indeed as pointed out by Australia the sales performance targets were not for automotive leather alone but overall sales by Howe. The USA used a figure of 90 per cent as the proportion of Howe's exports of automotive leather. Australia could have pursued the argument regarding the proportion of automotive leather exports of the actual total sales of Howe covered by the sales performance targets. Some figure approaching this level

<sup>22</sup> The sales performance target for 1999-2000 was \$214.0m and the total over the period 1 April 1997 to 30 June 2000 was \$567.5m. Thus the allocated amount of the grant payments for 1999-2000 was  $30 \times [214/567.5] = \$11.31\text{m}$ . Accordingly, the allocated amount of the grant payments for the Withdrawal Period was  $11.31 \times [290/366] = \$8.961\text{m}$ .

was implicitly accepted by the Panel in its Report. Accordingly, rather than revisiting this issue with the Panel, Australia simply took this 90 per cent figure.

49. For the preferred approach this would mean that \$6.602m<sup>23</sup> was required to be withdrawn and for the alternative approach \$8.065m.<sup>24</sup> A more detailed explanation of this calculation is at Attachment A.

#### IV. 1999 LOAN

50. The 1999 Loan is not part of the implementation of the recommendation adopted by the DSB. Australia did not notify it to the DSB in WT/DS126/7.

51. Australia considers that the 1999 Loan to ALH alone is not covered by the Panel's terms of reference, which relate to the implementation of the recommendation of the Report, i.e. to withdraw the grant payments from Howe.

52. The USA has not sought to show that the 1999 Loan is inconsistent with SCM Article 3.1(a), and indeed says that that is not an issue.<sup>25</sup> This is presumably because it recognizes that the 1999 Loan is clearly consistent and that this is reinforced by the Report's findings and conclusion on the 1997 Loan.

53. The Report at paragraph 9.61 said that each subsidy has to be evaluated on its own terms in deciding consistency with the SCM Agreement.<sup>26</sup> Moreover, at paragraph 9.64, the Report agreed with Australia that a prohibited subsidy can be replaced with a non-prohibited subsidy.<sup>27</sup> In this case the money is paid by Howe and the loan was to ALH without any reference to automotive leather.<sup>28</sup> How companies choose to organize their business is not a matter for government obligations under the WTO. In any case, even if the 1999 Loan to ALH were to be considered to replace all or part of the grant payments to Howe, it would need to be considered on its individual merits.

54. Australia is entitled to provide subsidies to ALH, so long as they are consistent with the WTO. Even if the 1999 Loan were to be regarded as replacing all or part of the subsidies to Howe, despite Howe and ALH being different entities with ALH's subsidiaries as a whole producing a broader product range, there would be nothing wrong with that under WTO rules. The Report says that "[i]t is, therefore, necessary that each subsidy be evaluated on its own terms in deciding whether it is consistent with the SCM Agreement<sup>29</sup> and that no conclusion can be drawn about the status of a subsequent subsidy from the status of the preceding one."<sup>30</sup>

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<sup>23</sup>  $7.336 \times 0.9 = 6.602$ .

<sup>24</sup>  $8.961 \times 0.9 = 8.065$ .

<sup>25</sup> See paragraph 50 of the USA's first submission.

<sup>26</sup> See at Footnote 6.

<sup>27</sup> See at Footnote 6.

<sup>28</sup> The 1997 Loan was for purposes relating to automotive leather.

<sup>29</sup> At paragraph 9.61 of the Report

<sup>30</sup> At paragraph 9.64 of the Report.

**V. CONCLUSION**

55. Australia has implemented the Report's recommendations and rulings in good faith by closely following the reasoning and findings in the Report.

56. Australia requests the Panel to find that in withdrawing \$8.065m. from Howe by 14 September 1999:

Australia has fully implemented the recommendation of the DSB of 16 June 1999 (WT/DS126/5).

## ATTACHMENT A

### CALCULATION OF AMOUNT TO BE WITHDRAWN

#### **PREFERRED OPTION**

**Amount to be repaid:** \$6.602m.

#### **Calculation**

Contract Period:

1 April 1997 - 30 June 2000: 1186 days.

Withdrawal Period:

15 Sept 1999 - 30 June 2000: 290 days.

Proportion of period after implementation:

$290 / 1186$ .

Amount not expensed at implementation date:

$\$30 \times [290/1186] = \$7.336\text{m}$ .

Amount allocated to exports of automotive leather on the basis of 90% exports not expensed at implementation date:

$90\% \text{ of } \$7.336\text{m.} = \$6.602\text{m}$ .

#### **ALTERNATIVE OPTION**

**Amount to be repaid:** \$8.065m.

#### **Calculation**

Aggregate sales performance targets under the Grant Contract: \$567.5m.

Sales performance target for 1999-2000 (July-June):

\$214.0m.

Proportion of \$30m. allocated to 1999-2000:

$214.0/567.5 = 0.377$

Amount allocated to 1999-2000:

$37.7\% \text{ of } \$30\text{m.} = \$11.31\text{m}$ .

Withdrawal Period:

15 Sept 1999 - 30 June 2000: 290 days.

Withdrawal Period as proportion of 1999-2000:

$290/366$

Amount not expensed at implementation date:

$\$11.31 \times [290/366] = \$8.961\text{m}$ .

Amount allocated to exports of automotive leather on the basis of 90% exports not expensed at implementation date:

$90\% \text{ of } \$8.961\text{m.} = \$8.065\text{m}$ .

	PREFERRED OPTION	ALTERNATIVE OPTION
Amount covering all domestic and export sales, including automotive leather	\$7.336m.	\$8.961m.
Amount covering 90% of total sales	\$6.602m.	\$8.065m.

\* \* \* \*

**LIST OF EXHIBITS**

AUS-1 Deed of Release  
AUS-2 Letter confirming payment

**EXHIBITS BUSINESS CONFIDENTIAL INFORMATION (BCI)**

AUS-BCI-1 Grant Contract  
AUS-BCI-2 1997 Loan Contract  
AUS-BCI-3 A\$ Loan Agreement  
AUC-BCI-4 Fixed and Floating Equitable Charge  
AUS-BCI-5 Deed Variation  
AUS-BCI-6 Letter from the Department of Industry, Science and Resources to ALH

**ANNEX 2-2**

**REBUTTAL SUBMISSION OF AUSTRALIA**

(15 November 1999)

**TABLE OF CONTENTS**

EXECUTIVE SUMMARY .....	1276
I. INTRODUCTION .....	1277
II. KEY POINTS .....	1277
III. USA'S FIRST SUBMISSION.....	1278
(a) Bringing into conformity .....	1278
(b) "Reimbursement" .....	1282
(c) Allocation period .....	1283
(d) Allocable versus non-allocable.....	1285
(e) Countervailing duty methodology and practice .....	1288
(f) SCM Annex IV .....	1288
IV. CONCLUSION .....	1289

**EXECUTIVE SUMMARY**

1. This submission rebuts the USA's attempt to introduce a trade effect and trade outcome approach to assessment of conformity with Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures (SCM). Instead, the USA should be focused on the matter before the Panel of whether Australia has brought the grant payments into conformity with SCM Article 3.1(a) in accordance with the Panel Report Australia - Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126/R) ("the Report").

2. The finding by the Report on the grant payments was that these were tied to the sales performance targets under the Grant Contract over the period 1 April 1997 to 30 June 2000. This is the period during which the grant payments were expensed.

3. Australia demonstrates that the USA's argument, that subsidies are no longer expensed after the date of the adoption of panel reports and even accumulate interest ad infinitum, is inconsistent with WTO law and GATT 1947 and WTO practice in having Members bring themselves into conformity.

4. In withdrawing \$8.065m<sup>1</sup> on 14 September 1999 from Howe and Co., Australia has done more than is necessary to comply with the recommendations of the Report and meet its WTO obligations by bringing the grant payments into conformity with SCM Article 3.1(a).

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<sup>1</sup> Australian dollars are used throughout this submission.

## I. INTRODUCTION

5. In the absence of third party submissions, this rebuttal limits itself to a brief recapitulation of key issues and then goes on to comment on aspects of the USA's First Submission.

## II. KEY POINTS

6. The sales performance targets under the Grant Contract show that the grant payments were expensed during the period 1 April 1997 to 30 June 2000. The Panel Report Australia - Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126/R) ("the Report") found that the grant payments were contingent upon export performance because of the sales performance targets. The grant payments were in any case provided to automotive leather as part of ongoing assistance arrangements for the period in which automotive leather was not eligible for assistance under the general textiles, clothing and footwear programmes. Automotive leather was excised from the current Import Credit Scheme (ICS) from 1 April 1997. The ICS was to terminate on 30 June 2000 and will be replaced by the new general textiles, clothing and footwear programme coming into force on 1 July 2000. This programme will include automotive leather.

7. In accordance with WTO rules, as well as practice under GATT 1947 and the WTO, a Member is only required to bring a measure into conformity on the date of implementation. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is not a punitive mechanism and does not have retroactive effect. Any subsidy that is allocated over time, continues to be expensed over the allocation period until the Member brings the measure into conformity by withdrawing the amount of money still outstanding. Alternatively, the measure comes into conformity automatically at the end of the allocation period as a consequence of all of the monies having been expensed.

8. Australia has withdrawn more than was necessary for it to comply with the Report's recommendations and bring the grant payments into conformity with Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) by 14 September 1999.

- The grant payments were tied to sales performance targets during the period 1 April 1997 to 30 June 2000.
- The grant payments were expensed during the period 1 April 1997 to 30 June 2000.
- Only the money tied to exports of automotive leather had to be withdrawn.<sup>2</sup>
- \$8.065m<sup>3</sup> was withdrawn from Howe and Co. (Howe) on 14 September 1999.

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<sup>2</sup> That is, money allocated to domestic sales of automotive leather and other sales did not have to be withdrawn, since that money was not tied to actual or anticipated exports of automotive leather.

<sup>3</sup> Australian dollars are used throughout this submission.

- Australia's First Submission proved that this amount exceeded any reasonable calculation of money from the grant payments tied to actual or anticipated exports over the rest of the period 1 April 1997 to 30 June 2000.
- The grant payments to Howe are separate measures from the concessional loan provided to Australian Leather Holdings Ltd (ALH) in 1999 (1999 Loan).
- The matter before the Panel is whether the grant payments have been brought into conformity with SCM Article 3.1(a).

In the alternative.

- Nothing stops the Australian Government providing new, WTO consistent subsidies to Howe, ALH or any other company.
- If the panel decides to consider the 1999 Loan, then it needs to be examined as a separate measure and assessed on its own merits under SCM Article 3.1(a).
- While the 1999 Loan to ALH is a subsidy, it is consistent with SCM Article 3.1(a).

### III. USA'S FIRST SUBMISSION

9. Following are some comments on specific aspects of the USA's First Submission.

(a) *Bringing into Conformity*

10. The USA at paragraph 15 in its First Submission said that:

"There is *no disagreement* between the parties that the provisions of Article 4.7 of the SCM Agreement and the recommendations in the Panel Report call for Australia *to withdraw only the prospective portion* of the illegal subsidy." [*Emphasis added.*]

and

'... Article 19 of the DSU provides 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 that agreement." The use of the phrase "bring the measure into conformity" indicates that the recommendations contemplated by Article 19 of the DSU include only recommendations calling for prospective corrective action by Members, not retrospective action.'

11. Australia considers that the Deed of Release<sup>4</sup> was sufficient to bring Australia into conformity because it terminated any obligations under the Grant Contract. However, to finalize this dispute, Australia decided to withdraw more than would be required under any reasonable alternative interpretation, i.e. \$8.065m.

12. It appears to be common ground with the USA that:

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<sup>4</sup> AUS-Exhibit 1.

- the issue is one of the Member bringing a measure into conformity with SCM Article 3.1(a); and
- where a subsidy has been expensed, it does not have to be withdrawn.

However, Australia considers that

- where an amount of the subsidy is expensed prior to the date that a Member brings the measure into conformity, then that amount does not have to be withdrawn; and
- only the amount considered to be tied to exports of automotive leather has to be withdrawn, not amounts tied to domestic sales of automotive leather or other sales.

13. Where a subsidy is allocated over a period, then only that part of the subsidy allocated to the period beyond the date of implementation has to be withdrawn to bring the measure into conformity at the date of implementation. As time passes the amount to be withdrawn becomes smaller and goes to zero at the end of the period over which the subsidy is allocated. Of course, if a Member does not bring the measure into conformity by the date recommended by a panel under SCM Article 4.7, then the complainant may have compensation or retaliation rights until the measure comes into conformity. However, that cannot increase, or halt the reduction over time of, the amount of subsidy to be withdrawn to bring the measure into conformity. By analogy, if the measure was a tariff rather than a subsidy, the USA's approach would entail that not only would the tariff have to be brought into conformity, the monies collected to the date of implementation would have to be refunded to the importers of record with interest. The DSU is not supposed to be a punitive instrument but rather a mechanism: "... providing security and predictability to the multilateral trading system. ..."<sup>5</sup>

14. Australia disagrees with the approach taken by the USA in its First Submission that:

- the amount to be withdrawn is the amount outstanding at the time of the adoption of the Report (i.e. 16 June 1999);
- the amount to be withdrawn by the end of the 90 days (i.e. 14 September 1999) includes interest for the period between 16 June 1999 and the date of withdrawal; and
- the amount to be withdrawn keeps on increasing until the date on which some much larger number is withdrawn.

15. The USA has not made any argument for this beyond saying:

- "Although the Panel accorded Australia 90 days in which to comply, Australia was free to comply at any time within that period. Instead, Australia used the entire 90-day period, waiting until September 14 to put its remedy in place and then claiming that its withdrawal would be effective from that day forward."<sup>6</sup>

and

<sup>5</sup> At DSU Article 3.2.

<sup>6</sup> At paragraph 45 of the USA's First Submission.

- "The United States submits that the 90-day compliance period did not provide Australia with an additional three months during which it could continue to provide the prohibited export subsidy with impunity."

and then goes on to make the assertion, not based on any WTO provision, that

- 'Such an interpretation would reward-and encourage-delay in carrying out the Panel's recommendations. Rather, the date from which the prospective element of the subsidy should be derived is the date of the Panel Report. This approach, which would not discourage early compliance, would give effect to the express intent of Article 4.7, which calls for panels to recommend that the Member concerned withdraw the prohibited subsidy "without delay."<sup>7</sup>

16. The provisions of the DSU, including SCM Article 4.7, do allow a Member time to bring a measure into conformity "with impunity". The purpose of the DSU is to have measures brought into conformity, not to punish the Member in some way. When a measure has been brought into conformity the object and purpose of the DSU has been served.

17. In paragraph 46 of its First Submission, the USA appears to be saying that there is a distinction between "without delay" in SCM Article 4.7 and the period recommended by the original Panel for Australia to bring the grant payments into conformity. This conflicts with the wording of SCM Article 4.7, which says:

"... withdraw the subsidy without delay. *In this regard*, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn." [*Emphasis added.*]

Thus under SCM Article 4.7, it is the task of a panel to recommend what time-period is meant by "without delay" in the case being considered. In this regard, paragraphs 10.6 and 10.7 of the Report say:

"... Moreover, we do not, as a factual matter, believe that a period of seven and one-half months can reasonably be described as corresponding to the requirement that the measure must be withdrawn "without delay". ... In light of the nature of the measures, we consider that a 90-day period would be appropriate for the withdrawal of the measures. We therefore recommend that the measures be withdrawn within 90 days."

18. Thus the period provided for under SCM Article 4.7 allows the Member "with impunity" to withdraw the measures at any time between the date of adoption and the end of the period recommended by the panel. There is nothing wrong in a Member using the time that it has been given. Where a Member has an export subsidy programme, which pays exporters at the time of export, there is nothing to suggest that such a Member would have to clawback the money it provided between the date of adoption and the date the programme was terminated. There is no basis for treating an in fact export subsidy paid in advance in a punitive way.

19. If the outstanding part of a subsidy did not continue to be expensed over whatever period it is allocated, then the amount to be withdrawn would never decline. Indeed, if the USA's punitive approach on interest were to be adopted, it would increase. This

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<sup>7</sup> At paragraph 46 of the USA's First Submission.

would mean that at the end of the allocation period, even though there would no longer be any benefit to the company involved, the Member would still have to withdraw the original outstanding amount, together with interest, to bring the measure into conformity. Indeed on this line of argument, if a Member could not, for whatever reason, withdraw the money, then it could never bring the measure into conformity, and presumably would be subject to compensation or retaliation forever despite there being no continuing benefit to the company concerned. That approach would rightly hold the WTO up to ridicule.

20. Indeed, if Australia had not withdrawn \$8.065m. and if the \$30m. is allocated over the entire period of 1 April 1997 to 30 June 2000, the amount to be withdrawn by Australia to bring the grant payments into conformity would have declined over time until it became zero on 30 June 2000. By the time that this Panel's report is adopted on say 14 February 2000, the amount of the subsidy that would have been left<sup>8</sup> would have been about \$3.5m<sup>9</sup> under the preferred approach set out in Australia's First Submission<sup>10</sup> and \$4.2m<sup>11</sup> under the alternative approach.<sup>12</sup> Taking exports of automotive leather at no more than 90 per cent of sales<sup>13</sup>, this would have left \$3.1m. or \$3.8m., respectively, to be withdrawn at that date for Australia to bring the grant payments into conformity.

21. The USA's First Submission, is apparently seeking to invent a new legal concept for assessing conformity with SCM Article 3.1(a) based on trade effect and trade outcome.

22. For example, it says:

"This Panel's findings on these points are critical if its Panel Report is to have **any practical meaning**." [Emphasis added.]<sup>14</sup>

"... Australia is seeking the Panel's permission to declare its illegal subsidy largely **irremediable**. ... **This cannot be permitted**. ... " [Emphasis added.]<sup>15</sup>

"The prospective portion of the subsidy **must** be determined on a **reasonable economic basis**" [Emphasis added] <sup>16</sup>

Australia submits that the task of a panel under the WTO system is to:

"... 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 ...."<sup>17</sup>

SCM Article 3.1(a) is not about adverse effect under SCM Article 5 or some other non-violation issue. The matter before this Panel is whether Australia has brought the meas-

<sup>8</sup> i.e. if the \$8.065m. had not been withdrawn on 14 September 1999.

<sup>9</sup> Preferred linear approach: 137 days would be left in 1999-2000 (July-June) and there are 1186 days in 1 April 1997 to 30 June 2000; and so the allocation would be  $30 \times [137/1186] = \$3.5m.$

<sup>10</sup> See paragraph 46 of Australia's First Submission.

<sup>11</sup> On the basis of the sales performance target for 1999-2000:  $30 \times [214/567.5] \times [137/366] = \$4.2m.$

<sup>12</sup> See paragraph 47 of Australia's First Submission.

<sup>13</sup> See paragraphs 48 and 49 of Australia's First Submission.

<sup>14</sup> At paragraph 6 of the USA's First Submission.

<sup>15</sup> At paragraphs 17 and 18 of the USA's First Submission.

<sup>16</sup> The title of Subsection III.A.2 of the USA's First Submission, which is reflected in the subsequent paragraphs.

<sup>17</sup> At DSU Article 11.

ures in question into conformity with SCM Article 3.1(a), and, if not, why and how it has not implemented the findings and recommendations of the Report.

The concept of making a subsidy "irremediable" is a misunderstanding of the purpose of a dispute under SCM Article 3.1(a), which is a violation case and so is about conformity with a rule. The key issue to implementing a recommendation in respect of a subsidy inconsistent with SCM Article 3.1(a) is why it was found to be inconsistent. That provides the basis for how a Member can reconfigure assistance to be consistent with SCM Article 3.1(a).

(b) *"Reimbursement"*

23. Paragraph 13 of the USA's First Submission says:

"... this small amount was not a [*sic*] even a partial withdrawal of the subsidy, to the extent it was **reimbursed** by the Australian Government through a loan on non-commercial terms." [*Emphasis added.*]

24. The 1999 Loan is a separate measure from the grant payments. As determined by the Report, if it were considered necessary to look at the consistency of the 1999 Loan, that would need to be assessed separately from the matter before the Panel of whether the grant payments have been brought into conformity with SCM Article 3.1(a).

25. In paragraph 9 of its First Submission, the USA agrees with the Report that the grant payments were to Howe.<sup>18</sup> The 1999 Loan was to a different company, ALH, with a wider product range. Even if the 1999 Loan had been to Howe/ALH like the 1997 Loan, Australia considers that it would have brought the grant payments into conformity with SCM Article 3.1(a). Such a loan would have itself been consistent with SCM Article 3.1(a), given that the 1997 Loan is consistent. To bring the grant payments into conformity, Australia did not have to impose a punitive measure on an individual company, be it Howe or ALH. This matter is about Australia's rights and obligations as a Member.

26. Australia was found to be in breach of the WTO by the original Panel and accepted that ruling without appealing. It has now brought the grant payments into conformity within the time-period provided for by the Report. SCM Article 3.1(a) is not a trade effect or trade outcome test but a rule about whether money is tied to actual or anticipated exportation. The impact on Howe or ALH or any other Australian company is irrelevant: they are not Members, Australia is. That said, there is a significant impact on Howe and on ALH through repaying the \$8.065m. This is an asset loss on the balance sheet. The equity of Howe and ALH has been reduced by this amount. While a concessional loan (1999 Loan) was provided to ALH, this does not affect the capital structure. The 1999 Loan is a liability and will have to be paid back. Its benefits will only come over the life of the loan. There is a clear distinction between the impact on capital and liabilities from providing a grant and from providing a concessional loan.

27. Paragraph 12 of the USA's First Submission says that the 1999 Loan to ALH turns withdrawal into a "sham". ALH and its associated companies produce a wider range of products than automotive leather. ALH can do whatever it wants with the

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<sup>18</sup> "On 9 March 1997, however, the Australian Government replaced these subsidy programmes with a A\$30 million grant, also contingent on export performance, [*Footnote 4 omitted.*] to Howe, the sole Australian automotive leather producer and exporter.... "

money under the 1999 Loan. It is under no obligation to put one cent of it towards the production or sale of automotive leather. The Report found that the grant payments were inconsistent with SCM Article 3.1(a) but that the 1997 Loan to Howe and ALH for purposes related to automotive leather was consistent. The Report (and the US<sup>19</sup>) also agreed that there was nothing wrong in a government replacing one subsidy with another that is consistent. What Australia has done is called, in WTO parlance, "bringing a measure into conformity", not a "sham".

28. Australia has a right to provide further subsidies to Howe and ALH provided that they are WTO consistent. The 1999 Loan to ALH is a separate measure from the grant payments and its consistency with SCM Article 3.1(a) would need to be assessed separately from the matter of whether Australia has brought the grant payments into conformity with SCM Article 3.1(a) by withdrawing sufficient money from Howe to comply with the Report's findings and recommendations

(c) *Allocation Period*

29. The issue before the Panel is the actual period of allocation of the \$30m., which was the key factor for the finding in the Report that the grant payments were inconsistent with SCM Article 3.1(a). The issue of what an economist might say about "benefit - and the resulting distortion to trade"<sup>20</sup> is irrelevant to the matter before the Panel.

30. The USA says in paragraph 17 of its First Submission referring to the \$30m. that:  
 "... agreeing to remove the export subsidy from the automotive leather industry, and then simply swapping it for another equally illegal export subsidy. ...."

This statement supports the fact that the \$30m. was to be expensed during the period 1 April 1997 to 30 June 2000. The agreement between Australia and the USA was in respect of the removal of automotive leather from the ICS from 1 April 1997.<sup>21</sup> The ICS only runs until 30 June 2000 because the legislation is sunsetted. Producers of automotive leather will be eligible to receive subsidies under the new general textiles, clothing and footwear programme from 1 July 2000. Thus the grant payments were simply allocated to fill in the gap from 1 April 1997 to 30 June 2000, and the Report found that this amount was tied to the sales performance targets for this period, which the Report found effectively created export targets for this period.

31. In paragraph 40 of its First Submission, the USA says:  
 "The grants amounted to an export subsidy because they were contingent on export performance."

32. In paragraph 41 of its First Submission, the USA says:

<sup>19</sup> At Footnote 132 of the Report:

"... the United States acknowledged that a prohibited export subsidy could be replaced by another form of assistance that is not tied to export performance and a Member could thus bring itself into conformity with the SCM Agreement. ..."

<sup>20</sup> At paragraph 16 of the USA's First Submission.

<sup>21</sup> A small amount of assistance was also provided under the Passenger Motor Vehicle Export Facilitation Scheme (EFS), which terminates on 31 December 2000.

"... the time-period established in a grant contract for performance requirements is not a reasonable measure of how long the benefits conferred by the subsidy lasts or for calculating the "prospective" portion."

33. The USA is saying that the grant payments are on the one hand allocated to the period of the sales performance requirements for the purposes of being found to be inconsistent with SCM Article 3.1(a), but then somehow they were not expensed over that period.

34. In paragraph 41 of its First Submission, the USA also says:

"... there is no necessary relationship between the criteria for an export subsidy - such as export performance requirements - and the actual duration of the benefit. Inventing such a relationship makes export subsidies open to manipulation."

The USA is saying that a measure can be found to be an export subsidy on the basis of a tie to exports in a specific period (i.e. "the criteria") but that the period of allocation for bringing the measure into conformity can be something quite different. The USA gives no explanation for this except that it wants more of the subsidy withdrawn. It is difficult to understand the USA's reasoning behind this, but clearly the fact that a subsidy is found to be inconsistent because of performance requirements is hardly "[I]nventing such a relationship". Similarly, using the criteria set out by a panel as being critical to its finding of inconsistency with SCM Article 3.1(a) cannot be said to make "export subsidies open to manipulation." The relationship is the basis of the inconsistency and so is crucial to the matter of bringing a measure into conformity.

35. Regarding paragraph 42 of the USA's First Submission, the tie to the sales performance targets was the critical difference between the grant payments and the 1997 Loan. While the sales performance targets were not the only factor, they were the only factor that did not apply also to the 1997 Loan, which was found to be consistent with SCM Article 3.1(a). The second sentence in paragraph 42 of the USA's First Submission is misleading. It reads:

"The "other facts" included that the expanded production resulting from the grants and from the "required capital investments" would translate into increased exports." [*Footnote reference to paragraph 9.67 of the Report not included.*]

To the extent that this "other fact" was relevant, it was equally true for the 1997 Loan. The 1997 Loan required that the monies be used for purposes related to automotive leather. Also paragraph 7.244 of the Report says that:

'In its half yearly report, Schaffer... stated that the loan was given "to assist with the capital programme." '

It is clear from paragraph 9.67 of the Report<sup>22</sup> that the key factor was the anticipated export performance during the period covered by the sales performance targets, i.e. 1 April 1997 to 30 June 2000.

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<sup>22</sup> For example:

"... Therefore, we conclude that, in order to expand its sales in a manner that would enable it to reach the sales performance targets (interim targets and the aggregate target) set out in the grant contract, Howe would, of necessity, have to continue and probably increase exports. At the time the contract was entered

36. Paragraphs 26 and 27 of the USA's First Submission put up a straw man for this dispute. The period involved for the expensing of the grant payments (1 April 1997 to 30 June 2000) is not "arbitrary". The sales performance targets in relation to this period were the key to the case. Clearly each situation would have to be addressed individually. If a Member nominated 6 months or a year or some obviously fictitious period, this would be taken into account by any panel in making its judgement. However, in this case the period is clear-cut and genuine, and was the basis for the findings in the Report. It is a nonsense that action by a Member to bring an inconsistent measure into conformity should be regarded as an action that "severely undercut" the rules. SCM Article 3.1(a) is not about removing adverse effect or about injuring the recipients of subsidies, but rather about the form of the subsidy involved and compliance with Members' obligations. Even the USA admitted this to the original Panel at Footnote 132 of the Report.<sup>23</sup>

(d) *Allocable Versus Non-Allocable*

37. The USA uses the language of recurrent and non-recurrent subsidies to seek to justify its approach. The USA provides no justification for its assertion that practice on countervailing and work being done on SCM Article 6.1(a) under Footnote 62 to SCM Annex IV should be indicative of how a measure should be assessed for the consistency with SCM Article 3.1(a).

38. Even in its own countervailing duty regulations, the USA notes that: 'Section 351.524 retains the distinction between "recurring" and "non-recurring" benefits. Although more precise terms might be "non-allocable" and "allocable" ....<sup>24</sup>

39. The term "allocable" means "able to be allocated".<sup>25</sup> Clearly the grant payments are able to be allocated, since they are tied to the sales performance targets. The fact that the sales performance targets may not have been actually achieved does not affect this, given the finding of the Report at paragraph 9.68 that: "[t]hus, the fact that the anticipated exports may not have come to pass in the volumes anticipated does not affect our conclusion. "

40. The rationale for the concept of recurrent and non-recurrent is to deal with large one off subsidy payments for the purposes of serious prejudice and countervailing where there is no actual tie to production or sales in a particular period. Thus the asset life approach to allocation is used as a default because there is no tie to another period.<sup>26</sup>

41. The situation is quite different for a case under SCM Article 3.1(a) where there must be a tie between the granting of the subsidy and the actual or anticipated exportation of the product concerned, if a breach is to exist. The task of the panel concerned is

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into, the government of Australia was aware of this necessity, and thus anticipated continued and possibly increased exports by Howe. In our view, these facts effectively transform the sales performance targets into export performance targets. We thus consider that Howe's anticipated export performance was one of the conditions for the grant of the subsidies.... "

<sup>23</sup> See Footnote 19.

<sup>24</sup> Federal Register Vol. 63, No. 227 at page 65392, or at page 83 of G/ADP/N/1/USA/1/Suppl.4 - G/SCM/N/1/USA/1/Suppl.4.

<sup>25</sup> New Shorter English Oxford Dictionary - CD - January 1997.

<sup>26</sup> Of course allocation across asset life can also be subject to abuse by countervailing authorities for protectionist reasons.

to determine whether such a tie exists. The basis for the panel's finding will determine the period over which the subsidy is allocated. In this case it is the period 1 April 1997 to 30 June 2000. Moreover, unless it is an explicit part of the factual record, it will not be possible to say what a company will be producing in the future or how much it exports, let alone that the money was tied by the granting government to such anticipated exports.

42. To make an assumption that money paid to Howe in return for sales performance during 1 April 1997 to 30 June 2000 should somehow be allocated as being an export subsidy on automotive leather for the next 10 years is fanciful. The money was paid for performance during 1 April 1997 to 30 June 2000, and so was allocated to that period and expensed during that period. This is also consistent with the approach in paragraphs 171 and 172 of the Appellate Body's Report on Canada Aircraft (WT/DS70/AB/R).

43. The 1997 Loan provided a concessional loan out to 2012 with no interest payable until 1 February 2003. The Report found that that was not inconsistent with SCM Article 3.1(a), even for the period to 30 June 2000, let alone out beyond that date. The only factor missing from the 1997 Loan that was present for the grant payments was the interim and aggregate sales performance targets over the period 1 April 1997 to 30 June 2000. Thus any part from the grant payments that was allocable to a period beyond 30 June 2000 could not be contingent upon export performance in terms of SCM Article 3.1(a). In particular, suppose that the grant payments were allocated across the 13 years proposed by the USA. The money allocated outside of the period 1 April 1997 to 30 June 2000 would not be contingent upon export performance in terms of SCM Article 3.1(a) and so would not be inconsistent with SCM Article 3.1(a). In that case, the amount required to be withdrawn on 14 September 1999 would have been only \$1.8m.<sup>27</sup>

44. The situation in the case of Howe and automotive leather is that:

- Howe benefited from the ICS (and in a minor way from EFS) for automotive leather until the removal of automotive leather from the schemes from 1 April 1997.
- The \$30m. Grant Contract covered the period through to the termination of the ICS on 30 June 2000.
- automotive leather will be eligible for subsidy payments under the new general programme for the textiles, clothing and footwear industry from 1 July 2000.

45. Presumably even the USA would agree that the assistance under the ICS was recurrent up to 1 April 1997. The tranches of the grant payments were payable: \$5m in March 1997; \$12.5m. on the basis of sales performance over the next quarter; and another \$12.5m. on the basis of performance over the subsequent 12 months. The Report found that these were also based on the aggregate sales performance target to 30 June 2000. After that date, there is a new general subsidy programme for the textiles, clothing and footwear industry. As was noted in paragraph 9.4 of the Report:

"The grant contract provides for a series of three grant payments totalling up to a maximum of A\$30 million. The aggregate of payments under the grant contract was capped at A\$30 million to limit the overall level of *ad*

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<sup>27</sup> \$30m. x [290/366]/13 = \$1.8m (there being 290 days from 14 September 1999 to 30 June 2000).

*valorem* subsidization of sales over the period to mid-2000 to approximately 5 per cent "

The USA did not challenge this. Against any reasonable assessment assistance on automotive leather has been and is recurrent in the sense of "occurring frequently or periodically."<sup>28</sup> The grant payments are allocable in the sense of being able to be allocated to sales over specific time periods. Where grants are in fact linked to sales in a particular period, any reasonable authority would expense them over the relevant period. In this case, assistance was given to automotive leather over a lengthy period, albeit in different forms for the three periods in question.<sup>29</sup>

46. The Report found that the grant payments were made on anticipated sales, i.e. paid in advance, as well as on past sales, and so were tied to the aggregate sales performance target, as well as the interim sales performance targets. This did not affect the Report's conclusion that the grant payments were tied to those sales performance targets.

47. Suppose that the interim targets had been set on a quarterly basis with the grant payments also paid quarterly after the event. Presumably the original Panel would still have found that the payments were in breach of SCM Article 3.1(a). Australia could simply have made the last payment on 14 September 1999 and it would have been in conformity. The subsidy would have been withdrawn and none of the money paid prior to 14 September 1999 would have had to be withdrawn from the company. There is no basis in the SCM Agreement, or the DSU, or GATT 1947 and WTO practice, that more money should be withdrawn because a subsidy is paid in advance than if it is paid after the fact.

48. The USA talks about the allocation of benefits over 13 years. If a recipient is obliged as a condition of receiving the subsidy to expense it to achieve sales in a particular period, then the money and benefits are expensed on those sales. In such a case the subsidy is increasing the income stream of the company, but the subsidy cannot be spent twice. The overall income stream of the company may go to investment in the same product, or it may go to investment in another product, or it may go to dividends, or anywhere else. The point about SCM Article 3.1(a) is that the purpose for which the subsidy is given is not fungible. It has to be tied in law or in fact to the export performance of the product concerned. The Report found the sales performance targets to be the critical factor with the grant payments tied to the interim and aggregate sales performance targets. Australia has implemented in good faith on the basis of that finding.

49. In any case, the future income and profit streams from automotive leather after 30 June 2000 are unclear. Currently Howe produces automotive leather at its plant at Thomastown in Melbourne. The tannery at Rosedale in eastern Victoria does not produce any finished leather let alone automotive leather - it is a tannery. Thomastown could shut or change to producing leather coats, and Rosedale could still go on.

50. The Rosedale tannery can produce inputs for any leather products, e.g. for shoes, upholstery, automotive, garment and accessories purposes. This is a matter for good management, including quality control, and delivering what the market wants. Similarly, at the Thomastown plant, while it actually produces automotive leather at the moment,

<sup>28</sup> New Shorter English Oxford Dictionary - CD - January 1997.

<sup>29</sup> Prior to 1 April 1997; 1 April 1997 to 30 June 2000; and post 30 June 2000.

there is little of its machinery apart from some specialized cutting equipment that is specific to automotive leather. It could use the machinery to produce leather for anything from shoes to couches. Even the cutting equipment can be adjusted for products other than car seats. The value in respect of automotive leather is in the quality control and business relationships. When the fashions change for car seats, as they will, then companies such as Howe will refocus on other lines as well. The USA is implicitly asserting that Rosedale will only produce for Thomastown; Thomastown will only produce automotive leather for the next 10 years; and all of that product will be exported. USA has not provided any argument for what is an unjustifiable claim.

51. Regarding paragraphs 33 and 34 of the USA's First Submission, the issue of an appropriate interest rate is irrelevant for this Panel. However, Australia notes for completeness that the USA has not provided any sensible data on what should be an appropriate interest rate as of 1999 or 2000. The USA has simply resubmitted an exhibit from the original Panel regarding ALH's 1997 financial statements. The USA has made no attempt to justify what an appropriate interest rate would be now, whatever the purpose might be. The data related to payments are also obviously inaccurate.<sup>30</sup>

*(e) Countervailing Duty Methodology and Practice*

52. The treatment by the countervailing authorities in the USA or the EC has no probative value for the Panel. In any case, this Panel is about SCM Article 3.1(a) and not countervailing practice. The reference to Canada Aircraft (WT/DS70/AB/R) in Footnote 10 of the USA's First Submission was in respect of the existence of a subsidy and not the issue of conformity with SCM Article 3.1(a), which is being addressed by this Panel. The Appellate Body found that the guidelines under SCM Article 14 were relevant context for assessing whether a benefit arose for the purposes of SCM Article 1.1(b). The guidelines of SCM Article 14 do not address the issue of allocation across asset life. Australia disputes that the countervailing practice of the USA should be considered to be dispositive of an interpretation of aspects of SCM Part V, let alone SCM Article 3.1(a).

*(f) SCM Annex IV*

53. This is a different part of the SCM Agreement. The USA has laid no foundation for arguing that an approach taken to one type of grant under SCM Article 3.1(a) should be dealt with in the same way as a quite different type of grant under SCM Article 6.1(a).

54. The report of the Informal Experts Group has no formal status and has only been noted by the SCM Committee. It has not been adopted as an Understanding as provided for under SCM Footnote 62 for the purposes of SCM Article 6.1(a). In any case, the report by the Group<sup>31</sup> makes it completely clear that each situation will have to be dealt with on a case by case basis by the panel involved.

"Fourth, the Group **does not view the report as exhaustive of every potentially relevant issue** under Article 6.1(a) and Annex IV. Thus, the fact that the report may not refer to a given issue or given measure is **not**

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<sup>30</sup> For example, see paragraphs 2.2 and 2.3 of the Report.

<sup>31</sup> G/SCM/W/415/Rev.2 and Suppl.1.

*meant to imply that such an issue is irrelevant in this context*, or that such a measure should not be included in any calculation under Article 6.1(a) and Annex IV.<sup>32</sup> [Emphasis added.]

"... the applicability and usefulness of any of the Group's recommendations to a particular situation should be *assessed on a case-by-case basis*."<sup>33</sup> [Emphasis added.]

"The illustrative table reflects the Group's conclusions regarding a number of points. First, the table indicates that certain types of subsidies (e.g., grants) may be *either expensed or allocated, depending on the circumstances*."<sup>34</sup> [Emphasis added.]

"The table and cover note reflect certain additional recommendations, as well. The first of these is that research subsidies be presumptively allocated, unless expensing is demonstrated to be more appropriate in a given case. Similarly, it is recommended that non-recurring and/or large subsidies be presumptively allocated, *unless expensing is demonstrated to be more appropriate in a given case*."<sup>35</sup> [Emphasis added.]

"Similarly, non-recurring subsidies should be presumptively allocated, *except where it is demonstrated that this would be inappropriate*."<sup>36</sup> [Emphasis added.]

"The table includes a category for *export-related subsidies*, notwithstanding that the relevance of the question of expensing versus allocating in the context of such subsidies might be limited, at least with respect to those export-related subsidies that are export subsidies in the sense of the Agreement."<sup>37</sup> [Emphasis added.]

The only entries in the table for export-related subsidies are in the expensing column.

55. SCM Part III, SCM Annex IV, and the work of the Informal Group of Experts have no probative value for the interpretation of conformity with SCM Article 3.1(a). Moreover, these excerpts shown clearly that even under SCM Part III and SCM Annex IV, the tie of the grant payments to the period 1 April 1997 to 30 April 2000 would require that they be expensed during that period.

#### IV. CONCLUSION

56. Australia complied with the Report's recommendations and brought the grant payments into conformity with SCM Article 3.1(a) by withdrawing \$8.065m. from Howe on 14 September 1999.

- The grant payments were tied to sales performance targets, and expensed, during the period 1 April 1997 to 30 June 2000.

<sup>32</sup> At second full paragraph on page 2 of G/SCM/W/415/Rev.2.

<sup>33</sup> At paragraph 5 of G/SCM/W/415/Rev.2/Suppl.1.

<sup>34</sup> At paragraph 5 of G/SCM/W/415/Rev.2.

<sup>35</sup> At paragraph 6 of G/SCM/W/415/Rev.2.

<sup>36</sup> At paragraph 2 of Recommendation 1 of G/SCM/W/415/Rev.2.

<sup>37</sup> At paragraph 7 of G/SCM/W/415/Rev.2.

- \$8.065m. was withdrawn from Howe on 14 September 1999.
- Only the money tied to exports of automotive leather had to be withdrawn.
- \$8.065m. exceeded any reasonable calculation of money from the grant payments tied to actual or anticipated exports over the rest of the period 1 April 1997 to 30 June 2000.
- The concessional 1999 Loan to ALH has to be assessed as a separate measure from the grant payments and the matter whether sufficient money has been withdrawn from Howe - the 1999 Loan is consistent with SCM Article 3.1(a).

**ANNEX 2-3**

**ORAL STATEMENT OF AUSTRALIA**

(23 November 1999)

**I. INTRODUCTION**

1. In this statement Australia first summarizes the key points proving that it has brought the grant payments into conformity with SCM Article 3.1(a) within the time-period recommended by the Report of the original Panel (WT/DS126/R), subsequently referred to as "the Report". It will then comment on several aspects of the USA's Second Submission.

2. When Australia received the Report, it examined it closely, and decided that its recommendations could be implemented in full by following its findings and reasoning, which cleared the 1997 Loan while finding that the grant payments were tied to actual or anticipated exports. Accordingly, Australia did not appeal the Report but accepted its adoption on 16 June 1999. By not appealing the Report, the USA also accepted that implementation should be based on the Report.

3. The USA's position from its First Submission is that the issue is one of bringing the grant payments into conformity. Australia agrees with that. This means that there is nothing special or punitive about implementing a recommendation in respect of prohibited subsidies. The obligation is simply to bring the measure into conformity.

**II. MAIN POINTS**

4. The issues for the Panel are:

- (1) How much money needed to be withdrawn by Australia in order to bring the measures into conformity?
- (2) Was sufficient money withdrawn?

*II.1. How much money needed to be withdrawn by Australia in order to bring the measures into conformity?*

5. Australia submits that given the reasoning and findings of the Report

- (a) the grant payments were tied to the period of the sales performance targets, i.e. 1 April 1997 to 30 June 2000,

and consequently the Panel should find that

- (b) the grant payments were allocated to the period of 1 April 1997 to 30 June 2000.

Australia submits that the Panel should also find that:

- (c) only the monies paid to Howe that were tied to exports of automotive leather were required to be withdrawn
- (d) Australia was not required to withdraw monies allocated to the period prior to the date of implementation in order to bring the grant payments into conformity.

*II.1(a) The grant payments were tied to the period of the sales performance targets, i.e. 1 April 1997 to 30 June 2000.*

6. The one factor in the Report that distinguished the grant payments from the 1997 Loan was the sales performance targets, aggregate and interim. All the other factors that surrounded the granting of the assistance package by the Australian Government applied equally to the granting of the 1997 Loan. Even on the issue of investment, the USA in paragraph 7.244 of the Report quoted from a half yearly report by Schaffer that: 'the loan was given "to assist with the capital programme." ' If investment had been the key, or if the Government's knowledge of Howe's export propensity or expectation about future exports had been the key, then the 1997 Loan would have been inconsistent also, since that was for purposes of automotive leather.

7. Given the difference in findings on the grant payments and the 1997 Loan, the sales performance targets were the crucial factor that made the grant payments inconsistent with SCM Article 3.1(a). Accordingly, the grant payments were tied to the period of the sales performance targets, i.e. they were tied to the period from 1 April 1997 to 30 June 2000.

8. Clearly the Report considered that facts about Howe's operations and investment were not sufficient to create the tie to exports required to meet the "in fact" test under SCM Article 3.1(a) for the 1997 Loan. The sales performance targets were the necessary fact to create the tie for the grant payments because they effectively created export performance targets.

9. Accordingly, the grant payments were tied to the period of the sales performance targets, i.e. 1 April 1997 to 30 June 2000.

*II.1(b) The grant payments were allocated to the period of 1 April 1997 to 30 June 2000*

10. The consequence of the tie of the grant payments to the sales performance targets is that the grant payments have been allocated to the period in question, i.e. the period to 30 June 2000. There were no sales performance targets beyond that date. The grant payments were to be expensed during that period for the purpose of achieving the sales performance targets. Australia understood that the significance put on the aggregate sales performance target by the Report, in particular paragraph 9.67<sup>1</sup>, meant that the expensing should be made uniformly across the period, i.e. Australia's preferred option in paragraph

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<sup>1</sup> The Report says at paragraph 9.67:

"Therefore, we conclude that, in order to expand its sales in a manner that would enable it to reach the sales performance targets (interim targets and the aggregate target) set out in the grant contract, Howe would, of necessity, have to continue and probably increase exports. At the time the contract was entered into, the Government of Australia was aware of this necessity, and thus anticipated continued and possible increased exports by Howe. In our view, these facts effectively transform the sales performance targets into export performance targets. We thus consider that Howe's anticipated export performance was one of the conditions for the grant of the subsidies. Australia argues that this consideration would lead to a result that would penalize small economies, where firms are often dependent on exports in order to achieve rational economic levels of production. Nevertheless, in the specific circumstances of this case, we find this consideration compelling evidence of the close tie between anticipated exportation and the grant of the subsidies."

46 of its First Submission. Thus \$7.336m. of the grant payments was outstanding at 14 September 1999.

11. There is nothing in the history or detail of this case that could in any way suggest that the period of 1 April 1997 to 30 June 2000 was a contrived period for expensing the grant subsidies. The use of the grant payments to achieve export sales in this period was the key to the Report's finding of the tie under SCM Footnote 4. Moreover, there was nothing artificial about this period. It was simply the gap between the date of the removal of automotive leather from the current textiles, clothing and footwear programme to the entry into force of the new programme on 1 July 2000.

12. It is not a question in this case of having to establish a future export stream as the basis on which to calculate the level of subsidy to be withdrawn. The grant payments were tied to specific sales performance targets over a specific period. Moreover, and most importantly, it was this tie that led to the finding that the grant payments were inconsistent with SCM Article 3.1(a).

*II.1(c). Only the monies that were paid to Howe tied to exports of automotive leather were required to be withdrawn*

13. The prohibition under SCM Article 3.1(a) is about monies paid on exports of the product, the good, that is the subject of the complaint. In this case, it is exports of automotive leather.

14. As far as SCM Article 3.1(a) is concerned, there is nothing stopping Australia paying money on domestic sales of automotive leather, or on sales of other goods. Of course, Australia is not saying that this can be used as a subterfuge to circumvent the in fact provision of SCM Article 3.1(a). However, that is clearly not the case here, and the USA has not made any suggestion that this should be regarded as being the case.

15. While the sales performance targets were crucial to the Report's finding of the tie to exports of the grant payments, the Report nevertheless recognized that these targets included sales other than exports of automotive leather. The Report did not say that Howe was expected to achieve \$567.5m. worth of export sales of automotive leather. It did conclude, however, that in the light of the level of Howe's domestic sales of automotive leather (as well as other sales) a large percentage of this target was exports of automotive leather. It was the tie to those exports that was found to be inconsistent with SCM Article 3.1(a).

16. Suppose that in 1997 the Australian Government had given Howe \$27m. on the basis of achieving specified export sales of automotive leather and \$3m. for achieving a specified volume of other sales, both to be achieved over 1 April 1997 to 30 June 2000. Then the \$27m. would have been unambiguously contingent in law upon export performance and so inconsistent with SCM Article 3.1(a). However, the \$3m. would have been consistent with SCM Article 3.1(a). There is no basis for having a harsher treatment of a subsidy found to be contingent in fact than one found to be contingent in law upon export performance.

17. Therefore, Australia was only obliged to withdraw monies found tied to exports of automotive leather to bring the grant payments into conformity with SCM Article 3.1(a).

*II.1(d) Australia was not required to withdraw monies allocated to the period prior to the date of implementation in order to bring the grant payments into conformity*

18. The issue here is whether, at the date on which a Member claims to have implemented a recommendation of the Dispute Settlement Body, there are any further outstanding monies that are inconsistent with SCM Article 3.1(a). Where the monies have been paid out, the amount outstanding will decline over time until the end of the allocation period. It does not make any sense to suggest that the act of the adoption of a panel report somehow freezes the expensing of a subsidy, and even increases the amount outstanding through interest, as suggested by the USA.

19. A Member is given a period by the panel under SCM Article 4.7 to bring the measure into conformity. If it does not, then the complainant may have compensation or retaliation rights. However, establishing this implementation period cannot affect the way in which the monies are being expensed and the continuing decline in the amount of outstanding monies throughout this period.

20. The USA's Second Submission seeks to argue this freezing of expensing would only apply to payments made in advance and not to subsidies under ongoing export subsidy programmes.<sup>2</sup> It is unclear why the USA considers that there should be a more punitive regime for advance payments and why there should be an obligation to take faster action against advance payments. The USA appears to have modified its position between its First and Second Submissions on this, following the raising by Australia of the implications of its position for the Foreign Sales Corporations dispute.

*II.2 Was sufficient money withdrawn?*

21. The facts of the case are:

- Howe repaid \$8.065m. to the Australian Government on 14 September 1999
- the Report said that new subsidies could be given to a company in place of a prohibited subsidy
  - ◆ the USA agreed that this is true<sup>3</sup>
- the Report found that measures must be examined individually and separately to assess their compliance with SCM Article 3.1(a)
- the Report found that the 1997 Loan was consistent as part of a package of assistance provided to Howe and ALH
- since the 1997 Loan is consistent, given its terms, the 1999 Loan must also be consistent.
  - ◆ the USA has not sought to present any argument that the 1999 Loan is itself inconsistent with SCM Article 3.1(a).

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<sup>2</sup> See paragraph 16 of the US's Second Submission.

<sup>3</sup> The Report says at Footnote 132 that:

"In the course of the Panel proceedings, the United States acknowledged that a prohibited export subsidy could be replaced by another form of assistance that is not tied to export performance and a Member could thus bring itself into conformity with the SCM Agreement."

22. Thus, Australia was entitled to provide a new WTO consistent subsidy to ALH in the process of bringing the grant payments into conformity with SCM Article 3.1(a). In addition the 1999 Loan is consistent with SCM Article 3.1(a). The fact that this is a dispute under DSU Article 21.5 does not affect Australia's right to provide WTO consistent subsidies to an Australian company.

23. Australia has withdrawn \$8.065m. from Howe. This withdrawal had the effect of a substantial reduction in Howe's net income for the period and a reduction in Howe's equity position.

### III. COMMENTS ON USA'S SECOND SUBMISSION

24. Australia will not go through the USA's Second Submission point by point, since it has dealt with all the important issues contained in it, and rebutted them already. However, it may be useful for the Panel if Australia comments on a few aspects of it.

25. The USA's approach is one based on trade outcome and effect. This includes its claim that the Panel should adopt an approach that is "economically reasonable". Essentially what the USA is seeking is a remedy that may have been "economically reasonable" if a finding had been made against Australia on the basis of export propensity alone or on the basis of a factor that meant the subsidy should be applied over the life of the company's assets. This was *not* the finding in this case. In this case, the remedy consistent with the Report's findings and "economic reasonableness" is to withdraw the amount tied to the prospective export sales targets.

26. The issue is what the rules are. This Panel has to consider what Australia's obligations were in bringing the grant payments into conformity, while acknowledging Australia's right to provide a new subsidy to an Australian company provided that the subsidy is consistent with SCM Article 3.1(a).

27. A recurrent theme of the USA in this dispute is that if it does not get its way, it would:

"... effectively render the obligations in Article 4.7 of the SCM Agreement meaningless. Australia's interpretation means that Members who provide significant illegal, prohibited export subsidy grants can easily relegate most or all of those grants to the past, declaring them outside the reach of the SCM Agreement remedies."<sup>4</sup>

28. That is clearly a nonsense. The approach does have implications for the status of the period between adoption and implementation, where even the USA has agreed with Australia's position as far as an ongoing programme such as the Foreign Sales Corporations is concerned.<sup>5</sup>

29. There is no "Australia's interpretation" for the main aspects of implementation at issue here. It is the Report's approach that Australia has followed. Under that approach, even where money has been paid out in advance of performance, implementation would depend on the circumstances and on the reasons why a panel found against the measure. Implementation must necessarily be judged on a case by case basis.

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<sup>4</sup> At paragraph 2 of the US's Second Submission.

<sup>5</sup> At paragraph 28 of the US's Second Submission.

30. For example, if a grant was found to be inconsistent with SCM Article 3.1(a) because it was tied to a specific long-term export contract of, say, 10 years duration, then the panel might find that the money was allocated over the 10 years. How much money would have to be withdrawn would depend on when the dispute was taken. Moreover, if the contract continued, then the recommendation of the panel may not be able to be implemented in a way analogous to this case, since new subsidies may be found to be still tied to the original contracts. If that tie was the basis of the finding of the panel, then some cosmetic cover, such as having the government's arrangement with the company nominally only tied to the first two years, would not get around the problem. The finding of the panel would set the framework for implementation. The responsibility of the panel is to determine what are the critical factor or factors, which create the tie to exports. Once that is determined, then the Member can implement the recommendation. If there were to be no relationship between the reasons for a panel's findings and the basis for implementation, then a Member would have no idea what its rights were or how it should implement to satisfy an Article 21.5 panel.

31. The Panel's task is to determine whether Australia has implemented the Report's recommendations in the light of the Report.

32. The key to bringing into conformity is to remove the tie "to actual or anticipated exportation or export earnings." How a Member can do this will depend on the findings by a panel. But what is clear from the Report and supported by the Canada Aircraft Appellate Body Report (WT/DS70/AB/R), in particular at paragraphs 171 and 172, the tie has to be demonstrated and not some proxy for an export propensity test as pushed by the USA. This means that there has to be a demonstrable tie to actual or anticipated exports. This would not have to be a short-term tie - that would depend on the circumstances found by the panel. In this case the finding was based on the sales performance targets over the period 1 April 1997 to 30 June 2000. That was the concrete tie found by the Report.

33. The Report did not find that the money was tied to some ongoing export propensity or to any ongoing expectation that there would be a continued high level of exports. It found that there was a concrete tie created by the Australian Government's conditions on Howe over the period 1 April 1997 to 30 June 2000. In the absence of those conditions, the Report must have cleared both the grant payments as well as the 1997 Loan. There was no difference between them as part of the *package* of assistance that went to fill the temporary gap between the removal of automotive leather from the Import Credit Scheme (ICS) and the new textiles, clothing and footwear programme coming into force from 1 July 2000. The USA continues to emphasize the fact that the grant payments were provided to Howe and not to other leather manufacturers. As has been explained before the original Panel, the reason for that is that there was only one manufacturer of automotive leather. All leather was eligible for assistance. However, between 1 April 1997 and 30 June 2000 automotive leather alone was not eligible under the ICS. If there had been other manufacturers of automotive leather, then they also would have received assistance outside the ICS. This reinforces the fact that the grant payments were allocated to the period 1 April 1997 to 30 June 2000.

34. Australia notes that the USA has not argued that the preferred option set out in paragraph 46 of Australia's First Submission is incorrect in the context of the period 1 April 1997 to 30 June 2000, i.e. that \$7.336m. was allocated to the Withdrawal Period of 15 September 1999 to 30 June 2000. Accordingly, Australia submits that the Panel

should find that that approach is consistent with the Report, in which case the issue of withdrawing 90% rather than 100% becomes irrelevant, since \$8.065m. was withdrawn.

35. While the Panel will of course assess the factual nature of the USA's submissions, it may be useful to comment on a few points. For example, paragraph 32 of the USA's Second Submission implies that Australia has done something underhand. The Australian Government informed the USA's government in advance about the terms of the 1999 Loan, i.e. before 14 September 1999. The USA made no subsequent request for information prior to its demand on 18 October 1999, at the first organizational meeting of the Panel. Because this deals with only two companies, Howe and ALH, it was not appropriate to make all commercial details public. However, there has never been any suggestion that the 1999 Loan was not concessional. The documents available to the Panel (and the USA) make it clear that the repayment of the \$8.065m. was by Howe and the 1999 Loan is to ALH and is unencumbered by any reference to automotive leather. Australia would note that it does not consider that this separation was necessary to bring the measure into conformity, but it sought in all aspects to exceed what was required by the Report.

36. Australia also notes that at paragraph 32 of its Second Submission the USA states that: 'ALH acknowledged receiving "valuable consideration" in exchange for the repayment [Footnote 25: Exhibit AUS-1, para.2.]'. This statement is inaccurate and Australia does not understand the reason for this misrepresentation. It is clear from the Deed that "valuable consideration" this does not refer to the 1999 Loan but to the removal of any subsisting obligations on Howe and ALH, including reporting obligations, under the Grant Contract.

37. Paragraph 33 of the USA's Second Submission says that Australia transferred \$8.065m. back to ALH. Clearly this is inaccurate. The USA is entitled to make claims about the benefit of the 1999 Loan to ALH over the life of the loan when compared to the \$8.065m. repaid by Howe, provided that it does so primarily as BCI. In Australia's view that is irrelevant to the matter at hand. However, the USA's Second Submission presents an inaccurate picture, an impression which would be heightened by its redacted version. Apart from the fact that the repayment was by Howe and the 1999 Loan was to ALH, there is a major difference to companies between making a large repayment such as made by Howe and receiving a concessional loan such as that provided to ALH. The repayment affects the income as well as the equity position of Howe. A loan has a major impact on the balance sheet of ALH, in particular the increase in liabilities. While the concessional nature of the 1999 Loan will provide a stream of benefits to ALH through to 2012, this is over time with the bulk of the benefits necessarily occurring some years out. A loan of this sort is not able to be traded and must be repaid at the end of the period. It also can be devoted to any of ALH's operations.

38. It is clear from paragraph 36 of the USA's Second Submission that the USA considers that the 1999 Loan itself is consistent with SCM Article 3.1(a). Accordingly, the Panel should reject the USA's argument in its paragraph 38. The Report determined that the 1997 Loan was consistent with SCM Article 3.1(a), where it was explicitly part of a package of assistance with the Grant Contract. As noted above the USA acknowledged to the original Panel that: "that a prohibited export subsidy could be replaced by another form of assistance that is not tied to export performance and a Member could thus bring

itself into conformity with the SCM Agreement."<sup>6</sup> At paragraph 38 of its Second Submission, when the USA says that the 1999 Loan "steps into the shoes" of the amount withdrawn, it must mean that the withdrawn grant payments have been being replaced by another form of assistance, the 1999 Loan. However, the USA does not dispute that the 1999 Loan itself is consistent with SCM Article 3.1(a). Therefore, the USA has already acknowledged in the Report that Australia was entitled to reconfigure the assistance in this way to bring itself into conformity with SCM Article 3.1(a).

#### **IV. CONCLUSION**

39. Australia considers that it has implemented the Report's recommendations in good faith in light of the Report and has brought itself into conformity with SCM Article 3.1(a). Accordingly, it asks the panel to find that it has brought the grant payments into conformity with SCM Article 3.1(a) within the 90 day period recommended by the Report.

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<sup>6</sup> At Footnote 132 of the Report.

**ANNEX 2-4**

**FINAL ORAL STATEMENT OF AUSTRALIA**

(24 November 1999)

1. Australia and the USA agree that any part of the monies that are allocated to the period before the adoption of the Report are gone and are no longer a matter for the WTO. They do not have to be withdrawn.
2. Australia disagrees with the USA that any remaining money is frozen and indeed has interest added. This means that that money is not allocated after the date of the adoption of the Report. This is inconsistent with even the USA's basis for allocating subsidies over time. It is saying that there is money outstanding but that it is not allocated after the adoption of the Report. Apart from having no foundation in the WTO, this approach leads to inherent inconsistencies with a Member potentially remaining in breach with large outstanding amounts of money to be withdrawn indefinitely when even on the USA's approach the money in question would have been spent or the assets fully depreciated.
3. The USA is arguing that its approach to allocation is "economically reasonable", but by ceasing to allocate money after the date of adoption it throws any pretence of economic reasonableness out of the window. Under the USA's approach an even greater amount would have to be withdrawn in 2010 than on 17 June 1999 even though under its own countervailing methodology the calculated benefit would decline over time and then vanish at the end of the period. Apart from the fact that the USA has not attempted to give a legal justification of this, it has no pretence of being "economically reasonable".
4. SCM Article 3.2 makes it clear that the obligation is not to grant or maintain subsidies inconsistent with SCM Article 3.1(a). Where part or all of the monies have been spent, they are no longer being maintained. Indeed where the monies are allocated over a particular period, the level of outstanding monies continues to decline until they go to zero by the end of the period. Moreover, where an outstanding subsidy is not contingent upon export performance, then it does not fall under SCM Article 3.1(a) and so Australia would not be maintaining a subsidy in breach of SCM Article 3.2.
5. The Report found that the granting of the grant payments fell under SCM Article 3.1(a) because of the sales performance targets. Accordingly, the grant payments applied to the period of the sales performance targets, i.e. 1 April 1997 to 30 June 2000. This meant that they were used in seeking to meet those sales performance targets. Thus the money is allocated on that basis.
6. The USA's approach of having a division of the money at the date of the adoption of the Report on the basis of 13 years is just as much tying the expensing of the money to a particular period. Its period, however, is based on its own objectives of maximizing the protectionist effect of countervail, which have nothing to do with this case involving SCM Article 3.1(a). In this case, the basis for the allocation is set out in the Report, i.e. the sales performance targets over the period 1 April 1997 to 30 June 2000.
7. There has been no finding in the Report or any evidence before this Panel about what Howe will be doing beyond 30 June 2000 and over the longer term. There is no basis for assuming that existing assets will be used for maintaining exports of automotive leather or even for producing automotive leather. There is no claim, or any basis for

a claim, that Howe will continue to concentrate on automotive leather at its Thomastown plant. Next year it could be producing some other form of upholstery leather or shoe leather. While the original Panel had evidence before it relating to the period 1 April 1997 to 30 June 2000 it had nothing before it concerning the period after 30 June 2000 and neither has this Panel. The Report's finding on the grant payments was for the period 1 April 1997 to 30 June 2000. By contrast the Report cleared the 1997 Loan, which stretched to 2012.

8. The USA has not provided any argument based on SCM Article 3.1(a) how the Panel could find that part of the \$30m. is being spent in some sense over a 13-year period. It refers to the USA's and the EC's countervail practices. These are for quite different purposes and the USA has been unable to establish any legal link to SCM Article 3.1(a).

9. Domestic legislation in areas such as countervail and competition policy, e.g. EU State Aids practice, do not provide guidance in this case. In the case of State Aids the issue is the treatment of money that has been given illegally under EU law and the focus is subsidization distorting competition in the EU's own market. SCM Article 3.1(a) is about the form of the granting of the subsidy not about the level of money provided. Moreover, there is nothing illegal about the subsidies in this case. The Australian Government acted legally, as did Howe and ALH. A breach of the WTO does not make the granting of a subsidy illegal under Australian law. This is a matter of Australia's international obligations.

10. Arguing in the *alternative* about the allocation period, if the Panel found that the grant payments should be allocated over a period beyond 30 June 2000, then the Panel should take into account that there has been no finding of contingency upon export performance beyond 30 June 2000. If money is allocated and so considered to be expensed after that date, then that money could not be found to be tied to export performance. In this circumstance the Panel should find that the only money that had to be withdrawn was the money allocated to 15 September 1999 to 30 June 2000. As shown in Australia's two submissions this amounts to less than \$2m. Therefore, Australia would have withdrawn far more than was required and so would have fully complied with the recommendations of the Report.

11. In withdrawing \$8.065m., Australia has withdrawn the amount of monies outstanding at 14 September 1999. Indeed in Australia's view more than sufficient to cover that. That was the subsidy that was being maintained at that time.

12. Moreover, the Deed of Release terminated all remaining obligations under the Grant Contract and hence in respect of the grant payments.

13. Therefore, Australia has withdrawn the measures and brought the m into conformity with SCM Article 3.

14. The USA has not disputed that the 1999 Loan itself does not fall under SCM Article 3.1(a). It could hardly do so given that the Report cleared the 1997 Loan. However, the USA's argument is in essence that a Member when implementing the recommendation of the DSB has less rights than other Members. This is also translated by the USA to mean that such a Member is subject to different interpretations of WTO rules under an Article 21.5 Panel. The USA has not put forward any basis for this extraordinary approach to international law, except the attainment of its own narrow trade objectives. Adoption of such an approach by panels would have severe adverse consequences for the WTO system.

15. The Report found at paragraph 9.64 that Members can replace inconsistent subsidies with consistent ones and thereby bring themselves into conformity. The USA also acknowledged that at Footnote 132 of the Report. The Report found that the Grant Contract and payments under it had to be examined separately from the 1997 Loan even though they were part of the one package of assistance. Australia is entitled to be able to rely on the Report when implementing its recommendations. Australia was entitled to provide the 1999 Loan, which is in conformity with SCM Article 3.1(a).

16. While not claiming that the 1999 Loan is inconsistent in itself, the USA has claimed that the 1999 Loan is inconsistent because it is linked to the repayment of an export subsidy, the \$8.065m. The USA agreed in the Report that an inconsistent measure could be reconfigured but somehow now if there is a contingency with the repayment of export subsidy money a measure becomes an export subsidy itself. No reasoning is given for this.

17. A measure is an export subsidy if it is contingent upon export performance, not if it is contingent upon the repayment of money whether or not that money is linked in some way to money provided as an export subsidy in the past. The USA has not claimed that the 1999 Loan is contingent upon export performance. It could not have done so because clearly the 1999 Loan is not contingent upon export performance. Moreover, even putting to one side the issue of the allocation of the grant payments, the USA does not dispute that the Report only found that the grant payments were contingent upon export performance over 1 April 1997 to 30 June 2000. The Report did not find any link to export performance after 30 June 2000. Moreover, the stream of benefits from the 1999 Loan only comes over time to 2012, since they derive from the concessional interest rate. The USA has not sought to argue any contingency upon export performance of automotive leather in respect of the 1999 Loan. There is no such contingency. Indeed ALH can use the 1999 Loan for any purpose with no link to automotive leather. Accordingly, the Panel should find that the 1999 Loan does not fall under SCM Article 3.1(a).

## CONCLUSION

18. There seems to be agreement between Australia and the USA that the grant payments were found to be export subsidies because of the sales performance targets in the Grant Contract created the necessary tie required by SCM Footnote 4. At the very least there does not seem to be a disagreement between Australia and the USA that the existence of this tie was required for the finding in the Report that the subsidies fell under SCM Article 3.1(a) and so were prohibited.

19. Having acknowledged this tie, the USA then says that this tie bears *no* connection or relationship to remedying the breach of the rules that has been found. The USA says that it is the subsidy allocated to production that flows from the investment base of the company over the life of the productive assets that has to be withdrawn. It does this without any basis of what those assets might be used for in the future, and even whether automotive leather would be produced by those assets. The USA cites no evidence from the Report to support its argument, and not surprisingly is mute on the 1997 Loan. The flaw in the USA's argument is that if the USA was correct that this was the remedy required, the Report would have had to have given some clue that the subsidy should be seen in this way. It gave none. If the subsidies had been tied to productive assets over

their life rather than to the sales performance targets, then there would not have been a sufficiently close tie between the granting of the subsidy and anticipated exportation or export earnings for the subsidy to fall under SCM Article 3.1(a).

20. This is not an assumption or a hypothesis on Australia's part. This is the plain reading of the findings and reasoning of the Report. The Report looked at precisely the sort of measure that the USA is addressing, i.e. it looked at the 1997 Loan, and found that the granting of the subsidies in these circumstances did not "suggests a specific link to actual or anticipated exportation or export earnings".<sup>1</sup> They did not fall under SCM Article 3.1(a) and did not have to be "withdrawn".

21. The only justification that the USA provides for allocating the grant payments over the life of Howe's assets is that the period for which these subsidies were specifically provided is a contrivance. There is no evidence in the history of this case to even hint at such a contrivance. The Report does not have any such finding. No evidence has been put to this Panel by the USA that it was a contrivance. It is absolutely clear from everything that this Panel and the original Panel have seen or heard that the assistance package was to "tide Howe over after it had lost eligibility for benefits related to automotive leather under these programmes."<sup>2</sup>

22. The report found that the grant payments were provided to Howe to assist the company to achieve the sales performance targets for the period 1 April 1997 to 30 June 2000. The Report found that these sales performance targets were effectively export performance targets. The Report found that the granting of these subsidies were "tied to" these targets and so were export subsidies. There have been many definitions of "tied to" suggested in this case, but the one accepted by the original Panel in the Report that was sufficient to demonstrate that there was, and had to be, a "close connection between the grant or maintenance of a subsidy and export performance."<sup>3</sup> The Report found the close connection in the grant payments because of the sales performance targets. The Report found that there was not a "close connection" for the 1997 Loan subsidy although the loan was for automotive leather purposes and was used to "assist with the capital programme."

23. Australia has implemented the Report's recommendations adopted by the DSB in good faith in light of the Report. Australia was entitled to rely on the Report for determining how it could implement its recommendations.

24. Therefore, Australia asks the Panel to reject the claims by the USA and to find that Australia has withdrawn the subsidies and brought the measures into conformity with SCM Article 3.

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<sup>1</sup> At paragraph 9.75 of the Report.

<sup>2</sup> At paragraph 9.65 of the Report.

<sup>3</sup> At paragraph 9.55 of the Report.

**ANNEX 2-5**

**AUSTRALIA'S ANSWERS TO WRITTEN QUESTIONS OF THE PANEL AND  
THE UNITED STATES**

(1 December 1999)

**ANSWERS TO QUESTIONS FROM THE PANEL TO AUSTRALIA**

1. (a) *Australia says, at para. 32 of its first submission, that "the subsidies contingent on export performance are presumed to be expensed on actual exports, paid either in advance or in arrears".*

*How would Australia approach the question of remedy where the contingency was expressed simply as "something must be exported". That is, a grant would be provided on the assumption that the recipient would export, with no performance targets or time-period specified. In Australia's view, would this mean that no action would be needed either to "withdraw the subsidy" or, in Australia's terminology, to "bring the subsidy into conformity"? If so, on what basis?*

*Answer 1(a):*

If a grant were to be provided simply on the "assumption that the recipient would export", then this would not fall under SCM Article 3.1(a). That would amount to a very weak export propensity test. For example, if a firm exported even a minor proportion of its production, say 10%, there could be an assumption that there would be some exports in the future, but the subsidy would hardly fall under SCM Article 3.1(a).

It is difficult to imagine a government imposing a condition as simple as that "something must be exported". Presumably, that could be satisfied by exporting one widget out of a production of one million widgets. If there was an explicit condition to export at least one widget and if that were to be removed before the one widget was exported, then the measure would be in conformity. Similarly, if the one widget had been exported already, then that condition would no longer apply and the measure would be in conformity. Of course in a real situation, a panel might find that the measure was in breach of SCM Article 3.1(a) as the result of factors other than "something must be exported". In that case, further action might need to be taken to withdraw the measure and bring it into conformity.

(b) *How would Australia approach the question of remedy where the contingency was exclusively, although in a general way, based on past exports? For example, the contingency might be expressed in very general terms, such as "past export success" or "last year's good export performance". In such cases, would Australia argue that nothing would need to be done to "withdraw the subsidy" or "bring the subsidy into conformity"? If so, on what basis?*

*Answer 1(b):*

Again, this would depend on the actual circumstances. For example, if this was no more than a random reward where there was no expectation by the recipient of re-

ceiving money, then it is highly questionable whether the money should be considered to fall under SCM Article 3.1(a) at all. However, it is unlikely that a government would provide money on such a simple basis and so the actual circumstances would have to be looked at. In any case, if the payment was simply based on past exports, then it would have gone and so there would be no subsidy to withdraw.

If this was part of a programme so that a company knew in advance, or had a reasonable expectation, that there would be a reward for export performance, then the action required would be to terminate the programme providing subsidies in this way.

There is nothing unusual or untoward in GATT and now WTO practice in not having some form of retroactive punishment for breaching a rule. The WTO is an agreement between sovereign states and there is a presumption that Members will try to follow the rules. There is no provision for dealing with one-off cases of past breaches.

*(c) Is Australia effectively arguing that only export subsidies that are expressly conditioned on specific, explicit performance targets covering future periods would require any action to be taken by the subsidizing government in order to be "withdrawn" or "brought into conformity"? If so, on what basis?*

*Answer I(c):*

No. The quote in the chapeau to this question was simply stating that for a finding of inconsistency with SCM Article 3.1(a) a panel must find a tie to actual or anticipated exports and so the money is tied to those exports. This is consistent with the Panel's questions on export subsidies being presumed to cause adverse trade effects - the reason for that is the presumption that the money is tied to exports, which are what cause the adverse effects. The quote did not prejudge what would happen in any particular case. However, in this case the grant payments were found to be tied to the sales performance targets over 1 April 1997 to 30 June 2000, which in turn effectively created export performance targets.

*(d) Would not the implication of such an approach be that a subsidizing government could provide (even de jure) export subsidies with complete impunity simply by omitting any specific performance requirements as to export levels and time periods in the expression of the export contingency? If not, why not?*

*Answer I(d):*

Not applicable.

*(e) Would not such an approach be equivalent to saying that the only thing really prohibited under Article 3.1(a) is specific export performance requirements (that is, that an export subsidy is completely "safe" so long as it is not associated with any explicit export performance requirements)? If not, why not? If so, on what basis can such an approach be justified?*

*Answer I(e):*

Not applicable.

2. *Australia argues that trade effects are irrelevant in the context of export subsidies, where, according to Australia, the question is not one of trade effects, but rather one of conformity with a rule. What, in Australia's view, is the purpose or rationale underlying the prohibition on export subsidies? Would Australia disagree that the reason that export subsidies are prohibited is because they are irrebutably presumed to cause adverse trade effects? Please explain the basis for any disagreement. In Australia's view, if such a presumption exists, is it relevant to this dispute? Why or why not?*

*Answer 2:*

The rules in the WTO on export subsidies are there primarily because of their potentially damaging trade effects. However, there is a distinction between the reason for having a rule and the basis for determining conformity with it. For example, tariffs are considered to cause adverse trade effects and hence the provision for bindings under GATT Article II. However, in order to demonstrate a violation of GATT Article II, the complainant does not have to demonstrate adverse trade effect. It would only have to do that in a non-violation case.

Similarly, the complainant does not have to demonstrate adverse trade effect, for a subsidy to be found to fall under SCM Article 3.1(a). On the other hand, the fact that a subsidy causes adverse trade effect would not prove that it fell under SCM Article 3.1(a).

SCM Parts III and V, together with GATT 1994 Article II, are about adverse trade effect and injury complaints regarding subsidies.

Such a presumption (about causing adverse trade effects) is not relevant to the matter before the Panel, which is about conformity with SCM Article 3 not about trade effects. Australia is not arguing conformity on the basis that trade effects have not been proved. Australia's point is that the USA is arguing that it wants a particular trade outcome and argues that the Panel should reach a decision not based on the rules but on the USA's desire for a particular trade effect from this case. Australia's obligation was limited to implementing the Report's recommendation adopted by the DSB.

The USA is arguing that because the granting of the grant payments was found to be inconsistent with SCM Article 3.1(a), it is entitled to a remedy based on its own protectionist approach to subsidies under its countervailing regime. This approach is based on a concept of "benefit" aimed at extending the scope of any countervailing duty action. It argued in its First Submission that the remedy should have nothing to do with the basis why the subsidy was found to be inconsistent by the Report.<sup>1</sup> Australia's argument is that the "export-contingent feature", to use the USA's words, is the only tool to use to measure how the subsidy should be allocated. The USA is arguing about its concept of "benefit", which it pursues from its view of trade effect, while Australia argues that this case is about rules. Even in the alternative, Australia considers that the grant payments are clearly allocable against the sales during 1 April 1997 to 30 June 2000.

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<sup>1</sup> Paragraph 40 of the USA's First Submission says:

"The grants amounted to an export subsidy because they were contingent on export performance. The export-contingent feature of the subsidy, however, is not a useful tool for measuring how the subsidy should be allocated."

3. *Is not Australia itself introducing a "trade effects" and "trade outcome" test (which is one of its criticisms of the US approach to determining the amount of the subsidy to be withdrawn), when Australia argues that export performance targets are the sole determinant of the allocation period that it proposes and of whether and how much money needs to be "withdrawn"? Please explain.*

*Answer 3:*

Australia's approach is a rules test, not a trade effect test. The issue is why the Report found the grant payments to fall under SCM Article 3.1(a). This was because the grant payments were tied to the sales performance targets in 1 April 1997 to 30 June 2000, which in turn effectively created export performance targets in the period 1 April 1997 to 30 June 2000. This was the key finding of the Report. Australia is arguing that the basis for the inconsistency must be the basis for the way in which Australia can bring the measure into conformity.

4. *Australia, although arguing that Howe's interest rate is irrelevant to this dispute, criticizes the US's estimate of that rate, derived from 1997 financial statements of Howe Leather (Australia's second submission at para. 51). What in Australia's view would be the commercial interest rate and loan terms that Howe would have been able to obtain on the market for long-term borrowing during each of the past three years? Please provide a full explanation and supporting documentation.*

*Answer 4:*

The USA had simply taken the amount of interest and costs of other finance paid for ALH for the year 1996-97 and divided it by the borrowings shown under Current Liabilities in the balance sheet at the 30 June 1997.

The reality is that this is not comparing like with like. It compares total interest paid over 12 months with the borrowings on outstanding Current Liabilities on 30 June. No consideration is taken of the fluctuations in borrowings and interest costs under both Current and Non-Current Liabilities during the course of the fiscal year or the significant reduction in commercial borrowed funds during that same year.

The published accounts for ALH for the year 1997-98 and for subsequent years require full details of all loans and the averaged interest rate for those classes of loans for that year. For example, the published figures show that for the year ending 30 June 1997 ALH had an average interest rate for bills of exchange of 7.5 per cent and an overdraft rate of 9.25per cent See Tables 1 and 2 below.

TABLE 1

## 28(b) Interest rate risk

The economic entity's exposure to interest rate risks and the effective interest rates of financial assets and financial liabilities, both recognized and unrecognized at the balance date, are as follows:

Financial instruments	Floating interest rate		Fixed interest rate maturing in:						Non-interest bearing		Total carrying amount as per the balance sheet		Weighted average effective interest rate	
			1 year or less		Over 1 to 5 years		More than 5 years							
	1998	1997	1998	1997	1998	1997	1998	1997	1998	1997	\$'000	\$'000	1998	1997
	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000
<i>(i) Financial assets</i>														
Cash									519	1,408	519	1,408	N/A	N/A
Receivables- trade									21,909	17,463	21,909	17,463	N/A	N/A
Receivables- related parties/entities									305	2,179	305	2,179	N/A	N/A
Receivable on sale of property									1,250	-	1,250	-		
Total financial assets									23,983	21,050	23,983	21,050		
<i>(ii) Financial liabilities</i>														
Bank overdrafts	6,657	4,042									6,657	4,042	8.25%	9.25%

Financial instruments	Floating interest rate		Fixed interest rate maturing in:						Non-interest bearing		Total carrying amount as per the balance sheet		Weighted average effective interest rate			
	1998 \$'000	1997 \$'000	1 year or less		Over 1 to 5 years		More than 5 years		1998 \$'000	1997 \$'000	1998 \$'000	1997 \$'000	1998 \$'000	1997 \$'000		
			1998 \$'000	1997 \$'000	1998 \$'000	1997 \$'000	1998 \$'000	1997 \$'000								
Bills of exchange and promissory notes			28,000	14,000	-	10,000					28,000	24,000	28,000	24,000	6.8%	7.5%
Trade creditors and accounts										13,760	10,765	13,760	10,765	N/A	N/A	
Other loans																
Total financial liabilities	6,657	4,042	28,000	14,000	-	10,000	25,000	25,000	13,760	10,765	25,000	25,000	73,417	63,807	Nil	Nil

TABLE 2

## 28(b) Interest rate risk

The consolidated entity's exposure to interest rate risks and the effective interest rates of financial assets and financial liabilities, both recognized and unrecognized at the balance date, are as follows:

Financial instruments	Floating interest rate		Fixed interest rate maturing in:						Non-interest bearing		Total carrying amount as per the balance sheet		Weighted average effective interest rate	
	1999	1998	1 year or less		Over 1 to 5 years		More than 5 years		1999	1998	1999	1998	1999	1998
	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000
<i>(i) Financial assets</i>														
Cash									67	519	67	519	N/A	N/A
Receivables-trade								27,633	21,909	27,633	21,909		N/A	N/A
Receivables-related parties/entities								-	305	-	305		N/A	N/A
Receivable on sale of property								1,250	1,250	1,250	1,250		N/A	N/A
Other receivables								2,409	13,924	2,409	13,924		N/A	N/A
Total financial assets								31,359	37,907	31,359	37,907			
<i>(ii) Financial liabilities</i>														
Bank overdrafts	322	6,657								322	6,657		10.25	8.25%

Financial instruments	Floating interest rate		Fixed interest rate maturing in:						Non -interest bearing		Total carrying amount as per the balance sheet		Weighted average effective interest rate		
	1999 \$'000	1998 \$'000	1 year or less		Over 1 to 5 years		More than 5 years		1999 \$'000	1998 \$'000	1999 \$'000	1998 \$'000	1999 \$'000	1998 \$'000	
			1999 \$'000	1998 \$'000	1999 \$'000	1998 \$'000	1999 \$'000	1998 \$'000							
Bills of exchange and promissory notes			20,000	28,000	-	-					20,000	28,000	8.25%	6.8%	
Trade creditors and accruals									25,056	13,760	25,056	13,760	N/A	N/A	
Other loans											25,000	25,000	Nil	Nil	
Total financial liabilities	322	6,657	20,000	28,000	-	-		25,000	38,760	25,000	70,378	25,000	73,417		

5. *How does Australia respond to the US argument that the repayment by Howe of part of the grant would not have occurred absent the 1999 loan, and that therefore provision of the loan made the withdrawal of the part of the grant a "sham"? In light of this argument, how in Australia's view are these transactions separate, and not so inextricably linked as to be inseparable in practical terms? That is, why can the "replacement measure" not be seen as part of the original measure, at least for purposes of the 21.5 proceeding? Is there any distinction to be drawn between an original dispute, where certain actions must be judged on their own merits as "separate measures", and an implementation dispute under 21.5 where all steps related to implementation must be examined for compliance with the DSB's recommendations? Please explain.*

*Answer 5:*

Australia is entitled to provide a new WTO consistent subsidy to ALH. The 1999 Loan was to ALH, while the \$8.065m. was repaid by Howe.

Even if the Panel considered that there was no distinction between ALH and Howe, Australia is entitled to reconfigure a prohibited measure. The Report agrees with that at paragraph 9.64 and the USA acknowledged it at Footnote 132 of the Report.

The matter before the Panel is whether Australia has brought itself into conformity with SCM Article 3.1(a). Australia considered that the 1999 Loan was not before the Panel but did not ask for any preliminary rulings on this and has provided the relevant documentation to the Panel. Clearly if the Panel considers that the 1999 Loan is before it, then it will need to assess it. However, Australia argues that the Panel should find that it is in conformity with SCM Article 3.1(a).

The Report considered the grant payments and the 1997 Loan separately even though they were a package of assistance. The Report found that the WTO status of the previous assistance measures was irrelevant to its assessment of the consistency of the grant payments and the 1997 Loan.

Any reconfiguration of an assistance measure that is WTO consistent is in a sense linked to the original measure. However, the assessment of conformity must be on the basis of what the current measures are. The 1999 Loan to ALH is a distinct, separate measure without any conditionality, in particular without any conditionality in respect of automotive leather. Given that the 1997 Loan was found to be consistent, no basis has been put forward by the USA why the 1999 Loan should fall under SCM Article 3.1(a).

An Article 21.5 proceeding is about whether the Member has brought a measure into conformity, in this case with SCM Article 3.1(a). The fact that a measure has been found to be inconsistent with SCM Article 3.1(a) does not reduce the Member's rights to provide WTO consistent subsidies to a company.

Australia considers that an Article 21.5 proceeding is about whether the inconsistent measure has been brought into conformity, and not that "all steps related to implementation must be examined for compliance".

The matters before the Panel are whether in the light of the Report Australia withdrew sufficient money from Howe and, if the Panel considers that the 1999 Loan is before it, whether in the light of the Report the 1999 Loan is WTO consistent. If

the answer to both of those questions is yes, then the Panel should find that Australia has withdrawn the measures as required and so has brought the measure into conformity. Anything else would lead to the paradoxical finding that even though Australia had no measures in place that were inconsistent with the WTO, somehow Australia was nonetheless in breach of the WTO.

Regarding the issue of separate measures, Australia considers that no distinction should be drawn between an original dispute and an implementation dispute under Article 21.5 regarding the assessment of measures on their own merits.

The USA has not sought to provide any argument justifying its extraordinary new concept that a Member's rights are reduced when it is bringing itself into conformity after a dispute and that it should be subject to different rules before an Article 21.5 panel.

6. *Does Australia agree that the logic of the remedies under SCM Agreement is that prohibited subsidies are subject to the most severe remedies, actionable subsidies the next most severe, and non-actionable the least severe? If not, why not and on what legal basis?*

*Answer 6:*

This depends on what is meant by "severe remedies". Australia agrees that SCM Article 9 on non-actionable subsidies would be ineffective, since it relies on a consensus in the SCM Committee for action.

The time periods under SCM Article 4 are shorter than under SCM Article 7, and so to that extent the remedy is more severe.

Moreover, SCM Part II is about rules rather than trade effect which must be proven under SCM Part III (or at least is subject to rebuttal under SCM Article 6.3 in the event that there is a presumption of serious prejudice under SCM Article 6.1.)

How a Member would comply with recommendations under SCM Articles 4.7 and 7.8 would depend on the circumstances of the case.

For the purpose of this Panel, it is not a question of what is most severe. SCM Articles 4 and 7 deal with different situations. SCM Article 4 deals with the rules set out in SCM Article 3, while SCM Article 7 deals with adverse effect. Subsidies falling under SCM Article 3 are also subject to SCM Article 7. Moreover, any reconfiguration of subsidies inconsistent with SCM Article 3 could also be subject to a complaint under SCM Article 7, unless it was non-actionable.

7. *Australia argues at para. 22 of its second submission that "the concept [raised by the United States] of making a subsidy 'irremediable' is a misunderstanding of the purpose of a dispute under 3.1(a), which is a violation case and so is about conformity with a rule". Is Australia thereby saying that where a pure violation exists (i.e., an export-contingent subsidy under SCM 3.1(a)) but there are no explicit performance targets, the measure is already "in conformity" and therefore no remedy is required? Would this not be the same as saying that a measure was simultaneously "a violation" and "in conformity"? Please comment.*

*Answer 7:*

No. Australia was saying that the issue is about bringing a measure into conformity. That is the remedy. The USA is focused on maximizing the amount of money to be withdrawn from Howe and objecting to the provision of a new subsidy to ALH. Its concept of remedy is not about conformity but about the outcome of a dispute in trade terms rather than rules terms.

If a subsidy has been brought into conformity with SCM Article 3, then the remedy of SCM Article 4 has been achieved.

A measure would not be simultaneously "a violation" and "in conformity". An assessment that a measure falls under SCM Article 3.1(a) is not simply about a sum of money but also about the contingency with export performance in the granting of that money. How a measure can be brought into conformity needs to be examined on a case by case basis. For example, in some cases this may be a matter of changing the conditions, which would in a legal sense amount to terminating the programme and replacing it with a consistent one.

Australia has not argued that there is a need for "explicit performance targets". It has argued that the Report found that the grant payments were tied to the explicit sales performance targets which the Report in turn found were effectively export performance targets. Thus, in this case, the grant payments were found by the Report to be tied to "explicit performance targets".

In addition, it is quite possible to have the situation that there was a measure in violation of SCM Article 3 but there no longer is a measure in violation of SCM Article 3. For example, suppose that there was a subsidy programme that was inconsistent with SCM Article 3 and it has been terminated. Then there has been a violation in the past but not in the present. There is no longer any measure, and so there is conformity only in the sense that there is no measure that is not in conformity.

8. *What is Australia's theoretical basis for allocating the subsidy in this case, and if different from that in the countervail context, please explain. If there had been no performance targets in this case, would Australia have argued for subsidy allocation, and if so, over what period and why? If not, why not?*

*Answer 8:*

Australia considers that the Report found that the grant payments were tied to the sales performance targets over 1 April 1997 to 30 June 2000. The critical factor in the finding on inconsistency with SCM Article 3.1(a) was the tie to the interim and aggregate sales performance targets. Accordingly, the Report allocated the grant payments to the sales in the period 1 April 1997 to 30 June 2000. Accordingly, given the weight put on the aggregate sales performance target by the Report, the approach in paragraph 46 of Australia's First Submission is to apportion, or allocate, the grant payments uniformly over the full period of the sales performance targets, i.e. 1 April 1997 to 30 June 2000. The alternative approach in paragraph 47 of Australia's First Submission is to apportion, or allocate, the grant payments over 1 April 1997 to 30 June 2000 on the basis of the interim sales performance targets.

Australia does not consider that the countervailing methodology is relevant here. Nonetheless, given that the grant payments were allocated to sales in this pe-

riod, Australia considers that the same period for allocation should be used for countervailing purposes. If the money had been paid after the event on say a quarterly basis, then presumably not even the USA would argue about the allocation. Australia sees no reason why just because the money was paid in the first half of the period covered by the Grant Contract, albeit in three tranches in three separate fiscal years, that that should affect the period of allocation for countervail purposes.

If there had been no performance targets, then the Report would have cleared both the grant payments and the 1997 Loan, since the surrounding circumstances would have been identical. However, if there had been some other conditions that led to an adverse finding, that would have been a different case with different reasoning. In that situation implementation would have depended on what those other conditions were and the reasoning and findings of the panel.

Nonetheless, since the \$30m. was to fill the period between the excision of automotive leather from the ICS and the entry into force of the new general industry programme, Australia would still have considered that the money should be allocated to sales in that same period, i.e. 1 April 1997 to 30 June 2000. See also the comments under the answer to Question 14(a) about "large" and "one-time".

9. *Could Australia please explain the significance of its argument, in para. 45 of its second submission, that the assistance under the ICS was "recurrent" up to April 1997, and that the tranches of the grant payments were payable thereafter at certain intervals. Is Australia arguing that the grant payments were recurring? How is this relevant to the Panel's task in this dispute?*

*Answer 9:*

This is a supplementary argument about allocation, which has already been touched on in the answer to Question 8. The USA has made an argument about recurrent and non-recurrent subsidies from its own, unilateral countervailing duty practice. Australia, while rejecting the relevance of the USA's approach, has noted that as a matter of fact the grant payments were part of a continuum of industry assistance to the textiles, clothing and footwear industries. Automotive leather was removed from eligibility of the ICS from 1 April 1997 and will not come back under the general industry programme until the entry into force of the new programme from 1 July 2000. The grant payments were to cover the period in between, i.e. 1 April 1997 to 30 June 2000. Thus they are allocable to that period alone, and so should not be treated as being non-allocable and so spread over an average asset life for the firm.

This confirms that, even in the absence of the sales performance targets, the grant payments are allocated over 1 April 1997 to 30 June 2000.

The grant payments were also paid in three tranches over three separate fiscal periods. The fiscal year 1999-2000 (July-June) is the only fiscal period in which there was not a grant payment.

Australia noted that assistance to the automotive leather industry, including the grant payments meets the definition of recurrent in the New Shorter English Ox-

ford Dictionary - 1997 CD, i.e. "occurring frequently and periodically". It also meets the definition used by the USA in its own countervail regulations, i.e. allocable.<sup>2</sup>

If by "recurring", the question means "allocable" the answer is yes. Moreover, the grant payments are part of a continuing system of assistance to the industry, albeit in a different form for automotive leather for 1 April 1997 to 30 June 2000.

The Report recognized this when at paragraph 9.65 it says:

"Howe earned significant benefits from its exports of automotive leather pursuant to those programmes [ICS and EFS]. Automotive leather was removed from eligibility under those programmes, and the government of Australia entered into the loan contract and the grant contract providing financial assistance at least in part to tide Howe over after it had lost eligibility for benefits related to automotive leather under these programmes".

In that context, the expression "tide Howe over" clearly indicates that the Report considered that the money was to cover sales, in replacement for the previous assistance, until the new programme came into force for automotive leather from 1 July 2000. Thus this was a genuine and not a contrived period for apportioning the grant payments.

The relevance to the Panel of this is that: on the one hand it puts to rest the straw men put up the USA regarding contrivances about the period to which export subsidies might be claimed to apply; and on the other it provides a supplementary argument why the grant payments are allocated to sales in the period 1 April 1997 to 30 June 2000. It also provides an argument in the alternative if the panel decided to accept the USA's argument about using the period to which the grant payments should be considered to be allocable for countervailing purposes. In this regard it also shows that that grant payments are not one-time or one-off payments (nor were they out of keeping with other assistance provided). See comments on "large" and "one-time" in the answer to Question 14(a).

*10. Australia argues, in paras. 25 of its second submission, that "to bring the grant payments into conformity, Australia did not have to impose a punitive measure on an individual company, be it Howe or ALH. This matter is about Australia's rights and obligations as a Member"; and in para. 26 that "[t]he impact on Howe or ALH or any other Australian company is irrelevant: they are not Members, Australia is". How does Australia reconcile these arguments with the fact that, under Article 1 of the SCM Agreement, a necessary condition for a subsidy to exist is the conferral of a benefit, which by definition is a benefit to a recipient, and therefore has nothing to do with the Member itself? (See, Appellate Body report in Canada Aircraft (WT/DS70/AB/R) at paras. 153-161 for a discussion of the term "benefit" in SCM Article 1.)*

<sup>2</sup> See paragraph 38 and Footnote 24 of Australia's Second Submission.

*Answer 10:*

The obligation to bring the measure into conformity is that of Australia as a Member of the WTO. The WTO does not directly affect domestic law in Australia. So far as the WTO rules are concerned, the actual impact on the recipient of the subsidy of the withdrawal of the measure under SCM Article 4.7 is irrelevant. However, in some cases to bring a measure into conformity may require action that has a significant impact on the recipient. In this case, the withdrawal of \$8.065m. has, in fact, had a major impact on the net income and equity structure of Howe. In some cases, the impact might be even greater. However, if a method of withdrawing a measure and bringing it into conformity were to be available that had no impact on the recipient, then that would still be an acceptable remedy, and there would be no basis for using the lack of effect as an argument about lack of conformity.

The use of the term "benefit" in SCM Article 1.1(b) is about determining the existence of a subsidy. That is distinct from the issues of whether the subsidy falls under SCM Article 3.1(a) and of how a measure might be withdrawn for the purpose of SCM Article 4.7.

*Question 11*

*11. Related to the preceding question, when Australia is proposing "expensing" subsidy amounts, is it referring to subsidy "benefits" or to something else? Please explain.*

*Answer 11:*

Australia is referring to the way the money has been found to be allocated by the Report in finding that the grant payments were tied to export performance in the period 1 April 1997 to 30 June 2000. The Report tied the grant payments to the sales performance targets, which ran over 1 April 1997 to 30 June 2000. Thus, the grant payments were considered to go to meeting those sales performance targets. On 14 September 1999 the only subsidy outstanding was any money allocated to sales over 15 September 1999 to 30 June 2000. This was the money covered by the withdrawal of the \$8.065m. from Howe.

"Benefits" is an invention of the USA in the context of this Panel assessing whether Australia has implemented the Report's recommendations. The USA acknowledges, at least implicitly, in paragraph 40 of its First Submission that its approach of allocating supposed "benefits" over the life of assets using its own countervailing duty approach has no connexion with the question of contingency on export performance under SCM Article 3.1(a), i.e. the fundamental matter before the original Panel and this Panel. However, this whole case is about contingency upon export performance and the Report's finding. The Report found that the grant payments were tied to the sales performance targets in the period 1 April 1997 to 30 June 2000. Thus, that is the basis for implementation of the Report's recommendations.

*12. The Panel recalls that in a communication dated 1 November, Australia provided a response to, inter alia, a question posed by the United States at para. 54.7 of*

the US's first submission, specifically, a request by the US for "any written calculation of the amount of the \$A13.654 million loan communicated to or by Howe or its related entities to or by the Australian Government", and "an explanation of how the \$A13.65 million was calculated or determined." Australia's response to this question was in part that there was "none", which the Panel understands to mean that there was no "written calculation" communicated between Howe or its related entities and the Australian Government. Australia offered no specific explanation or derivation of the amount of the loan. In footnote 26 of its second submission, the United States refers to a calculation which it has used to derive the \$A13.654 million loan amount. Could Australia please comment on this calculation. Could Australia please explain, and provide calculations demonstrating, how the \$A13.654 million amount was determined/derived.

*Answer 12:*

The USA's calculation is interesting. Of course, virtually any number could be derived by the appropriate choice of interest rate. It does not take any account of other issues such as taxation implications.

The final figure was a negotiated one. A wide range of figures was discussed. It would not be factual to present the Panel with a methodology that purported to be the way in which the figure was derived. The options for the treatment of taxation and interest rates can give rise to virtually any figure. Note that the reason for the \$54,000 was not the result of a precise calculation but the addition of the amount for stamp duty to the negotiated figure.

13. (a) *Does Australia see no difference at all between the term "withdraw the subsidy" within the meaning of Article 4.7 of the SCM Agreement and the term "bring the measure into conformity" within the meaning of Article 19.1 of the DSU? If so, how does Australia reconcile this view with the fact that Article 4.7 of the SCM Agreement is a special or additional dispute settlement provision which, pursuant to Article 1.2 of the DSU "shall prevail" over any different provisions in the DSU? In your answer, please take into consideration the report of the Appellate Body in Brazil - Export Financing Programme for Aircraft, WT/DS46/AB/R, at para. 191, where the Appellate Body stated:*

*"We note that Article 4.7 of the SCM Agreement is listed in Appendix 2 to the DSU as a "special or additional rule or procedure" on dispute settlement. We note also that Article 4.7 contains several elements which are different from the provisions of Articles 19 and 21 of the DSU with respect to recommendations by a panel and implementation of rulings and recommendations of the DSB. For example, Article 19 of the DSU requires a panel to recommend that the Member concerned bring its measure "into conformity" with the covered agreements. In contrast, Article 4.7 of the SCM Agreement requires a panel to recommend that the subsidizing Member withdraw the subsidy. In addition, paragraph 1 of Article 21 of the DSU requires "prompt compliance with recommendations or rulings of the DSB", and paragraph 3 of that Article allows an implementing Member "a*

*reasonable period of time" to implement the recommendations or rulings of the DSB, where it is impracticable to comply immediately. In contrast, Article 4.7 of the SCM Agreement requires a panel to recommend that a subsidy be withdrawn "without delay"."*

*Answer 13(a):*

The Appellate Body did not say in the text cited what it thought "withdraw the subsidy" means. The ruling by the Appellate Body was in respect of the determination of the time period for withdrawal.

Australia has never said that there was no obligation to "withdraw the subsidy". However, Australia considers that the phrases "withdraw the subsidy" and "withdraw the measure" in SCM Article 4.7 must be read in the context of DSU Article 19 to interpret them against the object and purpose of the WTO Agreement. The object and purpose is to have a Member bring an inconsistent measure into conformity. The SCM Agreement was negotiated as a stand-alone agreement and this language reflects the nature of the measure. DSU Article 19 could not have "withdraw the measure" since this would not fit all potential inconsistent measures. For example, a tariff in breach of a binding will remain in the same form by being reduced rather than withdrawn. Normally, withdrawing the subsidy/measure will be achieved by terminating a programme, or equivalently modifying it so that it no longer falls under SCM Article 3.1(a). However, as with most WTO disputes, the approach to bringing a measure into conformity, needs to be considered on a case by case basis. The object and purpose of the WTO would not be served by an interpretation of a provision, which made implementation not merely impracticable but also impossible in many cases. The purpose of disputes under WTO rules is to remove current inconsistencies, not to punish Members for past inconsistencies and provide a basis for retaliation or compensation in perpetuity after the inconsistencies have disappeared.

*(b) Under what circumstances would Australia see repayment of subsidy amounts as indispensable to fulfill the Article 4.7 obligation?*

*Answer 13(b):*

It is difficult to set out a complete set of parameters for this, which would have to be examined on a case by case basis. However, one example might be the following (which in itself could have many variants). Suppose that there is a large custom built item, e.g. a transformer, where the government pays the manufacturer money to allow it to win a tender in an export market, and suppose for simplicity that the date for withdrawal is before the item is exported. Then it is difficult to see how the subsidy could be withdrawn by the due date without withdrawing money.

*14. (a) Assume Member X grants a large, one time, in law export subsidy payment to a company, explicitly conditioned on export sales over a two-year period. Assume further that a dispute settlement proceeding is commenced after the two year period over which the contingency applies has expired. Is it Australia's view that an*

*amendment to the law, eliminating the contingency ex post facto, is all that would be required to "withdraw the subsidy"?*

*Answer 14(a):*

The answer would depend very much on the particular circumstances. For example, if the panel found that the measure was inconsistent with SCM Article 3.1(a) simply and only because the granting of the subsidy was "explicitly conditioned on export sales over a two-year period", then there would be nothing to remove after that two-year period. There would be no need to amend the law "eliminating the contingency *ex post facto*". Indeed there may be no more export sales after the two-year period, or the subsidy might have been for some particular item exported in that two-year period. If there were no more sales tied to the subsidy, then there would be no more export subsidy with or without an amendment. So there would be no subsidy or measure to withdraw.

It is unclear what is meant by a "large" subsidy and why that qualification has been included. "Large" would need to be defined, in particular whether this somehow relates to it being a contrivance. Note that in the matter before the Panel, the grant payments are not "large" when measured against any reasonable criteria. The basis of the sales performance targets was that the level of subsidy from the grant payments should not exceed 5% ad valorem. The after tax level of subsidy was much less. It is clear from the paragraphs 7.170-7.172 of the Report that the \$30m. is considerably less than the rate of assistance under the ICS and EFS, which even the USA would regard in its language as being "recurrent" and allocated to the actual sales.

Similarly, the grant payments were not a "one-time" payment. Apart from the fact that there was assistance before 1 April 1997 and will be after 30 June 2000, the grant payments were paid in three tranches over three fiscal years (July/June) with compliance assessment during that period under the Grant Contract. These were hardly one-time payments in normal parlance.

- (b) *Would your answer to part (a) of this question be different if the dispute settlement proceeding is commenced before the two year period over which the contingency applies has expired, but the Panel's report is adopted after that period has expired? Please explain.*

*Answer 14(b):*

No. For example, under the scenario in the first paragraph of the answer to Question 14(a) above, the measure would still be a matter under SCM Article 4 when the dispute was commenced, but the measure would have gone by the time the panel report was adopted.

15. *Assume a large one-time subsidy granted to a company on the basis of a business plan that it submits to the government. Assume further that a panel finds that this subsidy was granted because the company had demonstrated an "adequate commitment to export", and therefore the panel found the subsidy was tied to anti-*

*pated exports. In Australia's view, would any action need to be taken by the subsidizing government in order to "withdraw" the subsidy after the adoption of the panel's report?*

*Answer 15:*

Again there are the issues of what are meant by "large" and "one-time", as addressed in the answer to Question 14(a).

This is difficult to answer because in Australia's view a panel should not find that a measure fell under SCM Article 3.1(a) solely because of a phrase such as "adequate commitment to export". The panel would have to have a demonstrable tie to actual or anticipated exports. Particularly in smaller economies, a wide range of companies export and may have to export to be viable. This in turn would probably be reflected in a business plan. For a panel to then go on and say that this meant that any subsidy to such a company fell under SCM Article 3.1(a) would not be consistent with Australia's interpretation of this article.

The action required of the government concerned would depend on what other conditions the panel took into account in reaching its decision, including any time frame the panel found for the anticipated exports on which it based its conclusion that the measure fell under SCM Article 3.1(a).

#### **ANSWERS TO QUESTIONS FROM THE PANEL TO BOTH PARTIES**

*1. Both parties have proposed a calculation methodology to determine what they refer to as the "prospective" amount of the subsidy to be repaid. Given that the subsidy itself was entirely paid before the Panel's report was adopted, in what sense can any amount of repayment be considered "prospective"?*

*Answer 1:*

Australia's position is that there is no prospective amount payable, but in order to finalize the dispute, it has withdrawn \$8.065m.

The issue is whether, given the Deed of Release, some part of the \$30m. of grant payments remained tied to exports of automotive leather by Howe between 15 September 1999 and 30 June 2000, and, if so, how much.

*2. On what legal basis do the parties base the argument that the phrase "withdraw the subsidy" has "prospective" effect only. One interpretation of the phrase "withdraw the subsidy", which is not argued by either party, would be that it means "repay in full" or "take back" the financial contribution to the recipient. Please comment on this possible interpretation, with specific reference to the text, context, and object and purpose of Part II of the SCM Agreement.*

*Answer 2:*

As Australia understands the question, this issue is not a matter of dispute between the two parties and Australia wonders therefore whether it is an issue before the Panel.

The term "subsidy" is used in different ways in the text of the SCM Agreement. At times it could be read as being limited to money, but often it is clear from the text, that it includes the conditionality of the granting, e.g. "prohibited subsidy" in SCM Article 4.1 and "nature of the subsidy" in SCM Article 4.2. Moreover, in SCM Article 4.7, "subsidy" is used as being synonymous with "measure". In SCM Part II, it is not the money as such that is prohibited, but the combination of the money and the conditionality. Accordingly, withdraw the subsidy/measure in SCM Article 4.7 means the termination of a programme, including a modification of a programme to remove the reason for the inconsistency. This includes the termination or modification of in law and in fact contingency.

In some situations, this may be able to be done by removing the offending conditions without stopping a flow of money to industry, though the impact on industry's behaviour would usually be modified by the lack of, or different, conditions being imposed. The termination of the conditions is the "withdrawal of the subsidy". Past payments do not have to be repaid, or the flow of money does not have to be stopped. However, it is possible that the conditions may not be able to be terminated in some cases, e.g. see the answer to Question 13(b) to Australia.

Australia considers that through the Deed of Release, it has withdrawn the subsidy and brought the measures into conformity. However, Australia decided to take the precautionary step of withdrawing sufficient money to cover alternative interpretations. This was based on the possibility that while the critical factor was the sales performance targets in the Grant Contract, the Panel might consider that these targets continue to apply for the remainder of 1 April 1997 to 30 June 2000 despite the Deed of Release. In such a case the ongoing programme is the portion of the remaining money tied to the sales performance targets over the residual of the period 1 April 1997 to 30 June 2000.

On the question of "withdraw the subsidy" meaning "repay in full" or "take back" the financial contribution to the recipient, it is clear from the above that Australia does not agree with that interpretation. However, what is clear is that if that interpretation were to apply to the current matter, then it would have to apply to all cases falling under SCM Article 3.1(a) and (b).

This would be at odds with all past practice in the GATT and the WTO about remedy.

Such an interpretation could mean that, where a programme has been in place for a number of years, huge amounts of irretrievable money could be involved. The consequences for the WTO system would be extremely adverse and would result in giving retaliation rights to Members, which could be in perpetuity.

The object and purpose of the WTO dispute settlement provisions are to have Members conform to the WTO Agreement. Where a panel finds that a Member has breached a rule, usually, as in this case, inadvertently because of differing interpretations of the rules, the aim is to have the breach removed. Withdraw the sub-

sidy/measure, is simply the term used in the SCM Agreement regarding the achievement of that objective.

3. *In European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, the Panel noted that "any assessment of the level of nullification or impairment presupposes an evaluation of consistency or inconsistency with WTO rules of the implementation measures taken by the European Communities, i.e. the revised banana regime, in relation to the panel and Appellate Body findings concerning the previous regime." WT/DS27/ARB, 9 April 1999, at para. 4.3. The Panel further noted that both parties accepted that it was the consistency or inconsistency with WTO rules of the new EC bananas regime - and not of the previous regime - that had to be the basis for the assessment of the equivalence between the nullification suffered and the level of the proposed suspension, Ibid. at para. 4.5, and that it would be the WTO-inconsistency of the revised EC regime that would be the root cause of any nullification or impairment suffered by the United States. Ibid. at para 4.8. Is there any relationship, or should there be, between the concept of "equivalence" of the nullification or impairment of benefits to the suspension of concessions under Article 22 of the DSU, and calculation of the relevant amounts, and the calculation of the amount to be withdrawn in accordance with Article 4.7 of the SCM Agreement?*

4. *Further to the preceding question, would your answer change in light of the provisions of Article 4.10 of the SCM Agreement? That is, Article 4.10 of the SCM Agreement provides for "appropriate countermeasures" in the event a recommendation of the DSB is not followed, that is, the subsidy found to be prohibited is not withdrawn. Article 9 provides that "appropriate" countermeasures does not allow countermeasures that are disproportionate in light of the fact that the subsidies in question are prohibited. Does or should this have any relation to or consequences for the calculation of the amount to be withdrawn?*

*Answers 3 and 4:*

Australia is not certain of the relevance of the questions in respect of DSU Article 22 to the matter before this Panel.

The matter before the Panel is about the existence and consistency with the SCM Agreement of the measure or measures taken by Australia to implement the recommendations adopted by the DSB.

Thus the issues are whether any money had to be withdrawn given the Deed of Release and, if so, whether Australia withdrew sufficient money to bring the measures into conformity.

If there is no inconsistency, then there is no nullification or impairment. In that case there cannot be any money to be withdrawn. This emphasizes that the objective is to get the respondent to bring measures into conformity so that there is no inconsistency. Linkages between the new and old measures are irrelevant.

SCM Article 4.10 does not change the answer, rather it reinforces it. Clearly it would be disproportionate to impose countermeasures when there is no inconsis-

tency. Thus when measures have been brought into conformity, there can be no further money to be withdrawn.

5. *Australia has argued, based on the Panel's original decision, that it is entitled to replace a prohibited export subsidy with a WTO-consistent subsidy, and that the 1999 loan at most falls into this category of replacement. Assuming the 1999 loan is not inconsistent with the SCM Agreement, it might nonetheless be argued that once the DSB had adopted a decision that a subsidy was inconsistent, that ruling could not be implemented simply by replacing the inconsistent subsidy with a consistent one. To implement a recommendation to "withdraw the [prohibited] subsidy" by repayment, and then immediately replace it with a WTO-consistent subsidy has no remedial effect, because the harmful trade effects presumed to have been caused by the prohibited subsidy in the first instance will necessarily continue. Would the parties please comment on this proposition.*

*Answer 5:*

If a measure is brought into conformity with SCM Article 3.1(a), then the remedy provision of SCM Article 4 has been effective, i.e. there has been a remedial effect, the measure has been brought into conformity with the rules. It is not a matter of whether this provides a remedial trade effect. There is no basis for assuming that the act of bringing a measure into conformity with SCM Article 3.1(a) will of itself have any particular trade effect. Of course, depending on the circumstances, the complainant may then have a case under SCM Part III regarding adverse effect. However, that would be a separate dispute.

Since Australia has brought the measures into conformity with SCM Article 3.1(a), the issue of a trade remedial effect is irrelevant for this Panel.

In answer to the hypothetical question posed by the Panel, if a Member has brought a measure into conformity, then that is an end to the matter. A Member does not lose WTO rights because it has been in breach in the past. There is no basis for suggesting that such a Member would be in some sense on parole and lose its rights to provide WTO consistent assistance to its industry. If the measure has been brought into conformity, then the rules have worked.

Australia rejects the USA's extraordinary argument that a Member has less rights in introducing new measures as the result of losing a dispute, and that different rules apply to the responding Member under an Article 21.5 panel.

As explained in the answer to Question 2 to Australia, there is a distinction between why there is a rule prohibiting export subsidies and the basis for determining conformity with it. There is no basis for assuming that the remedy must remove "the harmful trade effects presumed to have been caused". The issue is one of conformity with rules, not a case of adverse trade effect, presumed or actual.

In most cases, it would be difficult for a Member to readily reconfigure assistance to be WTO consistent and to have exactly the same trade effect. It would be allowed to if it could. However, this would probably mean that the complainant had taken a case that was technical in nature and that the breach was a technical one. Where assistance contingent on export performance is causing harmful trade effects, the reconfiguration of that assistance away from export contingency would usually

affect the behaviour of the recipient and would certainly remove the presumption of harmful trade effects coming from the inconsistency with SCM Article 3.1(a).

### ANSWERS TO QUESTIONS FROM THE UNITED STATES

1. *Does the grant contract state that the grant is to be "expensed" in achieving the sales targets? If so, where in the contract does it state this?*

*Answer 1:*

The Deed does not use the actual term "expensed". However, the Report found that the Grant Contract tied the \$30m. to the sales performance targets in the Grant Contract, and so allocated the grant payments to the achieving of those sales in the period 1 April 1997 to 30 June 2000.

2. *On October 28, the Panel requested that Australia produce copies of certain documents identified in the U.S. First Submission or to object to their production. Among these was a request for*

1. *Any agreement, whether by formal agreement or by correspondence with Howe or its related entities, under which Howe agreed to repay, or repaid, A\$8.065 million of the A\$30 million provided in 1997 and/or 1998.*

2. *Any correspondence between the Government of Australia and Howe or its related entities that refers to the agreement to repay, or to the repayment of, the A\$8.065 million referred to in request 1. above.*

3. (a) *Any written calculation of the \$A8.065 million communicated to or by Howe or its related entities to or by the Australian Government.*

(b) *An explanation of how the \$8.065 million was calculated.*

*Australia did not object to the production of such documents, and responded with a document submitted as Exhibit AUS-2 (Letter confirming payment). That document references another document, stating: "The amount of the repayment is in accordance with the terms of our request to them [Howe & Company, Pty. Ltd.] for a partial repayment of the grant, we had previously provided to them."*

(a) *Could the Australian Government confirm that the latter referenced document has been submitted to the Panel as an exhibit, and, if so, identify it.*

*Answer 2(a):*

AUS - BCI - 6 contains the request for the \$8.065m. The reference to "the terms of our request " is limited to the first paragraph of AUS - BCI - 6.

*(b) Could the Australian Government confirm that there are no other responsive documents that have not been submitted as exhibits?*

*Answer 2(b):*

Yes.

**ANNEX 2-6**

**AUSTRALIA'S COMMENTS ON NEW FACTUAL INFORMATION  
FROM THE UNITED STATES**

(3 December 1999)

1. Australia would like to comment on the new factual material in the USA's answers to questions from the panel on 1 December 1999. This is in respect to the status of the Informal Group of Experts (IGE).
2. In its answer to Question 4 addressed to the USA it says:  
in the first paragraph  
"The determination ... by recognized experts"  
and in the fourth paragraph  
"Further, the Informal Group of Experts was created by the Committee on Subsidies and Countervailing Measures to clarify the calculation of subsidies. The experts were chosen by the Committee based on their substantive experience in subsidy calculation methodology. Their status and expertise in subsidy calculations should therefore be carefully considered by the Panel."
3. The IGE was set up by the Committee to try to develop the understanding referred to in SCM Footnote 62 to SCM Annex IV related solely to calculation issues under SCM Article 6.1(a). See G/SCM/5 and G/SCM/M/2, paragraphs 70-74, in particular 72.
4. Participants were not chosen by the Committee. The USA may be confusing the IGE with the Permanent Group of Experts.
5. There was no substantive qualification for participation in the IGE. There is no expertise on the issue of calculation in respect of SCM Article 6.1(a), let alone SCM Article 3.
6. Some participants from some Members, in particular the USA, reflected their countervail experience and this was in turn reflected in the IGE report as part of compromises over effectively irreconcilable concepts.
7. Australia's understanding is that of the list of persons who participated from time to time, at most two attended all the meetings of the IGE.
8. Members did not adopt the IGE's report and only noted it. There is no consensus amongst Members on the IGE's report and it does not constitute the understanding referred to in SCM Footnote 62, which has yet to be developed. Australia understood that the USA does not support the adoption of the IGE's report. Indeed the USA disagrees with the IGE's report even on the issue of allocation of subsidy benefits over time - see for example, G/SCM/M/16, paragraph 70.

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**ANNEX 3-1****ORAL STATEMENT OF THE EUROPEAN COMMUNITY**

(23 November 1999)

**Introduction**

1. The European Communities makes this third party submission to you today because of its systemic interest in the correct interpretation of the Subsidies Agreement and the DSU.

**Violation of Article 10.3 DSU**

2. The EC wishes to express its profound disappointment with the refusal of the Panel communicated by fax of 11 November 1999 to allow the EC to receive the second written submissions of the parties in this case.

3. As the EC pointed out in its letter to the Panel of 8 November 1999, Article 10.3 DSU provides that:

"Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel."

4. Since in this case there is only one meeting of the Panel and the Panel is considering at that meeting both written submissions of each party, the EC should, in accordance with Article 10.3 DSU, have received all the submissions of the parties.

5. Not only is this clearly required by Article 10.3 DSU, it is also necessary for the EC to be able to make known its views on the issues that the Panel is actually considering at this meeting, rather than having to express views on the incomplete positions of the parties that have been developed and may even have changed in the further submissions that the Panel has before it at this meeting.

6. The EC considers that it is transparently wrong for the Panel to endeavour to justify this position, as it does in its fax message of 11 November, by arguing that "had the Panel decided to hold two meetings with the parties, as is the normal situation envisioned in Appendix 3 of the DSU, third parties would only have received written submissions made prior to the first meeting but not rebuttals made subsequently."

7. There is no requirement in the DSU for a panel to hold two meeting. This is only required by the Working Procedures contained in Appendix 3, which the Panel is entitled to modify, as has been done in this case, notably by deciding to only hold a single meeting. The requirement to allow the EC as third party to know the arguments of the parties that are before the Panel when it meets to consider this case at that single meeting is however laid down in Article 10.3 of the DSU, which the Panel was not entitled to modify. By denying the EC its right, the Panel has violated the DSU.

8. Faced with this position of the Panel, the EC also asked the parties to provide it with copies of their second written submissions on the basis of both Article 10.3 and, for good measure, Article 18.2 DSU. Australia responded positively, and the EC thanks Australia for its cooperation and respect for the rules, but the US has refused,

a matter that the EC profoundly regrets, since it has contributed to preventing the EC from commenting on the substance of the issues before the Panel in this case.

### **Business confidential information**

9. The EC also feels that it must recall its position on the special procedures for the protection of "Business Confidential Information."

10. The EC recognizes that certain information used in panel proceedings may be of such a nature that particular care is called for to protect it. The EC cannot accept however that protective procedures are adopted which it is impossible for the EC to follow. As the EC explained in its letter to the Panel of 8 November, EC officials are not allowed to enter into personal commitments to third country governments concerning the conduct of dispute settlement proceedings. Such obligations may only be undertaken by the EC, which is bound vis-à-vis other WTO Members by Article 18.2 DSU to ensure that confidential information is protected. In the case of the EC, the effectiveness of this obligation is ensured by the fact that EC officials are all bound by the EC Treaty and their terms of employment not to disclose confidential information, including business confidential information.

### **The agreement not to appeal**

11. The EC notes that the parties to this proceeding have agreed not to appeal the Panel Report. The EC does not believe that it is possible to exclude a right of appeal in panel proceedings under Article 21.5 DSU.

12. The EC believes that the fact that the parties have agreed not to appeal, and have apparently taken the view that other rules of the DSU (such as those relating to third parties) may be dispensed with or varied, means that this proceeding is in fact an arbitration under Article 25 DSU.

13. The EC believes that these circumstances, and the absence of the discipline of a potential appeal in these proceedings, should be taken into account by any future panel which is considering whether the reasoning of the report arising out of these proceedings is of any guidance in resolving similar questions with which it may be confronted.

### **The scope of the proceeding**

14. This is a proceeding under Article 21.5 DSU. This provision allows a panel to adjudicate on two kinds of disagreements:

- those relating to the *existence* of measures taken to comply with the recommendations and rulings; and
- those relating to the *consistency* with a covered agreement of measures taken to comply with the recommendations and rulings.

15. The terms of reference of the Panel are set out in WT/DS126/8 of 4 October 1999 and seem to indicate that the disagreement in this case relates to the *consistency* with a covered agreement (that is, the Subsidies Agreement) of measures taken to comply with the recommendations of the Panel. In particular, the terms of reference do not clearly indicate whether there is a dispute before the Panel as to the *existence* of measures taken to comply with the recommendations.

16. The EC notes however that the parties have spent much time discussing whether certain action by Australia does in fact comply with the *recommendation* of the Panel. However, this is, for the EC, a question of the *existence* of measures taken to comply with the *recommendations*.

17. The EC understood document WT/DS126/8 of 4 October 1999 as limiting the mandate of the Panel to the question of whether the measures taken are in any way inconsistent with the Subsidies Agreement and not to include the consistency of those measures with the recommendations of the Panel.

### **Substance**

18. The EC is unable to say much about the substantive issues that arise in these proceedings.

19. One of the reasons for this is arises out of the peculiar factual background to this case. That is that it involves an *ad hoc* subsidy and *de facto* export contingency. This means that the present case is particularly fact intensive - and it is particularly difficult for the EC to comment when it has not been shown the evidence.

20. One thing that is clear is that the burden of proof under a "compliance panel," under Article 21.5, whether the obligation for implementation arises under Article 19.3 DSU or 4.7 Subsidies Agreement, is on the party contesting the existence of implementation measures or their consistency with a covered agreement.

### **The panel's questions**

21. The EC has received questions from the Panel yesterday but has not had time to consider how to respond before finalizing this statement.

22. The EC will endeavour to provide answers in writing as requested. In this regard, it would be of great assistance to the EC to have the written submissions of the parties and their statements to the Panel. Even if the Panel and any of the parties should still consider that the EC is not entitled to receive the second written submissions, they may still consider it useful to allow the EC to have them voluntarily - and thus put into practice the principle of transparency in dispute settlement about which there is so much talk these days. The same applies to the oral statements.

**Conclusion**

23. The EC regrets that its submission is limited to procedural questions and that it has not been possible, for the time being, for it to assist the Panel on the substance of the difficult and fundamental issues concerning the interpretation of the Subsidies Agreement which arise in this case.

24. The EC nonetheless wishes the Panel well in its deliberations and thanks you for your attention.

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**ANNEX 3-2****EUROPEAN COMMUNITY'S ANSWERS TO WRITTEN QUESTIONS OF  
THE PANEL**

(1 December 1999)

*Questions N° 1 and 2*

1. Each party has identified an amount of money that it refers to as the "prospective" amount of the subsidy to be repaid. Given that the subsidy itself was entirely paid before the Panel's report was adopted, in your view can any amount of repayment be considered "prospective"? Please explain.

2. The parties both argue that the phrase "withdraw the subsidy" has "prospective" effect only. One interpretation of the phrase "withdraw the subsidy", which is not argued by either party, would be that it means "repay in full" or "take back" the financial contribution to the recipient. Please comment on this possible interpretation, with specific reference to the text, context, and object and purpose of Part II of the SCM Agreement.

*Answers 1 and 2*

1. The EC considers the above questions to be linked and will answer them together. It will first set out its view that the obligation to withdraw a subsidy cannot be retroactive and must only be for the future. It will then briefly consider the question of how the prospective portion may be calculated.

The withdrawal can only be prospective

*1.1 The withdrawal can only be prospective*

2. The EC agrees with the parties to this dispute that the remedy under Article 4 *SCM Agreement*, like all other remedies under the WTO, can only be prospective in nature and cannot seek to compensate for a violation to the extent that its effects are situated in the past. Retroactive effect of WTO remedies is not acceptable to the Members.

3. The intent of the Members to exclude retroactive effect of WTO remedies can be discerned from an interpretation of the WTO provisions in accordance with the customary rules of interpretation of public international law, as required by Article 3.2 DSU.

4. The customary rules of interpretation of public international law are set out in Articles 31 and 32 Vienna Convention on the Law of Treaties (VCLT). In particular, Article 31.1 provides that a treaty must be interpreted "in good faith accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the

light of its object and purpose.<sup>1</sup> Article 31.3(c) provides that "there shall be taken into account together with the context .... any relevant rules of international law applicable in the relations between the parties."

5. The EC is of the view that, since the WTO Agreement is part of international law, international law principles must generally be applied. It notes that the Appellate Body has made frequent reference to general international law, for example in the *Hormone*<sup>2</sup> and *Shrimp*<sup>3</sup> cases.

6. The relevant elements of context and legal principles which the EC submits should guide the Panel are as follows:

- One purpose of the dispute settlement is to provide "security and predictability to the multilateral trading system" (Article 3.2 DSU).
- The WTO Agreement, like international law in general, lays down rights and obligations for the States and International Organizations which are its Members. It does not create rights and obligations for private parties.
- It is a general principle of law that legitimate expectations should be protected.

7. Since past trade effects can only be remedied in a market economy by interfering with the acquired rights of private parties, the EC considers that there can be no obligation on Members to remedy violations with retroactive effect. Indeed, any such obligation would be entirely ineffective since the resulting interference with private rights could give rise to claims within the internal legal systems of the Members to restore the *status quo ante*.

8. The EC considers that the principle of non-retroactivity of WTO remedies results clearly from the provisions of Article 19.1 DSU which imposes an obligation to "bring the measure into conformity with" the covered agreement and is confirmed by the circumstance that Article 21 DSU allows Members a reasonable period of time in which to implement panel reports. Even in the area of prohibited subsidies, Article 4.7 also allows a panel to take account of the impracticability of immediate implementation and to provide a period of time in which the subsidy is to be withdrawn. If immediate implementation is recognized as not being practicable, it goes without saying that *retroactive* implementation is not possible.

9. This principle has also been confirmed in the report of the Article 21.5 panel in *European Communities - Bananas - Recourse by Ecuador*<sup>4</sup> where the panel held that:

"In framing this issue for consideration, we do not imply that the European Communities is under an obligation to remedy past discrimination. Article 3.7 of the DSU provides that "... the first objective of the dispute settlement is usually to secure the withdrawal of the

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<sup>1</sup> Article 31.1 Vienna Convention on the Law of Treaties, 1969.

<sup>2</sup> WT/DS26/AB/R and WT/DS48/AB/R of 16 January 1998 (paras 120 to 125).

<sup>3</sup> WT/DS58/AB/R of 12 October 1998 (para 130).

<sup>4</sup> Report by the Panel on *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador*, WT/DS27/RW/ECU, 12 April 1999, DSR 1999:II, 803, at paragraph 6.105.

measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." This principle requires compliance *ex nunc* as of the expiry of the reasonable period of time for compliance with the recommendations and rulings adopted by the DSB. If we were to rule that the licence allocation to service suppliers of third-country origin were to be "corrected" for the years 1994 to 1996, we would create a retroactive effect of remedies *ex tunc*. However, in our view, what the EC is required to ensure is to terminate discriminatory patterns of licence allocation with *prospective* effect as of the beginning of the year 1999."

10. In the same way, the Article 22.6 Report referred to by the Panel in its Question 3 considered, as the Panel has noted in that question, that the level of nullification and impairment had to be assessed as it existed at the end of the reasonable period of time (which may, for a number of reasons, be different from that which existed before). This supports the view that the obligation to implement only relates to the future, not the past.

11. Consequently, the EC considers that the obligation to "withdraw" the prohibited export subsidy in Article 4.7 SCM Agreement can only be to withdraw the portion of it that corresponds to the future and not that which corresponds to effects which have occurred in the past. The EC will consider below the question of how the future portion may be calculated.

12. The EC realizes that this position means that the SCM Agreement may be considered not to provide a "remedy" against past subsidies (i.e. those which have been expensed prior to the deadline for implementation).<sup>5</sup> However this is a common feature of all the Multilateral Trade Agreements and an unavoidable consequence of the present rules which must be accepted. The WTO Agreement only provides a right to have violations remedied for the future.

13. The absence of a remedy for past and consummated violations has always been a well-known feature of the GATT/WTO system. First, it is inherent in the principle that DSB rulings do not have retroactive effect. Second, it is established and accepted that it can lead in some cases to there being no remedy at all for the complaining party. In the Panel Report under the Agreement on Government Procurement on *Norway - Procurement of Toll Collection Equipment for the City of Trondheim* there was such a situation and the panel discussion of GATT practice is still pertinent.

"... the Panel observed that, under the GATT, it was customary for panels to make findings regarding conformity with the General Agreement and to recommend that any measures found inconsistent with the General Agreement be terminated or brought into conformity from the time that the recommendation was adopted. The provision of compensation had been resorted to only if the immediate withdrawal of the measure was impracticable and as a temporary measure pending

<sup>5</sup> The term "expensed" is used as in the Report of the Informal Group of Experts G/SCM/W/415/Rev.2.

the withdrawal of the measures which were inconsistent with the General Agreement... Questions relating to compensation or withdrawal of benefits had been dealt with in a stage of the dispute settlement procedure subsequent to the adoption of panel reports."

"The Panel also believed that, in cases concerning a particular past action, a panel finding of non-compliance would be of significance for the successful party: where the interpretation of the Agreement was in dispute, panel findings, once adopted by the Committee, would constitute guidance for future implementation of the Agreement by Parties.

"In the light of the above, the Panel did not consider that it would be appropriate for it to recommend that Norway negotiate a mutually satisfactory solution with the United States that took into account the lost opportunities of United States companies in the procurement or that, in the event that such a negotiation did not yield a mutually satisfactory result, the Committee be prepared to authorize the United States to withdraw benefits under the Agreement from Norway with respect to opportunities to bid of equal value to the Trondheim contract.<sup>6</sup>

14. It is significant that this experience with the 1979 Government Procurement Agreement led the Parties to the WTO Government Procurement Agreement to negotiate special provisions on domestic challenge procedures (Article XX) so as to provide a remedy where the WTO system could not. No such mechanism has yet been negotiated in the field of subsidies.

15. The EC does not consider that it is possible to find support for retroactive remedies against prohibited subsidies by relying on the presence of the word "withdraw" in Article 4.7.

16. The word "withdraw" is also found in Article 3.7 and Article 26.1(b) DSU where it is used to mean the same as "bring into conformity" in Article 19.1 DSU. It does not therefore imply any retroactive effect but merely an obligation to withdraw the future effects.

### *1.2 The calculation of the prospective portion*

17. Certain subsidies provide a benefit which is fully expensed in the period in which it is granted (e.g. a bounty paid on the export of each shipment). Others provide a benefit which extends over a longer period of time (e.g. a loan at a concessionary interest rate or a large one-off grant). In the latter case, the benefit cannot be allocated only to the period when the subsidy is granted, but should be allocated over the period of time that the benefit is conferred.

18. The period of time over which the benefit is conferred is a question of fact in each case.

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<sup>6</sup> GPR/DS.2/R, adopted on 13 May 1992, paras. 4.21, 4.24 and 4.26.

19. In the present case, Australia has argued that the grant was made in order to compensate Howe for being "excised" from the current Import Credit Scheme (ICS) from 1 April 1997 to its due termination date of 30 June 2000 (after which it will be replaced by the new general textiles, clothing and footwear programme coming into force on 1 July 2000 which will include automotive leather.<sup>7</sup>

20. The EC is not in a position to take a view on this issue of fact. If the Panel finds it to be correct that Australia granted this subsidy as a temporary replacement for the ICS and that Howe would have considered the payment as relating to this period and treated it and accounted for it accordingly, it may be that the subsidy may be properly allocated over this period. If this were so, one would expect the amount of the grant to correspond to the amount of the ICS assistance which it was replacing.

21. The EC disagrees with Australia that the duration of the *de facto* export contingency is necessarily relevant to the question of the allocation period (although it may be relevant supporting evidence). The period over which an export subsidy benefits a company may be different from the period over which export performance is measured or the company has export performance obligations. The question of whether removal of export contingency is sufficient to remove the violation is also a different question from the question of what is the future benefit resulting from the financial contribution and what action is necessary to remove it.

22. In addition, without taking a position on the facts of this particular case, the EC considers that the average useful life of assets (AUL) may also, in certain circumstances, be a valid methodology for allocating non-recurring subsidies over time.

#### *Questions N° 3 and 4*

3. *In European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, the Panel noted that "any assessment of the level of nullification or impairment presupposes an evaluation of consistency or inconsistency with WTO rules of the implementation measures taken by the European Communities, i.e. the revised banana regime, in relation to the panel and Appellate Body findings concerning the previous regime", WT/DS27/ARB, 9 April 1999, at para. 4.3. The Panel further noted that both parties accepted that it was the consistency or inconsistency with WTO rules of the new EC bananas regime - and not of the previous regime - that had to be the basis for the assessment of the equivalence between the nullification suffered and the level of the proposed suspension, Ibid. At para. 4.5. and that it would be the WTO-inconsistency of the revised EC regime that would be the root cause of any nullification or impairment suffered by the United States. Ibid. At para 4.8. Is there any relationship, or should there be, between the concept of "equivalence" of the nullification or impairment of benefits to the suspension of concessions under Article 22 of the DSU, and calculation of the relevant amounts, and the calculation of the amount to be withdrawn in accordance with Article 4.7 of the SCM Agreement?*

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<sup>7</sup> See second written submission of Australia at e.g. paragraph 6.

4. Further to the preceding question, would your answer change in light of the provisions of Article 4.10 of the SCM Agreement? That is, Article 4.10 of the SCM Agreement provides for "appropriate countermeasures" in the event a recommendation of the DSB is not followed, that is, the subsidy found to be prohibited is not withdrawn. Article 9 provides that the term "appropriate" countermeasures does not allow countermeasures that are disproportionate in light of the fact that the subsidies in question are prohibited. Does or should this have any relation to or consequences for the calculation of the amount to be withdrawn?

*Answers to 3 and 4*

23. The EC does not consider that the Recourse to Arbitration by the European Communities under Article 22.6 of the DSU referred to in the question can properly be referred to as a "Panel" as is done in the question. It was, as its title indicates, an arbitration, even if the arbitrators were evidently confused about their role and powers. It was, in particular, never adopted by the DSB. However much the same conclusions can be drawn from the Panel Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by Ecuador*, referred to above.

23. The EC does not believe that there is, nor should there be, any relationship between the level of suspension of concessions under Article 22 DSU or the level of appropriate countermeasures under Article 4.10 SCM Agreement to be imposed in case of non-implementation of the report and the proportion of the subsidy to be withdrawn under Article 4.7 SCM Agreement.

24. It is true that the level of suspension of concessions under Article 22 DSU must be equivalent to the nullification and impairment. However the obligation to implement a panel report is an obligation to "bring the measure into conformity with [the covered agreement with which an inconsistency has been found]" (see Article 19.1 DSU) or to "withdraw the subsidy" found to be prohibited (see Article 4.7 SCM Agreement), **not** to remove any nullification and impairment. The nullification and impairment is assumed to be removed to whatever extent is required by the bringing into conformity of the measure or the withdrawal of the subsidy.

25. Bringing a measure into conformity or the withdrawing the subsidy can be more or less burdensome for the Member found to have violated the WTO Agreement than suffering temporary withdrawal of concessions or countermeasures. It may be more or less beneficial for the complaining Member. There is no necessary relationship between the obligation to bring a measure into conformity or withdraw a subsidy and the temporary measures of constraint provided for in case of non-compliance such that the calculation of the latter can help to assess the nature or extent of the former.

*Questions N° 5 and 6*

5. Australia has argued, based on the Panel's original decision, that it is entitled to replace a prohibited export subsidy with a WTO-consistent subsidy, and that the 1999 loan at most falls into this category of replacement. Assuming the 1999 loan is not inconsistent with the SCM Agreement, it might nonetheless be argued that once the DSB has adopted a decision that a subsidy was inconsistent, that ruling

could not be implemented simply by replacing the inconsistent subsidy with a consistent one. That is, to implement a recommendation to "withdraw the [prohibited] subsidy" by repayment, and then immediately replace it with a WTO-consistent subsidy would have no remedial effect, because the harmful trade effects presumed to have been caused by the prohibited subsidy in the first instance would necessarily continue. Please comment on this proposition.

6. The United States agreed, in the original dispute, that a Member is permitted to replace a prohibited subsidy with a non-prohibited subsidy, and that the consistency of the new subsidy would need to be judged on its own merits. In your view, can this argument be reconciled with the US's new argument that the 1999 loan should be judged on the basis of the Panel's original finding concerning the grant?

#### *Answers to 5 and 6*

26. It appears that the Panel's question assumes a retroactive remedy when it relates the "remedial effect" to "the harmful trade effects presumed to have been caused". The EC has already explained that there can be no retroactive effect of WTO remedies.

27. The EC also considers that the Panel's question begs a number of questions. First it is necessary to ask what is required by implementation or withdrawal? If a "remedial effect" is required, what remedial effect? It is only then that the Panel's question arises and the answer to it will not only depend on the answers to the earlier questions but also on the specific factual circumstances of which the EC has not been informed.

#### *Question N° 7*

7. Do you agree that the logic of the remedies under SCM Agreement is that prohibited subsidies are subject to the most severe remedies, actionable subsidies the next most severe, and non-actionable the least severe? If not, why not and on what legal basis?

#### *Answer to 7*

28. The EC considers that the SCM Agreement contains the remedies considered appropriate for the particular characteristics of each type of subsidy. It does not consider it correct to describe them in terms of "severity." They are simply different.

## ANNEX 4

### PROCEDURES GOVERNING BUSINESS CONFIDENTIAL INFORMATION

#### I. BASIC PRINCIPLE

1. The treatment of information as Business Confidential under these procedures imposes a substantial burden on the Panel and the parties. The indiscriminate designation of information as Business Confidential could limit the ability of a party to fully include in its litigation team individuals who have particular knowledge and expertise relevant to presenting the party's case, impede the work of the Panel and complicate the Panel's task in formulating credible public findings and conclusions. Accordingly, while the Panel recognizes that parties have a legitimate interest in protecting sensitive Business Confidential information, *the Panel expects that parties will exercise the utmost restraint in designating information as Business Confidential.*

#### II. DEFINITIONS

approved person" means

- (i) a Panel member;
- (ii) a representative; or
- (iii) a Secretariat employee

who has filed with the Chairman of the Panel a Declaration of Non-disclosure.

"capital city office" means the buildings and grounds of the United States Trade Representative in Washington, DC, United States of America, and [ appropriate designation for Australia ].

"conclusion of the Panel" means when,

- (i) pursuant to DSU Article 16.4, the Panel report is adopted;
- (ii) pursuant to DSU Article 16.4, the Panel report is not adopted; or
- (iii) when the authority for establishment of the Panel lapses pursuant to DSU Article 12.12.<sup>1</sup>

"Business Confidential information" means any information that has been designated as Business Confidential by the party submitting the information, and that is not otherwise available in the public domain.

"Declaration of Non-disclosure" means a copy of the declaration set out in Annex I, signed and dated by the person making the declaration.

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<sup>1</sup> By exchange of letters dated 1 October 1999, the parties to this dispute have mutually agreed that they both will unconditionally accept the Panel report and that there will be no appeal of that report.

"designated as Business Confidential" means:

- (i) for printed information, clearly marked with the notation 'BUSINESS CONFIDENTIAL INFORMATION' and with the name of the party that first submitted the information;
- (ii) for binary-encoded information, clearly marked with the notation 'BUSINESS CONFIDENTIAL INFORMATION' on a label on the storage medium, and clearly annotated in the binary-encoded files with the notation 'BUSINESS CONFIDENTIAL INFORMATION' and with the name of the party that first submitted the information; and
- (iii) for uttered information, declared by the speaker to be "Business Confidential information" prior to the disclosure, and identified with the name of the party that first submitted the information.

"dispute" means the United States' recourse under Article 21.5 of the DSU in respect of measures taken by Australia to comply with the recommendations and rulings of the WTO Dispute Settlement Body in the dispute WT/DS126, entitled "Australia -Subsidies Provided to Producers and Exporters of Automotive Leather".

"DSU" means the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.

"Geneva mission" means the buildings and grounds of the United States and Australia at 1-3 Avenue de la Paix, 1211 Geneva and 2 Chemin des Fins, 1209 Geneva, respectively.

"information" means:

- (i) printed information;
- (ii) binary-encoded information stored in computer diskettes, computer disc drives, CD roms, or other electronic media; or
- (iii) uttered information,

including without limiting the generality of the foregoing, offers, agreements, reports, forecasts, compilations, studies, plans, presentations, charts, graphs, pictures and drawings.

"Panel" means the WTO panel considering this dispute pursuant to DSU Article 21.5 and the 14 October 1999 decision of the WTO Dispute Settlement Body.

"Panel meeting" means a substantive meeting of the Panel with the parties as described in the working procedures adopted by the Panel.

"Panel member" means a person serving on the Panel.

"Panel process" means the process of the Panel as described in relevant provisions of the DSU.

"party" means the United States or Australia.

"premises of the WTO" means buildings and grounds of the WTO at Centre William Rappard, Rue de Lausanne 154, Geneva, Switzerland.

"representative" means:

- (i) an employee of a party;
- (ii) an agent for all purposes of a party; or
- (iii) a legal counsel or other advisor of a party,

who has been authorized by a party to act on behalf of such party in the course of the dispute and whose authorization has been notified to the Chairman of the Panel and to the other party, but in no circumstances shall this definition include an employee, officer or agent of a private company engaged in automotive leather manufacturing.

"Secretariat" means the Secretariat of the World Trade Organization.

"Secretariat employee" means a person employed or appointed by the Secretariat who has been authorized by the Secretariat to work on this dispute and whose authorization has been notified to the Chairman of the Panel, including without limiting the generality of the foregoing, interpreters and transcribers present at the Panel hearings.

"secure location" means a locked storage receptacle on the premises of the WTO chosen by the Secretariat to provide secure storage for Business Confidential information.

"submit" means:

- (i) the filing by a party of printed or binary-encoded information at the Secretariat during the dispute;
- (ii) the filing by a party of printed or binary-encoded information with the Panel during a Panel hearing; or
- (iii) the uttering of information during a Panel hearing.

"third party" means the European Communities or Mexico.

### **III. SCOPE**

1. These procedures apply to all Business Confidential information submitted during the Panel process, but do not apply to a party with respect to Business Confidential information first submitted by that party, including in derivative form.

### **IV. OBLIGATION ON PARTIES**

1. Each party shall ensure that its representatives comply with these procedures.

### **V. SUBMISSION BY A PARTY**

1. When submitting information, a party may designate all or any part or parts of that information as Business Confidential information. Business Confidential information shall be submitted in three copies: one copy of the Business Confidential information shall be provided to the Secretariat, and two copies shall be provided to the other party. Of the two copies for the other party, one copy is for that party's Geneva mission, and one copy is for that party's capital city office.

2. Where a submission by a party incorporates Business Confidential information first submitted by the other party, that submission shall identify all such information as set forth in Article II of these procedures concerning "designated as Business Confidential".

3. If, taking into the account the Basic Principle stated in Article I, the Panel considers that a party has designated as Business Confidential information which is not reasonably entitled to such treatment, the Panel may decline to consider such information. In such a case, the party submitting the information may, at its discretion:

- (i) withdraw the information, in which case the Panel and the other party shall promptly return the information to the party submitting it; or
- (ii) withdraw the designation of the information as Business Confidential.

4. When submitting printed or binary-encoded Business Confidential information, the party shall also provide:

- (i) a non-Business Confidential edited version, redacted in such a manner as to convey a reasonable understanding of the substance of the information;
- (ii) a non-Business Confidential summary in sufficient detail to convey a reasonable understanding of the substance of the information; or
- (iii) in exceptional circumstances, a written statement:
  - (a) that such a non-Business Confidential edited version or non-Business Confidential summary cannot be made, or
  - (b) that such a non-Business Confidential edited version or non-Business Confidential summary would disclose facts that the party has a proper reason for wishing to keep business confidential.

5. If the Panel considers that a non-Business Confidential edited version or summary does not fulfill the requirements of paragraph 4(i) or (ii), or that such exceptional circumstances as justify a statement pursuant to paragraph 4(iii) do not exist, the Panel may decline to consider the Business Confidential information in question. In such a case, the party submitting the information may, at its discretion,

- (i) withdraw the information, in which case the Secretariat and the other party shall promptly return the information to the party submitting it; or
- ii) comply with the provisions of paragraph 4 to the satisfaction of the Panel.

6. When uttering Business Confidential information at a Panel meeting, the speaker shall also provide a brief non-Business Confidential oral statement in sufficient detail to convey a reasonable understanding of the substance of the information that will be uttered.

## **VI. STORAGE**

1. The Secretariat shall store all Business Confidential information submitted in the secure location when not in use by an approved person.

2. Each party shall store all Business Confidential information submitted to it by the other party in a locked storage receptacle, to which only approved persons have access, at the premises of its Geneva mission or its capital city office, when not in use by an approved person.

3. An approved person shall take all necessary precautions to safeguard Business Confidential information when in use and when being stored.

## **VII. OBLIGATION NOT TO DISCLOSE**

1. Where Business Confidential information has been submitted pursuant to these procedures, no approved person who views or hears such information shall disclose that information, or allow it to be disclosed, to any person other than another approved person, except in accordance with these procedures.

2. The Panel shall not disclose Business Confidential information in its report, but may make statements of conclusion drawn from such information.

## **VIII. DISCLOSURE**

1. Business Confidential information submitted by a party and stored at the Geneva mission or capital city office of the other party may only be viewed by an approved person acting as representative of that other party.

2. An approved person viewing or hearing Business Confidential information may take written summary notes of that information for the sole purpose of the Panel process.

3. Business Confidential information shall not be copied, distributed, or removed from the premises of the WTO, or from the premises of a party's Geneva mission, or from the premises of a party's capital city office, except as specifically provided in these Procedures.

4. Notwithstanding paragraph 3. above, a party may bring with it to a Panel meeting, for the sole purpose of that meeting, one of the two copies of Business Confidential information that it has received from the other party under these procedures, and shall immediately thereafter return any and all such information to the locked storage receptacle at its premises.

5. Notwithstanding paragraph 3. above, a Panel member may make and remove from the premises of the WTO a copy of Business Confidential information. Any copies of Business Confidential information removed from the premises of the WTO by a Panel member shall be used exclusively by that Panel member for the purpose of working on the dispute, and shall be returned to the Secretariat upon conclusion of the Panel. Copies of Business Confidential information removed from the premises of the WTO by a Panel member shall be stored in a locked receptacle.

## **IX. DISCLOSURE AT A PANEL MEETING**

1. A party that wishes to submit Business Confidential information during a Panel meeting shall so inform the Panel prior to doing so. The Panel shall exclude persons who are not approved persons from the meeting for the duration of the submission of such information.

## **X. DISCLOSURE TO THIRD PARTIES**

1. Article 10.3 of the DSU provides that "[t]hird parties shall receive the submissions of the parties to the dispute to the first meeting of the Panel." Accordingly, disclosure of Business Confidential information contained in the first written submissions of the parties shall be granted to representatives of third parties who have filed a Declaration of Non-disclosure with the Chairman of the Panel. The provisions of these procedures shall apply *mutatis mutandis* to any such disclosure.

## **XI. TAPES AND TRANSCRIPTS**

1. Any tapes and transcripts of Panel meetings at which Business Confidential information is uttered shall be treated as Business Confidential information under these procedures.

## **XII. RETURN OR DESTRUCTION**

1. After the conclusion of the Panel the Secretariat and the parties shall:
  - (i) return any printed or binary-encoded Business Confidential information (including any notes taken pursuant to paragraph VIII:2 above) in their possession to the party that first submitted such Business Confidential information, or certify in writing that any such Business Confidential information has been destroyed, unless the party that first submitted such Business Confidential information objects;
  - (ii) destroy all tapes and transcripts of the Panel hearings that contain Business Confidential information and certify in writing that this has been done, unless the parties mutually agree otherwise.

**ANNEX I**

**DECLARATION OF NON-DISCLOSURE**

In accordance with the Procedures Governing Business Confidential information contained in Procedures on Business Confidential Information of the Panel on *Australia-Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126) - Recourse to Article 21.5 of the DSU Requested by the United States* (the Procedures), I agree to the following:

Words defined in the procedures have the same meaning in this Declaration of Non-Disclosure as in the Procedures.

1. I acknowledge having received a copy of the Procedures, a copy of which is attached.
2. I acknowledge having read and understood the Procedures.
3. I agree to be bound by, and to adhere to, the provisions of the Procedures and, accordingly, without limitation, to treat confidentially all Business Confidential information that I may view or hear from time to time in accordance with the Procedures.

Executed on this \_\_\_\_\_ day of \_\_\_\_\_, 1999.

BY: \_\_\_\_\_

Name:

Title:

(Advisors only) Affiliation or employment:

\_\_\_\_\_

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

**Report of the Panel**

WT/DS132/R\*

*Adopted by the Dispute Settlement Body  
on 24 February 2000*

**TABLE OF CONTENTS**

	Page
I. INTRODUCTION .....	1347
II. FACTUAL ASPECTS .....	1348
III. PREVIOUS WTO DISPUTE SETTLEMENT PROCEEDINGS BETWEEN THE PARTIES WITH RESPECT TO THE SAME OR RELATED MATTERS.....	1349
IV. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS .....	1349
V. ARGUMENTS OF THE PARTIES .....	1352
A. Standard of Review .....	1352
B. Objections.....	1353
1. Alleged Failure to Properly Identify Claims under Article 6.2 of the DSU and Alleged Failure to Properly Present a "Matter" under Article 17.4 of the AD Agreement.....	1354
2. Alleged Insufficiency of the Request for Establishment under Article 17.5 of the AD Agreement.....	1364
3. Allegedly Improper References to the Mexican Submission in on-Going NAFTA Proceedings.....	1375
4. Allegedly Improper References to Consultations .....	1383
5. References to the Provisional Measure .....	1388
C. Alleged Violations in the Initiation of the Investigation.....	1391
1. Alleged Insufficiency of the Information in the Application (Claims under Article 5.2).....	1391
2. Alleged Insufficiency of the Examination of the Information and Alleged Insufficiency of the Evidence to Justify Initiation (Claims under Article 5.3) .....	1424
3. Alleged Insufficiency of the Notice of Initiation (Claims under Article 12) .....	1451
D. Alleged Violations Regarding the Final Determination.....	1471

	Page
1. Consideration of Article 3.4 Factors in a Threat of Injury Determination.....	1471
2. Determination of Injury on the Basis of a Specific Market Sector Rather than on the Basis of the Whole Industry.....	1489
3. Insufficient Determination of the Likelihood of Substantially Increased Imports .....	1503
E. Period of Application of Provisional Measures.....	1515
F. Retroactive Levying of Anti-Dumping Duties for the Period of Application of the Provisional Measure.....	1525
G. Insufficiencies in the Final Notice Relating to the Duration of the Provisional Measure and the Retroactivity of Definitive Anti-Dumping Duties .....	1531
H. Arguments Presented by Third Parties.....	1540
VI. INTERIM REVIEW .....	1542
VII. FINDINGS.....	1554
A. Introduction .....	1554
B. Preliminary Issues.....	1555
1. Alleged Failure to Assert Claims under Article 6.2 of the DSU and Article 17.4 of the AD Agreement.....	1555
2. Alleged Insufficiency of the Request for Establishment under Article 17.5(i) of the AD Agreement.....	1559
3. Allegedly Improper References to SECOFI's Submission in on-going NAFTA Proceedings.....	1561
4. Allegedly Improper References to Consultations .....	1563
5. Claims Addressing the Provisional Measure .....	1566
C. Alleged Violations Regarding the Initiation of the Investigation .....	1569
1. Overview.....	1569
2. Alleged Insufficiency of the Information in the Application .....	1571
3. Alleged Insufficiency of the Notice of Initiation .....	1578
4. Alleged Insufficiency of the Examination of the Accuracy and Adequacy of the Evidence and Alleged Insufficiency of the Evidence to Justify Initiation .....	1582
D. Alleged Violations Regarding the Final Determination.....	1590
1. Consideration of Impact of Dumped Imports in a Threat of Injury Determination .....	1590
2. Determination of Threat of Injury on the Basis of Consideration of the Industry as a Whole.....	1600
3. Determination of Likelihood of Substantially Increased Importation .....	1606

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\* WT/DS132/R/Corr.1.

	Page
E. Period of Application of the Provisional Measure.....	1611
F. Retroactive Levying of Anti-Dumping Duties for the Period of Application of the Provisional Measure.....	1613
1. Failure to Make a Determination under Article 10.2 of the AD Agreement.....	1613
2. Claim under Article 12.....	1616
VIII. CONCLUSION AND RECOMMENDATION .....	1617

## I. INTRODUCTION

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

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

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

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

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

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

Chairman: H.E. Mr. Christer Manhusen

Members: Mr. Gerald Salembier  
Mr. Edwin Vermulst

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

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

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

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. ACTUAL 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.

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

2.3 SECOFI held disclosure meetings with parties regarding the preliminary determination in June and July 1997. Parties filed further submissions and replied to requests for supplementary information from July to October 1997. SECOFI verified

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

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

the information submitted by the Sugar Chamber and several importing and exporting companies during September-November 1997. SECOFI held a public hearing concerning the investigation on 3 December 1997.

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

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

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<sup>6</sup> *Resolución final de la investigación antidumping sobre las importaciones de jarabe de maíz de alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.99 y 1702.60.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia.* (Final determination in the antidumping investigation of high fructose corn syrup imports, merchandise classified in tariff classifications 1702.40.99 and 1702.60.01 of the Schedule to the General Import Duties Act, originating in the United States of America, irrespective of the country of export.) US-1, MEXICO-6 (*Final Determination*).

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

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

- (a) That the references made by the United States to the procedure being carried out under Chapter 19 of the NAFTA were improperly presented and, therefore, should be rejected.
- (b) That the references made by the United States to the consultations were improperly presented and contravened the United States obligation of confidentiality, and therefore should also be rejected.
- (c) That the United States allegations under Article 7.4 of the AD Agreement are inappropriate, since the provisional measure lies outside the Panel's mandate.
- (d) That Mexico's interpretations in applying the AD Agreement are admissible, for which reason the final anti-dumping measure is consistent with that Agreement.
- (e) That the initiation of the anti-dumping investigation into HFCS imports from the United States was consistent with the relevant provisions of Articles 1, 2, 3, 4 and, in particular, Article 5 of the AD Agreement.
- (f) That the public notice of initiation of investigation fulfilled the requirements of Articles 12.1 and 12.1.1 of the AD Agreement.
- (g) That the final determination of threat of material injury to the domestic sugar industry was made in conformity with the relevant provisions of Article 3 of the AD Agreement.
- (h) That the imposition of definitive anti-dumping duties on HFCS imports from the United States was consistent with Articles VI:1 and VI:6 of the GATT 1994.
- (i) That the extension of the duration of the provisional measure was in conformity with the provisions of Article 7.4 of the AD Agreement.

- 
- (j) That the imposition of anti-dumping duties retroactively to the period of application of the provisional measure is in conformity with Article 10.2 of the AD Agreement.
  - (k) That, in imposing the final anti-dumping measure, Mexico fulfilled the requirements of Articles 12.2 and 12.2.2 of the AD Agreement.
  - (l) That the final anti-dumping measure imposed by Mexico was adopted in the circumstances provided for in Article VI of the GATT 1994 and in accordance with Articles 1 and 18, *inter alia*, of the AD Agreement.

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

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

- (a) SECOFI neither initiated nor conducted the anti-dumping investigation on imports of HFCS from the United States in accordance with the provisions of the AD Agreement, and therefore its application of a final anti-dumping measure violates Article 1 of the AD Agreement.
- (b) SECOFI's initiation of an anti-dumping investigation on imports of HFCS from the United States was inconsistent with Articles 5.1, 5.2, 5.3, 5.4 and 5.8 of the AD Agreement.
- (c) SECOFI's initiation notice was inconsistent with Articles 12.1 and 12.1.1 of the AD Agreement.
- (d) SECOFI's final determination of threat of injury was inconsistent with Articles 3.1, 3.2, 3.4 and 3.7 of the AD Agreement.
- (e) SECOFI's imposition of anti-dumping duties on imports of HFCS from the United States was inconsistent with Articles VI:1 and VI:6 of the GATT 1994.
- (f) SECOFI's application of provisional anti-dumping measures on imports of HFCS from the United States in excess of six months was inconsistent with Article 7.4 of the AD Agreement.
- (g) SECOFI's imposition of final anti-dumping duties during the period of application of provisional measures was inconsistent with Articles 10.2 and 10.4 of the AD Agreement.
- (h) SECOFI's final determination was inconsistent with Articles 12.2 and 12.2.2 of the AD Agreement.

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

## V. ARGUMENTS OF THE PARTIES

### A. *Standard of Review*

- 5.1 Mexico recalls that Article 17.6 of the AD Agreement reads as follows:  
"17.6 In examining the matter referred to in paragraph 5:
- (i) in its assessment of the facts of the matter, the Panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned;
  - (ii) the Panel shall interpret the relevant provisions of the Agreement in accordance with the customary rules of interpretation of public international law. Where the Panel finds that a relevant provision of the Agreement admits of *more than one permissible interpretation*, the Panel shall find the authorities' measure *to be in conformity with the Agreement if it rests upon one of those permissible interpretations*" (emphasis added by Mexico).
- 5.2 According to Mexico, the first submission of the United States contains various assertions to the effect that Mexico did not fulfill its obligations under the AD Agreement because SECOFI did not proceed in the manner in which the United States interprets that the provisions of the AD Agreement should be applied. In addition, the submission asks the Panel to agree with the United States' interpretations as if these were the sole permissible interpretations.<sup>7</sup>
- 5.3 Mexico argues that, in taking this position, the United States forgets that it was the United States itself which proposed, during the corresponding round of negotiations, the inclusion of Article 17.6 of the AD Agreement with the intention of recognizing the discretionary power of the investigating authority when the AD Agreement itself does not establish a single interpretation with respect to one or more provisions of the Agreement. Consequently, any interpretation of the AD Agreement which is permissible is equally valid; there is no "quality standard" that determines varying "degrees of permissibility". What is important is that an interpretation is or is not permissible, regardless of whether some interpretations may appear, in the eyes of the United States or the Panel itself, more permissible than others. If the interpretation is permissible, the measure should be declared compatible with the AD Agreement. If the interpretation is not permissible, an explanation must be given of why that is so.
- 5.4 Mexico further argues that, consequently, when the United States considers that Mexico should have proceeded in a manner that is not clearly established in the AD Agreement, it is up to the United States to show that the manner in which SECOFI proceeded does not correspond to a permissible interpretation of the AD Agreement.

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<sup>7</sup> See United States first submission, WT/DS60/R, DSR 1998:IX, 3797, para. 156.

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

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

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

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

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

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

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

### B. *Objections*

5.11 Mexico submits for consideration by the Panel various objections that it states need be raised at the outset as they are critical for this dispute settlement proceeding. According to Mexico, the request for the establishment of the Panel submitted by the United States does not meet the requirements laid down in the AD Agreement and

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

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

the DSU, which are indispensable for determining the Panel's authority and terms of reference, and therefore the request must be rejected.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.21 Mexico maintains that, to understand the problem better, it is important to analyze the United States' omission in the light not only of Article 6.2 of the DSU, but also of Article 7 of the DSU and 17.4 of the AD Agreement. Mexico holds that, in the absence of "claims", which is one of the essential elements of the "matter"

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

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

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

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

referred to by Article 7 of the DSU and of the "matter" referred to in Article 17.4 of the AD Agreement, it is not possible to speak of a "matter" since it has not been properly constituted.<sup>15</sup>

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

"A distinction is therefore to be drawn between the "measure" and the "claims". Taken together, the "measure" and the "claims" made concerning that measure constitute the "matter referred to the DSB", which forms the basis for a panel's terms of reference".<sup>17</sup>

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

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

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

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

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

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

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

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

<sup>16</sup> *Guatemala-Cement Panel Report, supra*, footnote 8; WT/DS60/AB/R, *Guatemala-Cement AB Report*, adopted 25 November 1998, DSR 1998:IX, 3763, para. 72.

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

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

<sup>19</sup> See *Guatemala-Cement AB Report, supra*, footnote 16, para. 76.

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

- (c) in terms of Article 7 of the DSU, the United States did not submit a matter correctly, and therefore the Panel cannot fulfil its terms of reference.

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

5.26 The United States disputes Mexico's argument that the request for establishment fails to comply with Article 6.2 of the DSU. According to the United States, Mexico argues that the request for establishment was inconsistent with Article 6.2 of the DSU, because the United States did not explicitly link up the legal claims it identified in the chapeau of paragraph 4 of its *Request for Establishment* - Articles 1-7, 10 and 12 of the AD Agreement and Article VI of the GATT 1994 - with the amplified description of those claims as contained in paragraphs 4(a)-(k) of the request. Mexico asserts that all the United States' claims in this Panel should be dismissed because Mexico has allegedly been unable to defend itself adequately in the absence of such a link. In the view of the United States, Mexico's arguments are baseless and should be rejected.

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

"[I]t was sufficient for the Complaining Parties to list the provisions of the specific agreement alleged to have been violated without setting

<sup>21</sup> *European Communities - Regime for the Importation, Sale and Distribution of Bananas (European Communities-Bananas)*, WT/DS27/R/MEX (*European Communities-Bananas Panel Report*), adopted 25 September 1997, DSR 1997:II, 8093, para. 7.23.

<sup>22</sup> *European Communities-Bananas*, WT/DS27/AB/R (*European Communities-Bananas AB Report*), adopted 25 September 1997, DSR 1997:II, 591, para. 18: "The EC submits further that the request for establishment of a panel must at the very least make a link between the specific measure concerned and the Article of the specific agreement allegedly infringed thereby in order to give both the defending party and prospective third parties a clear idea of what the alleged infringements are".

out detailed arguments as to which specific aspects of the measure at issue related to which specific provisions of those agreements".<sup>23</sup>

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

5.29 The United States asserts that, in the present dispute, the United States did not stop at the *minimum* requirements for a request for establishment. Unlike the *European Communities-Bananas* request, the United States' request for establishment in this dispute made a linkage between the specific measures and the various claims. It described in detail the problems which the United States has experienced with the Mexican measure. Thus, paragraphs 4(a)-(k) of the *Request for Establishment* described those problems using the language in the cited provisions of the AD Agreement. Mexico's assertion that it is hopelessly confused about which AD provisions apply to these paragraphs simply lacks credibility. For example, paragraph 4(e) identified SECOFI's final threat of injury determination and explains that SECOFI failed to examine the likely impact of dumped imports on the domestic industry. Only one provision of the AD Agreement relates to a determination of injury and threat - AD Agreement Article 3. Similarly, other sub-paragraphs relate to other provisions of the AD Agreement. They thus provide summary arguments of the United States' legal claims, and significantly assist in describing the problems faced by the United States.

5.30 The United States observes that a request for establishment fails to be "sufficient to state the problem clearly" in accordance with DSU Article 6.2 if the request is so flawed that the defending party's rights of defense are being prejudiced.<sup>26</sup> However, Mexico cannot demonstrate that any imperfections in the United States request for establishment rise to that level. The Appellate Body analyzed an alleged Article 6.2 violation in *European Communities-Computer Equipment*.<sup>27</sup> The European Communities argued in that dispute that the United States' request had not properly identified the products and the measures at issue, and that it was denied its due proc-

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<sup>23</sup> See *European Communities-Bananas*, *supra*, footnote 22, WT/DS27/AB/R, para. 141.

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

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

<sup>26</sup> Article 6.2 of the DSU; see *European Communities - Customs Classification of Certain Computer Equipment (European Communities-Computer Equipment)*, WT/DS62/AB/R, WT/DSW67/AB/R, WT/DS68/AB/R, (*European Communities-Computer Equipment AB Report*), adopted 22 June 1998, DSR 1998:V, 1851, paras. 68-70.

<sup>27</sup> *Ibid.*

ess right to be aware of the case against it.<sup>28</sup> In affirming the panel's finding that the United States' request met the requirements of Article 6.2, the Appellate Body examined whether the European Communities' rights of defense had been prejudiced by the alleged inadequate description of the products and measures. It found that the European Communities had clearly been actually aware of the problems described by the United States, as well as the measures and products at issue in the United States' request as early as the consultation stage of the proceedings.<sup>29</sup> The Appellate Body concluded by stating:

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

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

5.32 The United States disputes Mexico's argument that its request for establishment does not contain claims, but rather assertions or reasoning. This formalistic argument reflects a fundamental misapprehension of the requirements of Article 6.2 as articulated by the Appellate Body. In *Guatemala-Cement*, the Appellate Body reiterated the distinction it had made in *European Communities-Bananas* between specific measures on the one hand, and the legal basis for the complaint or "claim" on the other.<sup>32</sup> It found that in an anti-dumping context, there were only three types of "specific measures" as set forth in Article 17.4. As noted above, the United States' request identifies SECOFI's final anti-dumping order as the "specific measure". The Appellate Body in *Guatemala-Cement*, *India-Patents*, and in *European Communi-*

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

<sup>29</sup> *European Communities-Computer Equipment*, *supra*, footnote 26, WT/DS62/AB/R, para. 70.

<sup>30</sup> *Ibid.*

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

<sup>32</sup> *Guatemala-Cement AB Report*, *supra*, footnote 16, para. 72.

*ties-Bananas* stated that "claims" or the "legal basis for the complaint" may be set out in a very summary fashion - the minimum requirement being to simply list provisions of a WTO agreement.<sup>33</sup> In the U.S. request, these claims are set forth in the chapeau of paragraph 4 of the request, and include AD Agreement Articles 1-7, 10 and 12 and Article VI of the GATT 1994. These claims are further described and amplified in paragraphs 4(a)-(k) of the request. Whether this amplification constitutes "argument" or additional information describing the problems which the United States has with the Mexican measure is not legally significant in light of the facts and the Appellate Body precedent cited *supra*.

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

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

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

5.36 The United States replied that it agreed with the panel in *EC-Yarn* that a particular sub-paragraph of the AD Agreement could potentially involve more than one claim. However, the *EC-Yarn* decision must be read in light of the Appellate Body decision in *European Communities-Bananas*. There the Appellate Body held that the "claims, but not the arguments must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint".<sup>35</sup> In *European Communities-Bananas*, the request for establishment specified a number of general GATT 1994 and WTO Agreement Articles but did not specify which (or how) particular sub-Articles had been violated. For example, Article III of the GATT 1994 was alleged to have been violated without specifying which particular language or sub-paragraph of Article III was being violated.<sup>36</sup> The Appellate Body's decision affirmed the panel's finding that

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<sup>33</sup> See *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products (India-Patents)*, WT/DS50/AB/R (*India-Patents AB Report*), adopted 16 January 1998, DSR 1998:I, 9, paras. 88-91.

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

<sup>35</sup> *European Communities-Bananas AB Report*, *supra*, footnote 22, para. 143.

<sup>36</sup> See *European Communities-Bananas Panel Report*, para. 7.23.3

the request for establishment was consistent with Article 6.2, *i.e.*, the listing of entire GATT Articles without further specification of the particular sub-Articles at issue. This fact demonstrates the summary nature of the legal claims that can be made under Article 6.2. Indeed, the observation of the panel in *EC-Yarn* would be just as correct regarding Article III - there could be more than one legal claim encompassed within that provision.

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

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

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

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

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

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

5.41 Mexico states that the obligation to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" is not a mere formality. Mexico stresses that Article 6.2 pursues two objectives: first, it enables the Member whose measure has been challenged to defend itself properly, apart from serving to safeguard the rights of other WTO Members who could be affected by the outcome of the proceeding; second, the request for establishment of a panel constitutes the basis for a panel's terms of reference. Mexico asserts that it drew the United States' attention to this concern even before the Panel was set up.<sup>39</sup>

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

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

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

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

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

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

5.46 Mexico observes that it is important for the Panel to see that, unlike Article 6.2 of the DSU, Article 4.4 of the same Agreement (on requirements for requests for

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

<sup>40</sup> See *EC-Cotton Yarn and Guatemala-Cement*, DSR 1998:IX, 3767 and 3797.

<sup>41</sup> See *Guatemala-Cement*, *supra*, footnote 40.

consultations) only requires that there is an indication of "the measures at issue and an indication of the legal basis for the complaint". However, at no time is it required that the latter be sufficient to present the problem clearly. Article 6.2 of the DSU contains a specific obligation for requests for the establishment of a panel. Failure to fulfil this obligation directly impacts Article 7 of the DSU and 17.4 of the AD Agreement and cannot be cured subsequently.<sup>42</sup> Neither the United States first submission nor its subsequent actions in the present proceeding would remedy this error.

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

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

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

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

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

<sup>42</sup> In its report on *European Communities-Bananas*, *supra*, footnote 22, para. 143, the Appellate Body stated that "if a *claim* is not specified in the request for the establishment of a Panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first submission to the Panel or in any other submission or statement made later in the Panel proceeding".

<sup>43</sup> *Japan - Taxes on Alcoholic Beverages (Japan -Alcoholic Beverages)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (*Japan -Alcoholic Beverages AB Report*), adopted 1 November 1996, DSR 1996:I, 97.

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

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

<sup>46</sup> See *European Communities-Computer Equipment AB Report*, *supra*, footnote 26, para. 70.

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

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

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

## 2. *Alleged Insufficiency of the Request for Establishment under Article 17.5 of the AD Agreement*

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

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

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

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

<sup>48</sup> *India-Patents AB Report, supra*, footnote 33, para. 85.

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

- (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member" (emphasis added by Mexico).

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

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

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

- (a) Articles 6.2 of the DSU and 17.4 and 17.5 of the AD Agreement are complementary and must be applied together;<sup>51</sup> and
- (b) the requirements of Articles 17.4 and 17.5 (which serves as the basis for a panel to examine a matter) of the AD Agreement and 6.2 of the DSU must be met in the request for the establishment of a panel.

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

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

<sup>50</sup> See *Guatemala-Cement AB Report, supra*, footnote 16, para.75.

<sup>51</sup> In its report, the Appellate Body which examined the *Guatemala-Cement* dispute said the following: "In our view, there is no inconsistency between Article 17.5 of the Anti-Dumping Agreement and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together". Furthermore, in paragraph 64 it stated that "the Anti-Dumping Agreement is a covered Agreement listed in Appendix 1 of the DSU; the rules and procedures of the DSU, therefore, apply to disputes brought pursuant to the consultation and dispute settlement provisions contained in Article 17 of that Agreement".

<sup>52</sup> This would be consistent with WTO practice. It should be recalled that in *Guatemala-Cement* the Appellate Body reversed the Panel's conclusion that the matter referred to in Mexico's request for establishment were properly before it, on the grounds that Mexico had not identified a specific measure at issue. See *Guatemala-Cement AB Report, supra*, footnote 16, para. 90(c).

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

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

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

- (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives or the Agreement is being impeded; and
- (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".<sup>54</sup>

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

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

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

<sup>54</sup> *Guatemala-Cement AB Report*, *supra*, footnote 16, para. 74.

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

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

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

5.64 According to the United States, the presumption of nullification and impairment from a violation of GATT provisions has been described by one panel as operating "in practice as an irrefutable presumption".<sup>57</sup> Indeed, to date, no GATT or WTO panel has ever found a party to have successfully rebutted the presumption that a measure infringing obligations causes nullification and impairment. This is because the absence of any adverse impact cannot operate so as to negate a finding of nullification or impairment as long as an agreement is found to be violated.<sup>58</sup> Thus, complaining parties alleging violations of the GATT 1994 and WTO agreements are, by definition, alleging that their benefits under those agreements are being nullified and impaired. The same is true in the case of Article 17.5(i). The interpretation of Article 17.5 offered by Mexico - that it can only be invoked if the exact words in the text of Article 17.5 are invoked - would be inconsistent not only with the text of Article 17.5, but also with these long-standing interpretations of Article XXIII:1 of GATT 1994 which now apply to all of the agreements annexed to the WTO Agreement, by virtue of Article 3.8 of the DSU.

5.65 The United States contends that this interpretation is supported by other aspects of the text of Article 17.5(i). Article 17.5 requires that complaining parties provide a written statement "indicating how a benefit has been directly or indirectly nullified or impaired, or the achieving of the objectives of the Agreement is being impeded". An "indication" is distinct from a detailed discussion and suggests that examination of the entire context of the request is important, not simply whether certain magic words have been invoked. The phrase "indicating how" suggests that something more than simply using the words "nullify and impair" (as Mexico appears to claim) is required, because it asks for a description of "how" benefits have been nullified or impaired. In this regard, the text of Article 17.5 is similar to the language in

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

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

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

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

Article 6.2 of the DSU requiring Members to submit "a brief summary of the legal basis sufficient to present the problem clearly". In finding "no inconsistency" between Article 17.5 of the AD Agreement and the provisions of Article 6.2 of the DSU the Appellate Body in *Guatemala-Cement* recognized this. Thus, any request (concerning a claim under the AD Agreement) which satisfies DSU Article 6.2 also satisfies AD Agreement Article 17.5. The Appellate Body has confirmed this point in characterizing Article 17.5 as requiring none of the detail that Article 6.2 requires.

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

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

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

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

5.69 The United States recalls that a Member is in compliance with both Article 6.2 of the DSU and Article 17.5 of the AD Agreement when its request for establishment provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" (DSU, Article 6.2), and "a written statement... indicating how a benefit..., directly or indirectly, has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded" (AD Agreement, Article 17.5). The request for establishment met these requirements. Therefore, this matter is properly before the Panel under Article 17.4 of the AD Agreement and Article 7 of the DSU.

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<sup>59</sup> *European Communities-Bananas AB Report, supra*, footnote 22, para. 132.

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

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

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

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

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

6.2 of the DSU and Article 17.5 of the AD Agreement, reading these provisions consistently with one another in this case.<sup>61</sup>

5.74 Mexico reiterates that Article 17.5 of the AD Agreement is an essential requirement for a panel to be able to examine a matter. In fact, the language of Article 17.5 itself makes it clear that it is the "basis" for examining the matter. Mexico also reiterates that in *Guatemala-Cement* the Appellate Body made it clear that Article 17.5 of the AD Agreement and Article 6.2 of the DSU are "complementary and should be applied together". It stated that the request for the establishment of a panel must comply with the requirements of Article 6.2 of the DSU as well as Articles 17.4 and 17.5 of the AD Agreement.

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

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

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

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

- (a) the actual text of Article 17.5, by establishing the obligation to "indicate how a benefit ... has been nullified or impaired ...", implies that this obligation must be fulfilled explicitly; otherwise, this obligation

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

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

would have no sense or purpose, since all requests for establishment would automatically fulfil the requirement regardless of whether or not they indicated "how a benefit ... has been nullified or impaired ...".

- (b) moreover, Article 17.5 of the AD Agreement is listed in Appendix 2 of the DSU, which contains the "special or additional rules and procedures contained in the covered agreements". In other words, the special or additional rules or procedures which, in case of conflict or discrepancy, prevail over the general provisions of the DSU (which include Articles 3.1 and 3.8 of the DSU). To assert, as the United States does, that an obligation of this kind may be fulfilled implicitly reverses the relationship that should exist between a special or additional obligation and those of the DSU, making the latter prevail over the special or additional ones, which is contrary to Article 1.2 of the DSU.

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

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

fulfilment of obligations" or even "violation". Article XXIII of the GATT 1994 itself distinguishes three circumstances in which there may be nullification or impairment or impeding of the achievement of the objectives of the Agreement, namely:

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

the existence of any other situation".

5.80 Hence, in Mexico's view, even if the United States had mentioned Article 3.8 of the DSU, this would not have been enough to satisfy the requirements of Article 17.5 of the AD Agreement. To assert otherwise would be tantamount to saying that Article 17.5 is not applicable to the non-violation disputes referred to in Article 26 of the DSU. According to Mexico, the United States agrees that its alleged compliance with Article 17.5(i) requirements was not explicit. Although in its reply a question by Mexico,<sup>63</sup> the United States maintains the contrary (there is nothing "implicit" in alleging violations), in its reply to a question by the Panel,<sup>64</sup> the United States openly recognizes that, in its opinion, there is no need to comply with the requirements of Article 17.5(i) of the AD Agreement explicitly ("The United States does not believe that an explicit statement that benefits are being nullified or impaired under the AD Agreement is required under Article 17.5(i). To satisfy Article 17.5(i), it is sufficient for the panel request to state a claim of violation of the AD Agreement by an anti-dumping measure").

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

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

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

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

to argue that using the language of the AD Agreement is sufficient in some cases, and argue that, in other cases, where the United States happens to have committed an error, it is not necessary.

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

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

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

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

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

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

Agreement as well as Article 6.2 of the DSU<sup>66</sup> (emphasis added by Mexico).

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

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

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<sup>66</sup> *Guatemala-Cement AB Report, supra*, footnote 16, para. 75.

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

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

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

3. *Allegedly Improper References to the Mexican Submission in on-Going NAFTA Proceedings*

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

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

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

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

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

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

5.93 Mexico argues that, in addition, this Panel's terms of reference are confined to the AD Agreement and GATT 1994. Any assertions made by the United States concerning the NAFTA proceedings should be rejected. The GATT and WTO have constantly adhered to the practice of not examining other agreements except in cases where they are *per se* violations of the WTO Agreements.<sup>71</sup> Mexico submits that taking a contrary position would entail serious dangers for the relationship between this Organization and other bilateral, plurilateral and multilateral agreements. Is a panel empowered to analyze a Member's statements made in the context of the Maastricht Agreement? Can a WTO Panel examine a Member's statements made in an APEC form and base its conclusions on such statements? Can draft decisions of the LAIA be the subject of a panel? The reply to all these questions can only be "no". Otherwise, the Panel would be going beyond its terms of reference and applying the WTO agreements outside their scope. Accordingly, Mexico requests the Panel to disregard the statements made by the United States that are based on the proceeding that is taking place under the NAFTA.

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

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

5.96 The United States observes that there are two types of NAFTA-related evidence that the United States has proffered to the Panel in this proceeding. First, citations to SECOFI's administrative record, as compiled by SECOFI and filed with the NAFTA panel, represent references to the contemporaneous record as developed by the investigating authority, during the anti-dumping investigation.<sup>73</sup> This is evidence

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

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

<sup>73</sup> Article 1911 of NAFTA defines the administrative record as: all documentary or other information presented to or obtained by the competent investigating authority in the course of the administrative proceedings, including any governmental memoranda pertaining to the case, and including any record of *ex parte* meetings as may be required to be kept; a copy of the final determination of the competent investigating authority, including reasons for the determination; all transcripts or

which the Panel may evaluate, pursuant to Article 17.6(i), in determining whether SECOFI's establishment of the facts, during the anti-dumping investigation, was proper, and its evaluation of them unbiased and objective. Indeed, Mexico has likewise cited to documents from SECOFI's administrative record in support of its arguments. Both the United States and Mexico have attached these documents to their respective submissions.<sup>74</sup> As a result, they are part of the Panel's record in this WTO dispute. Mexico does not appear to be disputing the United States' inclusion of these documents.<sup>75</sup>

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

5.98 The United States contends that Mexico cites to no WTO rules or jurisprudence in support of its position that all NAFTA evidence should be excluded from WTO proceedings and asserted that there is none. In fact, the Appellate Body in interpreting the fact-finding role of panels has made it clear that "[i]t is particularly within the province and the authority of a panel... to ascertain the acceptability and

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records of conferences or hearings before the competent investigating authority; and all notices published in the official journal of the importing Party in connection with the administrative proceeding.

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

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

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

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

relevancy of information and advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received".<sup>78</sup> According to the United States, the issue, therefore, is not whether the Panel may accept the NAFTA evidence proffered by the United States. There is no question that it has the power to do so pursuant to Article 13 of the DSU as set forth in the *United States-Shrimp* decision. Rather, the issue is whether the Panel should do so, and how much weight the Panel should give to this evidence.<sup>79</sup> In the view of the United States, the Panel should accept and give considerable weight to both types of evidence proffered by the United States.

5.99 The United States contends that there is no question that the documents concerning the first type of NAFTA-related evidence are authentic. Indeed, Mexico itself has attached to its first submission many documents from SECOFI's administrative record. These documents were generated during the course of SECOFI's anti-dumping proceeding and were subsequently compiled and filed with the NAFTA Chapter 19 panel, in accordance with its rules. In fact, neither the United States nor Mexico is objecting to inclusion of these documents in this proceeding, with the exceptions noted in notes 30 and 31 of the U.S. second submission. The Panel may therefore give full weight to the evidence in these documents, when conducting its review pursuant to Article 17.6(i).

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

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

- (a) The United States disputes Mexico's argument that WTO panels cannot consider government statements, made in other international fora (such as APEC), without going outside their terms of reference. International tribunals are sometimes called upon to consider statements made by government officials. While there are no hard and fast rules, the overarching approach has not been to find such statements inadmissible, as Mexico advocates, but rather to determine their probative value based on whether "enough evidence is produced in order to

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<sup>78</sup> See *United States - Import Prohibition of Certain Shrimp and Shrimp Products (United States-Shrimp)*, WT/DS58/AB/R (*United States -Shrimp AB Report*), adopted 6 November 1998, DSR 1998:VII, 2755, paras. 104-106.

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

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

prove that the statements at issue were in fact made by the official to whom they are attributed".<sup>81</sup> Mexico's categorical response of "no" to the question of whether panels can consider statements made by a government in other international contexts in a WTO dispute settlement proceeding is incorrect. The United States does not offer these public statements as factual evidence which pertains to the Panel's obligation, pursuant to Article 17.6(i), to assess SECOFI's evaluation of the facts. Rather, they are offered to assist the Panel in assessing the strength and credibility of Mexico's legal arguments. As such, the Panel may give them as much weight as it deems appropriate.

- (b) The United States notes that filings by parties in NAFTA Chapter 19 proceedings are public.<sup>82</sup> Therefore, contrary to Mexico's arguments, there is no bar to Mexico's submissions in the Chapter 19 dispute being properly before the Panel, insofar as these filings are public under the NAFTA rules. In the United States' view, reference to such public filings is no different than reference to public briefs filed before a national court or to parties' submissions as summarized in GATT or WTO panel reports. The fact that the NAFTA proceeding is ongoing, and that no NAFTA panel report has yet been issued, is not relevant, because the United States cited SECOFI's filings in the NAFTA case to demonstrate Mexico's public position on certain issues, not to demonstrate the NAFTA panel's ruling on those issues.
- (c) The United States also notes that Mexico points to NAFTA as being a different legal order from the WTO, because NAFTA panels assess whether national anti-dumping determinations are in accordance with the anti-dumping laws of the importing party.<sup>83</sup> In the view of the United States, Mexico, however, fails to mention that, in the Mexican legal order, treaties (including the AD Agreement) are the supreme law of the land, on a par with the Mexican Constitution and laws enacted by the Mexican Congress. In the event of a conflict between the Mexican Foreign Trade Law and the AD Agreement, Article 2 of the Mexican Foreign Trade Law dictates that the provisions of the AD Agreement prevail. Thus, in Mexico's own legal order, the AD Agreement forms part of the Mexican legal system.<sup>84</sup>

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

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

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

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

- (d) Finally, the United States disputes Mexico's contention that the United States is making a claim before the Panel under another international agreement, and that the Panel must reject information submitted by Mexico in a parallel proceeding under that other agreement, otherwise the Panel will be going beyond its terms of reference in this dispute. First, the United States is not asking this Panel to make findings on claims under NAFTA Chapter 19. The United States is merely bringing to the Panel's attention inconsistencies in Mexico's positions on certain legal issues also before the NAFTA panel.<sup>85</sup> Second, the fact that the AD Agreement is relevant law in a NAFTA proceeding does not change this. If anything, it reinforces the importance of bringing inconsistencies in Mexico's positions to the attention of this Panel.

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

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

5.104 Mexico reiterates its position that WTO and NAFTA panel proceedings differ significantly in a number of ways. Mexico notes first that the subject or matter for review by a binational panel under Chapter 19 of NAFTA is different from a matter submitted to a WTO panel. Under NAFTA Chapter 19, requests for review may concern:

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

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

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

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

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

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

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

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

5.107 In Mexico's view, the above implies that, even though the AD Agreement forms part of the Mexican legislation under which a NAFTA panel examines a final anti-dumping determination, the review carried out by a NAFTA Chapter 19 panel is much broader, since it goes beyond the provisions of the AD Agreement in order to

<sup>88</sup> *Guatemala-Cement AB Report, supra*, footnote 16, para. 79.

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

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

analyze the conformity of the determination with the more detailed provisions of the Foreign Trade Act and the regulations thereto, among others, in accordance with the provisions of NAFTA Article 1904.2

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

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

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

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

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

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

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

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

#### 4. *Allegedly Improper References to Consultations*

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

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

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

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

5.117 Mexico argues that an issue of even greater sensitivity is that the United States seeks to bring before the Panel information provided in consultations that are not part of the present dispute; in particular, the questions put to Mexico on 8 October 1997. This not only lacks any basis but is also wholly irrational. The 1997 consultations were carried out when Mexico had not even imposed the definitive meas-

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

<sup>93</sup> See *Korea - Taxes on Alcoholic Beverages (Korea-Alcoholic Beverages)*, WT/DS75/R, WT/DS84/R (*Korea-Alcoholic Beverages Panel Report*), adopted 17 February 1999, DSR 1999:I, 44 which states, in para. 10.23, "in our view, the very essence of consultations is to enable the parties to gather correct and relevant information, for purposes of assisting them in arriving at a mutually agreed solution, or failing which, to assist them in presenting accurate information to the Panel".

ure. The WTO Secretariat itself recognized that these were two different cases, which is why it gave the second case a different document symbol.<sup>94</sup>

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

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

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

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

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

5.123 According to the United States, Mexico argues that the *Korea-Alcoholic Beverages* panel report is "not even applicable to this case, since what was claimed in

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

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

<sup>96</sup> See *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) on One Megabit or Above from Korea (Korea-DRAMS)*, WT/DS99/R (*Korea-DRAMS Panel Report*), adopted 19 March 1999, DSR 1999:II, 521, paras. 6.7-6.8.

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

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

"All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly, facts must be disclosed freely. *This must be so in consultations as well as in the more formal panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations*"<sup>98</sup> (emphasis added by the United States).

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

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

<sup>97</sup> *Korea-Alcoholic Beverages Panel Report*, *supra*, footnote 93, para. 10.23.

<sup>98</sup> *India-Patents AB Report*, *supra*, footnote 33, para. 94.

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

that third parties, like parties to panel proceedings, are required to maintain the confidentiality of the proceedings.

5.127 The United States observes that it is not entirely clear what Mexico is arguing regarding the written questions from the 8 October 1997 consultations concerning SECOFI's provisional measure.<sup>100</sup> The United States did not submit to the Panel the written questions from the 8 October 1997 to which the "incorporation by reference" statement in the written questions for the 12 June 1998 consultations refers. Therefore, it is unclear how the panel could consider at all, let alone attach any weight to, a document that is not at its disposal. In response to a question put by the Panel, the United States maintains that regardless of how Mexico's argument may be labelled, the relief that Mexico appears to be seeking is the Panel's blanket exclusion from the record and/or its consideration in this proceeding of any and all information obtained by the United States from Mexico during the course of the consultations. Such a result is at odds with the DSU's goals of resolving disputes and the notion of due process, stressed by the Appellate Body in the *India-Patents* dispute. The *Korea-Alcoholic Beverages* Panel recognized that it is imperative for panel proceedings not to be hampered by parties' inability to make known information about what occurred at the consultations.<sup>101</sup> That panel's reasoning is equally applicable to the question of whether the United States has breached its Article 4.6 requirements in this dispute by providing the entirety of its first submission to the third parties, including references to information obtained at the consultations. Article 18.2 of the DSU provides that "[w]ritten submissions to the panel or the Appellate Body shall be treated as confidential", and paragraph 3 of the Appendix 3 Working Procedures of the DSU provides that "the documents submitted [to the Panel] shall be kept confidential". Nothing in these provisions exempts third parties from their confidentiality obligations. DSU Article 10.3 requires that the third parties "shall receive the submissions of the parties to the dispute to the first meeting of the panel". This right is not qualified to permit receipt of only those portions of the submissions which refer to information not obtained during consultations.<sup>102</sup>

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

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

5.130 The United States noted that Mexico had declined to provide written answers to the questions the United States made during the consultations. Accordingly, there is no agreed written record of what Mexico said during the consultations. The United States recognizes that the recollection of parties can differ as to what occurred in consultations held some time before panel proceedings. It is the recollection of the

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

<sup>101</sup> *Korea-Alcoholic Beverages Panel Reports*, supra, footnote 93, para. 10.23.

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

United States delegation, as supported by the actual questions posed at the consultations, that the Mexican delegation provided the information in response to these questions as noted earlier by the United States. Moreover, the United States' references to the consultation for the purposes of its Article 6.2 argument are not dependent on the answers provided by the Mexican delegation. The mere posing of the questions is sufficient to provide Mexico with notice and information concerning the various "problems" that the United States had with the Mexican final anti-dumping order. In its first submission, the United States used the statements Mexico provided at the consultation for the limited purpose of anticipating Mexico's arguments in this proceeding.<sup>103</sup>

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

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

5.133 Mexico does not dispute that the United States had an obligation to present its first submission in its entirety to third parties. However, as the third parties were not present at the consultations, the references made by the United States in this connection are inconsistent with the obligation placed upon it by Article 4.6 of the DSU. Mexico asserts that it is concerned that it may become generalized WTO practice that parties freely disclose information exchanged during consultations. In the context of consultations, the standards observed by parties are relatively flexible,<sup>105</sup> the aim being that parties are unrestrained to reach a mutually satisfactory solution. However, although consultations constitute an "informal" stage between the parties, the requirements applicable to participation by third parties are much stricter than in a

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

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

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

panel proceeding. Specifically, in order to be entitled to join in the consultations, a Member must have a substantial trade interest, and its request may be rejected by a party to the consultations. Conversely, for a Member to participate in panel proceedings as a third party, it need only have a substantial interest and notify that interest to the Dispute Settlement Body, with no possibility of rejection.

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

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

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

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

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

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

Mexico notes that the United States' request for the establishment of the Panel only refers to "SECOFI's final anti-dumping measure, including actions by SECOFI pre-

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<sup>106</sup> *Guatemala-Cement AB Report, supra*, footnote 16, para. 80.

ceding this measure".<sup>107</sup> The United States at no time identified the "provisional anti-dumping measure".

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

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

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

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

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

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

5.143 The United States submits that not only is the text of Article 17.4 clear in what it mandates, the structure is also logical. Violations of Article 7.4 do not occur at but rather after the imposition of provisional measures. Thus, a Member chal-

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

lenging the application of provisional measures during the time between the date on which the violation commenced and the date of the final measure would logically only know at the time of the final measure (and identify that measure as the "specific measure at issue" under Article 6.2 of the DSU).

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

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

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

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

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

5.147 Mexico also recalls that the Appellate Body in *Guatemala-Cement* ruled that the requirement to identify a specific anti-dumping measure at issue in a request for establishment in no way limits the nature of the claims that may be brought.<sup>110</sup> Mexico concludes that any claims that may be brought must concern a specific measure at issue. Since specific measures at issue and actions are mutually exclusive, claims

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

<sup>109</sup> *Guatemala-Cement AB Report, supra*, footnote 16, para. 86.

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

concerning a final anti-dumping measure could address any type of action carried out during the investigation, except for the provisional anti-dumping measure or a price undertaking. In order for a panel to be able to investigate a provisional anti-dumping measure, that measure must have been identified as a specific measure at issue.

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

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

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

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

### C. *Alleged Violations in the Initiation of the Investigation*

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

5.150 The United States argues that SECOFI did not have sufficient evidence of threat of material injury to the Mexican sugar industry from allegedly dumped imports of HFCS from the United States, or of a causal link between the allegedly dumped imports and the alleged threat, to justify initiation of the investigation. Contrary to the requirements of Article 5.2 of the AD Agreement, the application filed by

<sup>111</sup> *Guatemala-Cement Panel Report, supra*, footnote 8, para. 5.18.

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

5.151 The United States describes the facts relating to the filing of the application as follows. HFCS is a sweetener normally sold in liquid form in two concentrations of fructose: grade 42 and grade 55. U.S. exporters began exporting HFCS to Mexico in the early 1990s. In Mexico, as elsewhere, HFCS is used extensively by the beverage industry. On 14 January 1997, the Sugar Chamber filed its application for an anti-dumping investigation with SECOFI complaining that imports of HFCS from the United States were being dumped in Mexico and threatening the Mexican sugar industry with material injury. The application followed the format outlined by SECOFI in its "Application Form for Manufacturing Companies Requesting Initiation of Investigation for Price Discrimination Practices" (the application form).<sup>112</sup> The application form directed that "all questions, without exception, must be answered. If the answer... is not applicable, use 'n/a', if it is not available, use 'n/d' ".<sup>113</sup>

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

5.153 The United States holds that the application further asserted that the goal of U.S. HFCS producers was to "seize the consumer market for sugar", and that the introduction of HFCS prevented sugar from reaching its maximum price level, also exerting a downward pressure on sugar prices that nullified the market forces leading

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

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

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

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

<sup>116</sup> *Ibid.*

to an increase in sugar prices.<sup>117</sup> It was necessary for sugar to be at its maximum price level in order to service the industry's debt and meet investment goals.

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

5.155 According to the United States, the exhibits to the Sugar Chamber's application, however, contain articles which indicate that there was Mexican HFCS production, as early as 1995. For example, a conference presentation by Stephen Vuilleumier "World Outlook for High Fructose Syrup to 2000", World Sugar and Sweetener Conference, 26-29 March 1996, is referenced on page 22 (footnote 10) of the application, wherein Mr. Vuilleumier reports that Almex had begun production. In addition, there is a 21 March 1996 article in *Milling & Baking News*, which refers to a statement by Mr. Vieulleumeir at a sweetener colloquium that Almex would have production of HFCS at its Guadalajara plant in 1996 (also footnote 10). Further referenced is "Corn Sweeteners: Recent Developments and Future Prospects", prepared by Peter Buzzanell for a "Azucar '95 Foro Internacional" conference in Guadalajara on 10 October 1995, in which the author indicates that there has been "negligible" Mexican HFCS production (page 37, footnote 25 of the application). In addition, Mr. Vuilleumier's presentation at a London sweetener symposium (February 1996) is annexed and indicates that Almex began production in October 1995 and that Arancia was expected to start production in late 1996 (page 28, footnote 19).<sup>122</sup>

5.156 In the view of the United States, in a number of instances, the Sugar Chamber failed to provide information in its application as required by SECOFI's application form: i) information on damage to the domestic industry, threat of damage, and the causal relationship between imports and damage or threat of damage to the domestic industry (section 4.5); ii) information regarding principal clients (section 4.12) and data regarding clients lost to HFCS (section 4.13 (appendix 4.3v)) and information

<sup>117</sup> Application at 29 (section 4.3(ii)), US-4, p. 32.

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

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

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

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

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

regarding sales policies (section 4.14 (appendix 4.14)).<sup>123</sup> The Sugar Chamber simply deemed this information "N/A - not applicable".

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

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

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

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

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

5.160 According to the United States, in that notice SECOFI indicated that sugar and HFCS had a similar [chemical] composition since both contain a high concentration of glucose and fructose.<sup>128</sup> The section of the initiation notice entitled "Domestic Production" discusses Mexican sugar producers only.<sup>129</sup> The section of the initiation notice entitled "Importers and Exporters" identifies Almex and Arancia as importers of HFCS.<sup>130</sup> Nowhere does the initiation notice conclude that Almex and

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

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

<sup>125</sup> The United States provided Mexico with written questions for the 12 June 1998 consultations (*U.S. Written Question*). *See U.S. Written Question* 4.2, US-8. The panel in *Korea-Alcoholic Beverages*, recently confirmed the right of a party to a WTO dispute to use information learned in consultations in panel proceedings. The panel concluded: "It would seriously hamper the dispute settlement process if the information acquired during consultations could not be subsequently used by any party in the ensuing proceedings". *supra*, footnote 93, para. 10.23.

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

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

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

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

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

Arancia were also domestic HFCS producers.<sup>131</sup> SECOFI determined that the Sugar Chamber had the legal capacity to request an anti-dumping investigation.<sup>132</sup>

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

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

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

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

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

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

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

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

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

<sup>137</sup> *Ibid.*

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

<sup>139</sup> *Ibid.*

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

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

"113.

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

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

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

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

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

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

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

5.166 The United States further holds that paragraph 4.1 of SECOFI's application form states that the applicant must provide clear evidence of injury or threat of injury and that "the competent authority will deny the petition presented... and will terminate the investigation without delay as soon as it has been established that there is insufficient evidence of dumping or of the damage [i.e., injury] which justifies the continuation of the process relative to the case". Additionally, section 4.2(iii) of the application form states that the applicant must demonstrate injury through evidence of "negative effects on production, such as on sales, market participation, benefits, productivity, return on investments, utilization of installed capacity, cash flow, supplies, employment, salaries, growth, the ability to gather capital or investment". In the application, the Sugar Chamber's response to both of these paragraphs of the application form was "N/A" (i.e., not applicable).<sup>143</sup>

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

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

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

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

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

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

5.169 The United States recalls that Article 5.2 of the AD Agreement provides that an application requesting the initiation of an investigation "include evidence of... injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and... a causal link between the dumped imports and the alleged injury". Because the AD Agreement defines the term "injury" to include threat of material injury<sup>147</sup>, evidence both of threat of material injury and of a causal link between the allegedly dumped imports and the alleged threat of material injury is required where, as here, an application alleges threat of material injury. The panel in *Guatemala-Cement* recently reached this very conclusion: "Thus, the requirements in Article 5.2 regarding 'injury' must, in our view, be read to refer to threat of injury in a case where threat of injury is at issue. Consequently, in this case, as the applicant alleged threat of injury, clearly the application must contain evidence of threat of material injury".<sup>148</sup> Significantly, *Guatemala-Cement*, like the instant investigation, involved the initiation of an anti-dumping investigation on the basis of allegations of threat of material injury, and its conclusions are therefore particularly relevant to this dispute.<sup>149</sup>

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

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

<sup>148</sup> *Guatemala-Cement Panel Report, supra*, footnote 8, para. 7.76 (footnote omitted). The United States notes that, because the Appellate Body did not adopt the panel's decision on other grounds, it reached no conclusion regarding the panel's finding that Guatemala's initiation of the investigation was inconsistent with the AD Agreement and that the application failed to contain the required information regarding threat of material injury and causal link. See *Guatemala-Cement AB Report*, para. 89. The panel's conclusions regarding the evidence on threat of injury are nevertheless in agreement with Mexico's argument in that dispute. See, *e.g.*, *Guatemala-Cement Panel Report, supra*, footnote 8, paras. 4.139 ("Mexico submits that [the] application did not contain sufficient, relevant evidence of threat of injury to meet the requirements of Article 5.2 of the AD Agreement") and 4.150 ("Mexico contends that all applications must contain evidence of dumping, injury and a causal link between the dumped imports and the injury or threat of injury, failing which they should be rejected by the investigating authority").

<sup>149</sup> *Ibid.*

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

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

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

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

Article 5.2(iv) further provides:

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

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

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

5.174 According to the United States, an evaluation of the economic factors and indices of Article 3.4 is required in an investigation based on allegations of threat of material injury to a domestic industry, just as such an evaluation is required in investigations based on allegations of material injury. Article 5.2(iv) by its terms sets forth the type of information required of all applications, regardless of the type of "injury"

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

alleged - *i.e.*, material injury, threat of material injury, and/or material retardation of the establishment of a domestic industry.<sup>152</sup>

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

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

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<sup>152</sup> See *Guatemala-Cement Panel Report, supra*, footnote 8, para. 7.76 ("Thus, the requirements in Article 5.2 regarding 'injury' must, in our view, be read to refer to threat of injury in a case where threat of injury is at issue. Consequently, in this case, as the applicant alleged threat of injury, clearly the application must contain evidence of threat of material injury. (footnote omitted)").

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

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

<sup>155</sup> Obviously, in addition to historical trends, future projections regarding the relevant economic factors set forth in Article 3.4 are relevant to an assessment of threat of material injury for purposes of initiating an investigation. A threat analysis is, by its very nature, forward-looking and involves a likely projection of future events if dumping continues. Accordingly, Article 3.7, which sets forth the factors that authorities should consider in making a determination of threat of material injury, states that: (1) "[t]he change in circumstances which *would* create a situation in which the dumping *would* cause injury must be *clearly foreseen and imminent*" (emphasis added by the United States); and (2) the investigating authorities must conclude that "further dumped exports are *imminent* and that, unless protective action is taken, material injury *would* occur" (emphasis added by the United States). See also *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States (Korea-Resins)*, BISD 4DS/205 (*Korea-Resins Panel Report*), adopted 27 April 1993, para. 271 ("a proper examination of whether threat of material injury was caused by dumped imports 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); *Ibid.* at para. 273 (noting that "the Panel... examined whether the [investigating authority's] determination [of threat of material injury] included an analysis of *relevant future developments regarding the condition of the domestic industry* and the volume and price effects of the imports under investigation") (emphasis added by the United States).

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

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

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

<sup>156</sup> *Guatemala-Cement Panel Report*, para. 7.74; *see also Ibid. supra*, footnote 8, para. 4.154 (noting Mexico's argument that "[t]he applicant is... in a privileged position to provide information on the [Article 3.4] factors"). *See also* application, p. 9, para. 2.5, US-4; *Initiation Notice*, para. 4, US-3.

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

domestic industry's production capacity or capacity utilization would likely decline as a result of the influx of allegedly dumped HFCS imports; or whether the domestic industry would likely maintain stable, or increase, capacity utilization levels by increased production and sales to household customers (where the application acknowledged that HFCS imports did not compete with sugar).<sup>158</sup>

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

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

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

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

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

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

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

these customers is not in itself meaningful in assessing the likely impact of imports on the industry as a whole.

5.182 The United States asserts that the application also disclosed that overall domestic sugar consumption was increasing in pace with Mexican population growth.<sup>163</sup> Given this acknowledgement, it appears speculative that increasing HFCS imports would adversely affect the domestic industry's overall sales in the imminent future. The application failed to address whether the industry's sales to other customers were likely to increase in an amount equal to or exceeding the decline in sales to industrial customers. The application itself therefore did not seek to provide a basis for concluding that the sugar industry's overall sales were likely to decline.

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

5.184 The United States concludes that the Sugar Chamber's application contained insufficient evidence regarding threat of material injury, including the likely impact

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

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

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

of dumped imports on the domestic sugar industry, and the attendant economic factors set forth in Article 3.4 of the AD Agreement.

5.185 The United States argues that, in light of the absence of sufficient evidence in the application to justify initiation of the investigation, SECOFI should not have accepted the application and initiated the investigation. As Articles 5.3 and 5.8 of the AD Agreement state, "[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify initiation of an investigation", and "[a]n application... shall be rejected and an investigation shall be terminated as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case". An application that fails to address at all the likely impact on the domestic industry from allegedly dumped imports and numerous economic factors and indices enumerated in Article 3.4, when the relevant information is readily available to the applicant, could hardly be regarded as adequate. Indeed, SECOFI's acceptance of the application and initiation of the investigation, despite the absence of sufficient evidence in the application regarding likely impact and relevant economic factors, equates to an agreement with the petitioner's response of "N/A" to the pertinent application form questions, which indicated the petitioner's belief that such information was not relevant to the initiation of an investigation based on allegations of threat of material injury. Whatever the case, SECOFI clearly violated the AD Agreement in accepting the Sugar Chamber's deficient application and initiating an investigation in the absence of sufficient evidence concerning relevant economic factors and the likely impact on the domestic industry from the allegedly dumped HFCS imports.<sup>166</sup>

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

5.187 The United States contends that because neither the initiation notice nor the application contained sufficient evidence of threat of material injury to justify initiation, obviously SECOFI also did not have (and the application did not contain) sufficient evidence of causal link between the allegedly dumped imports and the alleged threat of material injury. Logically, sufficient evidence of causal link must be lacking

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<sup>166</sup> The United States notes that the initiation notice only recited the same information that the application contained. See *Initiation Notice*, paras. 2, 21-22, 58, 74, 91-96. Moreover, SECOFI's record does not reflect that it obtained additional information through its own efforts that would have justified initiating the investigation. The United States does not suggest that authorities, when faced with the absence of sufficient information in an application, are obligated to attempt to gather it themselves. Rather, authorities may, but are not required, to do so. See *Guatemala-Cement Panel Report*, *supra*, footnote 8, para. 7.53. Thus, the United States asserts that, by failing to provide adequate information regarding the relevant economic factors bearing on the state of the domestic industry and the likely impact of the allegedly dumped imports, SECOFI's initiation notice did not meet the requirements of Articles 12.1 and 12.1.1(iv) of the AD Agreement.

if there is insufficient evidence of either or both of the events between which there must be a causal nexus.<sup>167</sup>

5.188 According to the United States, the Sugar Chamber did not provide evidence in the application as required by Article 5.2 of the AD Agreement by failing to include in the application any information regarding causal link.<sup>168</sup> Indeed, as with the Sugar Chamber's response to the application form questions regarding impact on the domestic industry and relevant economic factors, the Sugar Chamber did not respond to the specific questions in the application form regarding causal link. Section 4.1 of SECOFI's application form-in language that closely tracks Article 5.2 of the AD Agreement - requires that the application contain "proof of the existence of... a causal relationship between the imported goods which are the object of dumping, and the supposed damage [*i.e.*, injury]". Likewise, section 4.2(iv) instructs the applicant to "demonstrate damage or prejudice to domestic production... in the following terms:... establish a causal effect of damage [*i.e.*, injury]". The Sugar Chamber's response to both of these paragraphs was "N/A" (*i.e.*, not applicable). By answering "N/A", the Sugar Chamber effectively stated to SECOFI its belief that information regarding causal link was not relevant to the initiation of an investigation on the basis of allegations of threat of material injury. Accordingly, the application contains no explanation or discussion of causal link. Because the application did not contain sufficient evidence regarding causal link, the investigating authorities should have rejected the application and not have initiated the investigation.<sup>169</sup> In addition, like the application, the initiation notice does not contain an explanation or discussion of causal link.

5.189 Finally, the United States contends that, given that the application did not contain any meaningful analysis of relevant economic factors and indices having a bearing on the state of the domestic industry, the application also did not contain any analysis of correlations or trends between and among those factors and indices,

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

"[A]n unbiased and objective investigating authority could not properly have determined that there was sufficient evidence of causal link to justify initiation if there was not sufficient evidence of dumping and threat of injury. In this case, having concluded that the evidence of dumping and threat of material injury were [sic] insufficient to justify initiation, we also conclude that the evidence of causal link between the dumped imports and the alleged injury was, perforce, not sufficient to justify initiation. The ADP Agreement clearly requires sufficient evidence of all three elements before an investigation may be initiated". (*Guatemala-Cement Panel Report, supra*, footnote 8, para. 7.78)

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

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

<sup>169</sup> As previously discussed, "[t]he AD Agreement clearly requires sufficient evidence of all three elements [*i.e.*, dumping, threat of material injury, and causal link] before an investigation may be initiated". *Guatemala-Cement Panel Report, supra*, footnote 8, para. 7.78. *Guatemala-Cement*, like the instant investigation, involved the initiation of an investigation on the basis of allegations of threat of material injury.

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

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

5.191 The United States argues that SECOFI's initiation of this investigation must stand or fall on the basis solely of the evidence on its record at initiation. Under the AD Agreement, as previous panels have found, an authority's failure to have sufficient evidence to justify initiation and failure to properly determine an application was made by or on behalf of the domestic industry are violations which cannot be cured at a later date.<sup>170</sup> Therefore, even assuming *arguendo* that SECOFI's final determination contains reasoning that would justify initiation, it does not show that SECOFI had the necessary evidence or made the necessary findings at the time of initiation. Any such *post hoc* justification is legally irrelevant and cannot cure SECOFI's erroneous initiation.

5.192 Mexico submits that the application filed by the Sugar Chamber was consistent with the requirements of Article 5.2 of the AD Agreement and that SECOFI

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<sup>170</sup> The *Guatemala-Cement* panel found that, due to Guatemala's flawed initiation, "the entire investigation rested on an insufficient basis, and therefore never should have been conducted. This is, in our view, a violation which cannot be corrected effectively by any actions during the course of the ensuing investigation". See *Guatemala-Cement Panel Report*, *supra*, footnote 8, para. 8.6. Certain GATT panels also addressed this issue when it arose under the Tokyo Round Agreement on the Implementation of Article VI of the GATT. See also, e.g., *United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden (United States-Steel Hollow Products)*, ADP/47 (*United States-Steel Hollow Products Panel Report*), issued 20 August 1990, unadopted, para. 5.20 (stating that "there was no basis to consider that an infringement of this provision could be cured retroactively"), and *United States - Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico (United States-Cement and Clinker)*, ADP/82 (*United States-Cement and Clinker Panel Report*), issued 7 September 1992, unadopted, para. 5.37 (stating that "a failure to observe the requirements of Article 5 could not be remedied by action subsequent to the initiation of the investigation".)

properly and validly determined that there was sufficient evidence of threat of injury and of a causal relationship to justify the initiation of an investigation under Article 5.3 of the AD Agreement.

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

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

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

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

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

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

- Complete description of the dumped product: Section B3 of the application and Annexes 2.10, 2.15 and 4.3(iii) thereto. See also a comparative study conducted by an academic institution of the characteristics and composition of HFCS and sugar, and various specialized publications in the field of sweeteners which reveal a diversity of uses and applications among the product investigated as well as their commercial substitutability;<sup>174</sup>
- The names of the country or countries of origin or export in question: Section B3, paragraph 2.13 of the application and Annexes 3.4 and 3.6;<sup>175</sup>

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

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

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

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

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

- Identity of each known exporter or foreign producer and list of importers of the investigated product: Section B2, paragraphs 2.7, 2.8 and 2.9 of the application and Annexes 2.15, 3.15, 3.16 and 4.3(i) as well as Table 2.9;<sup>176</sup>
- (c) Article 5.2(iii) of the AD Agreement:
- Data concerning the normal value and the export price of the like product: paragraph 2.6 and Section C of the application, Annexes 3.1, 3.4 and 3.6, 3.12, 3.15 and 3.16;<sup>177</sup>
- Information on prices at which the investigated product is sold when destined for consumption in the domestic market of the country of origin or export and information on export prices: paragraph 2.6 and Section C of the application, and Annexes 3.4 and 3.6, 3.12, 3.15 and 3.16 thereto.<sup>178</sup>
- (d) Article 5.2(iv) of the AD Agreement:
- Information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry: Section D of the application, and Annexes 3.4 and 3.6, 4.3(i), 4.3(ii), 4.3(iii), 4.3(v), 4.9, 4.12 and 4.14, 4.22, 4.23, 4.24 and 6-A to the same document.<sup>179</sup>

5.196 According to Mexico, it can be concluded therefore that the application for initiation submitted by the Sugar Chamber met all of the requirements laid down in Article 5.2 of the AD Agreement since it was based on the information appearing in

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

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

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

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

the text as well as the annexes, which contain a range of relevant documentary evidence, and not merely simple assertions.

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

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

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

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

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

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

5.203 Mexico holds that, while it is true that in certain parts of the application the Sugar Chamber indicated that the question was not applicable (N.A.), this was not

because the required information was irrelevant in supporting the alleged threat of injury, but because the Sugar Chamber, following the order of the application, incorporated the information in other sections. Likewise, the assertion by the United States that the application did not contain information indicating the loss of sales as a result of the HFCS imports is irrelevant, given that the information is incorporated in the application and was analyzed by SECOFI in paragraphs 57 and 58 of the notice of initiation.<sup>180</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"5.43... The applicant contended that if the massive imports of cement continued to be sold at the indicated prices, both the domestic industry's planned expansion and capital improvements would have to be cancelled and existing production facilities would be closed with a concomitant loss in employment. According to the United States, this information, while limited in scope, appears to minimally satisfy the requirements of Article 5.2(iv) relating to injurious price data and threat of injury. The United States considers it important to note, moreover, that the applicant alleged a threat of injury by virtue of the imports from Mexico, and did not assert the existence of present injury. The nature of information relevant for a threat case may be substantially different from that which is pertinent in a present injury case. Article 3.7 acknowledges this distinction in connection with determinations involving threat of injury. For the United States, it is only logical that the same distinction be recognized in terms of the information that is considered to be "reasonably available" to an applicant in requesting the initiation [*sic*] of an anti-dumping investigation. An applicant must still provide information, and not mere speculation, to support allegations of threat of injury. However, the United States suggests that the information may be different in kind than that which would be considered "reasonably available" in the context of an application involving present injury, if for no other reason than that threat of injury involves an incipient event".<sup>187</sup>

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

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

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<sup>187</sup> See *Guatemala-Cement Panel Report*, *supra*, footnote 8, para. 5.43.

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

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

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

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

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

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

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

7.77... Moreover, while as noted above, there is clearly a different standard applicable to making a preliminary or final determination of material injury, including threat of material injury, than to determining whether there is sufficient evidence of material injury, including threat

<sup>188</sup> See *Guatemala-Cement Panel Report*, *supra*, footnote 8, para. 5.52.

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

of material injury to justify initiation of an investigation, *we cannot agree with Guatemala's apparent position that the factors set forth in Article 3.7 are irrelevant to the initiation determination*" (emphasis added by Mexico).

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

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

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

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

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

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

"5.35 ... However, the United States submits that logic directs that the quantum and quality of information required for the initiation of an investigation must be less than that necessary for a preliminary or final determination that is reached after a full investigation is conducted".

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

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

"The United States notes that, in the conduct of anti-dumping investigations, investigating authorities are routinely confronted with com-

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<sup>190</sup> See *Guatemala-Cement Panel Report, supra*, footnote 8, footnote 248.

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

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

plex factual situations. *It would be impossible to state with complete confidence at the outset of an investigation precisely all of the information that will be necessary to reach a final determination ...*<sup>193</sup> (emphasis added by Mexico).

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

"In 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 the authority at the time of making a final determination ..."<sup>194</sup> (emphasis added by Mexico).

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

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

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

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

<sup>193</sup> See *Guatemala-Cement Panel Report*, *supra*, footnote 8, footnote 168.

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

<sup>195</sup> See *Guatemala-Cement Panel Report*, *supra*, footnote 8, para. 7.57.

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

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

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

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

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

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

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

5.230 Mexico submits that the evidence provided by the Sugar Chamber and the examination of the information undertaken by SECOFI are specifically recorded, at length, in paragraphs 20 to 23 and 42 to 98 of the *Initiation Notice*. In various parts of the notice of initiation, SECOFI notes that its findings were drawn from informa-

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<sup>196</sup> See *Guatemala-Cement Panel Report*, *supra*, footnote 8, paras. 5.44 and 5.39.

tion submitted by the Sugar Chamber, or from information submitted by the Sugar Chamber together with information collected by SECOFI itself. SECOFI's analysis is described in detail in paras. 62 to 98 of the *Initiation Notice*. As an integral part of this examination and in exercise of its investigatory powers, SECOFI collected a set of evidence which, together with the information in the application, could be considered as accurate, adequate and sufficient to justify the initiation of the investigation. It is clear, therefore, that Mexico complied with Article 5.3 of the AD Agreement. Mexico submits further that, in view of these considerations, there was no violation of Article 5.8 of the AD Agreement.

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

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

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

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

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

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

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

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

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

5.236 According to the United States, the data that the Sugar Chamber submitted were insufficient to satisfy the requirements of Article 5.2(iv) with respect to an application alleging threat of material injury. Article 5.2 requires that an application for anti-dumping duties contain "information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of these imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3". In turn, Article 3.4 identifies factors to be evaluated in examining the impact of dumped imports on the domestic industry. This includes such factors as "actual *and potential* declines in sales, profits, output, market share, productivity, return on investments" and "actual *and potential* negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments" (emphasis added by the United States).

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

5.238 The United States contends that the Sugar Chamber was silent on this point, however. It did not provide any information in either its application form or annexes on potential declines in the factors specified in Article 3.4. In light of this, the Sugar Chamber's repeated "N/A" responses on its application form must be taken at face value and considered to be evidence of the petitioner's belief that it did not have any

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neither have accepted this information nor relied on it in its initiation decision. Likewise, the Panel may not consider this information in assessing whether SECOFI had sufficient evidence of threat of injury to justify initiation.

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

response to the questions. There is no basis for interpreting the "N/A" responses, as did Mexico at the first panel meeting, to signify that the information was not provided on the application form because it could be found in other materials that the petitioner submitted.

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

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

5.241 The United States disputes the statement made by Mexico that SECOFI's initiation notice demonstrates that the application contained the requisite information about the impact of the dumped imports and the economic factors set forth in Article 3.4 of the AD Agreement.<sup>203</sup> Mexico is incorrect. SECOFI's initiation notice contains no more information concerning these matters than did the application.

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

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

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

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

<sup>205</sup> *Ibid.* para. 58.

<sup>206</sup> *Ibid.* paras. 91-96.

<sup>207</sup> *Ibid.* para. 92.

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

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

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

5.246 The United States maintains that Mexico's argument is also directly contrary to the language of Article 5 of the Agreement. Article 5.2(iv) requires the applicant to provide "information reasonably available" to it concerning "relevant factors and indices having a bearing on the domestic industry, *such as those listed in paragraphs 2 and 4 of Article 3*" (emphasis added by the United States). This mandatory language applies to all applications, including those alleging threat of material injury.<sup>208</sup> Consequently, the Agreement clearly contemplates that an application will contain information concerning the factors specified in Article 3.4.

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

5.248 In response to a question put by the Panel, the United States said that, while every application must contain reasonably available information concerning the Article 3.4 factors pertaining to the impact of the dumped imports on the domestic industry, this does not necessarily mean that every application must contain information concerning every specific factor in Article 3.4. In some cases, information con-

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

cerning a specific 3.4 factor might not be reasonably available to the applicant. In other cases, it may be clear from whatever conditions of competition applicable to the industry that are described in an application that a specific 3.4 factor is not pertinent to the industry. For example, industries that do not maintain inventories should not be required in an application to provide information on inventories. In the current proceeding, however, there is no indication that the information not provided in the Sugar Chamber's application concerning potential declines in the sugar industry in such factors as capacity, employment, or financial performance was not reasonably available to it. Nor is there any basis for a conclusion that potential declines in a factor such as financial performance is not pertinent to the sugar industry. Indeed, Mexico has repeatedly declined to make such an argument.<sup>209</sup>

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

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

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

5.252 Mexico argues that the application submitted by the Sugar Chamber contained a variety of information on the factors and indices set forth in Articles 3.2 and

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

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

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

3.4 of the AD Agreement, concerning the impact of the dumped imports in the domestic sugar industry. Mexico reiterates that the application contained, *inter alia*, information on the following factors:

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

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

5.254 Mexico submits that the United States makes an impermissible interpretation of Article 5.2(iv), plainly ignoring the existence of Article 3.7 even though the investigation concerned was initiated on the basis of threat of injury. In addition, in Mexico's view, the United States is in error when suggesting that the application should have contained information concerning the totality of the factors set forth in Articles 3.2 and 3.4 of the AD Agreement.

5.255 Mexico argues that Article 5.2(iv) makes it clear that the references to the factors and indices listed in Articles 3.2 and 3.4 are illustrative, since it is understood

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

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

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

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

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

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

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

that the investigating authority has the power to determine which of them are to be considered relevant according to its bearing on the state of the relevant domestic industry, and nothing requires the applicant to provide information on the totality of these factors and indices.

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

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

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

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

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

nificant, since its purpose is to avoid the imposition of excessive obligations on the applicant. The United States' interpretation is therefore entirely unacceptable.

5.260 Mexico also disputes the statement by the United States that the Sugar Chamber's application violated Article 5.2 in that it provided insufficient information concerning the causal link between the allegedly dumped imports and the alleged threat of injury -because there was insufficient information concerning injury, there also was insufficient information concerning causal link. In the view of Mexico, this allegation is groundless since it has been shown that the application contained sufficient information concerning threat of injury.

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

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

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

2. *Alleged Insufficiency of the Examination of the Information and Alleged Insufficiency of the Evidence to Justify Initiation (Claims under Article 5.3)*

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

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

<sup>221</sup> In response to questions put by the Panel, the United States said that "before an authority can determine which domestic producers may be appropriate for exclusion under Article 4.1(i), it must

initiation and without determining that the application had been made by or on behalf of the domestic industry, SECOFI should have rejected the application. Its failure to do so violated Article 5.8 of the AD Agreement.

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

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

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

5.268 The United States recalls that Article 5.1 requires, *inter alia*, that an investigation "shall be initiated upon a written application by or on behalf of the domestic industry". A domestic industry is defined as the domestic producers of the like product.<sup>222</sup> Article 5.4 further directs: "An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of

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first ascertain who the domestic producers are. The authority cannot know who the domestic producers are, however, until it defines the like product". The United States also asserted that "an authority must first determine the like product and only then proceed to determine the composition of the domestic industry". *See*, respectively, Answers of the United States to questions no. 33 and 35 by the Panel, 6 May 1999.

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

the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry". An application's allegations concerning what product corresponding to the subject imports is produced in the importing country are thus critical to the threshold questions of like product and domestic industry, and therefore also critical to the question of whether an application provides a sufficient basis for initiating an investigation. This is all the more important where, as here, an industry complains about imports of a product it does not produce.

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

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

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

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

<sup>224</sup> Critical facts and analysis must be included in the record of the investigation, in order that they may be evaluated by the reviewing panel. See *Guatemala-Cement Panel Report*, *supra*, footnote 8,

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

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

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

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para. 7.68, footnote 242. See also *Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community (Brazil-Milk Powder)*, SCM/179 (*Brazil-Milk Powder Panel Report*), adopted 28 April 1994, para. 294 (stating "the lack of explanation of the reasons for this finding made it impossible for the Panel to effectively review this finding in the light of the relevant requirements of the Agreement"). In addition, when faced with the absence of sufficient evidence in an application to justify initiation of an investigation, investigating authorities may (but are not required to) attempt to gather it themselves. See *Guatemala-Cement Panel Report*, *supra*, footnote 8, para. 7.53, and see also footnote 111.

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

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

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

<sup>228</sup> *Guatemala-Cement Panel Report*, *supra*, footnote 8, para. 7.50. Moreover, the Panel warned:

"The object and purpose of the initiation requirements of Article 5 as a whole, and of Article 5.3 in particular, is in our view to establish a balance between the competing interests of the import competing domestic industry in the importing country in securing the initiation of [an] investigation and the interest of the exporting country in avoiding the potentially burdensome consequences of [an] investigation initiated on an unmeritorious basis". *Ibid.* para. 7.52 (citing to *United States-Lumber Panel Report*, para. 331).

Furthermore, the *Guatemala-Cement* Panel adopted the reasoning of the panel in *United States-Lumber*, respecting the sufficiency of information for initiation: "In analysing further what was meant by the term "sufficient evidence", the Panel noted that the quantum and quality of evidence to be required of an investigating authority prior to initiation of an investigation would necessarily have to be less than that required of that authority at the time of making a final determination. At

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

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

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

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the same time, it appeared to the Panel that "sufficient evidence" clearly had to mean more than mere allegation or conjecture, and could not be taken to mean just "any evidence". In particular, there had to be a factual basis to the decision of the national investigating authorities and this factual basis had to be susceptible to review under the Agreement. Whereas the quantum and quality of evidence required at the time of initiation was less than that required to establish, pursuant to investigation, the required Agreement elements of subsidy, subsidized imports, injury and causal link between subsidized imports and injury, the Panel was of the view that the evidence required at the time of initiation nonetheless had to be relevant to establishing these same Agreement elements". *Ibid.* para. 7.55 (citing to *United States-Lumber Panel Report*, para. 332).

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

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

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

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

5.278 Mexico further argues that, even if SECOFI did not consider the annexed document entitled "Estimated Production Capacity of HFCS 42 and 55" as decisive<sup>231</sup>

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

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

with respect to the existence of domestic production of HFCS, SECOFI did consider as decisive other information contained in various Articles and papers annexed to the application, which clearly pointed to the involvement of the companies Almex and Arancia in the production of HFCS in Mexico; particularly, information published by the United States Department of Agriculture (USDA) concerning, *inter alia*, the establishment of HFCS distribution centres and manufacturing plants in Mexico. The latter was considered to be a most reliable piece of information since it came from a government source, which was not trying to demonstrate any particular trend.

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

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

5.281 Mexico maintains that, on the basis of official import statistics, SECOFI confirmed that, from January to December 1996, *i.e.* the period of investigation, the two domestic producers of HFCS, Almex and Arancia, had, in fact, become the leading

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the said document to be decisive with respect to the existence of HFCS production since it only contains an estimate of installed capacity for 1995 and 1996. See para. 61 of the *Preliminary Determination*, MEXICO-2.

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

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

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

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

5.282 Mexico disputes the argument made by the United States that SECOFI failed to examine the information contained in the application regarding the existence of HFCS production in Mexico, and that this necessarily prevented SECOFI from determining that the application was made "by or on behalf of the domestic industry", which allegedly involved a violation of Articles 5.1 and 5.4 of the AD Agreement. In this regard, Mexico notes that the finding of greater relevance arising from the examination under Article 5.3 of the Agreement conducted prior to the initiation of the investigation was that, according to the information included in the application and the information collected by SECOFI, the domestic producers of HFCS were themselves the leading importers of the subject product. After having examined the evidence in the application concerning the involvement of Almex and Arancia in the production of HFCS in Mexico, but above all, after having simultaneously verified the status of those two companies as the leading importers, SECOFI considered excluding the HFCS producers from the definition of the relevant domestic industry. The United States argument that there is no indication that SECOFI obtained information on whether the Mexican HFCS producers could be excluded from domestic industry is therefore entirely false.<sup>236</sup>

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

5.284 Mexico recalls that Article 4.1 of the AD Agreement reads as follows:  
"For the purposes of this Agreement, the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like product for those of them whose collective output of the product

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

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

constitutes a major proportion of the total domestic production of those products, except that:

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

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

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

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

5.286 In response to a question by the Panel as to whether the concept of "injury" required defining the relevant like product and domestic industry in order to specify the subject of the injury alleged, Mexico stated that, on the one hand, while it is true that under the AD Agreement there is a clear relationship between the determination of the domestic industry in accordance with Article 4.1 and the definition of the relevant like product in accordance with Article 2.6, it is also true that the Agreement does not establish or require a specific obligation of sequentiality between those articles. On the other hand, in anti-dumping practice the obligation concerning the determination of the relevant domestic industry for purposes of an investigation arises *a priori*, because the investigating authority, before taking the decision to initiate, must ascertain whether an application for initiation submitted to it has been made by or on behalf of the industry actually entitled (in terms of standing) to apply for such initiation. In this connection, while the AD Agreement does not lay down a required sequence, anti-dumping practice makes it necessary for an investigating authority at the outset to analyze the question of the relevant domestic industry, in order as a first step to establish whether the domestic industry which submitted an application for initiation has the requisite standing for that purpose, as a result *inter alia* of being a producer of a like product within the meaning of Article 2.6 and whether, as such, it may be the industry actually affected or threatened by dumped imports (*i.e.* the domestic industry subject to the alleged injury or threat of injury).<sup>237</sup>

5.287 In Mexico's view, Article 2.6 of the AD Agreement, when defining the term "like product" as a product which, although not identical to the subject product (*i.e.* alike in all respects), "has characteristics closely resembling" those of the subject product, suggests that for the purposes of Article 4.1(i) the term "domestic industry" can be interpreted as referring to the "rest of the producers" of like products with

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

closely resembling characteristics, if the producers of the like product that is identical to the imported product cannot be considered as representing the relevant domestic industry, on account of their being importers of the allegedly dumped product, as is the case in this dispute.

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

5.289 Mexico observes that SECOFI went on to determine, in accordance with the AD Agreement, whether the sugar producers, represented by the Sugar Chamber as applicant, could be considered as representing the relevant domestic industry, understood as referring to the producers of the "like product with closely resembling characteristics", and to assess whether the sugar producers could be the domestic industry affected or threatened by HFCS imports. SECOFI proceeded to analyze whether the product manufactured by such industry - sugar - could be considered as a "like" product with characteristics closely resembling those of HFCS within the meaning of Article 2.6 of the AD Agreement. Having done so, and having established through a detailed analysis<sup>239</sup> that HFCS and sugar qualified as like products with closely resembling characteristics, SECOFI determined, on the basis of Articles 2.6, 4.1, 5.1 and 5.4 of the AD Agreement, that the relevant domestic industry for the purposes of the investigation was indeed the sugar industry as represented by the Sugar Chamber.<sup>240</sup>

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

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

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

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

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

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

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

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

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<sup>241</sup> See *Guatemala-Cement Panel Report*, *supra*, footnote 8, paras. 4.402 and 4.404. See also *United States-Cement and Clinker Panel Report*, para. 5.37 (the Panel examined this question in the framework of the Tokyo Round Anti-Dumping Code. It is important to note that during this last Panel, the United States in fact adopted a different position).

paragraph 1 unless the authorities *have determined, on the basis of an examination* of the degree of support for, or opposition to, the application expressed, that the application has been made by or on behalf of the *domestic industry*" (emphasis added by the United States, footnotes omitted). Article 5.3 of the AD Agreement states, "The authorities *shall examine* the accuracy and adequacy of the evidence provided in the application *to determine* whether there is *sufficient evidence to justify the initiation* of an investigation" (emphasis added by the United States).

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

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

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

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

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<sup>242</sup> The United States notes in this connection that in rejecting the sufficiency of Guatemala's evidence regarding initiation, the *Guatemala-Cement* Panel stated, "there is no discussion or analysis of the evidence and information before the Ministry in the Resolution or in the public notice". (*Guatemala-Cement Panel Report, supra*, footnote 8, para. 7.60).

5.297 The United States observes that Mexico claims that it made such an examination and made such a determination.<sup>243</sup> Mexico asserts that HFCS would have been the identical like product,<sup>244</sup> but that SECOFI excluded Almex and Arancia from the domestic industry under Article 4.1(i) prior to initiation and found sugar to be the product closely resembling HFCS, *i.e.*, the like product.<sup>245</sup> However, Mexico's argument has an inherent factual flaw—there is no contemporary evidence on SECOFI's administrative record demonstrating that SECOFI conducted this examination and made a determination to exclude these companies from the domestic industry prior to initiation.<sup>246</sup> In response to a question put by the Panel, the United States asserts that "no evidence on SECOFI's record establishes that it examined whether Almex and Arancia were producers (or even potential producers) of HFCS, and no evidence establishes that SECOFI defined the domestic industry for injury purposes at initiation by excluding Almex and Arancia from the domestic industry. This violated Article 5.3, as well as Articles 5.1, 5.2, 5.4 and 5.8".<sup>247</sup> In response to another question from the Panel, the United States also asserts that "SECOFI did nothing ... that was available on the record, thus leaving its determination clearly outside the bounds of Article 5.3, even when reviewed under the standards of Article 17.6".<sup>248</sup>

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

5.299 The United States disputes the argument by Mexico that SECOFI's examination of the Sugar Chamber's information regarding production is evidenced in paragraphs 89 and 90 of the *Initiation Notice*. The United States maintains that these paragraphs cannot support the contention that SECOFI conducted the required examination, much less that SECOFI actually made a decision to exclude Almex and

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

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

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

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

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

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

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

5.300 The United States argues that none of the paragraphs to which Mexico points in the *Initiation Notice* as evidencing its standing and like product determinations (not paragraphs 89 and 90, not paragraph 25, not paragraphs 54 and 55) reflects a determination to exclude the HFCS producers from the domestic industry. In short, although the application provided plentiful reason to doubt the accuracy and adequacy of the Sugar Chamber's allegation of no domestic HFCS production, the initiation notice nowhere reflects a resolution of whether that allegation was wrong. Neither does the initiation notice state that SECOFI excluded Almex and Arancia from the domestic industry. Exclusion pursuant to Article 4.1(i) is a discretionary decision. Under Article 4.1(i), an investigating authority *may* interpret the domestic industry as excluding producers that import the subject merchandise, but it need not do so (emphasis added by the United States). Some affirmative indication of this decision is therefore required.

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

5.302 The United States recalls that the absence of - or flaws in - other pre-initiation domestic industry determinations was addressed in three GATT Panel reports.<sup>249</sup> The

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

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

5.303 The United States notes that the *United States-Cement and Clinker* Panel similarly found that "the investigating authorities had to satisfy themselves, prior to initiating the investigation, that the petition was made with the [*sic*] authorization or approval of producers of all or almost all of the production within such market" <sup>252</sup> (citing *United States-Steel Hollow Products*). In that dispute, Mexico argued, and the Panel agreed, that the United States had not complied with Article 5.1 because it had not satisfied itself prior to initiation under Article 4.1(ii) that the application was on behalf of producers of all or almost all of the production in the regional market in that case.<sup>253</sup> The United States had evidence on its administrative record, at initiation, demonstrating that a majority of the producers in the region supported the application.<sup>254</sup> The Panel rejected this evidence as insufficient to demonstrate support for the application by "all or almost all" of the relevant producers. Here, the investigating authority had *no* information on its administrative record at initiation that the producers of HFCS supported the application (emphasis added by the United States). Neither, however, did SECOFI's record contain any evidence - let alone sufficient evidence - that it made a decision under Article 4.1(i) to exclude these producers from the domestic industry prior to initiating the investigation with sugar as the like product.<sup>255</sup>

5.304 The United States notes further that, in *United States-Salmon*, the Panel looked at the question of whether the United States "had evaluated that the written request for the initiation of this investigation had been made with the authorization or

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for an application under Article 5.1 to properly be brought by or on behalf of the domestic industry. Citing *United States-Steel Hollow Products*, the *United States-Salmon* Panel determined that for an application to be "by or on behalf" of the domestic industry, it had to have the authorization or approval of the industry in question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

able facts, when these facts were not before the investigating authority during the investigation.<sup>260</sup>

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

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

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

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

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

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

<sup>261</sup> *Guatemala-Cement Panel Report*, *supra*, footnote 8, para. 7.68, footnote 242.

<sup>262</sup> *Guatemala-Cement AB Report*, *supra*, footnote 16, para. 44.

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

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

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

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

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

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

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

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

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

5.317 The United States notes that Article 6.4 uses the term "shall". The text of Article 6.4 provides that authorities shall allow interested parties to "see all information that is relevant to the presentations of their cases". There can be no question that the pre-initiation decision to exclude Almex and Arancia, the two leading producers of HFCS, from the domestic industry is one which was "relevant" to both Almex and Arancia, as well as to the United States exporters. Moreover, Article 6.4 is applicable to SECOFI's pre-initiation decision regarding the domestic industry because that decision was used by SECOFI in an anti-dumping investigation.

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

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

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

tlement system, if Members can "hide the ball" during the actual investigation and fail to produce key documents until challenged in dispute settlement.

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

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

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

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

5.324 The United States submits that the argument that the document in question was not part of the investigation's administrative record is independently substanti-

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

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

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

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

5.326 The United States argues that the Panel should not use Exhibit MEXICO-13 in reviewing SECOFI's initiation. Mexico asserts that this exhibit is part of a larger group of documents placed on the administrative record on 4 February 1997, that is, not listed separately in the index by its own date, 20 January 1997.<sup>269</sup> It is difficult to comprehend how such a crucial document would not have its own entry on SECOFI's administrative record, especially as the NAFTA Rules of Procedure, rule 41(b) specifically, require a descriptive list of all items on the administrative record.<sup>270</sup> Mexico explains that Exhibit MEXICO-13 was submitted to the NAFTA Panel as privileged information.<sup>271</sup> Yet when SECOFI identified the privileged documents to the NAFTA Panel, Exhibit MEXICO-13 was not listed. US-35 is SECOFI's opposition to a motion by the U.S. exporters seeking disclosure of the privileged documents SECOFI provided to the NAFTA panel.<sup>272</sup> This SECOFI opposition exhibit has no reference to any document dated 20 January 1997 (the date of the MEXICO-13 document) and no document dated 4 February 1997 (the date of the entry in the NAFTA index referring to a set of working papers including the MEXICO-13 document). In short, none of the privileged documents SECOFI provided to the NAFTA panel were dated or created during the period before initiation.

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

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

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

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

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

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

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

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

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

5.331 Therefore, in Mexico's view, the fact that the public notice did not contain the information that the United States would have liked it to contain concerning the determination of the relevant domestic industry does not imply that the investigating authorities did not examine the evidence contained in the annexes to the petitioner's application pointing to HFCS production in Mexico during the period of investigation.

5.332 Mexico disputes the argument made by the United States that the information that SECOFI had before it prior to initiating the investigation cannot support the

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

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

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

5.334 According to Mexico, the fact that SECOFI considered the information published by USDA, concerning, *inter alia*, the establishment of distribution centres and plants for the domestic manufacture of HFCS, as the most reliable information, given that it came from a government source, in no way implies that SECOFI at any time disqualified the information contained in the Articles by two of the leading experts in the field of sweeteners, which formed part of the bibliographical files submitted as annexes to the application and provided evidence of the involvement of the companies Almex and Arancia in the domestic production of HFCS during the period of investigation.

5.335 In Mexico's view, these Articles show that Almex had already begun manufacturing HFCS in Mexico in 1995 and Arancia would begin sometime in 1996, the year encompassing the period of investigation. The United States attempts to ignore the fact that, in paragraph 17 of its first submission and paragraph 32 of its oral statement at the first meeting of the Panel with the parties, it stated that this evidence in the application reflected HFCS production in Mexico. The evidence in question was included in MEXICO-8. This makes it clear that, while some of the documents annexed to the application showed that not only would there be HFCS production in the immediate future, and that the companies Almex and Arancia already had the capacity to produce HFCS in Mexico, other documents showed that there had in fact been production during the period of investigation. One way or another, all of this information taken together showed that there had been production capacity in Mexico since 1995, and both the information published by the USDA and the information provided by the leading experts in sweeteners irrefutably pointed to the concrete fact that these companies were in fact producing HFCS in Mexico during the period of investigation. Mexico argues that SECOFI had no obligation under the AD Agreement or under Mexican law to consider the exact production data concerning Almex and Arancia, since for the purposes of this investigation, they could appropriately be excluded as a possible relevant industry. Hence, there was no obligation to delve deeper or seek to obtain further information with respect to their production. In fact, the United States tries to impose obligations on Mexico beyond what the AD Agreement itself stipulates. Further, the United States' position ignores or minimizes the

fact that Almex and Arancia, although HFCS producers in Mexico, were also the leading importers,<sup>274</sup> and as such, it could at least be presumed that they were the main beneficiaries of the alleged dumping. The fact that they were themselves the leading importers is the determining factor in a case of exclusion under Article 4.1(i) of the AD Agreement. Thus, it was perfectly valid to exclude them and consider the sugar industry represented by the Sugar Chamber as actually having the standing to request the initiation of the investigation and being the domestic industry that could in fact be affected by the dumped imports. It is also illogical for the United States to assert that SECOFI "had no information on its administrative record at initiation that the producers of HFCS supported the application"<sup>275</sup> since they were not the ones that submitted the application and it was clear that as the leading importers, and hence the leading beneficiaries of the dumping, it was not at all in their interest to support the application for initiation of an anti-dumping investigation.

5.336 Further, Mexico disputes the argument of the United States that the confidential staff working paper (MEXICO-13) in which SECOFI determined the sugar industry to be the relevant domestic industry is not included in the administrative record submitted to the NAFTA Panel. The Rules of Procedure for Chapter 19 of NAFTA include rules governing the classification of information submitted to the Panel in that proceeding. The Rules of Procedure for NAFTA Article 1904 (Rules of Procedure) establish different categories into which the importing party under the proceeding may classify the information contained in the administrative record, and according to that classification, the importing party presents a copy of the record held by the investigating authority for review by the binational panel.

5.337 According to Mexico, under Rules of Procedure 3 and 41, non-public information from the administrative record that the importing party submits to the Chapter 19 panel may be classified in three categories: proprietary, privileged and government information.

5.338 Mexico observes that Rule 3 (under the section "Definitions and Interpretation") expressly states that:

"3. For the purposes of these Rules, ...  
privileged information shall mean:

- (a) With respect to a panel review of a Final Determination made in Mexico, ...
  - (ii) internal communications between officials of the Secretaría de Comercio y Fomento Industrial in charge of anti-dumping and countervailing duty investigations or communications between those officials and other Government officials ...".

5.339 Mexico also observes that Rule of Procedure 41 (under the heading "Record for Review") expressly states that:

"41. (1) The investigating authority whose Final Determination is under review shall, within 15 days after the expiration of the

<sup>274</sup> Concerning the information examined by SECOFI on imports, *see* MEXICO-11 and MEXICO-12.

<sup>275</sup> United States second submission, para. 62.

time period fixed for filing a Notice of Appearance, file with the responsible Secretariat

- (a) nine copies of the Final Determination, including reasons for the Final Determination;
  - (b) two copies of an Index comprised of a descriptive list of all items contained in the administrative record, together with proof of service of the Index on all participants; and
  - (c) subject to subrules (3), (4) and (5), two copies of the administrative record.
- (2) An Index referred to in subrule (1) shall, where applicable, identify those items that contain proprietary information, privileged information or government information by a statement to that effect.
- (3) Where a document containing proprietary information is filed, it shall be filed under seal in accordance with Rule 44.
- (4) No privileged information shall be filed with the responsible Secretariat unless the investigating authority waives the privilege and voluntarily files the information or the information is filed pursuant to an order of a panel ...".

5.340 Mexico notes that, on the basis of Rule 41, there is an obligation to submit proprietary information, but the investigating authority reserves the right to decide on the voluntary submission of privileged information. In addition, according to this Rule of Procedure, while the index to be submitted to the Panel in a NAFTA procedure must list the documents in the administrative record, there is no obligation under the Rules of Procedure to submit the information that the authority identifies in the index as privileged information or government information. Thus, the index submitted to the binational panel lists information (non-proprietary, proprietary, privileged and government information) on the understanding that privileged information does not necessarily have to be included in the copy of the record that is submitted to this Panel.

5.341 Mexico asserts that the document submitted as Exhibit MEXICO-13 to this Panel was indeed submitted to the binational panel under NAFTA Chapter XIX as "privileged information", given that it was a working document of the investigating authority (*i.e.* an internal communication between SECOFI officials in charge of anti-dumping investigations), and Mexico voluntarily decided to submit to the NAFTA panel the working papers of the Deputy Directorate-General for Injury and Safeguards.<sup>276</sup> Thus, the working paper submitted to this Panel as Exhibit MEXICO-13 does form part of the administrative record submitted to the NAFTA binational panel, and does form part of the administrative file of the investigation.

5.342 In response to a question put by the Panel, Mexico acknowledged that the interested parties in the investigation did not have access to Exhibit MEXICO-13 given that this was a confidential government document. However, interested parties did have access to the information submitted in the Sugar Chamber's application

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<sup>276</sup> See MEXICO-48.

showing not only that Arancia and Almex had productive capacity and had engaged in production, but also that these companies had become the leading importers of HFCS.<sup>277</sup>

5.343 Mexico contends that the reference by the United States to *Guatemala-Cement* is out of context, since the facts in that case were completely different. In *Guatemala-Cement*, the investigating authority was unable to prove that certain information was part of the administrative record. In this case, Mexico has established that the working paper submitted as MEXICO-13 did form part of the administrative file.

5.344 Mexico disputes the argument by the United States that MEXICO-13 is a working document which, at most, "contains a staff person's thoughts", and that "even if the working paper had been transmitted to others, there is no reason to believe that its suggestions were adopted". Under Mexican practice, a working paper by SECOFI constitutes analytical work undertaken by the investigating authority in conformity with its obligations within the applicable legal framework. In particular, MEXICO-13 contains an analytical table of the share of imports by company in the total volume imported from the United States, and it is a working paper by SECOFI reflecting its analysis and setting forth its conclusions on the volume of imports investigated by company, the production capacity of HFCS during the period of investigation, and the determining fact that Almex and Arancia, although producers, were also the leading importers. Since Exhibit MEXICO-13 reflects the examination and the conclusions of officials of a Deputy-Directorate General of SECOFI regarding the above matters, and was directed to the officials of another Deputy-Directorate General at the same Ministry, this document should be regarded with all seriousness. Mexico also disputes the argument by the United States that working documents are inadequate to support the examination, conclusions or decisions of an investigating authority conducting an anti-dumping investigation, when in fact, there is no provision in the AD Agreement which prevents the issue of this kind of document. On the contrary, in procedures of this kind it is perfectly acceptable, not only in Mexican administrative practice, but also in administrative practices of other WTO Members, to produce working papers and analyses that are transmitted from department to department between officials responsible for anti-dumping investigations; and it is perfectly valid that such documents reflect the actions and conclusions supporting the decisions of the investigating authority. Even the Rules of Procedure (Rule 3) of NAFTA Chapter 19 recognize this. Thus, the United States' argument has no foundation in the AD Agreement and in anti-dumping practice.

5.345 Mexico reiterates that the decision to exclude Almex and Arancia from the definition of the relevant domestic industry for the purposes of the investigation was based on the determining fact that these two companies were the leading importers, and hence the main beneficiaries of the allegedly dumped imports. This fact was duly established not only in the analytical table of imports by company and the working documents submitted to the Panel as Exhibit MEXICO-13, but also in a number of other analytical tables, which likewise showed that SECOFI had examined and substantiated of the status of Almex and Arancia as leading importers by analyzing their

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<sup>277</sup> See Answer of Mexico to question no. 5 by the Panel, 22 June 1999.

share in HFCS imports by company. These analytical tables are submitted to the Panel so that the Panel is able to review them.<sup>278</sup>

5.346 Mexico argues that SECOFI's examination and determination concerning the exclusion of Almex and Arancia and the consideration of the sugar industry as the relevant domestic industry should be considered in the light of the various elements taken as a whole, in their totality, including the information contained in the application and the information that SECOFI itself obtained, as well as the analytical tables and working documents establishing SECOFI's actions and conclusions, and supporting its decision.

5.347 Mexico also reiterates that the analysis and determination of the relevant domestic industry for the purposes of an investigation arises, in practice, from the obligation of the investigating authority to determine, prior to the initiation, whether an application for initiation has been submitted by the industry that has standing to request such initiation. In this context, the examination conducted and the conclusions reached by SECOFI prior to the initiation of the investigation, set forth in its analytical tables and working documents, formed the basis for SECOFI's determination in accordance with which the investigation was initiated with the sugar industry as the relevant domestic industry, and the Sugar Chamber's standing to apply for the investigation was established in paragraph 25 of the *Initiation Notice*.

5.348 Mexico contends that, as the standing of the Sugar Chamber was established in the notice of initiation as a result of the investigative authority's prior determination concerning the relevant industry, the parties, including Almex and Arancia, had ample opportunity to defend themselves and to present their arguments in this respect, as they indeed did throughout the investigation. Their claims and arguments were duly answered during the different stages of the procedure and in the subsequent public notices. In other words, the United States' argument concerning the alleged lack of defence opportunities due to the fact that the notice of initiation did not contain an explanation of how the investigative authority reached its determination is unfounded.

5.349 The United States disputes Mexico's argument that it "confuses" the obligations under Articles 5 and 12. This argument is apparently based on Mexico's mistaken assumption that evidence of the Article 5 examination must be contained in the initiation notice.<sup>279</sup> Yet the United States has never argued for such an interpretation of Articles 5 and 12. Rather, the United States has argued that SECOFI's Article 5.3 and 5.4 examinations and determinations must be found in the record, and must be based on documents which were available to interested parties at the time of the initiation of the investigation. The initiation notice is a central part of the administrative record. It is often the first exposure interested parties have to a foreign anti-dumping authority's decision to initiate. As such, it is a logical place for an authority to set out the key elements regarding its determination to initiate an investigation. But it is not the only place an authority can do so. Wherever the decision is located, it must be accessible to the interested parties.

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<sup>278</sup> See MEXICO-49.

<sup>279</sup> See Mexico's second submission, paras. 76, 107, 111-12, 120-22.

5.350 The United States also disputes Mexico's argument that SECOFI's examination can be discerned from the "totality" of the information in the administrative record.<sup>280</sup> Yet such an assertion contradicts the major emphasis which Mexico places on MEXICO-13, as seen in Mexico's answers to questions put by the Panel.<sup>281</sup> Mexico's "totality" argument would imply that the Panel should conduct a *de novo* review of the information at SECOFI's disposal prior to initiation, even though Mexico has not given the Panel any evidence that SECOFI conducted the required examination itself. The Panel would presumably piece together information from disparate sources which, in its totality, would demonstrate whether the basis for a "determination" existed before 27 February 1997. Yet it was the responsibility of SECOFI at the pre-initiation stage, not the Panel in this dispute, to conduct this synthesis and make a determination of whether the finding was one of production or potential production (and, in this latter case, address the basis for this leap in logic rather than presume it irrelevant because there was importation). It was also SECOFI's responsibility to make a record determination to exclude Almex and Arancia from the domestic industry under Article 4.1(i). Bits and pieces of information produced *post hoc* - particularly when what Mexico now claims is a major bit is a secret document - do not evidence the required examinations or constitute such determinations.

### 3. *Alleged Insufficiency of the Notice of Initiation (Claims under Article 12)*

5.351 The United States argues that SECOFI's initiation notice did not meet the stringent notice requirements of Articles 12.1 and 12.1.1 of the AD Agreement. In its initiation notice, SECOFI states that it commenced this investigation based on the Sugar Chamber's allegation that HFCS was not produced in Mexico during the period of investigation.<sup>282</sup> Even the preliminary determination does not state that SECOFI was aware of domestic HFCS production at the time of initiation. In that determination, SECOFI notes that it had become aware of production by Almex and Arancia from the information these companies had submitted. However, these companies did not submit this information until after initiation.<sup>283</sup> Further, SECOFI's preliminary determination rejects A.E. Staley's argument that the chart annexed to the Sugar Chamber's application entitled "Estimated Production Capacity of HFCS 42 and 55" could have any relevance for purposes of demonstrating the existence of HFCS production.<sup>284</sup> The question thus arises: on what basis could SECOFI have known about HFCS production in Mexico prior to initiation to assess whether to exclude Almex and Arancia at that time from the domestic industry?

<sup>280</sup> See Mexico's second submission, paras. 126-27, 133 and 161.

<sup>281</sup> See Answers of Mexico to questions no. 6 and 7 by the Panel, 6 May 1999.

<sup>282</sup> See *Initiation Notice*, in which SECOFI Secretary Blanco Mendoza states, "*I issue this Decision in accordance with the following:*" and... "In regard to the nationally produced product, the requester pointed out that in the United Mexican States, *high fructose corn syrup is not produced.*." (emphasis added by the United States), respectively, at third para. (unnumbered), and para. 7, US-4.

<sup>283</sup> See United States first submission, paras. 24-25.

<sup>284</sup> See *Preliminary Determination*, para. 30(B), US-2 (A.E. Staley's argument) and para. 61 (SECOFI's rejection).

5.352 According to the United States, in its final determination SECOFI states unequivocally for the first time that it had known of domestic HFCS production prior to initiation. SECOFI then suggests that it had conducted some sort of pre-initiation analysis in order to exclude Almex and Arancia from the definition of the domestic industry.<sup>285</sup> This, the United States asserts, contradicts SECOFI's stated basis for initiating an investigation at the time of initiation - the Sugar Chamber's allegation that there was no domestic production of HFCS.

5.353 The United States submits that identifying the relevant like product and consequently the relevant domestic industry are essential factors on which any allegation of injury must be based. As footnote 9 of the AD Agreement states, "Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of *such an industry*..". (emphasis added by the United States). Thus, the term "injury" as used in Article 12.1.1(iv) incorporates as an essential element the definition of "domestic industry".<sup>286</sup> Article 4.1, in turn, provides, "[f]or the purposes of this Agreement, the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products...". Any decision regarding injury must therefore begin by defining, as an essential factor, the like product.

5.354 The United States contends that the information that SECOFI provided as to the allegation of injury here both failed to summarize the factors on which the allegation was based and failed to provide adequate information thereon. Whether by accident or design, SECOFI repeats in its initiation notice the Sugar Chamber's statement that there was no domestic production of HFCS; whereas its final determination states that SECOFI knew the opposite to be true at the time of initiation.<sup>287</sup> Assuming this later representation to be true, the initiation notice failed to provide adequate information summarizing the factors relevant to the allegations concerning the relevant domestic industry on which SECOFI decided to initiate. SECOFI's initiation notice represented that the Sugar Chamber had alleged that there was no domestic HFCS production, as a basis for its allegation that the relevant like product was sugar, and that SECOFI issued its decision to initiate in accordance with this application. Since, however, the Sugar Chamber's application contained other information that apparently convinced SECOFI of the opposite conclusion, SECOFI's repetition of that simple allegation failed to summarize the allegations on this factor.<sup>288</sup> Articles 12.1 and 12.1.1 cannot reasonably be interpreted to mean that when an application makes multiple contradictory allegations, an initiation notice ade-

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<sup>285</sup> See *Final Determination*, para. 113, US-1.

<sup>286</sup> Article 12.1.1(iv) requires that when investigating authorities are satisfied that there is sufficient evidence to justify initiation, a public notice shall be given: "A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report, adequate information on... (iv) a summary of the factors on which the allegation of injury is based...".

<sup>287</sup> See *Final Determination*, para. 113, US-1.

<sup>288</sup> Nor did SECOFI provide a separate report available to the public that contained such a summary. See AD Agreement footnote 23 ("Where authorities provide information and explanations under the provisions of [Article 12] in a separate report, they shall ensure that such report is readily available to the public").

quately summarizes the allegations when it states only the allegation that the authority has concluded are untrue.

5.355 The United States maintains that the requirement of Article 12.1 to provide "adequate information" on the factors enumerated in its subparts presumes that there will be occasions in which a simple recitation of the application's allegations will be inadequate. SECOFI's statements in its final determination establish that it must have initiated the investigation on the basis of an understanding of the facts contrary to the allegation regarding domestic production that its initiation notice recited. Far from crediting the Sugar Chamber's allegation that there was no domestic production of HFCS, SECOFI states in the final determination that it reached the opposite conclusion.

5.356 The United States is of the view that, in these circumstances, SECOFI's simple recitation of the Sugar Chamber's allegation necessarily misled the public, the respondents and the United States, the Member whose product was the subject of the investigation, as to both the information in the application and the basis on which SECOFI initiated the investigation. Under no fair reading of the requirements of Article 12.1 can such a misleading notice constitute "adequate information". The requirement that such a notice issue arises under Article 12.1: "[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5". A notice cannot provide "adequate information" when, as here, it affirmatively directs the public and interested parties away from the bases on which the authorities were satisfied that there was sufficient information to justify an investigation. Otherwise, investigating authorities could conceal the true bases for commencing investigations, unfairly forcing parties to engage in guesswork to challenge them.

5.357 The United States asserts that, because SECOFI failed to disclose its later-stated knowledge of domestic HFCS production, its initiation notice was also misleadingly silent on the factors that might have led it to conclude that there was sufficient information to initiate an investigation. As is reflected in SECOFI's final determination, in order to determine that the sugar industry was the relevant domestic industry, it needed to reach a resolution of the status of those companies who were producing HFCS in Mexico prior to initiation. Once SECOFI concluded, in reviewing the application, that there was domestic production of HFCS, it needed to consider whether the producers of HFCS in Mexico should be included within the industry producing the like product. In a case such as this, in which the complaining industry admittedly does not produce the product under investigation, it is all the more imperative for the investigating authority to apply the requirements of Article 4.1.1 and footnote 11 (which govern the exclusion of importers and producers from the domestic industry) with care, and provide adequate information about what it did.<sup>289</sup> The application contained no allegations relevant to this matter, and SECOFI's initiation notice also provided no information - let alone adequate information - summarizing the factors upon which SECOFI excluded those HFCS producers.

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<sup>289</sup> Article 4.1(i) provides that "when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term 'domestic industry' *may* be interpreted as referring to the rest of the producers" (emphasis added by the United States).

5.358 According to Mexico, the United States misreads the notice of initiation. The fact that the Sugar Chamber's allegation was reproduced by SECOFI in the notice of initiation in no way signifies that this was the basis for initiating the investigation.

5.359 Mexico submits that the United States' argument rests on an excessive interpretation of Article 12.1.1(iv) of the AD Agreement. This provision, however, does not require the notice of initiation to contain information concerning the factors considered by the investigating authority in defining the relevant domestic industry, as the United States alleges. In conformity with Article 12.1.1(iv), the notice of initiation contained the required information summarizing the factors on which the allegation of threat of injury to the domestic sugar industry, the domestic industry defined as relevant prior to the initiation of the investigation, was based.

5.360 Mexico argues that, while paragraph 7 of the *Initiation Notice* does reflect the Sugar Chamber's allegation that there was no HFCS production in Mexico, this in no way signifies, as the United States suggests, that this paragraph was the basis on which SECOFI decided to initiate the investigation, given that it does not present a statement by the investigating authority.

5.361 Mexico argues further that this misreading of the notice of initiation is a demonstration of bad faith and feigned or intentional lack of understanding by the United States regarding the structure of public notices in Mexican legal practice, despite the fact that during the consultations held with the United States on 12 June 1998, Mexico explained the importance and implications of this structure for a correct reading and clear understanding of the content of the notice in question.

5.362 Mexico notes that in Mexican legal practice, public notices are divided into three sections: (1) *Resultandos*, (2) *Considerandos* and (3) *Resolución*, each of which has a specific purpose and content. The three sections taken together comprise a public notice complying strictly with all of the requirements of Article 12 of the AD Agreement.

5.363 Mexico notes further that, in the context of public notices of initiation of anti-dumping investigations, the *Resultandos* section, which includes the above-mentioned paragraph 7, contains only a certain amount of general factual data and the description, transcription or synthesis, as appropriate, of the allegations, arguments, information and evidence submitted by the applicant with respect to the alleged dumping, the alleged injury or threat of injury and the causal relationship between them. The analysis of these *Resultandos* comes under the *Considerandos* section, which addresses the examination of the allegations, information and evidence submitted by the applicant, and of the information obtained by the investigating authority itself, with respect to dumping, injury or threat of injury and the causal relationship between them.

5.364 Mexico observes that, once the grounds for the initiation of the investigation are established (in the *Considerandos* section), the final section constitutes the *Resolution* of the investigating authority by which the initiation of the investigation is decided, through the so-called *Puntos Resolutivos*, accepting the application and establishing the concrete steps to be taken by the investigating authority and interested parties: e.g. establishment of the deadlines for the interested parties to submit their opinions, the address to which the representations by the parties should be directed, the date of the public hearing, the date of entry into force, the order to notify the interested parties and the exporting member, etc.

5.365 Mexico observes further that the purpose of this structure is to distinguish the simple description or transcription of general data and the allegations, information and evidence submitted by the applicant (*Resultandos*) from, on the one hand, the examination or analysis of all of the allegations, information and evidence obtained (*Considerandos*)<sup>290</sup> and, on the other hand, the so-called "Puntos Resolutivos" in which the investigating authority actually decides to initiate the investigation, by means of accepting the application and determining the concrete steps that the investigating authority and the interested parties must take as of the initiation of the investigation (*Resolución*).

5.366 Mexico notes that paragraph 7 of the *Initiation Notice* appears in the initial section of the notice, *i.e.* the *Resultandos* section. Consequently, that paragraph, as part of the *Resultandos*, simply repeats or reproduces in the notice of initiation an allegation made by the Sugar Chamber in its application that there was no HFCS production in Mexico, this is also true of many other paragraphs of the *Resultandos* section with respect to other allegations, information and evidence contained in the application.

5.367 Mexico contends that the United States refers only to paragraph 7 of the *Initiation Notice*, omitting any reference to, or mention of, other paragraphs, in particular a number of paragraphs in the *Considerandos* section, which in fact reflect what SECOFI itself considered as the reasons or the basis for its determination to initiate the investigation. It is in the *Considerandos* section, and not in the *Resultandos* section, that the investigating authority actually conducts its analysis and provides the grounds which justify its determination to initiate the investigation.

5.368 In Mexico's view, it is particularly significant that the United States fails to mention paragraphs 89 and 90 of the *Initiation Notice* - which show that SECOFI, prior to the initiation of the investigation, examined the evidence and information supplied by the Sugar Chamber<sup>291</sup> establishing the existence of HFCS producers in Mexico, giving greater importance to the information published by the USDA as shown in paragraph 90 of the *Considerandos* section - when in fact these are the paragraphs which effectively establish the grounds for initiating the investigation.<sup>292</sup>

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<sup>290</sup> This can be appreciated by observing, for example, that although references are made to the evidence in the various sections of the *Initiation Notice*, paras. 16-23, which form part of the *Resultandos* section, simply reproduce the list of evidence submitted by the Sugar Chamber in its application for initiation, while paras. 30, 32, 34-37, 40, 41, 50, 68, 69, 70, 77, 86, 97, 98, *inter alia*, which form part of the *Considerandos* section, contain the evaluation and analysis by SECOFI of the listed evidence.

<sup>291</sup> In particular the document entitled "Estimated Capacity of Production of HFCS 42 and 45".

<sup>292</sup> As mentioned above, although the allegation by the applicant transcribed in para. 7 of the notice and the information and evidence contained in the application contradict each other as to the operations of the manufacturing companies, SECOFI examined the information available and decided that the most reliable information in this respect was the data published by the USDA, as a governmental source. Consequently, in para. 89 of the *Initiation Notice*, SECOFI adopts as part of the *Considerandos* the claim by the applicant that the United States corn sweeteners industry made investments in different parts of the Mexican market in order to be able to manage the importation, distribution and, at some point, the production of HFCS, which would take a few years to become significant. Para. 90, also part of the *Considerandos* section of the public notice, takes as evidence of this the information published by the USDA concerning various operations by Almax, Arancia and Cargill in

Generally speaking, the *Considerandos* section in this notice of initiation comprises paragraphs 24 to 99, which include an extensive analysis of the alleged dumping, threat of injury and causal relationship between the allegedly dumped imports and the threat of injury to the domestic industry. Paragraph 99 states, in conclusion:

"99. In accordance with the information, arguments and evidence submitted by the National Chamber of Sugar and Alcohol Industries and the information collected by the Ministry, we conclude that there are reasonable grounds for considering that during the investigation period, the United States imports entered the Mexican market under alleged conditions of price discrimination and threatened to cause injury to the domestic sugar industry, and therefore, pursuant to Article 52, Part I of the Foreign Trade Act and Article 80 of the Regulations thereto, we issue the following [RESOLUTION] " .

5.369 In Mexico's opinion, it is clear from the above that SECOFI's decision to initiate the investigation was the result of an extensive analysis of the arguments, evidence and information submitted by the Sugar Chamber, as well as the information collected by SECOFI itself, and thus, the basis for the determination to initiate the investigation was absolutely not the allegation by the Sugar Chamber that there was no domestic HFCS production, as the United States suggests.

5.370 Mexico contends that United States arguments referred to above are unfounded, and are in fact contradictory. In particular, the United States erroneously asserts that SECOFI stated that the basis for initiating its investigation was the Sugar Chamber's allegation that there was no domestic production of HFCS<sup>293</sup>, when in fact, neither in paragraph 7 or in any other paragraph of the *Initiation Notice* did SECOFI make a statement or assertion that "the fact that there was no domestic production of HFCS in Mexico constituted the basis or grounds for initiating the investigation". Moreover, according to Mexico, the United States itself recognizes in its first submission that paragraph 7 simply repeats or reproduces<sup>294</sup> in the *Initiation Notice* an allegation made by the applicant that there was no HFCS production in Mexico.

5.371 Mexico also disputes the United States argument that the notice of initiation failed to meet the requirements of Article 12.1.1 of the AD Agreement, in particular those of subparagraph (iv) thereof. Mexico observes that, in paragraph 53 of its first submission, the United States asserts that "... the initiation notice failed to provide adequate information summarizing the factors relevant to the allegations concerning the relevant domestic industry on which SECOFI decided to initiate ...". In the view of Mexico, the United States makes an excessive interpretation of the requirements of Article 12.1.1(iv) of the AD Agreement.

5.372 Mexico submits that Article 12.1.1(iv) of the AD Agreement requires that notices of initiation contain the necessary information summarizing the factors on which the allegation of injury or threat of injury is based, but does not further require

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Mexico which was submitted in Annex to the application for initiation. See paras. 93 and 115 of Mexico's first submission.

<sup>293</sup> See United States first submission, paras. 50, 51, 54 and 57-59.

<sup>294</sup> See United States first submission, paras. 53-55.

that such notices provide adequate information summarizing the factors relevant to the allegations concerning the relevant domestic industry on which it was decided to initiate, let alone the adequate information summarizing the factors upon which SECOFI excluded the HFCS producers.

5.373 In response to a question by the United States with respect to this issue, Mexico observed that SECOFI's public notice contained adequate information on all the requirements expressly laid down in Article 12.1.1. Indent (iv) of this Article only requires a summary of the factors on which the allegation of injury is based, which in no way implies that the totality of the pieces of evidence available to the investigating authority should be included in a notice of initiation, much less the considerations and evidence taken into account for the determination of the relevant industry for purposes of the investigation, which takes place prior to the initiation of the investigation and in the context of Article 5 of the AD Agreement, not Article 12.1.1.<sup>295</sup>

5.374 Mexico also holds that, although the identification of the relevant like product in an anti-dumping investigation determines the domestic industry in respect of which the allegation of injury must be made, this does not mean that Article 12.1.1 of the AD Agreement can be interpreted as requiring that the notice of initiation must contain information concerning "factors relevant to the allegations concerning the relevant domestic industry".

5.375 Mexico asserts that the definition of the relevant domestic industry is established prior to the initiation of an investigation, and that it is in accordance with this prior determination that it is decided to initiate the investigation and issue the corresponding public notice, which must include the information summarizing the grounds for the allegation of injury to the domestic industry previously defined as relevant.

5.376 Mexico argues that, as SECOFI established prior to the initiation of the investigation that the two companies producing HFCS in Mexico were also the leading importers of the allegedly dumped product,<sup>296</sup> the status of those companies as domestic HFCS producers lost all significance, and SECOFI excluded them from the definition of the relevant domestic industry under Article 4.1(i) of the AD Agreement. As SECOFI also determined that HFCS and sugar qualified as like products with closely resembling characteristics under Article 2.6 of the AD Agreement, SECOFI considered that, for the purposes of the investigation, the relevant domestic industry was made up of the sugar producers as represented by the Sugar Chamber. Thus, such producers constituted the domestic industry defined as relevant for the purposes of the investigation and which could be affected or threatened by the allegedly dumped imports.

5.377 Mexico argues further that, in accordance with the AD Agreement, the identification of the relevant like product - *i.e.* sugar, as the like product with closely resembling characteristics - and the consequent definition of the relevant domestic industry, determined that the grounds for the allegation of threat of injury, and ultimately the summary of the factors on which that allegation was based, required under

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<sup>295</sup> See Answer of Mexico to question no. 12 by the United States, 6 May 1999.

<sup>296</sup> Mexico cites in this respect MEXICO-13.

Article 12.1.1(iv) of the AD Agreement, related strictly to the sugar producers represented by the Sugar Chamber.<sup>297</sup>

5.378 Mexico observes that, since the national sugar producers as represented by the Sugar Chamber constituted the domestic industry defined as relevant for the purposes of the investigation, SECOFI decided to initiate the investigation and issue the public notice of initiation under those terms, in strict compliance with all of the requirements of Article 12.1.1 of the AD Agreement, including the requirement to provide the necessary information summarizing the factors on which the allegation of threat of injury to the domestic sugar production was based.

5.379 Mexico disputes the argument by the United States, referring to paragraphs 198 to 200 of Mexico's first submission, that it took the position that the decision to exclude Almex and Arancia "did not need to be disclosed to the public". Mexico maintains that it never indicated that the purpose of not including such information was to conceal the facts from the public, as the United States suggests, much less to mislead anyone. Simply, there was no provision in the AD Agreement which imposed this legal requirement to include information on a determination made prior to the initiation of the investigation. Mexico observes that, in paragraph 87 of its second submission, the United States asserts that SECOFI's notice of initiation did not provide adequate information and makes an excessive interpretation of Article 4.1(i) of the AD Agreement to the effect that determinations under this provision must appear in the notice. Mexico submits that the notice of initiation complied fully with Article 12.1.1, specifically by including the required information in connection with the summary of factors on which the allegation of injury was based.

5.380 In support of the above arguments, Mexico states that the notice of initiation contained adequate information on the following:

- (a) the name of the exporting country and the product involved, which are clearly indicated even in the heading of the notice;<sup>298</sup>
- (b) the date of initiation of the investigation, set forth in paragraph 109;<sup>299</sup>
- (c) the address to which representations by interested parties should be directed, which is indicated in paragraph 104;<sup>300</sup>
- (d) the time-limits allowed to interested parties for making their views known, indicated in paragraph 103;<sup>301</sup>

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<sup>297</sup> See Article 4.1 of the AD Agreement which states that, for the purposes of the AD Agreement, [including the determination of injury or threat of injury], the term "domestic industry" shall be interpreted as referring to domestic producers as a whole of the like products, which can be identical or have closely resembling characteristics under Article 2.6 of the AD Agreement; in Mexico's view in this case the domestic sugar industry corresponds to the latter of these two definitions. Moreover, Article 5.1 of the Tokyo Round Anti-Dumping Code states that "an investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry affected..." (emphasis added by Mexico). In this respect, the Panel in the *United States-Cement and Clinker* case pointed out that applications for initiation must be submitted by or on behalf of the industry affected. See *United States -Cement and Clinker Panel Report*, paras. 5.17 and 5.20. See also footnote 72 in Mexico's first submission.

<sup>298</sup> Article 12.1.1(i) of the AD Agreement.

<sup>299</sup> Article 12.1.1(ii) of the AD Agreement.

<sup>300</sup> Article 12.1.1(v) of the AD Agreement.

<sup>301</sup> Article 12.1.1(vi) of the AD Agreement.

- (e) the basis on which dumping is alleged in the application, appearing in paragraphs 27-41;<sup>302</sup> and
- (f) a summary of the factors on which the allegation of injury was based, which appears in paragraphs 61 to 98.<sup>303</sup>

5.381 Mexico contends that, contrary to the arguments of the United States, paragraphs 61 to 98 of the *Initiation Notice* contain a summary of the factors on which the allegation of threat of injury to the domestic sugar industry was based, as required under subparagraph (iv) of Article 12.1.1 of the AD Agreement, including a summary of the information concerning such factors as increase in dumped imports, real and potential decline in sales, price effects, export capacity, investment projects, return on investments, utilization of installed capacity and inventories of the investigated products, concluding (causal relationship) that, in view of the high growth rate of HFCS imports from the United States, the price at which the imports were taking place and the increase in installed capacity, there were reasonable indications of threat of injury to the domestic sugar industry.

5.382 Mexico disputes the United States' argument that the notice of initiation did not meet the requirements of Articles 12.1 and 12.1.1 of the AD Agreement. The investigation was initiated considering the relevant domestic industry as consisting of the domestic producers of the like product with closely resembling characteristics, and not the HFCS-producing companies in Mexico, which were excluded prior to the initiation of the investigation on the grounds that they had become the leading importers of the allegedly dumped product, in conformity with Articles 2.6 and 4.1 of the AD Agreement.

5.383 Mexico also disputes the argument by the United States that there is a contradiction between the notice of initiation and the notices of imposition of provisional anti-dumping measures and of imposition of definitive anti-dumping duties.

5.384 Mexico observes that the standing of the Sugar Chamber was established in the *Initiation Notice*, paragraph 25,<sup>304</sup> given that the definition of the relevant domestic industry - the domestic sugar industry - was established prior to the initiation of the investigation. In Mexico's view, Article 12.1.1 of the AD Agreement does not in any way require, as the United States alleges, that notices of initiation contain a detailed explanation of how the determination of the relevant domestic industry, on the basis of which the standing of the Sugar Chamber to apply for the initiation of the investigation was established in the notice at issue, was reached.

5.385 Mexico also observes that, in response to the arguments put forward by the importing and exporting companies during the preliminary stage of the investigation concerning the standing of the applicant, and pursuant to Article 12.2.1 of the AD Agreement,<sup>305</sup> which lays down the obligation for a notice of the imposition of provi-

<sup>302</sup> Article 12.1.1(iii) of the AD Agreement.

<sup>303</sup> Article 12.1.1(iv) of the AD Agreement.

<sup>304</sup> See also paras. 54 and 55 of the *Notice of Initiation*.

<sup>305</sup> Article 12.2.1 reads as follows:

"A public notice of the imposition of provisional measures shall set forth ... sufficiently detailed explanations for the preliminary determinations on dumping and injury and *shall refer to matters of fact and law which have led to arguments being accepted or rejected* ... " (emphasis added by Mexico).

sional anti-dumping measures to refer to the matters of fact and law which have led to the arguments of the interested parties being accepted or rejected, SECOFI determined, in paragraph 62 of the *Preliminary Determination*, that the Sugar Chamber had standing to request the initiation of the investigation. Thus, the preliminary determination concerning the standing of the Sugar Chamber referred to in paragraph 62 of the corresponding notice was in fact made in connection with the arguments of some of the interested parties<sup>306</sup> and on the basis of the information submitted by them during the preliminary stage of the investigation, with reference, as provided for in Article 12.2.1 of the AD Agreement, to the matters of fact and law which led to the arguments of the importing and exporting companies concerning the alleged lack of standing of the applicant being rejected.

5.386 Mexico disputes the argument by the United States that it was on the basis of information supplied by Almex and Arancia, provided after the initiation of the investigation, that SECOFI established the standing of the Sugar Chamber. The preliminary finding concerning the standing of the applicant in paragraph 62(b) of the *Preliminary Determination* is simply intended to fulfil the requirement laid down in Article 12.2.1 of the AD Agreement by establishing, among other matters of fact and law that must be included in the corresponding public notice, that the companies Almex and Arancia had declared that they were producers of HFCS in Mexico, that they were linked to the United States exporters, and that they themselves were the leading importers of HFCS. These statements were made by Almex and Arancia in their replies to the official questionnaire for importers filed during the preliminary stage of the investigation, in which they themselves repeat the fact already known to SECOFI before the initiation of the investigation that they were producers and leading importers, and in which they declare, in addition, their status as parties related to the exporters.

5.387 Mexico asserts, therefore, that the information provided by Almex and Arancia during the preliminary stage of the investigation became a matter of fact and law which, *inter alia*, added elements to SECOFI's analysis leading to the rejection of the arguments by the importing and exporting companies that questioned the standing of the Sugar Chamber, permitting SECOFI to confirm, as part of its preliminary determination, the standing of the Sugar Chamber established in paragraph 25 of the *Initiation Notice*. This was, in turn, consistent with the definition of the relevant domestic industry established prior to the initiation of the investigation.

5.388 Mexico asserts further that, in conformity with the requirements of Article 12.2.2 of the AD Agreement and without any incompatibility in respect of the previous public notices, paragraphs 113 and 430 to 441 of the *Final Determination* duties carefully set forth the grounds on which the investigating authority rejected the ar-

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<sup>306</sup> Paragraph 62 of the *Preliminary Determination* states that:

"In connection with the arguments of the importing and exporting companies that the applicant does not have standing in that it does not represent the domestic producers of the identical product given that during the period investigated there was a domestic production of high fructose corn syrup, this Ministry determined that the National Chamber of Sugar and Alcohol Industries does have the standing to request the initiation of the investigation for the following reasons ... " (emphasis added by Mexico).

guments presented during the course of the investigation by the importing and exporting companies, as well as by the exporting Member, concerning the standing of the applicant and the prior determination of the relevant domestic industry.<sup>307</sup> To that end, the above-mentioned paragraphs explain in greater detail the reasons why SECOFI, prior to the initiation of the investigation, had decided to exclude Almex and Arancia from the definition of the relevant domestic industry, and define that industry as the domestic sugar industry represented by the Sugar Chamber, which was consequently established as having the standing to apply for the initiation of an investigation as from the notice of initiation.

5.389 Mexico submits therefore that the United States is in error when arguing that there were inconsistencies between the information set forth in the final determination showing that SECOFI knew of the existence of domestic HFCS production at the time of initiation, and what the United States wrongly considers to be the alleged grounds "stated" by SECOFI in the notice of initiation; that is, "... the Sugar Chamber's allegation that there was no domestic production of HFCS ...",<sup>308</sup> contained in paragraph 7 of the *Initiation Notice* which, as Mexico has pointed out and the United States has recognized,<sup>309</sup> simply repeats one of several allegations by the applicant<sup>310</sup> reproduced in the *Resultandos* section, in accordance with the established structure of public notices. This does not in any way imply, however, that SECOFI stated that the allegation was the basis for initiating the investigation. Mexico states that, even if Articles 12.2.1 and 12.2.2 of the AD Agreement do not require that preliminary determinations and final determinations contain an explanation of the investigating authority's definition of the relevant domestic industry either, they do require that such notices contain an explanation of the grounds for accepting or rejecting the arguments of the exporters and importers, which was done in this case in respect of the standing of the Sugar Chamber. Thus, it was pursuant to the requirements laid down in Articles 12.2.1 and 12.2.2 of the AD Agreement concerning the required content of preliminary determinations and final determinations that the respective notices in this investigation contained, as an expression of the preliminary and final findings of SECOFI, the reasons for rejecting the arguments of the interested parties questioning the Sugar Chamber's standing established in the initiation notice and which was consistent with the determination of the relevant domestic industry made prior to the initiation of the investigation.

5.390 The United States submits that, once an investigating authority determines that there is sufficient evidence to initiate an anti-dumping investigation, Article 12.1.1 imposes the obligation to publish "adequate information" about what it found

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<sup>307</sup> Mexico maintains that the United States attempts to find a contradiction between SECOFI's statements in the initiation notice, in the preliminary determination, and in the final determination, concerning the reasons for excluding Almex and Arancia as the relevant domestic industry. In support of this contention, SECOFI refers to the incomplete quotation of paragraph 113(c) of the *Final Determination*. The complete text of this paragraph makes it perfectly clear that, during the preliminary stage of the investigation, Almex and Arancia provided information according to which SECOFI not only confirmed that these companies were producers and at the same time the leading importers of HFCS, but also learned that such companies were related to the United States' exporters.

<sup>308</sup> See United States first submission, para 51.

<sup>309</sup> See United States first submission, paras. 52 and 54.

<sup>310</sup> See Mexico's first submission, footnote 68.

sufficient in a way which summarizes "the factors on which the allegations of injury is based". This obligation can be satisfied through the publication of a public notice, or by making a separate report containing "information and explanations" available publicly.

5.391 The United States contends that SECOFI's initiation notice found sugar to be the like product,<sup>311</sup> and that Mexico acknowledges that SECOFI repeated the Sugar Chamber's allegation that there was no Mexican production of HFCS.<sup>312</sup> Nothing, however, in SECOFI's initiation notice contains any indication that SECOFI excluded Almex and Arancia as domestic producers of the like product in order to find sugar to be the like product. Mexico's frequent statements regarding paragraph 25 of the *Initiation Notice* entitled "Legal Capacity" cannot transform its content into a determination to exclude Almex and Arancia from the domestic industry pursuant to Article 4.1(i).

5.392 The United States disputes Mexico's argument that, while Article 12.1.1(iv) requires that an investigating authority summarize the factors on which the allegation of injury is based, this does not require a summary of allegations with respect to the relevant domestic industry, "let alone adequate information summarizing the factors upon which SECOFI excluded the HFCS producers".<sup>313</sup> In the United States' view, Mexico's assertion that SECOFI's initiation notice need not address the question of domestic industry is belied by the fact that the initiation notice includes a lengthy discussion of like product. This demonstrates that SECOFI considered that the requirement to provide "adequate information" on the "factors" pursuant to Article 12.1.1(iv) can, and in this case did, include the agency's like product determination. There is no textual or logical reason why it should not also have included the standing and domestic industry determination.

5.393 According to the United States, Mexico's interpretation of Article 12.1.1 is not permissible.<sup>314</sup> Mexico's interpretation of the obligation to provide "adequate information" on a "summary of the factors on which the allegation of injury is based" is that SECOFI did not need to provide any information or explanations regarding its definition of the domestic industry, either in a public notice or a separate report. Mexico draws an impermissible distinction between the terms "injury" and "domestic industry" to support its position that the concept of "domestic industry" is not a factor on which allegations of "injury" are based.

5.394 The United States asserts that under the scheme of Article VI of GATT 1994 and the AD Agreement, "injury" does not occur in the abstract. Injury is what occurs to a "domestic industry". The term "injury" itself is defined using the term "domestic industry". Article VI makes this clear in two places. Article VI:1 states that dumping "is to be condemned if it causes or threatens material injury to an established industry...". Article VI:6(a) states that "No contracting party shall levy any anti-dumping... duty... unless it determines that the effect of the dumping... is such as to cause or threaten material injury to an established domestic industry...". Likewise, the AD Agreement specifically defines "injury" as something which occurs "to a domestic

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<sup>311</sup> *Initiation Notice*, para. 50, US-3.

<sup>312</sup> Mexico's first submission, paras. 183 and 189, *Initiation Notice*, para. 7, US-3.

<sup>313</sup> See Mexico's first submission, paras. 180, 187.

<sup>314</sup> The United States cites in this regard Article 17.6 (ii) of the AD Agreement.

industry".<sup>315</sup> If the concept of domestic industry were not a factor on which allegations of injury must be based, industries could complain about imports which they do not produce and which are not "like" the products they produce. For this reason, in view of the fact that the Sugar Chamber's members did not produce HFCS, it was especially important for SECOFI to provide notice that there either were no HFCS producers or that the HFCS producers were being excluded as related parties. By publishing the former when it found the latter, SECOFI did not provide "adequate information" on an important factor on which the allegation of injury was based.

5.395 The United States asserts further that providing the requisite notice on "domestic industry" normally is not complicated. The investigating authority, conducting its examination under Articles 5.3 and 5.4, normally has sufficient evidence from the applicant, provided pursuant to Article 5.2, demonstrating that it or its members do produce the complained about product. This was not the case here. The Sugar Chamber undisputedly did not produce HFCS, and plainly alleged that there was no HFCS production. Regardless of whether that was all the information that was reasonably available to the Sugar Chamber, SECOFI did not accept this allegation. It decided that the domestic industry was the sugar industry not because the sugar producers also produced HFCS, but because it found HFCS to be the like product, but then excluded the producers of HFCS as related parties under Article 4.1(i). This was a factor on which the allegation of injury was based, and under Article 12.1.1, adequate information (*i.e.*, some statement) summarizing this needed to be in the initiation notice. There was no such statement.<sup>316</sup>

5.396 The United States submits that a Member's actions cannot be consistent with the notice requirements in Article 12.1.1 when the Member chooses to publish one of the applicant's allegations regarding production by the domestic industry, but the Member actually initiated on the basis of other - directly contrary - information in the application as to production by the domestic industry.<sup>317</sup> Consistent with the rules of treaty interpretation, SECOFI could not interpret its Article 12.1.1 obligation as allowing it to publish the information it found unreliable and omit the information it

<sup>315</sup> AD Agreement, Article 3, footnote 9.

<sup>316</sup> The United States disputes Mexico's argument that two paragraphs of the *Initiation Notice* (89 and 90) reflect SECOFI's determination that there was domestic HFCS production (Mexico's first submission, notes 58 and 60, and para. 191). Notably, Mexico never argues that these paragraphs demonstrate that SECOFI made a determination to exclude Almex and Arancia from the domestic industry. These paragraphs reflect that information submitted by the Sugar Chamber showed that Mexican companies had or would have the capacity to produce HFCS. Neither of those statements indicates that SECOFI concluded - contrary to the affirmative allegation of the Sugar Chamber - that there was HFCS production in Mexico at the time of initiation. In addition, despite ambiguous references to various other paragraphs of the *Initiation Notice* (for example, 25, 54 and 55), there is absolutely no mention in any of these paragraphs of a decision to exclude the domestic producers of HFCS from the domestic industry. Mexico argues that because this decision was made prior to initiation, the actual status of Almex and Arancia as producers of HFCS "lost significance" and did not need to be disclosed to the public. The United States asserts that this explanation as to why SECOFI did not include any statement relating to this factor on which the allegation of injury was based lacks complete merit and should be rejected by the Panel.

<sup>317</sup> The United States argues that, by publishing any of the Sugar Chamber's allegations regarding the production of HFCS, SECOFI itself acknowledged that it needed to address the issue of what domestic industry the applicant was seeking to represent.

relied upon. This interpretation of "adequate information" is inconsistent with the ordinary meaning of that term, its context and in light of the object and purpose of the AD Agreement.<sup>318</sup>

5.397 The United States submits further that an inaccurate statement cannot provide "adequate information", and that a misleading statement cannot be made in good faith. Article 31(1) of the *Vienna Convention on the Law of Treaties*<sup>319</sup> (the Vienna Convention) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Consistent with Article 12.1.1, SECOFI could not interpret this obligation as allowing it to publish the information it found unreliable and omit the information it relied upon. This interpretation of "adequate information" is inconsistent with the ordinary meaning of that term.

5.398 The United States argues that, if the requirement to provide "adequate information" is interpreted as Mexico urges, then an authority may find certain information to be "sufficient" for purposes of initiating an investigation under Article 5, but publish notice of completely different information as "adequate" under Article 12.1.1. Rather than reflecting that the authority rejected certain allegations of the applicant as insufficient, an initiation notice could, on Mexico's theory, simply repeat those allegations and omit the actual facts that the authority found to be sufficient for initiation. Mexico's argument ignores the plain language of the Agreement.

5.399 The United States also argues that, in addition to the terms of a treaty, Article 31(1) of the Vienna Convention calls for consideration of the context of treaty terms.

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<sup>318</sup> The Panel requested parties' comments on whether it can be argued that Article 6.2 of the AD Agreement requires investigating authorities to make public any determinations made prior to initiation where such determinations are or may be relevant to a party's arguments during the course of the investigation. In response to this request, the United States recalled paragraph 26 of its statement at the first panel meeting:

"The notice requirement of Article 12.1.1, in the context of the Agreement as a whole, is designed to ensure that all parties have a full opportunity for the defense of their interests [Article 6.2], including seeing all information that is relevant to the presentation of their case [Article 6.4]. Under the interpretation that Mexico would give to Article 12.1.1, an initiation notice would have exactly the opposite effect. Rather than reflecting that the authority rejected certain allegations of the applicant as insufficient, an initiation notice could, on Mexico's theory, simply repeat those allegations and hide the actual facts that the authority found to be sufficient. It is difficult to conceive of information that interested parties would find more relevant to the presentation of their case. Under Mexico's theory, an initiation notice may be a device for misleading respondents and their governments. This is a result that the Agreement does not countenance".

In the view of the United States, SECOFI's inaccurate initiation notice affirmatively directed the parties and the public away from the bases on which SECOFI was satisfied that there was sufficient evidence to initiate an investigation. SECOFI's decision to publish the Sugar Chamber's allegation of "no production" in the notice, and conceal both its knowledge of HFCS production and its determination to exclude those producers from the domestic industry, meant that the U.S. respondent parties had to - and continue to - engage in guesswork to challenge SECOFI's actions. Thus, as indicated early on in this proceeding, SECOFI's misleading initiation notice prevented the parties from having a full opportunity to defend their interests. *See* Answer of the United States to question no. 7 by the Panel, 22 June 1999.

<sup>319</sup> Vienna Convention, done at Vienna, 23 May 1969, 1155 U.N.T.S. 221; 8 International Legal Materials 679 (1969).

In this case, other sub-sections of Article 12, as well as a number of other notice provisions in the Agreement, support the conclusion that the drafters did not intend for Members to be able to make misleading statements when providing public notification or when notifying parties under the provisions of the Agreement. The United States, in this regard, points to the following:

- Article 12.2* - Public notices of preliminary and final determinations.
- Article 12.2.3* - Public notice of the termination or suspension of an investigation.
- Article 12.3* - Public notice of initiation and completion of reviews under Article 11.
- Article 12.3* - Public notice of decisions to apply anti-dumping duties retroactively under Article 10.
- Article 5.5* - An initiating government must notify the government of the exporting party after receipt of a properly documented application and prior to proceeding to initiate.
- Article 6.1.3* - Authorities must provide the application to the known exporters and to the authorities of the exporting Member.
- Article 6.1* - Interested parties shall be given notice of the information which the authorities require.
- Article 2.4* - The authorities must indicate to the parties in certain circumstances what information is needed to ensure a fair comparison.
- Annex I(1)* - Investigating authority should inform the authorities of the exporting Member of its intention to carry out on-the-spot investigations.
- Annex I(4)* - Investigating authority should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.
- Annex I(5)* - Sufficient advance notice should be given exporting firms before on-the-spot visits are made.
- Annex II(6)* - Authorities should inform the supplying party if its evidence or information is not accepted and provide the reasons.

5.400 The United States concludes that, as can be seen from this illustrative list, the AD Agreement has numerous notice requirements, be they public notice requirements or requirements to notify the parties, including the exporting Members, either of actions the authority is considering taking or information that the authority requires. Viewed in the context of the AD Agreement, the notice requirement in Article 12.1.1 is thus part of a broad scheme to ensure that anti-dumping measures are imposed under conditions that are transparent for the parties, including the exporting

Member, and that public notices actually provide accurate information to the parties and the public.

5.401 The United States notes that Article 12 is a new provision in the AD Agreement. It was added in the Uruguay Round, amending and elaborating upon other public notice requirements that were contained in the Tokyo Round Anti-Dumping Code. The negotiating history of this provision reflects that equity and fairness of process, in respect of the public notice requirements, was a concern of the drafters. In 1983, long before the completion of the Uruguay Round, Members were already clear on the need for enhanced public notice requirements, including those relating to initiation notices. They reflected this in a 1983 recommendation of the Committee on Anti-Dumping Practices, whose content, in very large part, formed the basis of Article 12. The recommendation states:

"The Committee recognizes that in order to ensure that anti-dumping investigations are conducted on a fair and equitable basis, and to enable parties to consider the possibility of legal recourse, it is essential that any decision taken by the investigating authority should be published together with the reasons which led to it. Publication shall be obligatory at the time of the initiation of an investigation, the application of provisional measures and the conclusion of the investigation (by the imposition of definitive duties, the acceptance of price undertakings or a negative finding)".<sup>320</sup>

5.402 Thus, in the view of the United States, the negotiating history of the AD Agreement confirms that its drafters intended that public notices, including notices of initiation, contain, at a minimum, accurate reflections of the decisions taken, otherwise, they would prevent parties from participation in the investigation on a fair and equitable basis.

5.403 The United States contends that SECOFI's initiation notice achieved precisely the opposite result of what the drafters intended and what the terms of the Agreement to provide "adequate information" on a "summary of the factors on which the allegation of injury is based" require. First, SECOFI's initiation notice did not include any statement documenting the determination Mexico claims SECOFI made to exclude Almex and Arancia from the domestic industry. Determinations under Article 4.1(i) are discretionary, and, therefore, when Members make them under Articles 5.1 and 5.4 (assessing under Article 5.3 the application's information provided under Article 5.2) in order to define the domestic industry for injury purposes at initiation, the initiation notice needs to state that such a determination was made. On the facts of this case, such a statement was required. Second, in this case, SECOFI's initiation notice was affirmatively misleading. Under no circumstances can a misleading initiation notice provide "adequate information" as required by Article 12.1.1. By publishing the Sugar Chamber's allegation of no production, and not publishing any statement about what information in the application it relied upon, SECOFI misinformed the parties and the public of the basis of a key factor on which it determined the allegation of threat of injury was based.

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<sup>320</sup> See Committee on Anti-Dumping Practices: Recommendation Concerning Transparency of Anti-Dumping Proceedings, ADP/17, adopted 15 November 1983, BISD/30S, 24, 26.

5.404 The United States asserts that the violation of Article 12.1.1 was borne out by the events of the investigation. The record shows that Almex and Arancia spent months and money trying to convince SECOFI that it improperly initiated the investigation because they were domestic producers of HFCS. These companies argued through the preliminary stage that SECOFI had made the wrong like product and domestic industry determinations, only to learn in the notice of preliminary determination that SECOFI had known, prior to initiation (and in spite of the Sugar Chamber's allegation which SECOFI published), that indeed there were domestic producers of HFCS, but that SECOFI had excluded them from the domestic industry as related parties.<sup>321</sup> Had SECOFI's initiation notice fulfilled the requirements of Article 12.1.1, this expenditure of time and resources would have been unnecessary.

5.405 The United States argues that the language of Article 12.1.1 is not neutral - it *requires* an investigating authority to provide adequate information on the factors on which the allegation of injury is based: "A public notice of the initiation of an investigation *shall* contain..."<sup>322</sup> If the objectives of the AD Agreement are to be achieved, investigating authorities must abide by all of its provisions. SECOFI's decision to choose not to respect Article 12.1.1 because it decided to exclude Almex and Arancia from the domestic industry "prior to" initiation is not permissible. Nor is its decision to publish the facts which it rejected and omit the facts on which it decided to initiate.

5.406 Mexico disputes the argument made by the United States that the essential problem with the initiation notice was that it did not indicate the basis for initiating the investigation, because the notice contained no explanation concerning the determination of the relevant domestic industry. Mexico argues that it should be made clear that it was prior to the initiation of the investigation, not "in initiating" or "at the time of initiation", that SECOFI concluded that the relevant domestic industry for the purposes of the investigation was the sugar industry.

5.407 Mexico states that the United States' position is absurd since it seeks to draw a parallel between the definition of the relevant domestic industry and the "basis" for the initiation of an anti-dumping investigation.

5.408 Mexico contends that the determination of the relevant domestic industry is a determination to be made by the investigating authority prior to the initiation of an investigation in the context of the obligations derived from Article 5 (paragraphs 1 and 4 in particular).

5.409 Mexico recalls in this connection that the Panel which examined the *United States-Cement and Clinker* case found that the very purpose of Article 5 of the AD Agreement is "to ensure that certain conditions be met *before* the initiation was decided upon"<sup>323</sup> (emphasis added by Mexico). This finding together with anti-dumping practice actually suggest that this is a determination which must be made by the authorities prior to the decision to initiate, since basically it is made in order to as-

<sup>321</sup> Ironically, Arancia ultimately succeeded in getting SECOFI to find that it *was* an embryonic producer of HFCS. Notably, however, SECOFI did not treat Arancia as an industry member for purposes of conducting an injury determination under Article 3 of the AD Agreement.

<sup>322</sup> See AD Agreement, Article 12.1.1 (emphasis added by the United States).

<sup>323</sup> This was the finding of the Panel which examined the case *United States-Cement and Clinker*. See *United States-Cement and Clinker Panel Report*, para. 5.37.

certain whether the application was submitted by or on behalf of the relevant domestic industry, that is to say, whether or not the party applying for an investigation is in principle entitled in terms of standing to apply for such initiation.

5.410 In Mexico's view, what this implies is that the determination concerning the domestic industry, rather than constituting the "basis" for the initiation decision, is a necessary precondition for establishing the grounds for initiation in the light of the existence of dumping, threat of injury and the causal link.

5.411 According to Mexico, it also follows that an essential requirement of Article 12.1.1 is that the notice of initiation should contain the basis on which dumping is alleged in the application (subparagraph (iii)) and a summary of the factors on which the allegation of injury is based (subparagraph (iv)).

5.412 Mexico reiterates that the argument developed by the United States to the effect that the notice of initiation did not comply with the requirements of Article 12.1.1(iv) of the AD Agreement is based on an excessive and impermissible interpretation of the requirements of subparagraph (iv), relying on a false interpretation of the scope of footnote 9 of the AD Agreement.

5.413 Mexico states that it does not deny the scope of footnote 9. However, the true scope of that footnote implies that, pursuant to subparagraph (iv) of Article 12.1.1, the notice of initiation must contain a summary of the factors on which the allegation of material injury, threat of material injury or material retardation - as the case may be - is based, in respect of the domestic industry previously defined as relevant. However, interpreting the term "injury" in subparagraph (iv) of Article 12.1.1 to create or impose on Mexico obligations which the AD Agreement itself does not establish with regard to the content of notices of initiation is definitely and unduly excessive.

5.414 Mexico contends that, if the intention of the negotiators of this provision had been to impose the obligation that initiation notices contain information concerning the determination of the relevant domestic industry, that would have been reflected in the drafting of subparagraph (iv) of Article 12.1.1, or the inclusion of another subparagraph along the same lines would have been considered. But that was not the case.

5.415 Mexico notes that, on the contrary, the obligation laid down by Article 12.1.1(iv) was clearly limited to the inclusion in initiation notices of a summary of the factors on which the allegation of injury or, as in this case, of threat of injury is based, in accordance with the scope of footnote 9. This provision does not require that initiation notices should contain information on the "factors" considered in defining the relevant domestic industry alleged to be injured.

5.416 Mexico is of the opinion that an investigating authority in a specific country can decide that its initiation notices contain information relating to its determination concerning the relevant domestic industry, if that investigating authority so wishes, but no such obligation is contained in the AD Agreement.

5.417 Mexico contends that the definition of the relevant domestic industry is made prior to the initiation of an investigation and that, even before the decision to initiate is taken, it is in the light of that prior determination that the grounds are established which, at a given point in time, might justify the initiation, on the basis of an examination of the information and evidence contained in an application concerning dumping, threat of injury and the causal link, and the corresponding publication of notice of initiation. The notice in question should include the information summa-

rizing the basis on which injury is alleged, in the relevant terms and only in those terms, *i.e.* injury to the domestic industry previously defined as relevant and alleged to have been injured.

5.418 According to Mexico, the argument by the United States that the initiation notice does not comply with the requirements of Articles 12.1 and 12.1.1 is inappropriate and out of place, since it erroneously relies on a clearly excessive and impermissible interpretation of the AD Agreement. Given the obligations imposed on Mexico by Article 12, there was no reason for the notice of initiation to include information on the determination of the relevant industry. The summary of the factors on which the allegation of threat of injury was based was related to the sugar industry - the domestic industry previously defined as relevant. Consequently, paragraphs 61 to 98 of the *Initiation Notice* contain the summary required by subparagraph (iv) of Article 12.1.1, which shows that the domestic sugar industry could be affected by allegedly dumped imports.

5.419 Mexico reiterates that it is important to clarify the distinction between the allegations of the applicant, which are simply reproduced or repeated in the "*Resultandos*" section of an initiation notice (as in the case of paragraph 7) and other matters which, on being substantiated by adequate information and evidence, may be adopted by SECOFI in the "*Considerandos*" section, where the grounds for the initiation are established, relating basically to the standing of the applicant, the period investigated, the analysis of dumping and the analysis of injury and causal link. Thus, paragraph 7 of the public notice of initiation simply repeats or reproduces a claim made by the Sugar Chamber as was done in many other paragraphs of the *Resultandos* section with respect to other claims, information and evidence contained in the application. The foregoing may be illustrated by reference to paragraphs 2, 13-16, 18, 20, 22 and 23 of the notice of initiation, which, like paragraph 7 of the notice, simply repeat or reproduce in the same *Resultandos* section various points concerning other claims, information and evidence produced or provided by the applicant.

5.420 Mexico disputes the United States' argument that the interpretation of Article 12.1.1 suggested by Mexico would imply that information found to be sufficient for purposes of initiation under Article 12.1 may lead to the publication of a notice containing information "completely different" from that considered as sufficient. What Mexico argues is simply that the obligations derived from the various provisions of Article 5 are different in scope from the requirements regarding the content of initiation notices under Article 12.1.1 of the AD Agreement.

5.421 In the view of Mexico, it is true that the Article 12.1 requirement to issue a notice of initiation arises when the investigating authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 5. However, the United States confuses the obligations derived from the various provisions of Article 5 of the AD Agreement with the provisions of Article 12.1 and, in particular, with the requirements under Article 12.1.1 of the AD Agreement with regard to what should be contained in public notices of initiation of an investigation.

5.422 Mexico reiterates that the purpose of the provisions of Article 5 of the AD Agreement is "to ensure that certain conditions be met *before* the initiation [of an investigation is] decided upon" (emphasis added by Mexico). Further evidence that the suggestions made by the United States are inconsistent with the legal requirement contained in Article 12.1.1 can be found in the text of a draft recommendation, not yet adopted, concerning matters to be included in preliminary affirmative determina-

tions, which was recently proposed at the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices, which is submitted to the Panel for consideration as Exhibit MEXICO-57. This draft recommendation reads as follows:

"The Committee considers that *guidelines* for the matters to be included in such preliminary affirmative determination would be *useful*. The Committee *recognizes* that Article 12.2 of the Agreement *specifies the contents of the public notice* of a preliminary affirmative determination. This recommendation concerning matters to be included in preliminary affirmative determinations is without prejudice to the question of contents of the public notice of such determination (emphasis added by Mexico).

In light of the foregoing considerations, the Committee *recommends* that, as a *general rule*, preliminary affirmative determination should include the following matters: One, "the name(s) of the domestic producers submitting the application, the names of other domestic producers, and the names of the importers and the exporters of the product"; and two, the "information concerning the domestic like product and industry, including if relevant information regarding the exclusion of any related producers" (emphasis added by Mexico).

5.423 Mexico observes that, in paragraph 85 of its second submission, the United States cites a recommendation adopted in 1983 by the Committee on Anti-Dumping Practices and remarks that its content, in very large part, formed the basis for Article 12. This recommendation states that: "Publication shall be obligatory at the time of the initiation of an investigation ...", which indicates that Mexico's obligation to publish the decisions of the investigating authority begins with the initiation of the investigation, *i.e.* the decisions taken prior to initiation do not need to be included in the notice of initiation if the AD Agreement does not so require. Thus, the recommendation cited by the United States supports Mexico's position that Article 12 did not require SECOFI to include in the notice the decision to exclude Almix and Arancia from the relevant domestic industry since it was a determination made prior to the decision to initiate the investigation. According to Mexico, the purpose of Article 12.1 is to establish the point in the procedure at which the initiation notice should be published, and that point is reached precisely once the authority has satisfied itself as to the sufficiency of evidence to justify the initiation pursuant to Article 5 and once it has decided, on the basis of such sufficiency, to initiate an investigation. On the other hand, Article 12.1.1 of the AD Agreement lists the specific elements required to be contained in the public notice of initiation, which include, *inter alia*, the basis on which dumping is alleged in the application and a summary of the factors on which the allegation of injury is based.

5.424 Mexico asserts that the notice of initiation of an investigation is published once it has been ascertained that there is sufficient evidence to justify initiation and after the decision to initiate has been taken. In this connection, the obligation to make sure of the sufficiency of the evidence, pursuant to Article 5, is a prerequisite for proceeding to publish an initiation notice, the content of which must basically comply with the requirements laid down in Article 12.1.1. This by no means reflects any "duplicity", nor does it suggest that a notice should be published containing "completely different" information from that found to be sufficient under Article 5.

5.425 Mexico also asserts that the scope of Article 5 should not be confused with that of Articles 12.1 and 12.1.1. The text, context, object and purpose of the latter in no way imply that the initiation notice must necessarily reflect all the actions, findings or decisions of the authority, set forth in the various provisions of Article 5 of the AD Agreement, nor even that the initiation notice should reproduce all the information provided in the application. This follows from the actual wording of Article 12.1.1 of the AD Agreement; for example, in the use of the word "summary".

5.426 Mexico disputes the argument by the United States that the position taken by Mexico in relation to Article 12.1.1 would result in parties not having a full opportunity to defend their interests by making the following points. First, the *Initiation Notice*, in accordance with Mexican practice, was remarkably full and detailed, informing the interested parties of the grounds justifying initiation of the investigation, including details of the standing of the Sugar Chamber (paragraph 25) and the period of investigation, as well as, inter alia, the basis on which dumping was alleged in the application and a summary of the factors on which the allegation of threat of injury to the sugar industry was based, in accordance with the content requirements set out in Article 12.1.1 of the AD Agreement. Second, there is no basis for affirming that the parties were unaware of the grounds on which SECOFI initiated the investigation, since the interested parties had every opportunity to defend their interests. In fact, from the time of publication of the initiation notice and throughout the various stages in the procedure, the parties submitted all the arguments and claims they considered relevant to their defence, and SECOFI duly responded to them, as is clear from the administrative file and the subsequent public notices concerning the investigation. At the same time, the parties had every opportunity to take cognizance of and access the information contained in the administrative file, for the purpose of devising an adequate defence of their interests.<sup>324</sup>

5.427 Finally, Mexico asserts that it has never suggested that Exhibit MEXICO-13 is a separate report under Article 12. Mexico's position is that Article 12 does not require the public notice of initiation to contain information on the determination of the relevant domestic industry.

5.428 The United States points out that the recommendation of the Ad Hoc Group on Implementation of the WTO Committee on Anti-Dumping Practices is only an unadopted draft currently under discussion about which numerous Members, including the United States, have indicated concerns.

#### D. *Alleged Violations Regarding the Final Determination*

##### 1. *Consideration of Article 3.4 Factors in a Threat of Injury Determination*

5.429 The United States notes that, in the final determination, SECOFI concluded that the Mexican sugar industry was threatened with material injury because of dumped HFCS imports from the United States.<sup>325</sup> SECOFI based this conclusion upon the growth in imports relative to domestic consumption, "giving [SECOFI]

<sup>324</sup> In this regard, Mexico cites MEXICO-46.

<sup>325</sup> *Final Determination*, para. 552, US-1.

reasonable cause to expect a sharp rise in these imports in the immediate future".<sup>326</sup> In addition, SECOFI stated that increasing HFCS capacity and production in the United States and "steady growth in the local soft drink market" gave SECOFI "reasonable cause to expect a large hike in exports dumped on the Mexican market at discriminatory prices".<sup>327</sup> Finally, SECOFI found that, because HFCS imports significantly undersold "locally manufactured products", there would be "a jump in the demand for additional imports at these same discriminatory prices in the immediate future, forcing sugar prices downward".<sup>328</sup> However, aside from an unsupported assertion regarding the domestic industry's potential cash flow and loan repayment problems if dumping were to continue<sup>329</sup>, SECOFI's threat determination does not assess the likely economic impact of HFCS imports on the domestic sugar industry.

5.430 According to the United States, SECOFI argued in its First NAFTA Panel Submission that while the economic factors and indices of Article 3.4 of the AD Agreement are relevant to a determination of material injury, they are not relevant to a determination of threat of material injury. The United States asserts that during the 12 June 1998 consultations with the United States, Mexico expressed the same view.<sup>330</sup>

5.431 The United States disputes that Article 3.7 of the AD Agreement is more specifically addressed to a threat determination than Article 3.4. The United States also disputes that the economic factors and indices in Article 3.4 need not be evaluated in a threat determination. Article 3.4 is itself framed in terms directed to a threat determination. It refers to an "actual and *potential* decline in sales, profit, output, market share, [etc.]" and "actual and *potential* negative effects on cash flow, inventories, employment, [etc.]" (emphasis added by the United States). The use of the word "potential" necessarily entails a prospective, or future-looking, analysis of the economic factors, which is the touchstone of a threat of material injury determination. Obviously, in addition to historical trends, future projections regarding the relevant economic factors set forth in Article 3.4 are relevant to a threat determination. Nei-

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<sup>326</sup> *Final Determination*, paras. 468-70.

<sup>327</sup> *Ibid.* paras. 486-87.

<sup>328</sup> *Ibid.* para. 527. SECOFI concluded that available inventories of HFCS from the United States were not significant to its analysis of threat of material injury, since the physical and chemical characteristics of HFCS prevented its long-term storage. *Ibid.* para. 528.

<sup>329</sup> *Ibid.* para. 531. Additionally, although SECOFI noted that it had some information showing a potential impact from dumped imports on the future investment projects of some sugar mills, it concluded that "it did not [have] sufficient information at its disposal to evaluate the overall status of investment projects in the sugar industry". *See Ibid.* paras. 529-30.

<sup>330</sup> *See* US-8. SECOFI based this argument on the general principle that specific legal guidelines take precedence over general legal guidelines. Given that Article 3.7 of the AD Agreement provides for the evaluation of certain specific factors in a threat determination, while Article 3.4 in its view does not specifically indicate that the economic factors and indices set forth therein must be evaluated in a threat determination, SECOFI reasoned that Article 3.4 must be read as pertaining only to an injury determination and not to a threat determination. Accordingly, SECOFI concluded that, in order to make a threat determination, the investigating authority needed only consider the specific "threat" factors of Article 3.7 and needed not consider the economic factors of Article 3.4. *See* Brief of the Investigating Authority (SECOFI) Before the Binational NAFTA Panel, NAFTA Secretariat File No. MEX-USA-98-1904-01, 21 August 1998, at Part 12(D), pp. 481-82 (English Translation and Spanish original), US-10(a).

ther SECOFI's determination nor its assertions in the NAFTA dispute can be reconciled with the text of the AD Agreement, which required SECOFI to consider the likely condition of the domestic industry, including the economic factors set forth in Article 3.4, in making its threat of material injury determination.

5.432 The United States argues that SECOFI's proposed narrow reading of the AD Agreement ignores the fact that the AD Agreement defines the term "injury" broadly to include threat of material injury:

"Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, *threat of material injury to a domestic industry* or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 3]".<sup>331</sup>

Accordingly, Article 3.4, which by its terms sets forth the impact factors for purposes of a determination of "injury" (Article 3.1), also applies on its face to a determination of threat of injury.

5.433 The United States further argues that, even if Article 3.4 addressed only "material injury", rather than "injury" defined to include threat, and even if Article 3.4 did not on its face speak to "potential" impacts, the terms of Article 3.7 itself would still require an examination of the likelihood of future "material injury" and the imminent prospects for the kinds of effects that would give rise to a current material injury determination. Article 3.7 states that: (1) "[t]he change in circumstances which would create a situation in which the dumping would cause *injury* must be clearly foreseen and imminent" (emphasis added by the United States); and (2) the investigating authorities must conclude that "further dumped exports are imminent and that, unless protective action is taken, *material injury* would occur" (emphasis added by the United States).<sup>332</sup> SECOFI could not reach either of these conclusions in the absence of an analysis of the economic factors set forth in Article 3.4. In short, Article 3.7 by its own terms refers to the standards for determining material injury. Such an inquiry could not in principle be undertaken without examination of the factors set forth in Article 3.4.

5.434 The United States contends that SECOFI's proposed interpretation of the AD Agreement ignores the nonexclusive terms of Article 3.7 itself. Article 3.7 only states that in making a threat determination the investigating authority "should consider, *inter alia*, such factors as" the enumerated factors set forth in Article 3.7(i)-(iv). The use of permissive, rather than mandatory, language (*i.e.*, "should consider"), and of the Latin term "*inter alia*" (*i.e.*, "among other things"), clearly implies that a number of factors other than those specifically enumerated may also be relevant to a threat determination. Furthermore, the use of permissive language in Article 3.7 (*i.e.*,

<sup>331</sup> AD Agreement, footnote 9 (emphasis added by the United States).

<sup>332</sup> See also *Korea -Resins*, para. 271 ("a proper examination of whether threat of material injury was caused by dumped imports necessitated a *prospective analysis of a present situation* with a view to determining whether a 'change in circumstances' was 'clearly foreseen and imminent'") (emphasis added by the United States); *Ibid.* 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).

"should consider"), in contrast to the mandatory language of Article 3.4 (*i.e.*, "The examination of the impact of the dumped imports on the domestic industry concerned *shall include*..". (emphasis added by the United States)), indicates that Article 3.7 is meant to complement Article 3.4, rather than to apply in isolation. Accordingly, Article 3.7 by its own terms does not "trump" Article 3.4 and cannot mean that the investigating authority is not to consider other relevant economic factors, such as those set forth in Article 3.4, in making a determination of threat of material injury.

5.435 The United States asserts that the foregoing reasoning is consistent with that of the *Guatemala-Cement* panel, which found, at Mexico's urging, that the likely condition of the industry is relevant to an assessment of threat of injury in an anti-dumping investigation.<sup>333</sup> Although that panel's findings related to an assessment of threat of injury for purposes of initiation, its reasoning - that the economic factors set forth in Article 3.4 are relevant to an assessment of threat of injury - is equally, if not more, applicable to an assessment of threat of injury for purposes of a final determination, because the evidentiary standard for a final determination is higher than for initiation.<sup>334</sup> The *Guatemala-Cement* panel's finding was consistent with Mexico's contentions in that dispute that the economic factors bearing on the likely state of the domestic industry set forth in Article 3.4 were relevant to the decision whether to initiate the anti-dumping investigation, and hence should have been included in the domestic industry's application claiming that Mexican imports threatened the domestic industry with material injury.<sup>335</sup> Given Mexico's arguments before the *Guatemala-Cement* panel, it is difficult to understand why Mexico now maintains that the likely state of the domestic industry and the relevant economic factors set forth in Article 3.4 are not relevant to a threat determination.

5.436 In the view of the United States, SECOFI's assertion - that a determination of threat of material injury does not require an assessment of the likely impact of imports and the relevant economic factors set forth in Article 3.4 - is clearly not what the AD Agreement intended. If this reading of the AD Agreement were correct, then an investigating authority could merely evaluate the likely trends in, and projections of, volume increases, capacity increases, prices, and increases in inventories with respect to the dumped imports (*i.e.*, the four specific threat factors set forth in Article 3.7(i)-(iv)), without ever considering whether those imports would have any impact whatsoever on the pertinent domestic industry. Such a result is contrary to the plain language of both Articles 3.4 and 3.7.

5.437 The United States also holds that failure to consider the likely effect of dumped imports on the pertinent domestic industry in determining threat of material injury violates Article VI of GATT 1994. Article VI:6(a) of that agreement provides:

"No contracting party shall levy any anti-dumping... duty on the importation of any product of the territory of another contracting party *unless it determines that the effect of the dumping... is such as to cause or threaten material injury to an established domestic industry,*

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<sup>333</sup> See *Guatemala-Cement Panel Report, supra*, footnote 8, para. 7.74.

<sup>334</sup> *Ibid.* para. 7.57 ("the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation"); accord *United States-Lumber Panel Report*, para. 332.

<sup>335</sup> See *Guatemala-Cement Panel Report, supra*, footnote 8, paras. 4.127, 4.154.

or is such as to retard materially the establishment of a domestic industry" (emphasis added by the United States).

In addition, Article VI:1 of GATT 1994 provides that "[t]he contracting parties recognize that dumping... is to be condemned *if it causes or threatens material injury in the territory of a contracting party* or materially retards the establishment of a domestic industry" (emphasis added by the United States). In light of the foregoing discussion, a contracting party cannot determine that the dumped imports "threaten *material injury*" (emphasis added by the United States) to a domestic industry without examining their likely impact on the domestic industry.

5.438 The United States argues that, although SECOFI concluded that dumped imports would increase, it did not meaningfully analyze the likely effect (if any) that this increase would have on the domestic industry. SECOFI could have examined several economic factors that were clearly relevant to an assessment of the impact of dumped imports on the domestic industry in this investigation. But it did not. For instance, SECOFI did not evaluate any actual and potential decline in the domestic industry's return on investments. Furthermore, the final determination contains no discussion of the domestic industry's capacity utilization, overall capacity trends, and projections of future capacity, including whether the domestic industry's production capacity or capacity utilization would likely decline as a result of increasing HFCS imports; or whether the domestic industry would likely maintain stable or increasing capacity utilization levels by increased production and sales to household customers (where no one disputes that HFCS imports do not compete with sugar).<sup>336</sup>

5.439 The United States also argues that SECOFI did not provide any discussion of employment trends and projections within the domestic industry either. In paragraph 443 of the *Final Determination*, SECOFI notes that the petitioner indicated "direct employment for approximately 385,000 workers [in the sugar cane industry], including sugar cane planters, day labourers, crop harvesters, mill workers, confidential clerks, drivers and pensioners". This passing reference to data provided by the petitioner, while interesting, has little probative value, inasmuch as: (1) it does not address the question of actual and potential negative effects on employment due to dumped imports; and (2) the domestic industry defined by SECOFI clearly did not encompass sugar cane planters, harvesters, and pensioners. Accordingly, SECOFI failed to evaluate the "actual and potential negative effects on... employment", in accordance with Article 3.4 of the AD Agreement, within the relevant domestic industry arising from the impact of dumped imports. Finally, the list of "economic dependents" in Exhibit 4.3(iii) of the Sugar Chamber's application, from which SECOFI obtained the figure of 385,000 workers, appears to be a static number (apparently for the current year or at the time of the filing of the application) and does not indicate employment levels in prior years or estimates of employment levels in future years. Indeed, in its First NAFTA Panel Submission, SECOFI conceded that it did not conduct an analysis of the domestic industry's employment and that it was

<sup>336</sup> See, e.g., *Final Determination*, para. 463, US-1 (noting that "household consumption... was never threatened by the presence of imports of HFCS from the United States of America").

simply quoting the Sugar Chamber's application at this point in the final determination.<sup>337</sup>

5.440 Additionally, the United States observes that SECOFI provided no meaningful discussion in the final determination of any "actual and potential decline[s] in the domestic industry's sales, profits, output, [and] market share". While paragraph 521 of the *Final Determination* notes that the domestic industry's "sugar sales to industrial consumers on the domestic market in 1996 were down from the previous year", SECOFI did not describe the domestic industry's sales during other years and periods, much less projections of likely sales trends in the future. Nor did SECOFI discuss the sugar industry's sales to other customers (*e.g.*, household consumers). Accordingly, SECOFI's statement that the sugar industry's sales to industrial customers "in 1996 were down from the previous year" is largely meaningless in assessing the impact of imports on the industry. Even in 1996, it is entirely possible that the sugar industry's overall sales may not have declined (or may have even increased), because its sales to other customers may have increased in an amount equal to or exceeding the decline in sales to industrial customers.

5.441 Furthermore, the United States argues that, as a consequence of SECOFI's failure to provide an evaluation of the domestic industry's sales, profits, output, and market share, SECOFI also failed to discuss overall trends in, and projections of, consumption of sweeteners (both HFCS and sugar) in Mexico.<sup>338</sup> While SECOFI discussed domestic consumption and market share for sales to industrial sugar consumers,<sup>339</sup> it did not address overall consumption levels. Again, therefore, SECOFI's analysis of consumption in the portion of the industry serving the industrial sugar market is largely meaningless in assessing the overall impact of imports on the domestic industry. As with SECOFI's analysis of sales, it is entirely possible that the domestic industry's share of total domestic consumption would not decline as a result of increasing HFCS imports, if the domestic industry increased its sales to other customers, such as household consumers of sugar.<sup>340</sup> Indeed, the Sugar Chamber's

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<sup>337</sup> See SECOFI NAFTA brief Part 12(D)(e), p. 490 (English Translation) and Spanish original, US-10(b).

<sup>338</sup> Obviously, domestic consumption is a function of overall sales (plus any internal transfers that are captively consumed) by the domestic industry and importers, minus exports.

<sup>339</sup> See, *e.g.*, *Final Determination*, paras. 461, 464-65, 468, US-1.

<sup>340</sup> Although consumption itself is not one of the economic factors and indices specifically enumerated in Article 3.4, as previously noted, it is a function of economic factors (*i.e.*, sales) that are specifically enumerated in that Article. In addition, market share, which is specifically mentioned in Article 3.4, is a function of consumption and sales. Moreover, other paragraphs of Article 3 specifically mention consumption as a relevant economic factor and hence support the conclusion that SECOFI should have evaluated the overall levels of sugar consumption in assessing the impact of imports on the domestic industry. Article 3.5 of the AD Agreement notes that an analysis of "contraction in demand or *changes in the patterns of consumption*" (emphasis added by the United States) may be relevant to determining whether the requisite causal nexus exists between the dumped imports and the injury. Since the AD Agreement defines the term "injury" as including threat of injury (see AD Agreement, footnote 9) and Article 3.7 states that "The change in circumstances which would create a situation in which the dumping would *cause injury* must be clearly foreseen and imminent" (emphasis added by the United States), a consideration of whether dumped imports are causing threat of injury to the domestic industry is clearly essential to a determination of threat of injury. In addition, Article 3.2 provides that, "With regard to the volume of the dumped imports, the

application requesting the initiation of this investigation states that "national consumption of sugar maintains its traditional growth level at the rhythm of population growth, the effect of which is to raise prices".<sup>341</sup> Given the applicant's acknowledgement that overall sugar consumption was growing in pace with Mexican population growth, it is speculative that increasing HFCS imports would have affected the domestic industry's total share of consumption and would likely do so in the imminent future.

5.442 In the view of the United States, although SECOFI noted that the domestic industry might experience cash flow and loan repayment problems if dumping were to continue (*see Final Determination*, para. 531), SECOFI's findings were clearly insufficient to establish the likely impact of dumped imports on the domestic industry. SECOFI did not analyze whether, and to what extent, a downturn in one market served by the sugar industry (*i.e.*, in sales to industrial customers) would impede the domestic industry's cash flow and ability to pay its debts. Moreover, as with SECOFI's inadequate analysis of overall sales and consumption, it is entirely possible that the domestic sugar industry would maintain stable, or even increasing, profitability and cash flow, by increasing sales and/or prices to household customers, despite decreasing sales to industrial customers.

5.443 Accordingly, the United States contends that SECOFI violated Articles 3.1, 3.4 and 3.7 of the AD Agreement in performing its threat of material injury analysis by failing to analyze a number of the relevant economic factors that were clearly relevant in this investigation bearing on the likely condition of, and the potential adverse impact from imports on, the domestic industry.

5.444 Mexico disputes the argument by the United States that SECOFI did not assess the likely impact of HFCS imports on the domestic sugar industry, that it did not consider the economic factors set forth in Article 3.4 of the AD Agreement; and that it did not make an exhaustive analysis of those factors.

5.445 Mexico maintains that SECOFI's final determination of threat of injury was based on an assessment of the impact of dumped HFCS imports on the domestic sugar industry, including an assessment of the various economic factors set forth in Articles 3.2, 3.4 and 3.7 relevant to this case in particular, on account that they had a crucial bearing on the state of that industry.

5.446 Mexico notes that the relevant economic factors that enabled SECOFI to examine the impact of dumped HFCS imports on the domestic sugar industry and the imminence of future dumped imports include:<sup>342</sup>

- (a) the rate of increase of dumped imports, the effects on the domestic market, and the likelihood of an increase in such imports in the future;
- (b) the exporter's freely disposable capacity and the likelihood and imminence of further exports to Mexico, considering the availability of other markets to absorb such exports;

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investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or *consumption in the importing Member*" (emphasis added by the United States).

<sup>341</sup> Application, p. 32, US-4.

<sup>342</sup> *See Final Determination*, paras. 448-550, MEXICO-6.

- (c) the prices of the imports, the likely effect on domestic prices and the likelihood that in the future the dumped prices would increase the demand for future imports;
- (d) HFCS inventories;
- (e) domestic sales;
- (f) increasing market share of the imports under investigation;
- (g) factors affecting domestic prices;
- (h) magnitude of the margin of dumping;
- (i) return on investments; and
- (j) cash flow.

5.447 Mexico argues that a cumulative assessment of all these factors led SECOFI to the well-founded conclusion that, since imports were dumped and in view of their consequent effects on the domestic sugar industry (the impact of the imports), and future imports at dumped prices were imminent, a change in circumstance was clearly foreseeable and would produce a situation in which, unless anti-dumping duties were imposed, material injury to the domestic industry would occur. In other words, Mexico holds that, from a comprehensive examination of all the factors deemed relevant by the investigating authority, it was clear that during the period of investigation there had been a threat of injury to the domestic sugar industry and that, unless an anti-dumping measure was adopted, imports at dumped prices would continue and cause material injury to that domestic industry. Mexico asserts that the analysis of each of these factors is contained in the final determination. As observed in the notice, SECOFI's analysis involved various factors set forth both in Article 3.7 and in Articles 3.2 and 3.4 of the AD Agreement.

5.448 In response to a question from the United States, Mexico stated that factors cited by the United States, such as capacity, production, market share, employment and industry profitability, as well as other factors set forth in Article 3 of the AD Agreement, may be relevant in conducting a threat of injury analysis. However, in Mexico's view, this examination must take into account the peculiarities of each investigation in order that the investigating authority determines which factors have a bearing on the state of the domestic industry and should be taken into consideration in reaching the final determination.<sup>343</sup>

5.449 In response to another question from the United States, Mexico asserted that SECOFI does not have the practice to include in its final determinations a specific section, establishing in advance which of the factors of Article 3 of the AD Agreement will or will not be taken into account in its analysis of injury or threat of injury. The AD Agreement does not lay down any specific obligation in this respect. Thus, SECOFI's practice is to include directly in its final determinations the analysis and conclusions concerning the factors that were in fact considered in conformity with the AD Agreement.<sup>344</sup>

5.450 Mexico states that it is important to note that the points cited by the United States from the report of the *Korea-Resins* Panel do not in any way establish that the

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<sup>343</sup> See Answer of Mexico to question no. 2 by the United States, 6 May 1999.

<sup>344</sup> See Answer of Mexico to question no. 4(c) by the United States, 6 May 1999.

investigating authority must, as the United States alleges, assess all of the factors set forth in Article 3.4 of the AD Agreement. In fact, the Panel in question ruled that there are differences between the criteria for affirmative determinations of injury and threat of injury, and emphasized that a distinctive feature of the latter analysis was the assessment of the clearly foreseeable and imminent existence of a change in circumstances. Similarly, that Panel confirmed that a threat of injury determination was subject, in particular, to the requirements of Article 3.6 of the Anti-Dumping Code,<sup>345</sup> *i.e.* Article 3.7 of the present AD Agreement.

5.451 According to Mexico, it is totally out of order for the United States to suggest to this Panel that, in making its threat of injury determination, SECOFI should have made an exhaustive analysis of the factors mentioned in Article 3.4 of the AD Agreement,<sup>346</sup> especially in view of what the United States has regarded as sufficient and consistent with the requirements of the AD Agreement in other panels.

5.452 Mexico asserts that it is difficult to reconcile the stance the United States now takes in this Panel proceeding with the position the United States adopted in *Guatemala-Cement* regarding the scope of the analysis that should be performed by investigating authorities in a threat of injury case. Mexico observes that, in *Guatemala-Cement*, the United States argued that, for the purpose of a either an injury or a threat of injury determination, the AD Agreement does not require an analysis of all the factors enumerated in Articles 3.4 and 3.7 and that, on the contrary, the actual text of those Articles acknowledges the ability of investigating authorities to discern the comparative importance of each factor, depending on the particular circumstances of the case involved:

"5.52 ... while Guatemala's preliminary determination did not address all of the factors in Articles 3.4 and 3.7, the United States suggests that it was not necessary to do so. Neither of those Articles requires discussion of all of the listed factors in an injury or threat of injury determination. Moreover, the United States recalls that each Article also specifically includes a proviso that the lists are not exhaustive and no single factor or group of factors is decisive, recognizing the ability of national authorities to discern the importance of each factor in the particular circumstances of each investigation".<sup>347</sup>

<sup>345</sup> Article 3.6 of the Tokyo Round Anti-Dumping Code stated: "A determination of a threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent".

In this regard it is relevant to point to the conclusion reached by the Panel in question, which said the following: "The Panel observed that apart from the requirements of Article 3.1 regarding positive evidence and an objective examination of certain factors, a determination of a threat of material injury was *in particular* subject to the requirements of Article 3.6 ..." (emphasis added by Mexico). Contrary to the United States suggestion, the Panel, by interpreting Article 3.6 in conjunction with Article 3.1, also added that a determination of a threat of material injury required an analysis of relevant future developments with regard to the volume and price effects of the dumped imports and their consequent impact on the domestic industry. *See Korea-Resins Panel Report*, para. 271.

<sup>346</sup> *See* United States first submission, paras. 100-102.

<sup>347</sup> *See Guatemala-Cement Panel Report, supra*, footnote 8, para. 5.52.

Accordingly, in the view of Mexico, for the United States an affirmative threat of injury determination under the AD Agreement does not require an exhaustive analysis of the factors mentioned in Articles 3.4 and 3.7 of the AD Agreement.

5.453 Mexico notes further that the United States also contended in the same Panel that:

"The nature of information relevant for a threat case may be substantially different from that which is pertinent in a present injury case. Article 3.7 acknowledges this distinction in connection with determinations involving threat of injury...".<sup>348</sup>

In Mexico's opinion, it is clear from the above that, in drawing this distinction, the United States was referring in general to both the relevant information that should be included in the application and to the information to be taken into account for preliminary and final determinations, recognizing that the latter may be different in a threat of injury case from a present injury case. Indeed, in the same paragraph the United States went on to say:

"For the United States, it is only logical that *the same distinction* be recognized in terms of *the information that is considered to be "reasonably available" to an applicant* in requesting the initiation of an anti-dumping investigation. An applicant must still provide information, and not mere speculation, to support allegations of threat of injury. However, the United States suggests that *the information may be different in kind than that which would be considered "reasonably available" in the context of an application involving present injury*, if for no other reason than that threat of injury involves an incipient event"<sup>349</sup> (emphasis added by Mexico).

5.454 Mexico maintains that there is a clear inconsistency between the excessive interpretation the United States is trying to make in this Panel proceeding of Article 3 of the AD Agreement, and the interpretation the United States has regarded as admissible - in panels examining similar issues - in connection with the requisite characteristics of a threat of injury determination.

5.455 Mexico contends that the United States' present attitude in this Panel disregards the power or ability that the importing Member's investigating authority should have in order to decide, in the light of the particular circumstances of each case, what the various relevant factors should be for an injury or threat or injury determination.

5.456 Mexico holds that the United States' argument is groundless, since SECOFI properly established the factors to be used as a basis for examining the impact of the dumped imports. In doing so, SECOFI gave greater relative weight to those mentioned in Article 3.7 of the AD Agreement, because they were fundamental factors in concluding that there were convincing reasons to find that in the immediate future HFCS imports at dumped prices would substantially increase, thus creating a situation in which the dumping would cause injury. However, SECOFI also assessed the factors in Article 3.4 of the AD Agreement that were considered relevant and arrived at an affirmative determination of threat of injury.

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<sup>348</sup> See *Guatemala-Cement Panel Report, supra*, footnote 8, para. 5.43.

<sup>349</sup> *Ibid.*

5.457 Mexico concludes that it follows from the above that SECOFI's final determination of threat of injury, and the consequent application of definitive anti-dumping duties on HFCS imports from the United States, were consistent with the obligations set out in Article 3 of the AD Agreement and in Article VI of the GATT 1994 respectively.

5.458 The United States argues that SECOFI's threat determination lacks a meaningful examination of the nature of the anticipated impact of HFCS imports from the United States on the Mexican sugar industry. Article 3.4 states that "[t]he examination of the impact of the dumped imports on the domestic industry shall include an evaluation of all relevant factors and indices bearing on the state of the industry" and lists several factors for investigating authorities to consider. By contrast, SECOFI's determination was premised on findings: (a) that the volume of HFCS imports from the United States had steadily increased over the period of investigation;<sup>350</sup> (b) the US HFCS producers had significant freely available capacity that would enable them to increase exports to Mexico further;<sup>351</sup> and (c) that imported HFCS undersold domestically-produced sugar in the Mexican market.<sup>352</sup> SECOFI nowhere discussed the likely sales volumes, profitability, output, or market share of the domestic sugar industry, notwithstanding that sales, profits, outputs, and market share are the first four specific factors listed under Article 3.4, and notwithstanding that examination of these factors was critical to any understanding of whether further imports would in fact injure the Mexican sugar industry.

5.459 According to the United States, Mexico acknowledges that SECOFI's threat analysis focused on trends in import volume, foreign capacity, and prices, corresponding to the factors listed in Articles 3.7(i)-(iii). The United States also observes that Mexico states that "SECOFI gave greater weight to those [factors] mentioned in Article 3.7 of the AD Agreement, because they were fundamental factors in concluding that there were convincing reasons to find that in the immediate future HFCS imports at dumped prices would substantially increase, thus creating a situation in which the dumping would cause injury".<sup>353</sup>

5.460 The United States contends that Mexico's argument misunderstands the meaning of Article 3.7. Article 3.7 does identify four factors that investigating authorities should consider in deciding whether there is a threat of material injury that pertain generally to the question of whether increased imports are likely. Although these factors are tools for the investigating authority to use in considering whether there is a threat of material injury, nothing in Article 3.7 indicates that the threat analysis encompasses only these factors. Instead, "the totality of the factors considered must lead to the conclusion that further dumped imports are imminent and that, unless protective action is taken, material injury would occur".

5.461 The United States argues that whether "further dumped imports are imminent" will be determined principally by reference to the four enumerated factors in Article 3.7. By contrast, whether "material injury would occur" requires reference to the factors indicated in Article 3.4. Consequently, the investigating authority must

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<sup>350</sup> *Final Determination*, para. 453, US-1.

<sup>351</sup> *See e.g., Ibid.* paras. 479-80, US-1.

<sup>352</sup> *See e.g. Ibid.* paras. 499-500, US-1.

<sup>353</sup> *See Mexico's first submission*, para. 245.

refer to the factors identified in Article 3.4 in making a threat of material injury determination.

5.462 The United States further argues that it is inherent that in any determination of threat of material injury an investigating authority must analyze whether there is some clear and imminent change in the industry's current condition giving rise to the threat of material injury.<sup>354</sup> To be able to conduct such an examination, the investigating authority must know not only information about trends in import volumes and prices. It must also know sufficient information about the domestic industry's current condition to enable it to ascertain whether further imports are likely to cause that condition to change and whether that change will lead to material injury to the domestic industry.<sup>355</sup>

5.463 Consequently, in the opinion of the United States, an investigating authority must examine the Article 3.4 factors to enable it to ascertain that any conditions giving rise to the likelihood of increased imports that it identified in its examination of factors under Article 3.7 will in fact result in material injury. Mexico's own argument confirms that SECOFI failed to do this. Indeed, Mexico contends that under Article 3.4 SECOFI had the discretion to "decide, in the light of the particular circumstances of each case, what the relevant factors should be for an injury or threat of injury decision".<sup>356</sup>

5.464 According to the United States, Mexico acknowledges that it did not consider all factors listed in Article 3.4. Indeed, in paragraph 230 of its first submission, Mexico states that the only Article 3.4 factors it examined were domestic sales, increasing market share of the imports under investigation, factors affecting domestic prices, return on investments, and cash flow.<sup>357</sup> Thus, even assuming *arguendo* that the record before SECOFI contained information concerning other Article 3.4 factors, SECOFI by its own admission did not consider them.

5.465 In the view of the United States, Mexico's defense of SECOFI's examination of a very limited number of Article 3.4 factors, on the basis that SECOFI had the discretion to choose which factors it would consider and which it would ignore, can-

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<sup>354</sup> For a panel statement to this effect, see *Korea-Resins Panel Report*, para. 271.

<sup>355</sup> Mexico has recognized this principle in other contexts. See *Guatemala-Cement Panel Report*, *supra*, footnote 8, para. 4.248 (indicating that Mexico had argued that although cement exports from Mexico had increased, "what is really important is whether these exports really affected Guatemala's domestic industry").

<sup>356</sup> See Mexico's first submission, para. 244.

<sup>357</sup> Moreover, the United States asserts that SECOFI did not in fact examine domestic sales or factors affecting domestic prices, because its analysis disregarded a substantial proportion of domestic sugar production. Further admissions by SECOFI on the Article 3.4 factors it did not consider are presented in its NAFTA submissions. SECOFI acknowledged in its NAFTA submission that it did not in fact consider such Article 3.4 factors in its final determination as declines in profits and sales (*Ibid.* pp. 483-87), productivity (*Ibid.* pp. 487-88), return on investments (*Ibid.* pp. 488, 490-493), and employment (*Ibid.* pp. 489-90). See also *Ibid.* p. 495 ("it is important to point out to this Panel [*i.e.*, the NAFTA Panel] that the investigating authority did not base its determination of the threat of injury on factors such as the decline in profits, sales, productivity, and investment yield.... In fact, nowhere in the conclusions section of paragraph 551 of the final determination is it stated that these elements have been considered by the investigating authority in concluding that HFCS imports risk producing injury to the sugar industry, in view of the fact that the articles applicable to the assumption of the threat of injury do not mention these factors".).

not be reconciled with anything in the text of Article 3.4. Article 3.4 states that its list of factors "is not exhaustive, nor can one or several of these factors necessarily give decisive guidance". Mexico's argument, however, is that several factors -although it has never identified which ones - can give decisive guidance, and others may simply be disregarded by an investigative authority.

5.466 The United States submits that such a construction is contrary not only to the language of Article 3.4, but also to findings and conclusions of prior panels. In *Korea-Resins*, the panel rejected the type of approach espoused by Mexico here. In a decision construing the predecessor provision in the AD Code to Article 3.4 in the context of a threat determination, the Panel concluded that the investigating authority could not focus solely on factors supporting a conclusion that the domestic industry would likely encounter difficulties while disregarding other factors.<sup>358</sup> Similarly, in *United States-Salmon*, the panel emphasized that Article 3 required investigating authorities to "examine[d] all relevant facts before them".<sup>359</sup> In upholding the determination of the US International Trade Commission (ITC), the panel emphasized that the ITC had considered and explained not only factors indicating difficulties that the domestic industry was experiencing, but also those indicators, such as employment and production, where the domestic industry's performance had improved.<sup>360</sup>

5.467 The United States further submits that SECOFI could not simply focus on factors that the applicant believed supported a determination of threat of material injury without considering the other factors. Nor could SECOFI reach an affirmative threat determination without consideration of the factors of profits, sales, output, or capacity utilization that are specified in Article 3.4 and were essential to any understanding of the current condition of the Mexican sugar industry. Because it lacks any meaningful analysis of the industry's current condition, SECOFI's determination fails to articulate how future HFCS imports would cause any change in circumstances to that condition which would lead to material injury.

5.468 The United States asserts that nowhere in its determination does SECOFI present any data or analysis which would enable one to ascertain whether the increased volumes of dumped imports of HFCS that SECOFI concludes are likely will cause Mexican sugar producers to produce less, will affect their sales revenues, will cut their market share, or will cause their operations to be less profitable. In essence, SECOFI concludes that increased volumes of dumped imports threaten injury *per se*. Such a threat determination not only cannot be reconciled with Article 3.4, it also reads out the requirement of Article 3.1 that any injury determination (including one based on threat) be based on an objective analysis not only of the import volume and price effects, but also of the likely impact of the imports on domestic producers.

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<sup>358</sup> *Korea-Resins Panel Report*, paras. 274-76, 287. See also *Brazil-Milk Powder Panel Report*, para. 333 (Under the provision of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT equivalent to current AD Agreement Article 3.4, an investigating authority could not consider only one economic factor of its own selection; the provision required a comprehensive evaluation).

<sup>359</sup> *United States-Salmon Panel Report*, para. 492.

<sup>360</sup> *Ibid.* paras. 536-39.

5.469 The United States disputes Mexico's argument that this position is inconsistent with the position that the United States took in its third-party submission before the *Guatemala-Cement* panel. In that proceeding, the United States made the following point.

"The United States considers it difficult to reconcile Mexico's assertions that Guatemala failed to give consideration to the factors in Articles 3.4 and 3.7 with the explicit discussion of these factors in the preliminary determination by Guatemala. Furthermore, while Guatemala's preliminary determination did not address all of the factors in Articles 3.4 and 3.7, the United States suggests that it was not necessary to do so. Neither of those Articles requires discussion of all of the listed factors in an injury or threat of injury determination".<sup>361</sup>

Thus, noting that Guatemala appeared to have considered the Article 3.4 factors, the United States argued that an injury or threat of injury determination does not require discussion of all factors listed in Article 3.4 and 3.7, and that authorities had the discretion to determine which of the factors required more extensive discussion in a particular determination. For example, it may be apparent from the face of an authority's final determination why the authority did not give weight to specific factors that the determination did not discuss. The United States, however, did not argue that investigating authorities were not obliged to consider the Article 3.4 factors in making their determination critical to an understanding of the domestic industry's condition, or that authorities had the discretion to consider some Article 3.4 factors and disregard others.<sup>362</sup> Here, there is no reason apparent from the face of SECOFI's determination why SECOFI would not accord weight to factors such as profitability, sales, and output. Indeed, it is difficult to see how these factors would not be worthy of discussion. In any event, as discussed above, Mexico has disavowed even having examined these factors.

5.470 The United States concludes that SECOFI's selective and incomplete consideration of economic factors for purposes of its threat of material injury analysis cannot be reconciled with either the language of the Agreement or pertinent, past panel decisions. Mexico's failure to consider the impact of dumped imports on the domestic industry violates Articles 3.1, 3.4, and 3.7 of the AD Agreement and Article VI of GATT 1994.

5.471 Mexico disputes the argument by the United States that, in a threat of injury case, the applicability of Article 3.4 of the AD Agreement is determined by the inclusion or use of the term "injury" in Article 3.7. Mexico submits that the applicability of Article 3.4 to threat of injury cases is clearly determined by the scope of footnote 9 of the AD Agreement and not by the inclusion of the term "injury" in Article 3.7. Mexico recalls that, according to footnote 9 of the AD Agreement, the investigating authority must take into account the factors set forth in Article 3.4 of the AD Agree-

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<sup>361</sup> *Guatemala-Cement Panel Report, supra*, footnote 8, para. 5.52.

<sup>362</sup> In response to a question made by Mexico with respect to this issue, the United States asserted that Mexico misstated the United States position in *Guatemala-Cement* and that they did not argue that investigating authorities could pick and choose which Article 3.4 factors they would consider in issuing a threat determination. See Answer of the United States to question no. 59 by Mexico, 6 May 1999.

ment in cases involving injury, threat of injury and even material retardation of the establishment of an industry.

5.472 According to Mexico, the misreading by the United States of these provisions has serious implications as regards the correct interpretation of Article 3 of the AD Agreement. Firstly, it implies that, in cases involving material injury, the factors listed in Article 3.7 must also be examined merely because of the inclusion or use of the term "injury" in Article 3.7. Secondly, and more importantly, it reflects an excessive and impermissible interpretation of Article 3.4, since it suggests that in a threat of injury case, the factors required for a determination of material injury must necessarily be examined in an exhaustive manner, disregarding the fact that the standard in a threat of injury case may be different from the standard in a present injury case. Thirdly, the above interpretation over-minimizes the importance of Article 3.7. In Mexico's view, the United States' interpretation is diametrically opposed to what could be considered a permissible and reasonable interpretation of Articles 3.4 and 3.7 of the AD Agreement.

5.473 Mexico submits that Article 3.7, unlike Article 3.4, was specially included in the AD Agreement and indeed, even in the Tokyo Round Anti-Dumping Code (Article 3.6), for the purpose of establishing the factors that in fact did have to specifically and necessarily be taken into consideration in a threat of injury case. Article 3.4, on the other hand, is applicable to any of the three notions of injury including threat of injury in accordance with footnote 9 of the AD Agreement, and consequently, not all of such factors necessarily have to be taken into consideration. The consideration of these factors is different according to whether the case is one of present injury, threat of injury or material retardation in the establishment of an industry depending on their relevance, *i.e.* their impact or their direct and decisive bearing on the state of the domestic industry in the light of the particular circumstances of each investigation.

5.474 Mexico submits further that this is confirmed by Article 3 itself, which clearly uses different language for paragraph 4 and paragraph 7:

"3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including ... This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.7 ... In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as: [i-iv]

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

5.475 Mexico argues that, in the light of the last sentence of Article 3.7 of the AD Agreement, it is particularly obvious that the United States has made an excessive and impermissible interpretation of Article 3, particularly when it states that "unless it examined the factors required for a finding of *material injury*, SECOFI could not

reach the conclusion required by Article 3.7<sup>363</sup> (emphasis added by Mexico). The language of the final sentence of Article 3.7 expressly establishes that it is the totality of "these" factors, *i.e.* the factors listed in indents (i) -(iv) of Article 3.7, that must lead the investigating authority to the conclusion that further dumped imports are imminent and that unless an anti-dumping measure is adopted, material injury will occur.

5.476 Mexico also argues that the interpretation that the United States has proposed for these provisions in this dispute is thoroughly inconsistent with the interpretation that the United States itself supported as a third party in *Guatemala-Cement*, either for systemic reasons or for reasons of self-interest, as the United States stated at the first meeting of the Panel with the parties, without making clear what was meant by the term "self-interest" and wrongly alleged that in that case the United States had problems of timely access to the translations of the parties' submissions.

5.477 Mexico asserts that SECOFI did not ignore in its injury analysis the "critical factors" referenced in Article 3.4, as the United States contends. In fact, as part of its administrative practice, SECOFI stipulated in its application for producing enterprises requesting the initiation of dumping investigations that, for the purpose of the determination of threat of injury, the applicant must provide information concerning the factors referenced in Article 3.4 of the AD Agreement, *inter alia*.

5.478 Mexico also asserts that, contrary to what the United States contends, SECOFI did not reach the conclusion that the increase in volume of dumped imports threatened to cause injury *per se*. This reductionist interpretation disregards SECOFI's whole discussion of the various economic factors which were decisive in determining the existence of a threat of injury. In this regard, the Panel is referred to the previously mentioned points in Mexico's submissions and Mexico's replies to the Panel's questions, and to the final determination. SECOFI's final determination of threat of injury did in fact consider the various factors set forth in Article 3.4 in a manner consistent with the AD Agreement. Mexico rejects the contention by the United States that in order to be consistent with the relevant multilateral disciplines, this assessment would have had to conform to the format used by the United States International Trade Commission (USITC).

5.479 Mexico states that there is evidence both in the administrative record of the investigation and in working papers<sup>364</sup> in support of SECOFI's analysis of the behaviour of the factors and indices that have a bearing on the state of the domestic industry. This evidence is as follows:

- (a) Production. During the period of investigation (1996), sugar production for the industrial sector increased by 5 per cent as compared to the previous comparable period, while production for the domestic market decreased by 12 per cent during the same period.
- (b) Sales. This indicator decreased by 5 per cent during the period of investigation as compared to 1995. It should be stressed that the decline in sales had the effect of displacing domestic sugar production in the

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<sup>363</sup> See the oral statement of the United States at the first meeting of the Panel with the parties, 14 April 1999, para. 10.

<sup>364</sup> See MEXICO-52.

- market, given that the share of investigated imports increased in the apparent domestic consumption.
- (c) Share in the Mexican market of sugar production directed to the industrial sector. This indicator fell from 95 per cent in 1995 to 87 per cent in the period of investigation i.e. there was a loss in market share of 8 per cent during that period. Moreover, upon analyzing the growth in HFCS imports from the United States in relation to apparent domestic consumption, SECOFI observed that such imports had a growing share from 1994 onwards.
  - (d) Inventories. During the period of investigation, total inventories of sugar increased by 3 per cent over the previous comparable period. It should be stressed that while there was an increase in sugar production, the domestic industry was unable to make sufficient sales, and this was reflected in the mentioned increase in inventories.
  - (e) Return on investments. On the basis of the information concerning the investment projects of certain mills forming part of the domestic sugar industry, SECOFI determined that, while a project proposed by one of the mills was feasible, in event of HFCS imports at dumped prices the future cash flow for that project would be affected. As regards other projects, SECOFI observed that the information provided was essentially qualitative, and therefore determined that it did not have sufficient elements to conclude whether they would be affected by imports.
  - (f) Employment and productivity. On the basis of the information provided by the applicant, SECOFI calculated the per capita productivity index for the period of investigation.
  - (g) Size of the margin of dumping. On the basis of the margins of dumping determined during the final stage of the investigation, SECOFI calculated what the prices of imports would be once the possible anti-dumping duties were applied and compared them with the domestic sugar prices.
  - (h) Ability to raise capital and cash flow. With respect to the financial situation, SECOFI obtained the liquidity and leverage ratios in order to determine the sensitivity of the domestic sugar industry to adverse situations. Having determined that the high leverage made the industry more sensitive, the investigating authority deemed that it was unnecessary to estimate the ability to raise capital and the cash flow, since the level of indebtedness of the sugar industry was such that financial institutions were not prepared to grant it additional credit.

In other words, SECOFI considered that, owing to their high level of indebtedness, domestic sugar producers did not have the ability to raise capital or sufficient capital flow; so that this was not the result of the entry of HFCS imports into the Mexican market. Thus, SECOFI did not attribute this situation to dumped imports. Nevertheless, one should emphasize that the financial decline affecting the domestic sugar industry had an impact on the industry's sensitivity to the kind of adverse events that it could face in the future.

5.480 Mexico disputes the United States' contention that Mexico relies on the theory that the investigating authority has the "discretion" to decide which of the Article 3.4 factors it will consider. This is a misinterpretation of what Mexico argues. What Mexico argues is that the investigating authority has the power to decide what the relevant factors are, not at its "discretion" ("*libremente*") as the United States contends, but in accordance with their impact or influence on the relevant domestic industry. This is recognized by the United States itself in para 5.52 of the Panel Report in *Guatemala-Cement*, where the United States recognizes "the ability of national authorities to discern the relative importance of each factor in the particular circumstances of each investigation". This shows that, again, the United States contradicts its own position and distorts Mexico's.

5.481 Mexico argues that, in its threat of injury determination, SECOFI evaluated all of the economic factors set forth in Article 3.7 of the AD Agreement, and hence was able to examine the imminence of further dumped imports. Mexico asserts that SECOFI fully complied therefore with the obligations set forth under Articles 3.1, 3.4 and 3.7 of the AD Agreement, and that the United States' assertions are groundless. Indeed, the overall evaluation of the factors described above led SECOFI to the substantiated conclusion that, in view of the dumped imports and their effects on domestic sugar production (impact of imports), and in view of the imminence of further imports at dumped prices, a change in circumstances giving rise to a situation in which, unless anti-dumping duties were introduced, there would be material damage to the domestic industry, was clearly foreseeable.

5.482 According to the United States, Mexico asserts that SECOFI considered the factors of sales and output and argues that this is confirmed by Exhibit MEXICO-52.<sup>365</sup> This is inconsistent with Mexico's previous submissions before the Panel.<sup>366</sup> Even if this inconsistency were disregarded, the Panel should reject Mexico's new argument.

5.483 In the view of the United States, Exhibit MEXICO-52 does not, as Mexico contends, reflect "SECOFI's analysis of the behaviour of the factors and indices that have a bearing on the state of the domestic industry". Exhibit MEXICO-52 reflects no analysis at all. This is apparent from the face of the document, which states that it is a report of a verification visit "to confirm that the information submitted by the Chamber during the course of the administrative procedure is correct, complete, and consistent". The purpose of the report is to assess the accuracy of the Sugar Chamber's data, not its significance.

5.484 The United States observes that at several points the verification report emphasizes that SECOFI was verifying information that the Sugar Chamber had submitted in its application. However, as already explained, the application failed to provide information concerning several critical factors mentioned in Article 3.4, and concerning the causal nexus between the dumped imports and the alleged threat of material injury. In this respect, it is hardly surprising that nothing in Exhibit MEXICO-52 reflects consideration of the purported "financial decline" of the sugar industry. The only material in the MEXICO-52 report even referencing data of a fi-

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<sup>365</sup> See Mexico's second submission, para. 208.

<sup>366</sup> See Mexico's first submission, para. 230.

nancial nature concerns debt restructuring costs; there is nothing addressing any other aspect of industry financial performance. Consequently, Exhibit MEXICO-52 cannot serve to negate Mexico's prior assertions, both before this Panel and in the NAFTA proceedings, specifying the factors that SECOFI did and did not consider in its final determination.

5.485 The United States further observes that, even if Exhibit MEXICO-52 did reflect a discussion or "analysis" of the factors listed at paragraph 208 of Mexico's second submission, Mexico's reliance on the document is inconsistent with Article 12.2 of the Agreement. Article 12.2 states that each notice of a final determination "shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". The final determination's silence on the issues of the Mexican sugar industry's sales, output, or financial decline, together with its failure to reference Exhibit MEXICO-52 with respect to these factors, only supports the conclusion that SECOFI made a deliberate decision not to analyze these factors as part of the basis for its determination. Moreover, under paragraph 212 of the *Korea-Resins* panel decision, SECOFI may not point to the administrative record as evidencing a decision with respect to findings never actually discussed in its determination or a separate report.

5.486 The United States finally notes that, even if the Panel should accept both Exhibit MEXICO-52 and Mexico's characterization of what Article 3.4 factors SECOFI considered, Mexico still has not contended that SECOFI considered Article 3.4 factors such as profitability or capacity utilization. Instead, Mexico continues to argue that SECOFI was not required to consider all factors relating to the examination of the impact of dumped imports on the domestic industry listed in Article 3.4. In paragraphs 200-203 of its second submission, it maintains that it may select which of the Article 3.4 factors it considers relevant in a particular investigation and which it does not.

## 2. *Determination of Injury on the Basis of a Specific Market Sector Rather than on the Basis of the Whole Industry*

5.487 The United States notes that SECOFI concluded in the final determination that the relevant domestic industry for purposes of its determination of threat of material injury consisted of Mexican sugar producers.<sup>367</sup> Given this conclusion, SE-

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<sup>367</sup> See *Final Determination*, para. 426, US-1. Although SECOFI concluded that HFCS and sugar were similar products, it ultimately decided that only sugar producers made up the relevant domestic industry for purposes of its threat determination, because of its decision to exclude all HFCS producers. SECOFI excluded one domestic HFCS producer (Almex) because it was a related party and the other producer (Arancia) because it had only engaged in "embryonic" production during the investigation period. See *Ibid.* paras. 430-41. According to the United States, SECOFI acted contrary to the AD Agreement in excluding the "embryonic" production of Arancia. Nothing in the AD Agreement authorizes excluding "embryonic" production of a domestic producer. To the contrary, under footnote 9 of the AD Agreement "the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article" (emphasis added by the United States). Indeed, the reference to "material

COFI's analysis of threat of injury was fundamentally flawed, because it looked solely to a portion of the industry's production serving a sub-market to assess the impact of imports and never considered their impact on the domestic industry as a whole, as the AD Agreement requires.

5.488 The United States submits that, under the terms of the AD Agreement, an assessment of material injury or threat thereof must be based upon the impact of dumped imports on the entire domestic industry (or a substantial portion thereof). Article 4.1 defines "domestic industry" (absent certain exceptions not relevant here) as "the domestic producers as a whole of the like products or...those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". The AD Agreement explicitly provides for two circumstances when it may be relevant to examine less than the entire domestic industry: (1) exclusion of related parties; and (2) division of the Member's territory into smaller competitive regions.<sup>368</sup> Neither of these exceptions was relevant to SECOFI's decision to focus its threat analysis in the final determination solely on the part of the domestic industry's production serving the industrial sugar market. In addition, it should be noted that Article 3.6 of the AD Agreement does not permit an examination of less than the whole domestic industry. Rather, that Article only permits the assessment of a broader base of production that includes the pertinent domestic industry, when it is impossible to obtain financial and production information that is specific to the domestic industry.<sup>369</sup> Data from the entire domestic industry (or a major proportion thereof) must therefore form the foundation of an assessment of material injury or threat thereof under Articles 3.2, 3.4, and 3.7 of the AD Agreement, because the meaning of each of these substantive "Determination of Injury" Articles turns upon the definition of "domestic industry".

5.489 The United States further submits that threat of material injury requires a determination of whether "further dumped imports are imminent and that, unless protective action is taken, *material injury* would occur".<sup>370</sup> In turn, the AD Agreement provides that "the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a *domestic industry*, threat of material injury to a *domestic industry* or material retardation of the establishment of such an industry and shall be inter-

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retardation" indicates the particular susceptibility of an industry that has not fully established production to being injured by reason of dumped imports. Consequently, "embryonic" producers, as well as "established" producers, must be treated as industry members for purposes of conducting an injury determination under Article 3 of the AD Agreement.

If Arancia's HFCS production was embryonic, as SECOFI found, SECOFI should not have excluded that production. Paragraph 441 of the *Final Determination* indicates that if SECOFI had found there to be Mexican production of HFCS, it would have defined the domestic like product as HFCS. Accordingly, Article 3 of the AD Agreement required SECOFI not to exclude Arancia's production, but instead to determine whether imports of HFCS from the United States materially retarded the establishment of a domestic HFCS industry in Mexico consisting of Arancia's "embryonic" production.

<sup>368</sup> See AD Agreement, Article 4.1(i)-(ii).

<sup>369</sup> See AD Agreement, Article 3.6 (stating that if "separate identification of [domestic production of the like product] is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, *which includes the like product*, for which the necessary information can be provided") (emphasis added by the United States).

<sup>370</sup> AD Agreement, Article 3.7 (emphasis added by the United States).

preted in accordance with the provisions of [Article 3]".<sup>371</sup> Similarly, Article 3.4 mandates an "examination of the impact of the dumped imports on the *domestic industry concerned*" (emphasis added by the United States). Finally, Article 3.1 provides in part that "[a] determination of *injury* [which is defined to include threat of injury to the domestic industry]... shall be based on positive evidence and involve an objective examination of... the volume of the dumped imports and the... consequent impact of these imports on *domestic producers* of such products" (emphasis added by the United States). Article 3.2 elaborates on Article 3.1 by providing that "[w]ith regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member". Hence, Article 3.2, like Articles 3.4 and 3.7, turns on the definition of "domestic industry", by elaborating on Article 3.1, where the terms "injury" and "domestic producers" obviously rely on the definition of domestic industry. Articles 3.2 and 3.4 are clearly relevant to a threat determination. Article 3.4 applies for the reasons discussed above. For similar reasons, as the *Guatemala-Cement* panel noted "the factors in Article 3.2 remain relevant" to an analysis of threat of injury.<sup>372</sup>

5.490 The United States contends that, instead of heeding the AD Agreement's mandate to examine the impact of dumped imports on the domestic industry as a whole, SECOFI limited its threat analysis to the part of the domestic industry's production serving the industrial sugar market and completely ignored the fact that the same producers shipped the same product (*i.e.*, sugar) to the household market. Indeed, throughout the final determination, SECOFI frankly acknowledged that it was limiting its evaluation of the impact of imports to only a portion of the domestic sugar industry's production. For instance, SECOFI stated that it "*assessed the specific impact of the imports under investigation on the industrial sector*, estimating the share of domestic sugar production earmarked for household use at 47 per cent and the share earmarked for industrial use at 53 per cent, of which 29 per cent was for bottling plants and 24 per cent for other industries".<sup>373</sup> Thus, even if SECOFI's estimate was accurate, SECOFI simply disregarded nearly half of the pertinent domestic industry's production. While the AD Agreement does not preclude an analysis of a particular market served by a domestic industry in the context of an examination of "all relevant economic factors and indices having a bearing on the state of the industry" (Article 3.4), it does not permit a determination of material injury or threat thereof to a part of the domestic industry's production to be equated with injury or threat to the industry as a whole.<sup>374</sup>

<sup>371</sup> AD Agreement, note 9 (emphasis added by the United States).

<sup>372</sup> *Guatemala-Cement*, *supra*, footnote 8, para. 7.76, footnote 248. As previously discussed, while the *Guatemala-Cement* panel was considering the requirements of an assessment of threat of injury for purposes of the initiation of an investigation, its reasoning is equally, if not more, applicable to a final determination of threat of injury.

<sup>373</sup> *Final Determination*, para. 465 (emphasis added by the United States).

<sup>374</sup> The United States asserts that, clearly, SECOFI was not considering whether there was threat of material injury to a "major proportion" of the "domestic industry" by only considering the part of the industry's production serving the industrial market. AD Agreement, Article 4.1. Nowhere in the final determination did SECOFI state that it was doing this. Nor was this a case in which SECOFI was unable to obtain information from some producers and therefore could not make a determination

5.491 The United States argues that SECOFI's analysis of domestic consumption is particularly egregious. SECOFI analyzed apparent domestic consumption as consumption earmarked for industrial use, rather than total sugar consumption, regardless of the sugar's ultimate use.<sup>375</sup> Obviously, this constriction of the denominator of consumption greatly exaggerated the level of import market share. SECOFI estimated the "share of domestic sugar production earmarked for household use at 47 per cent and the share earmarked for industrial use at 53 per cent".<sup>376</sup> The 53 per cent/47 per cent estimate used by SECOFI is itself a static number, rather than a breakdown of consumption from year to year or a projection for future years. Despite this shortcoming, however, SECOFI used this estimate to determine the HFCS imports' share of industrial sugar consumption from 1994 to 1996.<sup>377</sup> SECOFI stated that this estimate was "furnished to the Ministry by the petitioner [*i.e.*, the applicant] in tables labelled 'sugar consumption'" and was consistent with other information of record in the investigation.<sup>378</sup> There is no evidence in the final determination, however, that SECOFI either had or sought any information regarding the relative levels of growth in the industrial and household portions of the overall sugar market. Given that SECOFI used without further inquiry a static estimate and breakdown of consumption destined for sale to industrial users, SECOFI did not make an objective examination of whether there was a significant increase in imports relative to consumption, as specified in Article 3.2; a decline in market share by the domestic industry as a result of dumped imports, as specified in Article 3.4; or a "change in the pattern of consumption", in accordance with Article 3.5. Even assuming *arguendo* that this percentage breakdown between household and industrial sugar use was accurate, SECOFI's manipulation of the denominator resulted in nearly doubling the computation of import market share. Pursuant to the AD Agreement, however, SECOFI

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concerning the industry as a whole. See *Final Determination*, para. 7 (noting that the Sugar Chamber represented 98 per cent of domestic sugar production). In any event, SECOFI could not have actually divided the domestic industry along industrial versus household lines, because the same domestic producers, producing on the same equipment and with the same employees, apparently sold to both markets and often did not know whether their sales to intermediate distributors ultimately went to household or industrial users. See Transcript referenced in CRA First NAFTA Submission, p. 86, footnote 109 (noting that domestic sugar producers at the public hearing stated that they "cannot be certain if the sugar they sell to wholesale marketers will be allocated to industrial or household consumption"), US-20. Moreover, Article 4.1 of the AD Agreement states that "domestic industry" means "the *domestic producers* as a whole of the like products or... *those of them whose collective output of the products constitutes a major proportion* of the total domestic production of those products" (emphasis added by the United States). Thus, the AD Agreement is phrased in terms of the total production of those domestic producers that constitute a major proportion of domestic production, rather than simply a major proportion of domestic production by all producers. Accordingly, SECOFI's own estimate that it was considering 53 per cent of the industry's total production, apparently by all producers, could not, under any reading, suffice to fall within the "major proportion" language of Article 4.1 of the AD Agreement. *Final Determination*, para. 465, Exhibit US-1.

<sup>375</sup> See *Final Determination*, paras. 461, 465, US-1.

<sup>376</sup> *Ibid.* para. 465.

<sup>377</sup> *Ibid.* para. 469.

<sup>378</sup> *Ibid.* para. 466.

should have considered total sugar production (*i.e.*, both industrial and household uses) as the denominator for consumption.<sup>379</sup>

5.492 The United States also argues that SECOFI's utter failure to consider the entire sugar industry was by no means limited to its assessment of consumption levels. Rather, this fundamental error infected the entire threat analysis, including the assessment of sales trends,<sup>380</sup> price comparisons,<sup>381</sup> and the analysis of the channels of distribution of the imported and domestic article.<sup>382</sup> The following paragraphs of the final determination are representative of this error:

- SECOFI "examine[d] apparent domestic consumption by the industrial sector" based upon the petitioner's argument that HFCS imports targeted industrial rather than household users.<sup>383</sup>
- SECOFI rejected "a general assessment of the threat of injury to all sugar production" because that "would also include production earmarked for household consumption, which was never threatened by the presence of imports of HFCS from the United States of America..."<sup>384</sup>
- SECOFI "decided to assess the impact of the imports under investigation taking into account the specific nature of competition within this industry and, thus, to pinpoint domestic production threatened by the presence of imports of HFCS from the United States of America, finding that it had sufficient information at its disposal to isolate the industrial segment of the domestic market for purposes of its investigation..."<sup>385</sup>
- SECOFI "calculated apparent domestic consumption based on domestic sugar production earmarked for the industrial sector, which it added to the value of domestic HFCS production as an integral part of the demand for nutritional sweeteners with comparable sweetening power..."<sup>386</sup>
- "The data used as the basis for calculating domestic sugar prices was deemed by [SECOFI] to be representative, in that it reflected 55 per cent of all domestic sales to the industrial sector during the period under investigation".<sup>387</sup>

<sup>379</sup> The United States notes that, although consumption itself is not specifically enumerated in Article 3.4, it derives from factors that are set forth therein and is, in turn, used to derive market share, which is specifically mentioned in Article 3.4. Moreover, Articles 3.2 and 3.5 do specifically mention consumption as a relevant economic factor.

<sup>380</sup> *See Final Determination*, paras. 521, 525(ii), US-1.

<sup>381</sup> *Ibid.* paras. 498, 500.

<sup>382</sup> *Ibid.* paras. 446-47.

<sup>383</sup> *Ibid.* para. 461.

<sup>384</sup> *Ibid.* para. 462.

<sup>385</sup> *Ibid.* para. 467.

<sup>386</sup> *Ibid.* para. 468.

<sup>387</sup> *Ibid.* para. 498.

- SECOFI "compared the prices paid for both products based on data solicited from industrial consumers..."<sup>388</sup>.
- SECOFI noted "sugar sales to industrial consumers on the domestic market in 1996 were down from the previous year, while the imports under investigation accounted for an increasingly large share of apparent domestic consumption..."<sup>389</sup>.
- In discussing the channels of distribution for imported HFCS and domestic sugar, SECOFI concluded that "both... are distributed to industrial plants specializing in the manufacturing of processed foods, beverages, canned goods, pastries, candy, bakery products, dairy products, pharmaceutical products, etc., either directly or through distributors" and that this conclusion was confirmed by "information supplied by industrial consumers of HFCS and sugar..."<sup>390</sup>.

5.493 According to the United States, SECOFI's focus solely on the portion of the industry's production serving the industrial market compounded its error in failing to ground its analysis on the economic factors set forth in Article 3.4. During the course of its threat analysis, SECOFI did not even mention a number of overall trends and projections affecting the likely condition of, and the impact of imports on, the entire domestic industry, including profit levels, market share, return on investments, capacity utilization, and growth. Likewise, there is no analysis of the extent to which the domestic industry is insulated from threat of material injury by imported HFCS, based upon the fact that imports do not compete for sales in the household market.

5.494 The United States holds that SECOFI also did not evaluate relative trends in, and projections of, overall consumption for sugar for all uses and within the household and industrial portions of the market. It is entirely possible, for example, that, as imports obtained an increasing market share of sales to the bottling industry, domestic producers sold more of their production to other industrial users or to household users, if consumption in these other portions of the industry was increasing. Although paragraph 486 of the *Final Determination* notes "the steady growth in the local soft drink market", such determination lacks any discussion of growth trends and projections in the other industrial and household markets. Likewise, paragraph 469 notes that imports have increased their share of domestic consumption of sugar for industrial use, but the final determination lacks any discussion of consumption levels, trends, and projections for household use.

5.495 In the view of the United States, even within the portion of the domestic industry's production serving the industrial market, SECOFI improperly focused its analysis solely on use by the beverage and bottling industry and largely ignored other industrial uses, such as the baking and confection industry. To be sure, SECOFI noted that, within the industrial market, the large majority of imports were sold to the bottling industry.<sup>391</sup> SECOFI also estimated that 55 per cent of domestic sugar pro-

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<sup>388</sup> See *Final Determination*, para. 500.

<sup>389</sup> *Ibid.* para. 521.

<sup>390</sup> *Ibid.* paras. 446-47.

<sup>391</sup> *Ibid.* para. 464 ("the beverage industry generated the largest share of demand, accounting for 81 per cent of all sales, with the remaining 19 per cent going to plants manufacturing bakery products,

duction for industrial use was sold to bottling plants, while the remaining 45 per cent was sold to other industries.<sup>392</sup> Yet SECOFI focused the analysis on trends and projections in the soft drink industry and did not evaluate any data regarding the sales trends and projections for other industrial uses.<sup>393</sup> Accordingly, not only did SECOFI fail to assess the impact of imports on the domestic industry as a whole (*i.e.*, both industrial and household uses of sugar), but it also did not adequately assess the impact of imports across the entire portion of the industry's production serving the industrial market.

5.496 The United States argues that not only did SECOFI violate the AD Agreement in failing to assess the impact of dumped imports on the domestic industry as a whole, but it also violated the GATT 1994. Article VI:6(a) of GATT 1994 requires, in order to levy an anti-dumping duty, a determination "that the effect of the dumping is such as to cause or threaten material injury to an established domestic industry..."; and Article VI:1 of GATT 1994 recognizes that "dumping is to be condemned if it causes or threatens material injury in the territory of a contracting party or materially retards the establishment of a domestic industry". Since SECOFI did not assess the impact of the dumped imports on the domestic industry as a whole, it did not properly determine threat of material injury to the domestic industry. Therefore, its imposition of final anti-dumping measures violated Article VI of GATT 1994.

5.497 The United States asserts that, contrary to what SECOFI actually said in the final determination, Mexico stated at the 12 June 1998 consultations with the United States that SECOFI had determined that there were two separate domestic industries: sugar production for industrial use and sugar production for household use. If this is in fact what SECOFI determined, there is no discussion of it in the like product or domestic industry sections, or indeed anywhere else in the final determination. Since Article 12.2 of the AD Agreement requires the investigating authorities to provide public notice setting forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material", and Article 12.2.2 requires public notice of "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures", SECOFI's failure to disclose such a fundamental decision regarding the identity of the relevant domestic industry clearly would have violated the AD Agreement.

5.498 In the view of the United States, if SECOFI in fact determined that there were two domestic sugar industries (*i.e.*, one serving industrial uses and the other serving household uses), this finding would be utterly inconsistent with its determination that sugar and HFCS were similar. Article 4.1 of the AD Agreement provides that "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products...". Therefore, if SECOFI determined that there were two separate domestic

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processed food products, daily [sic] products, pharmaceutical products, candy, etc., based on data supplied by importers on their sales of imported products on the Mexican market").

<sup>392</sup> *Ibid.* para. 465. These estimates are static numbers and hence are subject to the same objections previously discussed regarding the breakdown of overall sugar consumption into household and industrial uses.

<sup>393</sup> *See e.g. Ibid.* paras. 481(i)-(ii), 486.

sugar industries, it would have had to find that sugar for industrial use and sugar for household use were separate like products. However, this like product finding would have been inconsistent with the reasoning that SECOFI used to find that sugar and HFCS were similar, which would apply *a fortiori* to sugar for industrial use and sugar for household use. In analyzing the similarity of sugar and HFCS, SECOFI determined that, while not identical in all respects, they are commercially interchangeable and have very similar compositions, physical properties, sweetening power, nutritional properties, energy-yielding properties, and functions. These same considerations lead inevitably to the conclusion that sugar for industrial use and sugar for household use are similar. Obviously, both are sugar, and each is by definition only distinguishable by its ultimate end use. It is in fact the same sugar and therefore has the same chemical composition, physical properties, sweetening power, nutritional properties, energy-yielding properties, and function.<sup>394</sup> Indeed, the same domestic producers, production facilities, equipment, and workers produce the sugar, regardless of whether it is later consumed for industrial or household uses. Accordingly, by misdefining the "domestic industry" under Article 4.1 to include only sugar production for industrial use (rather than all sugar production regardless of use), SECOFI rendered its determination of threat of material injury inconsistent with Article 3 of the AD Agreement.<sup>395</sup>

5.499 Finally, the United States observes that the AD Agreement required SECOFI to assess the impact of imports on, and the likely condition of, the domestic industry as a whole in making its determination of threat of material injury. Assuming *arguendo* that SECOFI was correct in its statements at consultations with the United States that it determined two separate domestic industries (*i.e.*, sugar production for industrial and household uses), then there is no indication that the cash flow and loan repayment problems mentioned in paragraph 531 of the *Final Determination* were specifically tied to sugar for industrial uses, rather than simply relating to the entire sugar industry. Similarly, outside of the soft drink market, SECOFI did not consider trends in, or likely projections of, sales and consumption levels for other industrial uses within the industrial market. If sales and consumption of sugar for other industrial uses was also growing (as the soft drink market apparently was), it is entirely possible that the domestic sugar industry sold an equal or greater amount of product to these customers, as the domestic industry's share of sales to the beverage and bottling industry decreased.

5.500 Mexico rejects the argument by the United States that SECOFI violated Articles 3.1, 3.2 and 3.4 of the AD Agreement by failing to analyze the impact of dumped imports on the entire domestic sugar industry, alleging a supposed inconsistency between SECOFI's analysis and the determination of the similarity between HFCS and sugar.

5.501 Mexico also disputes the statement by the United States that in the consultations on 12 June 1998 Mexico said it had determined the existence of two separate industries. This statement is utterly incorrect, since Mexico did not say any such

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<sup>394</sup> Clearly, household sugar and industrial sugar are also commercially interchangeable, given that domestic sugar producers can " earmark " their shipments to either industrial or household customers. See *e.g. Ibid.* paras. 465, 468.

<sup>395</sup> See *Final Determination*, paras. 423-425.

thing in the consultations, nor can anything along those lines be inferred from any of the public notices of the investigation.

5.502 According to Mexico, what it said in the consultations was that, from the outset of the investigation, two clearly defined sectors could be distinguished in the industry concerned according to the type of consumer: the sector consuming sugar for household use and the sector using sugar for industrial purposes.<sup>396</sup> In response to a question by the Panel, Mexico stated that the distinction between sugar for household and sugar for industrial use was drawn from the "sugar consumption tables". According to these data, the relative shares of sugar for household use and sugar for industrial use are 47 and 53 per cent, respectively.<sup>397</sup> In response to another question by the Panel, Mexico also asserted that the destination of sales by the sugar industry could also be tracked on the basis of the sales invoices provided by the sugar mills to SECOFI during the course of the investigation. This information was referred to in paragraphs 49(I) and 94(C) of the *Final Determination*.<sup>398</sup>

5.503 Mexico states that SECOFI determined in its threat of injury analysis that a significant portion of the production of all sugar producers was being threatened and established that this analysis encompassed 100 per cent of all sugar producers. Consequently, out of the total volume of sugar produced by the 61 mills making up the domestic industry, SECOFI identified the production that competed directly with the imports under investigation.

5.504 According to Mexico, SECOFI found that the sales of HFCS by importing firms in the Mexican market are destined for the industrial sector. Consequently, HFCS imports were directly competitive with sugar production only in that sector and not in the household sector.

5.505 Mexico observes that, as established in the section concerning "Product Likeness Analysis" of each of the investigation's public notices, SECOFI determined that sugar and HFCS are like products with closely resembling characteristics. Sugar, in turn, is a product that can be distinguished by end-use, that is, sugar destined for household use and sugar destined for the industrial sector. SECOFI had sufficient information to analyze both sectors separately. Nevertheless, in view of the direct competition of HFCS with sugar destined for the industrial sector, SECOFI decided to analyze chiefly this sector. In other words, SECOFI considered in its analysis all sugar producers and, in view of the specific competition with HFCS imports, separately identified the production intended for the industrial sector from the production consumed by the household sector.

5.506 Mexico argues that paragraphs 461 to 469 of the *Final Determination* fully substantiate in economic terms the distinction drawn between the two sectors making

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<sup>396</sup> Paragraph 68 of the *Initiation Notice* says: "The applicant stated that virtually all imports of high-fructose corn syrup are intended for the industrial sector and not the household sector, for which reason the Ministry considered apparent domestic consumption specifically for the industrial sector, since sugar demand in this sector is the one that would in principle be threatened by high-fructose corn syrup imports from the United States. In making this estimate, account was taken of the "sugar consumption" tables provided by the applicant, and only the percentages of sugar serving the industrial sector were taken into consideration; they were used to estimate relevant domestic production for the purposes of the threat of injury analysis". MEXICO-1.

<sup>397</sup> See Answer of Mexico to question no. 15 by the Panel, 6 May 1999.

<sup>398</sup> See Answer of Mexico to question no. 16 by the Panel, 6 May 1999.

up the sugar market. Accordingly, SECOFI had sufficient information for the separate identification of domestic sugar production destined for the industrial sector and production destined for household use, as established in Article 3.6 of the AD Agreement. In response to a question from the Panel, Mexico reiterated its opinion that SECOFI's determination of threat of injury considering the industrial sector separately is supported by Article 3.6 of the AD Agreement.<sup>399</sup>

5.507 Mexico argues further that, to assess the threat of injury to the industry concerned, SECOFI took account of the following:

- (a) The information contained in the administrative file, which indicated that virtually all HFCS imports were earmarked for the industrial sector and not for the household market.<sup>400</sup>
- (b) In the light of this information, SECOFI estimated the relevant domestic production for the purpose of threat of injury analysis on the basis of the sugar consumption tables.<sup>401</sup> This made it possible to pinpoint, from 100 per cent of the output - involving 61 sugar mills - the amount of domestic sugar production serving each sector.<sup>402</sup>
- (c) By means of analyzing the destination of the sales of the imported product (HFCS) in the Mexican market,<sup>403</sup> SECOFI verified that 100 per cent of such sales were observed in the industrial sector, with 81 per cent accounted for by the soft drinks industry; and the remaining 19 per cent accounted for by other industries, such as processed foods, preserves, confectionery, bakery and dairy products, among others.<sup>404</sup>

5.508 In Mexico's view, therefore, SECOFI had sufficient information to estimate apparent domestic consumption specifically for the industrial sector and this did not involve any inconsistency between the determination of the likeness of HFCS and sugar and the determination of threat of injury to the relevant domestic production.

5.509 Mexico disputes the statements by the United States that SECOFI's breakdown between sugar destined for the industrial sector and sugar destined for household use is a static number rather than a projection, and that this estimate was used to determine the share of HFCS imports in the consumption of industrial sugar for the years 1994 to 1996. According to Mexico, the United States neglects that SECOFI had information regarding the shares of the industrial sector and household use for the years 1990 to 1996 and that for calculating consumption by the industrial sector

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<sup>399</sup> See Answer of Mexico to question no. 18 by the Panel, 22 June 1999.

<sup>400</sup> See the arguments on the destination of HFCS imports contained in para. 4.3 of the application for initiation of the investigation, MEXICO-16.

<sup>401</sup> See sugar consumption tables contained in the application for initiation of the investigation, MEXICO-36.

<sup>402</sup> See *Final Determination*. Paras. 465 to 468 describe the methodology and the percentages used in the calculations by SECOFI, as established in para. 466, the percentages were corroborated, MEXICO-6. See submission by Refrescos del Bajío Azteca, SA de CV, of 6 August 1977 and "Forecasts of trends in sweetener demand in the food and soft drinks industry in Latin America" by Peter Buzzanell, MEXICO-37.

<sup>403</sup> See Annex 22 of the reply to the request for information by Almex19 May 1997, MEXICO-38, and analysis of sales of HFCS imports on the Mexican market, MEXICO-39.

<sup>404</sup> See *Final Determination*, para. 464, MEXICO-6.

SECOFI used data corresponding to each of those years. Hence, this was in no sense a static estimate, as the United States maintains.<sup>405</sup>

5.510 In addition, Mexico disputes the argument by the United States that the effect of calculating domestic consumption by taking account only sugar production destined to the industrial sector was to double import penetration ratios. This is a tenuous argument since it suggests that, had SECOFI considered both consumption for industrial and for domestic use when calculating apparent domestic consumption, the conclusion of a threat of injury to the domestic sugar industry would not have been reached. In response to questions by the United States and by the Panel, Mexico stated that SECOFI's calculations taking into account all domestic sugar consumption, independently of the sector, were available in the form of working documents.<sup>406</sup>

5.511 Mexico asserts that, regardless of the share of imports in industrial sector consumption, the following factors were undeniably present in the period of investigation: a significant rate of increase in imports; sufficient freely disposable capacity of exporters; and import prices significantly lower than those of the like product, among other reasons, indicating a well-founded likelihood that in the immediate future HFCS imports would substantially increase,<sup>407</sup> displacing Mexican sugar production, with the consequent effect on the domestic sugar industry's economic and financial indicators. Accordingly, SECOFI's affirmative threat of injury determination would not have involved a substantial change if household consumption had also been taken into consideration.

5.512 Mexico argues that, when making the above argument, the United States refers to import penetration in relative terms and fails to comment on the sharp increase of imports in absolute terms, which SECOFI discussed at length in the final determination (section on "imports subject to price discrimination"), demonstrating that aggregate HFCS imports from the United States, in absolute terms, showed an upward trend in recent years.<sup>408</sup>

5.513 According to Mexico, the United States seeks to minimize the impact of HFCS imports on the domestic sugar industry, affirming that Mexican sugar producers could have increased their sales to industries other than the soft drinks industry. Even if, as the United States suggests, consumption by industries other than the soft drinks industry had increased, and even if the increase had been covered not by HFCS imports but by sales of domestic sugar, the loss of sales to the soft drinks industry as a result of dumped HFCS imports was one of the factors SECOFI assessed in determining the state of the domestic industry, and it is a fundamental aspect of

<sup>405</sup> See sugar consumption tables contained in the application for initiation of the investigation, MEXICO-36.

<sup>406</sup> See Answer of Mexico to question no. 5 by the United States, 6 May 1999, and Answer of Mexico to question no. 15 by the United States, 22 June 1999.

<sup>407</sup> See sugar consumption tables contained in the application for initiation of the investigation, MEXICO-36.

<sup>408</sup> In 1994 the volume of imports was 60,996 tonnes, in 1995 it was 90,824 tonnes and, in the period under investigation, 192,906 tonnes, a situation that marks a percentage increase in those years over the same period in the preceding year of the order of 49 per cent in 1995 and 112 per cent in 1996. See import statistics tables in the injury investigation file, MEXICO-40.

the conclusion about a decline in potential sales of sugar, that would create a situation in which the dumping would cause injury to that industry.

5.514 Lastly, Mexico states that SECOFI had sufficient information to identify the sector in which the HFCS was in direct competition with sugar, affecting the 61 sugar mills that make up the domestic industry. Thus, in the final determination of threat of injury to the domestic sugar industry and the consequent imposition of definitive anti-dumping duties, Mexico fully complied with all of its obligations under Article 3 of the AD Agreement and Article VI of the GATT 1994 respectively.

5.515 In the view of the United States, Mexico's response to its argument that SECOFI failed to assess the impact of the subject imports on the appropriate domestic industry is that SECOFI obtained data from all 61 Mexican sugar producers and thus "the analysis encompassed 100 per cent of sugar producers". Consequently, Mexico reasons, its analysis satisfied Article 2.6 and Article 4.1. Mexico emphasizes that SECOFI found only one domestic like product, sugar.<sup>409</sup>

5.516 According to the United States, Mexico's argument misunderstands the pertinent requirements of the AD Agreement. Article 4.1 states that "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products...". Consequently, the focus is on the production of the like products, not on the identity of the producers. This is confirmed by the language of Article 3.1, which requires an objective examination of, *inter alia*, the "effect of the dumped imports on prices in the domestic market for like products", and Article 3.6, which states that "[t]he effect of the dumped imports shall be assessed in relation to the domestic production of the like product...". The requirement to analyze the domestic industry cannot be satisfied when the investigating authority examines all producers of the like product, but only some of their production of that product. Instead, the investigating authority must analyze those operations of the domestic industry corresponding to the production of the domestic like product.<sup>410</sup>

5.517 In the United States' view, Mexico does not contest that SECOFI failed to do this. Mexico acknowledges that SECOFI's analysis focused exclusively on that portion of the domestic like product directed to the industrial market.

5.518 According to the United States, Mexico contends that its focus on the industrial market was justified because this was the market in which all imports of HFCS competed. While it is not improper *per se* for an investigating authority to examine a particular market served by the domestic industry, SECOFI did more than examine a specific market sector. It essentially premised its determination on threat of injury to the sector of the sugar industry serving the industrial market rather than finding threat of material injury to the Mexican sugar industry as a whole.

5.519 In the opinion of the United States, Mexico's argument that SECOFI's "affirmative threat of injury determination would not have involved a substantial change

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<sup>409</sup> The United States noted that, consequently, there was no need for it to pursue the argument that was raised in its first submission that Mexico could not treat sugar for industrial use and sugar for household use as separate like products.

<sup>410</sup> Although Article 3.6 permits the investigating authority to examine a broader category of products than the like product under circumstances not applicable here, there is no provision authorizing the investigating authority to examine a narrower category of products than the like product. *See* United States first submission, para. 115 and footnote 139.

if household consumption had also been taken into consideration" merely underscores SECOFI's failure to take into account all production of the domestic like product in its threat analysis. In any event, Mexico's argument is baseless for the following reasons:

(i) It is true, as Mexico argues, that the rate at which HFCS imports would be likely to increase may be the same regardless of what domestic production is analyzed.<sup>411</sup> Nevertheless, the market penetration of the imports would have been considerably lower if SECOFI had considered all domestic sugar production; consequently, the impact on the domestic industry's market share would have been mitigated. Nowhere in its final determination did SECOFI consider this question.

(ii) Because consumption of sugar in the household market is, by Mexico's own analysis, not subject to competition from imported HFCS, there is no reason to assume that whatever price effects HFCS might have on sugar sold in the industrial market will carry over to sugar sold in the household market. Consequently, there is no basis for Mexico's speculation that price effects in the industrial sector attributable to imported HFCS would be reflected in the performance of the industry as a whole.

(iii) Mexico's argument that imports of HFCS would have a likely impact on the domestic industry's financial and economic indicators is sheer speculation. SECOFI failed to make any findings on pertinent financial and economic indicators even with respect to the industrial sector of the sugar industry.

(iv) Even on those factors on which SECOFI purported to make findings, its focus on the industrial sector meant that it did not in fact address the issue of the likely impact of imports on the industry as a whole. For example, SECOFI's final determination suggests that price pressures resulting from increased HFCS imports would impair the sugar producers' ability to repay debt.<sup>412</sup> Sales of sugar to the household sector, however, will not be affected by increased HFCS imports and, as far as one can ascertain from the determination, may be increasing. Without analysis of the likely trends in the sugar producers' cash flow and income from all sugar sales, SECOFI could not reasonably draw a conclusion on those producers' likely cash flow and ability to pay debt in the imminent future.

5.520 Therefore, the United States concludes that SECOFI's failure to take into account the impact of the imports on the entire domestic industry violated Articles 3.1, 3.2, and 3.4 of the AD Agreement and Article VI of GATT 1994.<sup>413</sup>

5.521 According to Mexico, the United States erroneously suggests that a determination of threat of injury cannot be based on an evaluation of the impact of imports on a majority of domestic production. Mexico reiterates that SECOFI's affirmative

<sup>411</sup> Indeed, this is the only "finding" of those described in para. 260 of Mexico's first submission for which Mexico can provide a citation to SECOFI's final determination. The remaining "findings" in para. 260, as explained below, are simply *post hoc* argumentation.

<sup>412</sup> *Final Determination*, para. 531, US-1.

<sup>413</sup> *See Ibid.* para. 123.

determination of threat of injury began and ended with the analysis of all domestic sugar production by the 61 mills, directed to both the industrial sector and the household sector. However, that when evaluating the impact of imports as part of the analysis of threat of injury, special consideration had to be given to the specific conditions of competition in the domestic sugar industry with respect to HFCS imports.

5.522 Mexico contends that such conditions were determined by the fact that, although domestic sugar producers produced for both the industrial and household sectors, upon evaluating the impact of HFCS imports, SECOFI found that 100 per cent of these imports were destined to the industrial sector where they competed directly with sugar destined towards industrial use, while imports did not compete directly with sugar destined towards household use. Consequently, the logical method for evaluating the impact of HFCS imports was to identify the portion of sugar production where 100 per cent of such imports had an effect, *i.e.* the industrial sector, where HFCS imports competed directly with the sales of domestically produced sugar.

5.523 Mexico states that, in this particular case, it would have been thoroughly illogical to analyze the impact of HFCS imports on the household sector given that HFCS imports are not destined for this sector and they do not compete in it. In other words, SECOFI began by analyzing domestic production as a whole, but upon evaluating the impact of HFCS imports, it became obvious that such imports were destined in their totality for the industrial sector and not for the household sector. Thus, the assessment of the impact of imports was conducted in the light of the specific conditions of competition between HFCS imports and sugar destined to the industrial sector. But since there is in fact only one domestic industry, given that sugar firms produce for both the industrial sector and the household sector, the impact of HFCS imports upon a majority of production represented, in effect, a threat of injury to the entire domestic sugar industry.

5.524 In response to a question from the Panel as to whether sales of sugar in the household market affected the condition of all the domestic industry producing sugar, Mexico asserted that SECOFI's point of departure was to analyze all sugar production but this analysis led it to consider the industrial market separately, given that this is the sector where sugar competes directly with HFCS imports. Thus, after considering the industrial market separately and determining the effects of HFCS imports in this sector, SECOFI concluded that such effects could be generalized to the production of sugar as a whole. In response to a further question as to whether SECOFI collected any information on prices, or other events or circumstances concerning the household sector and whether such information was referred to in the final determination, Mexico stated that SECOFI clearly did have information on prices and other elements concerning the household sector as of the initiation of the investigation, since it had enough elements to distinguish in the overall information the economic indicators referring to the industrial sector from those referring to the household sector, which was taken into account for issuing the affirmative determination of threat of injury to the domestic sugar industry. The information for both the industrial sector and for the household sector appeared in the working papers and in the administrative record of the investigation. This information was referred to in the *Initiation Notice*, in the section "Arguments and Evidence", paragraph 23, as well as in Mexico's first submission, paragraph 125(c). SECOFI had considered this information from the initiation of the investigation until reaching the final determination,

so that there was not necessarily a section in the final determination setting out this fact. However, as proof of the fact that this information had been taken into account, SECOFI referred to the verification visit to the Sugar Chamber which was recorded in paragraphs 101B and 102 of the *Final Determination*.<sup>414</sup>

5.525 The Panel also asked Mexico whether SECOFI's final determination establishes a connection between the effects of the dumped HFCS imports in the industrial sector and the effects of such imports in the domestic sugar industry as a whole. Mexico's response was that, although this connection is laid out in the *Final Determination* in its entirety, it was illustrated particularly in a number of paragraphs in that determination relating to the margin of dumping (paragraphs 228, 282, 318 and 327), the world market (paragraph 427), the domestic market (441, 442 and 445 through 447), "likeness" analysis between products (paragraphs 423 through 426), dumped imports (paragraph 470), export capacity (paragraph 487), pricing analysis (paragraph 527), other indicators (paragraphs 531 through 533), additional elements (paragraphs 541 through 544), and conclusions (paragraphs 551).<sup>415</sup>

5.526 Mexico concludes that SECOFI's determination of threat of injury satisfies the requirements laid down in Articles 3.1, 3.2 and 3.4 of the AD Agreement, since threat of injury affects the entire domestic sugar industry, produced for both the industrial sector and the household sector by all domestic producers.

### 3. *Insufficient Determination of the Likelihood of Substantially Increased Imports*

5.527 The United States submits that an additional flaw in SECOFI's threat determination stems from its failure to resolve an argument concerning whether Mexican soft drink bottlers had entered into an agreement which would have had the effect of limiting their future purchases of HFCS. Specifically, the importers argued before SECOFI that there was no basis for finding a threat of material injury in light of an alleged agreement between Mexican sugar refiners and Mexican soft drink bottlers. The alleged agreement was designed to increase the use of sugar and accordingly limited the bottlers' use of HFCS.<sup>416</sup> Because of this failure, SECOFI did not properly perform the analysis required by Art. 3.7(i) of the AD Agreement on the likelihood of substantially increased imports.

5.528 According to the United States, in September 1997, U.S. exporters participating in the investigation learned of the existence of an agreement between sugar producers and soft drink bottlers to limit the bottlers' purchase of HFCS. At a pre-final hearing conference on 24 November 1997, a representative of the Sugar Chamber confirmed to the U.S. participants the existence of a restraint agreement.

5.529 The United States holds that, on 1 December 1997, Almex filed a submission requesting that the proceedings be terminated due to the existence of this restraint agreement.<sup>417</sup> The CRA, representing U.S. HFCS producers and exporters collectively, as well as exporters and an importer individually, also filed a submission re-

<sup>414</sup> See Answer of Mexico to question no. 15 by the Panel, 22 June 1999.

<sup>415</sup> See Answer of Mexico to question no. 12 by the Panel, 22 June 1999.

<sup>416</sup> See *Final Determination*, para. 28L.

<sup>417</sup> See US-11.

requesting termination of the investigation for this reason.<sup>418</sup> These submissions were put on the investigation record on 2 December 1997.<sup>419</sup> Although there was a hearing on 3 December 1997, the U.S. producers were not allowed to address questions to the Sugar Chamber regarding the restraint agreement because SECOFI ruled such questions irrelevant to the investigation. In its 10 December 1997 post-hearing brief, CRA advised SECOFI of SECOFI Secretary Herminio Blanco Mendoza's statement before the Mexican Senate on 23 September 1997 that he took great satisfaction in the restraint agreement between the sugar producers and the bottlers:

"I have been informed, and it has also given me great satisfaction, that the sugar mills and soft-drink producers have reached a private arrangement among themselves by which integration is achieved in the chain of production, as the soft-drink producers have made a commitment not to increase their consumption of fructose and as the sugar mills have made a commitment to charge increasingly competitive prices, and in more competitive conditions of supply, for the soft-drink bottlers".<sup>420</sup>

5.530 The United States also holds that, after SECOFI's ruling at the 3 December hearing that the restraint agreement was irrelevant to the investigation, SECOFI sent a letter to the Sugar Chamber on 11 December 1997 to inquire into the existence of such a restraint agreement.<sup>421</sup> On 15 December 1997, the Sugar Chamber responded to SECOFI's inquiry and denied that a restraint agreement existed but indicated that the sugar industry and the soft drink industry had held meetings for the purpose of improving relations between the two industries.<sup>422</sup>

5.531 The United States observes that, in its final determination, SECOFI responded to the U.S. industry's contentions concerning the restraint agreement between Mexican sugar refiners and Mexican soft drink bottlers. The U.S. industry had asserted that the refiners and bottlers had agreed to boost the use of sugar and restrict HFCS consumption. The U.S. industry contended that the investigation should be terminated because the restraint agreement effectively eliminated any alleged threat of injury.<sup>423</sup> Among the materials that the U.S. industry provided in support of its argument were official and newspaper accounts in which Secretary Blanco Mendoza was quoted as stating that the agreement afforded protection to the Mexican sugar market by limiting the acquisitions of fructose.<sup>424</sup>

5.532 The United States also observes that, in response, SECOFI stated that the U.S. industry had not produced a copy of the agreement and that the Sugar Chamber maintained that there was no agreement of the type asserted by the U.S. industry.<sup>425</sup>

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<sup>418</sup> See US-12.

<sup>419</sup> See *Ibid.* and US-11.

<sup>420</sup> See US-13(a).

<sup>421</sup> See US-14.

<sup>422</sup> See US-15.

<sup>423</sup> *Final Determination*, paras. 28 L, 545, US-1.

<sup>424</sup> See US-13.

<sup>425</sup> See *Final Determination*, para. 546, US-1. The Sugar Chamber acknowledged that it had conducted meetings with the soft drink industry. It maintained, however, that there was no "September 1997 agreement between sugar mills and soft drink companies to restrict the use of HFCS". *Ibid.*, para. 95; see also US-20.

The final determination, however, did not address the U.S. industry's arguments that the existence of the agreement had been publicly disclosed by Secretary Blanco Mendoza. In fact, the determination did not resolve the issue of whether there was such an agreement.

5.533 According to the United States, SECOFI concluded instead that, even if such an agreement existed, it would not eliminate the threat of injury. In support of this conclusion, SECOFI stated that any agreement "does not rule out the possibility of these bottling plants as well as other industries using HFCS for a number of different applications, continuing to purchase the imported product at discriminatory prices as a sugar substitute".<sup>426</sup>

5.534 The United States observes that SECOFI declined to find that a restraint agreement existed solely on the basis of the importers' contentions.<sup>427</sup> If its failure to find that the agreement existed had been SECOFI's basis for disposing of the importers' argument, such a basis would have been plainly inadequate because it mischaracterized the record. That record contained more than simple assertions by the importers. Instead, it included evidence showing that SECOFI Secretary Blanco had knowledge of the agreement and characterized it publicly as restraining purchases of fructose.<sup>428</sup>

5.535 The United States also observes that SECOFI did not reject the relevance of a restraint agreement, however, simply by characterizing it as an inadequately substantiated contention by the importers. Instead, SECOFI determined that it did not need to resolve whether a restraint agreement in fact existed. It concluded that even if such an agreement existed, it would not eliminate the threat of injury to the Mexican sugar industry. SECOFI explained that the existence of a restraint agreement "does not rule out the possibility of these bottling plants and other industries using HFCS for a number of different applications, continuing to purchase the imported product at discriminatory prices as a sugar substitute".<sup>429</sup>

5.536 In the view of the United States, SECOFI did not identify the "different applications" for which it believed bottlers might purchase HFCS if they had in fact agreed to restrict the amount of HFCS they used in their production of soft drinks or that other industries would have for HFCS. To the contrary, SECOFI's affirmative threat determination was premised on findings that the use of subject imports in Mexican production of soft drinks was likely to increase substantially:

- (a) The finding that the beverage industry accounted for 81 per cent of sales of subject imports during the period of investigation.<sup>430</sup>
- (b) The finding that the Mexican beverage industry was an attractive market for US exporters of HFCS in light of its size and the substantial per capita beverage consumption in Mexico.<sup>431</sup>
- (c) The finding that "a large share of the freely available capacity of the US [HFCS] industry will be trained on the Mexican market in the near

<sup>426</sup> See *Final Determination*, para. 547.

<sup>427</sup> *Ibid.* para.546.

<sup>428</sup> See US-13.

<sup>429</sup> *Final Determination*, para. 547, US-1.

<sup>430</sup> *Ibid.* para. 464.

<sup>431</sup> *Ibid.* para. 481.

future" because of, *inter alia*, "the steady growth in the local soft drink industry".<sup>432</sup>

5.537 The United States contends that all of these findings assumed that the bottlers had taken no action that would restrict their future use of HFCS. If in fact a restraint agreement did exist, as the US importers alleged, it would severely limit, if not eliminate, bottlers' ability to increase their HFCS purchases. There would be no reason for bottlers to purchase HFCS if they could not use it to sweeten beverages. Moreover, in light of SECOFI's finding that the beverage industry accounted for 81 per cent of consumption of US HFCS imports, if bottlers' purchasers of HFCS did not increase significantly, SECOFI's own findings indicated that it would be very unlikely that overall purchases of HFCS in Mexico would increase significantly.

5.538 Consequently, the United States argues that SECOFI's finding that Mexican users of HFCS would continue to purchase imported product at dumped prices whether or not a restraint agreement was in effect cannot be reconciled with SECOFI's rationale concerning why the imports were threatening material injury to the Mexican sugar industry. Because of this failure, SECOFI's determination of threat of material injury by reason of the allegedly dumped US HFCS imports does not satisfy the requirements of Article 3.7 of the AD Agreement.

5.539 The United States recalls that Article 3.7 of the AD Agreement instructs investigating authorities to consider several factors in determining whether there is a threat of material injury. The first factor of this provision directs authorities to consider whether there is "a significant rate of increased in dumped imports into the domestic market indicating the likelihood of substantially increased importation". As explained above, determining whether a restraint agreement in fact existed was critical in this case to making a conclusion of whether a significant rate of increased dumped imports is likely. If such an agreement were in effect, the amount of imported HFCS purchased by soft drink bottlers would not increase significantly. Instead, it would stabilize or decrease. Because the bottlers account for the overwhelming proportion of subject HFCS imports, overall subject imports would similarly stabilize or decrease if a restraint agreement were effective.

5.540 The United States is of the view that SECOFI's determination did not resolve this issue. SECOFI's finding of likelihood of substantial increases in subject imports was premised on bottlers' not being restrained from purchasing additional quantities of HFCS. SECOFI, however, never squarely found that no restraint agreement existed, deciding that reaching a definitive conclusion on the issue was unnecessary.

5.541 According to the United States, SECOFI cannot justify its failure to make a finding on the grounds that it hypothesized what bottlers might do even if a restraint agreement were in effect. SECOFI's finding in paragraph 547 of the *Final Determination* that a restraint agreement "does not rule out the possibility of these bottling plants... using HFCS for a number of different applications..." has no basis in the record. Even if it did, a hypothesis that there is a "possibility" of future purchases cannot satisfy the requirement of Article 3.7(i) of the AD Agreement that there be a likelihood of substantially increased importation. Moreover, basing a threat determination on a speculative hypothesis contravenes the requirement of Article 3.7 of the

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<sup>432</sup> *Final Determination*, para. 486.

AD Agreement that "[a] determination of threat of material injury shall be based on facts and not merely on allegation, conjecture, or remote possibility".

5.542 The United States recalls that Article 3.7 also requires that there must be facts supporting a finding that "further dumped imports are imminent". Because SECOFI did not make a conclusion as to whether a restraint agreement existed, its record contained insufficient information to support such a finding.

5.543 Mexico disputes the argument by the United States that SECOFI did not solve the matter of the existence of an alleged agreement between sugar producers and soft drink bottlers to limit consumption of HFCS and that it thus violated Article 3.7(i) of the AD Agreement.

5.544 Mexico observes that, even though the importers and exporters argued in the final stage of the investigation that there was an alleged restraint agreement potentially limiting HFCS consumption, the information provided in this regard by the CRA to SECOFI, and referred to by the United States in this proceedings, was submitted extemporaneously on 22 January 1998. In other words, the information in question was filed with SECOFI not only after the public hearing had been held and allegations submitted, but also after the decision to impose a final anti-dumping measure had been taken and the final determination had been sent for publication in the Official Journal, which took place on 23 January 1998.<sup>433</sup>

5.545 Mexico disputes the argument of the United States that SECOFI decided that there was no need to determine whether such a restraint agreement actually existed. In reality, SECOFI did not reject considering the importers' and exporters' arguments,<sup>434</sup> and, in fact, it did analyze the possible effects of the alleged agreement.

5.546 Mexico holds that, while it is true that SECOFI did not resolve whether the alleged agreement existed, because this was not within its powers as the anti-dumping authority and because it had not received any suitable evidence to prove the existence of the alleged agreement, SECOFI did bear in mind the exporters' and im-

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<sup>433</sup> In response to a question from the Panel, Mexico confirmed that the statement by SECOFI's Secretary Blanco before the Mexican Senate regarding imports of HFCS was filed with SECOFI on 22 January 1998. *See* Answer of Mexico to question no. 16(b) by the Panel, 22 June 1999. The statement acknowledged the existence of an agreement restraining imports of HFCS by soft-drink bottlers. Mexico also confirmed that, prior to this date, parties had filed with SECOFI allegations concerning the existence of the restraint agreement which, however, were unaccompanied by any supporting documentation. *See* Answer of Mexico to question no. 16(d) by the Panel, 22 June 1999. In response to questions by the Panel, the United States confirmed that exporters raised the argument about the existence of the restraint agreement in submissions filed with SECOFI on 2 December 1997, two days before the public hearing, and 10 December 1997. *See*, respectively, Answer of the United States to question no. 54 by the Panel, 6 May 1999; and Answers of the United States to questions by the Panel, Note, 22 June 1999. In response to a further question from the Panel as to whether SECOFI attempted to verify the allegation about the existence of the restraint agreement made in a post-hearing brief, Mexico stated that SECOFI made an inquiry in this regard with the Sugar Chamber, one of the parties presumably involved in the alleged agreement, and that this inquiry was provided to the Panel as MEXICO-4. *See* Answer of Mexico to question no. 16(c) by the Panel, 22 June 1999. Mexico notes that, in its reply to SECOFI's inquiry, the Sugar Chamber denied the existence of the alleged agreement.

<sup>434</sup> Proof that SECOFI did not reject the importers' and exporters' arguments is that on 11 December 1997 it requested the Sugar Chamber to report to it regarding the existence of the alleged restraint agreement, MEXICO-4.

porters' arguments in this connection. Indeed, assuming that such an agreement existed, SECOFI made an analysis of the potential effects that the alleged agreement could have on the imminence of a substantial increase in dumped imports, as required by Article 3.7(i) of the AD Agreement.<sup>435</sup>

5.547 Mexico observes that SECOFI referred to the alleged agreement in paragraph 547 of the *Final Determination*, concluding that the arguments submitted by the importers and exporters (Almex and CRA) were not sufficient to establish that the alleged agreement would forestall an imminent and substantial increase in dumped HFCS imports.

5.548 Mexico also observes that SECOFI's conclusion was that, even under the non-proven assumption that Mexican bottlers would limit their consumption of HFCS, the threat of injury to the domestic industry was not removed. This conclusion was based on the following considerations:

- (a) On the basis of the information in the administrative file, SECOFI analyzed whether HFCS imports showed a significant rate of increase indicating a well-founded likelihood that in the future there would be a substantial increase, and reached the conclusion that, together with other factors - such as low prices, increasing substitution, freely disposable and increasing capacity of the exporting country, Mexico as a genuinely important destination for United States exports - such a situation had occurred during the period of investigation.<sup>436</sup>
- (b) Mexico's threat of injury determination was based on information for 1996, the period of investigation. In addition, from January to September 1997 HFCS imports rose 75 per cent over the same period in 1996.<sup>437</sup> Accordingly, SECOFI's conclusion concerning a well-founded likelihood of a substantial increase in the imports under investigation was fully demonstrated.
- (c) Other industries, in addition to the soft drinks industry, use imported HFCS in their activities and would be under no restriction whatsoever to increase consumption of this product as a sugar replacement. These industries accounted for approximately 46 per cent of the industrial sector's total sugar consumption.<sup>438</sup>
- (d) Both the soft drinks industry and the other industries could purchase the imported product at low prices as a result of the dumping, thereby causing the price of sugar to deteriorate.

5.549 Thus, Mexico states that, to comply with Article 3.7(i) of the AD Agreement, SECOFI examined whether, if the use of HFCS was limited, as the exporters and importers argued, the alleged agreement between the soft drink bottlers and the sugar mills would remove the likelihood of substantially increased imports, and it con-

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<sup>435</sup> Article 3.7(i) of the AD Agreement establishes that, in determining the existence of threat of injury, consideration should be given to the rate of increase of dumped imports indicating the likelihood of substantially increased importation in the future.

<sup>436</sup> See *Final Determination*, para. 470, MEXICO-6.

<sup>437</sup> See the import statistics tables in the injury investigation file, MEXICO-40.

<sup>438</sup> See *Final Determination*, para. 465, MEXICO-6.

cluded that even if HFCS use by soft drink bottlers was limited, it would not remove the likelihood that the same bottlers and other industries which use HFCS in many applications would continue to purchase the dumped imported product as a replacement for sugar.

5.550 Mexico disputes the statement by the United States that SECOFI did not identify the various applications, other than soft drinks, for which the bottlers could purchase HFCS. Mexico argues that the United States incorrectly interprets Mexico's analysis by confusing the soft drink bottlers sector with the beverages industry as a whole, and fails to take into consideration that the latter consists both of producers of bottled soft drinks and of producers of other beverages such as juices, tonics for athletes and prepared infusions. Mexico also argues that the United States disregards that, to arrive at its conclusion, SECOFI also considered HFCS consumption by other non-beverage industries using HFCS in many applications, such as processed foods, preserves, confectionery, bakery products, dairy products, etc. In the view of Mexico, it is clear from SECOFI's determination that not only could soft drink bottlers continue to purchase HFCS at dumped prices as a substitute for sugar, but also other sectors in the beverage industry, together with other non-beverage industries using HFCS in many applications, such as processed foods, preserves, confectionery, bakery products and dairy products, would continue to purchase the imported product, gradually displacing their consumption of sugar.

5.551 Mexico argues that the United States does not make the above distinction, suggesting that SECOFI's determination was based on the erroneous assumption that 81 per cent of HFCS sales on the Mexican market went to soft drink bottlers. Paragraph 464 of the *Final Determination*, however, clearly states that the beverages industry - not merely the soft drink bottlers - purchased 81 per cent of HFCS sales.<sup>439</sup>

5.552 Mexico observes that, as the bottled soft drink sector accounts for only part of the 81 per cent of HFCS sales accounted for the beverages industry, even if HFCS imports for that sector were to remain at the level they had already reached,<sup>440</sup> the alleged agreement would not prevent other sectors in the beverages industry from increasing their own purchases of the imported HFCS, with the consequent displacement of domestic sugar production and effect on prices. The alleged agreement, therefore, would not in any way remove the impact in the immediate future of dumped HFCS imports on the domestic sugar industry.

5.553 In response to a question from the Panel, Mexico stated that, out of the 81 per cent of the sales of HFCS imports accounted for by the beverages industry, 68 percentage points are attributable to the soft drink bottlers while the remaining 13 percentage points are attributable to other beverage producers.<sup>441</sup>

5.554 Mexico concludes that SECOFI's affirmative determination of threat of injury to the domestic industry complied with the requirements of AD Agreement Article 3.7(i) by analyzing even the possible repercussions of the alleged restraint agreement.

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<sup>439</sup> See Working Papers on the Analysis of Sales of HFCS Imports on the Mexican Market, MEXICO-39.

<sup>440</sup> See *Final Determination*, para. 460, which mentions that the exporters' information indicated that the alleged agreement was reached in September 1997; in the period January-September of that year, HFCS imports rose 75 per cent over the same period in 1996, MEXICO-6.

<sup>441</sup> See Answer of Mexico to question no. 23 (a) by the Panel, 6 May 1999.

5.555 According to the United States, Mexico acknowledges that SECOFI did not resolve whether the restraint agreement existed. Mexico contends, however, that SECOFI was not obliged to decide the issue because it concerned a matter outside its jurisdiction. Mexico further asserts that resolution of the issue was unnecessary because SECOFI concluded that even assuming that the restraint agreement was effective, the agreement would not eliminate the threat of injury to the Mexican sugar industry caused by imports of HFCS from the United States. The United States submits that Mexico's argument cannot be sustained because it mischaracterizes both SECOFI's final determination and the nature of the evidence before SECOFI.

5.556 The United States notes that, as an initial matter, it agrees with Mexico that SECOFI would have discharged its responsibilities under Article 3.7(i) if SECOFI had established that, notwithstanding the restraint agreement, there would be a likelihood of substantially increased importation of HFCS from the United States.<sup>442</sup>

5.557 In the view of the United States, Mexico's argument that SECOFI conducted the required analysis does not accurately summarize SECOFI's actual findings.<sup>443</sup> Contrary to Mexico's contention,<sup>444</sup> SECOFI did not find that there would likely be increased purchases of HFCS for use in products other than soft drinks. It instead concluded that the restraint agreement "does not rule out the *possibility* of these bottling plants and other industries using HFCS for a number of different applications, continuing to purchase the imported product at discriminatory prices as a sugar substitute".<sup>445</sup> The United States also argues that SECOFI's final determination of the likelihood of increased imports focuses exclusively on the likelihood of continued substitution of HFCS for sugar in the production of soft drinks, and that this determination does not support the conclusion that there was a likelihood of substantially increased imports of HFCS for use in applications other than soft drinks.

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<sup>442</sup> Nevertheless, the United States does not agree with SECOFI that resolution of the importers' argument that a restraint agreement existed was "not an obligation incumbent on the investigating authority". Mexico first submission, para. 225. Article 3.4 of the AD Agreement, which Mexico has acknowledged is pertinent to determinations involving threat of material injury, *see* Mexico first submission, paras. 233, 245, requires investigating authorities to conduct "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry". Surely an agreement under which purchasers commit to purchasing specific volumes of the like product produced by the domestic industry is a "relevant economic factor... having a bearing on the state of the industry". Moreover, Article 3.5 of the AD Agreement directs authorities to examine "trade restrictive patterns of and competition between the foreign and domestic producers". SECOFI's own actions indicate that it recognized this. *See Final Determination*, para. 95. These actions also belie SECOFI's current argument that the argument concerning the restraint agreement was not asserted to it until the eve of publication of the final determination in the *Diario Oficial*. SECOFI's own determination indicates that arguments concerning the restraint agreement were asserted in briefs of the parties submitted well before issuance of the final determination. *See Final Determination*, para. 28L.

<sup>443</sup> The United States also argues that SECOFI's final determination of the likelihood of increased imports focuses exclusively on the likelihood of continued substitution of HFCS for sugar in the production of soft drinks, and that this determination does not support the conclusion that there was a likelihood of substantially increased imports of HFCS for use in applications other than soft drinks. Mexico disputes both assertions. *See* Answers of Mexico to questions no. 6(a) and 6(b) by the United States, 6 May 1999.

<sup>444</sup> *See* Mexico's first submission, para. 274.

<sup>445</sup> *Final Determination*, para. 546 (emphasis added by the United States), US-1.

5.558 The United States submits that SECOFI's finding that increased purchases for non-soft drink applications was "possible" is insufficient to support a finding of threat of material injury. Under Article 3.7(i) of the AD Agreement, the investigating authority is supposed to consider whether there is a "likelihood of substantially increased imports" - not merely a possibility. Article 3.7 of the AD Agreement also states that a "determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture, or remote possibility". Yet SECOFI's findings in its final determination - and Mexico's arguments in its first submission - are based on the conjecture that purchasers would purchase increasing volumes of HFCS for non-soft-drink applications even in the presence of a restraint agreement.<sup>446</sup>

5.559 The United States holds that Mexico's assertion that demand for HFCS in non-soft-drink applications would be likely to increase is another example of its reliance upon *post hoc* reasoning. The finding of a likelihood of increased exports in SECOFI's determination concerned the likelihood of increased demand for use of HFCS in "soft drinks" - not "beverages" generally, and not other applications.<sup>447</sup> The United States notes that, although quarrelling with the United States' use of data from SECOFI final determination, and introducing its own data of dubious relevance,<sup>448</sup> Mexico never disputes the United States' contention that soft drink bottlers were by far the largest purchasers of HFCS from the United States.<sup>449</sup>

5.560 The United States asserts that, in light of this information, there was no basis for any finding that overall purchases of HFCS would be likely to increase significantly if the restraint agreement served to restrict the amount of imported HFCS that could be used in the soft drink market. Indeed, SECOFI made no finding to this effect. Accordingly, because it failed to resolve whether the restraint agreement existed, SECOFI failed properly to analyze whether future increased dumped imports are clearly foreseen and imminent. Because it did not properly establish or objectively evaluate the facts concerning the likelihood of further dumped imports,

<sup>446</sup> The United States reiterated this view in response to a question from Mexico as to whether the United States recognizes that SECOFI did analyse the possible effects that the alleged restraint agreement might have in relation to the imminence of dumped imports. See Answer of the United States to question no. 71 by Mexico, 6 May 1999.

<sup>447</sup> See *Final Determination*, paras. 481, 486, US-1.

<sup>448</sup> Mexico argues the United States' use of the 81 per cent figure cited in para. 464 of the *Final Determination* is erroneous because this figure encompasses purchases of all beverages, not merely soft drinks. However, in para. 465 of the *Final Determination*, SECOFI broke out industrial consumption of sugar into use "for bottling plants" and other uses. It was reasonable to expect that the categories SECOFI used to report HFCS consumption in para. 464 of the *Final Determination* would conform to those it used for sugar consumption in para. 465. Additionally, SECOFI's citation that 46 per cent of sugar consumed in the industrial sector went to applications other than soft drinks, Mexico first submission, para. 269(c), bears little relevance to the issue of the proportion of HFCS consumed in such applications. SECOFI's own data show that patterns of HFCS consumption differ markedly from those of sugar consumption. See *Final Determination*, paras. 464, 465, US-1. Indeed, SECOFI acknowledged that HFCS cannot serve as a substitute for sugar in all commercial and industrial applications. *Ibid.* para. 418, US-1.

<sup>449</sup> Indeed, other information submitted by Mexico tends to corroborate the United States' assertions. See MEXICO-37 (indicating that 82 per cent of total imports of HFCS were consumed by the soft drinks industry).

SECOFI had insufficient evidence to support a finding of threat of material injury under Article 3.7 of the AD Agreement.

5.561 Mexico disputes the argument by the United States that SECOFI's threat determination is defective in its treatment of the alleged restraint agreement in that SECOFI declined to resolve whether that agreement existed. Mexico argues that SECOFI could not, and indeed it was not within SECOFI's powers as the anti-dumping authority, to resolve whether the alleged restraint agreement existed. In any case, the alleged agreement was a private one, apparently intended to limit purchases of HFCS by Mexican soft drink bottlers, which constrained SECOFI to analyze the probable effects of the alleged agreement based upon a presumption of its existence given that, it should be stressed, no adequate evidence of this was ever presented. Moreover, the alleged agreement took place outside the investigation period. Mexico's anti-dumping practice consists of analyzing the information corresponding to the period established as the period of investigation. In cases where the investigating authority has information or is given information on events subsequent to that period, SECOFI does examine that information to assess whether it could be relevant to the determination of threat of injury, and in particular in evaluating the imminence of further dumped imports. It goes without saying that if the assessment reveals that the information is not relevant because it does not affect the change of circumstances, the determination of threat of injury remains unchanged.

5.562 Mexico also states that, in this particular case, although the alleged agreement took place outside the period of investigation, and exporters and importers merely presented arguments without any adequate evidence of the existence of the alleged agreement during the investigation, SECOFI assumed the existence of such agreement and went on to analyze its possible impact on the likelihood of a substantial increase in dumped imports, as required by Article 3.7(i) of the AD Agreement.

5.563 According to Mexico, SECOFI's concluded from the above analysis that, even if there was such an agreement, this would not remove the threat of injury to the domestic sugar industry. In fact, the United States acknowledges that the purpose of the alleged restraint agreement was to limit future HFCS purchases by Mexican soft drink bottlers. Limiting such purchases, however, is not at all the same thing as eliminating them. SECOFI found that, if the alleged agreement existed, it would not remove the likelihood that soft drink bottlers, as well as other sectors of the beverage industry and other industries using HFCS in many applications, continued to purchase the dumped product.

5.564 Mexico observes that the basis for SECOFI's conclusions is set forth in Mexico's first submission. Given that the United States' arguments regarding this matter reflect a lack of understanding of Mexico's position, Mexico provided the following clarifications:

- (a) The industrial users that could possibly consume both sugar and HFCS are, on the one hand, the producers of beverages of all kinds, i.e. producers of bottled soft drinks, juices, tonics for athletes and prepared infusions, concentrates, and even alcoholic beverages, and on the other hand, the producers of processed foods, preserves, confectionery, bakery products and dairy products.
- (b) The producers of bottled soft drinks form part of the beverage industry, and the arguments presented by the exporters and importers indi-

cated that such producers would allegedly limit their consumption of HFCS.

- (c) Although during the period of investigation, the producers of bottled soft drinks were the main consumers of HFCS, this does not mean that they were the only consumers of HFCS, nor that consumption by other industries was either negligible or less important.
- (d) When evaluating the arguments concerning the alleged agreement, SECOFI considered, in particular, the situation of the soft drink bottlers, not because it had any special interest in those producers, but because the arguments made by the exporters and importers focused on consumption by soft drink bottlers.
- (e) However, for the analysis of threat of injury, SECOFI, in conformity with the AD Agreement and with the rest of its analysis, assessed the situation of other industrial users in the light of the possible existence of the agreement, and concluded that these users would not modify their behaviour in the market. Thus, making an overall evaluation of the situation of all industrial users, SECOFI concluded that even if the alleged agreement existed, it would not remove the likelihood of an increase in HFCS imports.

5.565 Mexico also observes that SECOFI concluded that dumped imports were imminent by determining, among other factors, that HFCS imports increased by 112 per cent during the period of investigation (1996) as compared to the previous period (1995). Furthermore, as of September 1997, date of the alleged agreement, imports showed an additional increase of 75 per cent over the period January to September 1996. In other words, the increase in imports predicted in the period of investigation had already taken place at the time of the alleged agreement, so that the alleged limitation in the consumption of HFCS by the soft drink bottlers was already based on a level of imports substantially higher than the consumption observed during the investigation period.

5.566 Mexico argues that the above consideration, added to the fact that in Mexico industrial users other than the soft drink bottlers were replacing their consumption of sugar with HFCS in increasing amounts,<sup>450</sup> placed the volume of HFCS imports at a level at which the threat of injury persisted.

5.567 In response to a question from the Panel, Mexico provided information available to SECOFI of the degree of technical substitutability between HFCS and sugar with respect to non soft drink beverage producers and other industries using sweeteners. This information had been referred to in paragraph 523 of *Final Determination* but the Panel wished to have Mexico expand upon it. Mexico provided estimates from two sources: (a) a market survey commissioned by Almex, and (b) a market survey undertaken by SECOFI in the course of the investigation.

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<sup>450</sup> This is due to the particular situation of the Mexican market, in which the use of HFCS is not yet well established, since substantial imports of HFCS only began in 1994. In 1996 certain industrial users had not yet begun to substitute HFCS for sugar, and in other cases, products of the same brand used HFCS for part of their production and sugar for the rest, gradually substituting HFCS for sugar.

5.568 Mexico stated that, according to the Almex market survey, the degree of technical substitutability between HFCS and sugar varied per application as follows:

Industrial users	Degrees of substitutability of sugar with HFCS (percentage)
Non-soft drink beverage producers	100
Other products:	
Bread	100
Ketchup	50
Yoghurt	50
Marmalades	33
Biscuits, pastries and desserts	10

Mexico also stated that the market survey referred to above reflected conditions in 1996, when the development of the HFCS market in Mexico was at a stage of product introduction; therefore, the degrees of substitutability quoted in this market study should not be considered as a technical limitation, but rather as the level of substitutability that had been reached up to that point.

5.569 Mexico asserted that, according to the market survey conducted by SECOFI, the degree of technical substitutability varied per application as follows:

Products	Degrees of substitutability of sugar with HFCS (percentage)
Juices	100
Wines	100
Liquid caramel	100
Glazes	100
Whipped cream	100
Frozen fruit	100
Syrups	99
Seasonings	96
Marmalade	70
Fruits in syrup	52
Ice-cream	36

Mexico observed that this market study referred the use of HFCS in production processes during 1996.<sup>451</sup>

5.570 The Panel inquired whether Mexico took the view that, even in event of the alleged agreement, imports of HFCS would have continued (or increased) in such quantities as to threaten material injury, notwithstanding that (a) only a minority of HFCS imports are consumed by industrial users other than soft drink bottlers and that (b) these producers cannot fully switch to consuming HFCS instead of sugar. Mexico replied that producers consuming HFCS other than soft-drink bottlers cannot be considered to be a minority, since during the period of investigation alone, they consumed nearly one third of the HFCS imported from the United States into Mexico. In addition, Mexico stated that even though such producers could not completely switch

<sup>451</sup> See Answer of Mexico to question no. 23(c) by the Panel, 6 May 1999.

to consumption of HFCS, it was reasonable to expect an increase in their share of HFCS consumption during the period subsequent to period of investigation. Lastly, Mexico noted in this regard that, by September 1997 (the date of the alleged agreement), HFCS imports had increased by 75 per cent, so that even if the use of HFCS by soft drink bottlers had been limited by the alleged agreement, both consumption and imports of HFCS had already reached such a level that the threat of injury to the domestic sugar industry would remain.<sup>452</sup>

5.571 Thus, Mexico disputes the United States' statement that SECOFI's final determination did not support the conclusion that there was a likelihood of increased imports of HFCS. Through this simplistic assertion, the United States attempts to distract the Panel's attention from the extensive analysis conducted by SECOFI of all of the factors set forth in Article 3.7 of the AD Agreement for determining the imminence of further dumped imports.<sup>453</sup> The analysis of these factors shows that SECOFI did not base its determination of threat of injury on possibilities, but on the substantiated likelihood that in the immediate future there would be a substantial increase in dumped HFCS imports.

5.572 Finally, Mexico also disputes the United States argument that, by declining to resolve whether the alleged agreement existed, SECOFI failed to analyze the restrictive trade practices of domestic producers. On the contrary, SECOFI did analyze this issue by considering the possible effects of the alleged agreement on the situation of the Mexican sugar industry, assuming that such agreement existed. In particular, SECOFI discussed the trade practices of the domestic sugar producers in paragraphs 511 to 517 of the *Final Determination*, with respect to the economic behaviour of the mills and the determination of sugar prices by the mills. Thus, Mexico's affirmative determination of threat of injury to the domestic industry did comply with the requirements of Article 3.5 and Article 3.7 of the AD Agreement by analyzing the possible impact of the alleged restraint agreement.

#### *E. Period of Application of Provisional Measures*

5.573 As described below, the United States withdrew its claim regarding SECOFI's alleged lack of justification for extending the provisional measure from four to six months (SECOFI's alleged failure to conduct a lesser-duty inquiry) at the first meeting of the Panel with the parties. The relevant arguments and counter-arguments are described herein, however, for the sake of completeness.

5.574 The United States observes that SECOFI published its affirmative preliminary determination imposing provisional anti-dumping measures on 25 June 1997. The preliminary determination reflects the anti-dumping duties on HFCS calculated for four named United States exporters and for all other U.S. exporters at specified U.S. dollar amounts.<sup>454</sup> It further directed the Secretariat of Finance and Public Credit,

<sup>452</sup> See Answer of Mexico to question no. 23(d) by the Panel, 6 May 1999.

<sup>453</sup> In its final determination of threat of injury, SECOFI carried out an analysis of all of the factors indicated in Article 3.7 of the AD Agreement, which were included in the notice of imposition of the definitive anti-dumping duties in the sections entitled: imports subject to price discrimination, export capacity, price analysis and inventories of the investigated product.

<sup>454</sup> Preliminary Determination, paras. 307-308, US-2.

General Customs Administration, to impose the anti-dumping duties on imports and to allow a bond to be posted to cover payment of the additional duties, effective on 26 June 1997.<sup>455</sup>

5.575 The United States asserts that, nearly four months after the effective date of SECOFI's imposition of provisional measures, CRA filed, on 24 October 1997, letters requesting that SECOFI terminate the provisional measures as of 26 October 1997.<sup>456</sup> They cited the requirement of Article 7.4 of the AD Agreement that provisional measures be limited to as short a period as possible, not to exceed four months. That period would expire on 26 October four months following the effective date of SECOFI's imposition of provisional measures on 26 June 1997. Attorneys for CRA and Almex met with officials at SECOFI on 24 October 1997, to express their concerns about this issue.<sup>457</sup> None of the U.S. exporters requested SECOFI to extend the application of provisional measures by two months, pursuant to Article 7.4 of the AD Agreement.

5.576 The United States also asserts that, in response to U.S. exporters' and an importer's requests, SECOFI determined, in an agency memorandum on the record, that, in accordance with Article 7.4 of the AD Agreement, it was necessary to examine if the imposition of an anti-dumping duty less than the margin of dumping would be sufficient to eliminate the threat of injury to the domestic industry, so that the period of provisional measures could be extended from four to six months from the publication date of the preliminary determination.<sup>458</sup> SECOFI also responded by letters dated 29 October 1997, to CRA and others, informing them that the agency had "determined the necessity to examine if the imposition of an anti-dumping duty on the importation of high fructose corn syrup, grades 42 and 55, at a level inferior to the dumping margin, would be sufficient to eliminate the threat of injury to domestic production, such that the effective period for provisional measures would be extended to six months ... in conformity with Article 7.4 of the Agreement on the Application of Article VI of GATT 1994".<sup>459</sup>

5.577 The United States observes that, in accordance with its determination, SECOFI continued the application of provisional measures two more months, or until 26 December 1997, six months after the effective date of their imposition. That

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<sup>455</sup> *Ibid.* paras. 310-11, 314, 316.

<sup>456</sup> Annexed at US-15 as follows: (a) Letters from Lic. Luis Bravo Aguilera, Counsel for CRA, Progold Limited Liability Co. (Progold), and Minnesota Corn Processors, to Lic. Gustavo Uruchurtu Chavarin of SECOFI (24 October 1997); (b) letter from David Hurtado Badiola, Counsel for Almex, to Lic. Gustavo Uruchurtu Chavarin of SECOFI (24 October 1997); (c) letter from Javier Pandal Perez, Counsel for ADM, to Lic. Gustavo Uruchurtu Chavarin of SECOFI (24 October 1997).

<sup>457</sup> SECOFI Communication Report (24 October 1997)( handwritten), US-17.

<sup>458</sup> See US-18 as follows: (a) SECOFI Memorandum, "Extension of the Effective Period of Provisional Anti-dumping Duties", initialed by Director General, Legal Technical Attachment, Juan Manuel Saldana Perez (24 October 1997); (b) SECOFI Memoranda concerning the CRA, Progold, Minnesota Corn Processors, Almex, and ADM, stating the same determination regarding Article 7.4, initialed on behalf of the Directorate General, Legal Technical Attachment (28 October 1997).

<sup>459</sup> See US-19: (a) Letter from SECOFI, signed by Juan Manuel Saldana Perez, to Lic. Luis Bravo Aguilera, Counsel for CRA, Progold, and Minnesota Corn Processors (29 October 1997); (b) letters from SECOFI, signed by Juan Manuel Saldana Perez, to counsel for Almex, ADM, A.E. Staley (29 October 1997). See also (c) letter from SECOFI, signed by Juan Manuel Saldana Perez, to Director General of Customs (29 October 1997).

date came and went, however, with the result that SECOFI continued the application of provisional measures for almost an entire additional month, or until 24 January 1998, the date following the date of publication of the final determination.<sup>460</sup> In its final determination, SECOFI stated:

[Duration of the provisional measures]

"In accordance with Article 7.4 of the [AD Agreement], the Ministry decided to extend the duration of the provisional measures imposed under the Preliminary Determination referred to in paragraph 19 of this determination in order to determine whether a definitive anti-dumping duty below the level of the corresponding dumping margin would suffice to eliminate the threat of injury to domestic sugar production, extending the effective period of the provisional measures established under paragraphs 307 and 308 of the aforementioned preliminary decision to six months" (para 149).

5.578 The United States maintains that, nowhere in the final determination, did SECOFI provide any explanation of its supposed determination whether a definitive duty below the level of the dumping margin would suffice to eliminate the threat of injury to domestic sugar production. Likewise, SECOFI's record is devoid of any documents that substantiating that it examined whether a lesser duty would be sufficient to remove injury. In the 12 June 1998 consultations, SECOFI mentioned a "government confidential" memorandum allegedly providing this explanation. However, no such document was ever made available to the U.S. industry or Mexican HFCS importers or any other U.S. party during the administrative proceeding, and no such document has been produced to the United States in this dispute.

5.579 The United States also maintains that nowhere in the final determination did SECOFI provide any explanation for its extension of provisional measures for a third month, from 26 December 1997, to 24 January 1998. Instead, SECOFI ordered the Ministry of Finance and Public Credit to collect the bonds posted by the importers of HFCS from the U.S. to assure the payment of anti-dumping duties.<sup>461</sup>

5.580 The United States holds, finally, that SECOFI's final injury determination was a "threat" determination, finding that the Mexican sugar industry was threatened with material injury by reason of dumped imports, rather than that material injury was actually occurring.<sup>462</sup> Nowhere in the final determination, however, did SECOFI make a finding that the effect of the dumped imports would, in the absence of the provisional measures imposed, have led to a determination of injury to the domestic industry. Nevertheless, SECOFI imposed provisional measures retroactive to the date of the preliminary determination.

5.581 The United States recalls that Article 7.4 of the AD Agreement limits the application of provisional measures to the shortest period possible, not to exceed four months except in specified circumstances:

<sup>460</sup> Actually, the extension of the provisional measures probably did encompass a full third month, or until 26 January 1998, because 24 January was a Saturday. The final determination was published on a Friday, 23 January 1998.

<sup>461</sup> Final Determination, para. 562, US-1.

<sup>462</sup> *Ibid.* para. 552.

"The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively".

5.582 The United States notes that, according to Article 7.4, provisional measures cannot be extended beyond a four-month period unless one of three exceptions applies. The first exception allows a two-month extension for a total provisional measures period of six months, if exporters representing a significant percentage of the trade involved in the case request an extension. None did in the investigation in question. The second exception allows a similar two-month extension for a total provisional measures period of six months, when the investigating authority examines whether a duty lower than the margin of dumping would be sufficient to remove injury - - the lesser-duty rule. The United States asserts that SECOFI did not conduct the requisite examination. The third exception applies if both exporters representing a significant percentage of the trade involved in the case have requested an extension and the authority examines whether to apply a lesser-duty. In this case, Article 7.4 allows the investigating authority to maintain provisional measures for a total of nine months. Since the U.S. exporters never requested an extension in this case, this exception does not apply. All three of these exceptions deviate from the general rule, which is to impose provisional measures for "as short a period as possible, not exceeding four months".<sup>463</sup>

5.583 The United States observes that SECOFI relied on the lesser-duty provision of Article 7.4 as its reason for continuing the application of provisional measures beyond the four-month limit. SECOFI failed, however, to conduct any substantive examination, based on factual information and critical analysis, of whether a lesser duty would, in fact, be sufficient to remove injury, as required by Article 7.4.<sup>464</sup> SECOFI did respond to the requests of U.S. exporters and an importer to terminate the provisional measures at the four-month mark by stating that it would examine whether a lesser-duty would be sufficient. SECOFI repeated this response in the final determination when it stated that it had determined "to extend the duration of the provisional measures imposed under the preliminary determination... in order to determine whether a definitive anti-dumping duty below the level of the corresponding dumping margin would suffice to eliminate the threat of injury to domestic sugar production".<sup>465</sup> However, the final determination as well as the agency record is devoid of any analysis of the results of this supposed investigation. No requests by SECOFI

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<sup>463</sup> AD Agreement, Article 7.4. See also GATT, Anti-dumping and Countervailing Duties, Report of Group of Experts, GATT Sales No. GATT/1961-2 (1961) at 18, advising that provisional measures "should be used sparingly and for the shortest possible time in order to interfere as little as possible with normal trade and in order that they should not assume a protectionist character". This excerpt is quoted in Stewart at 34, US-21.

<sup>464</sup> See United States first submission, paras. 43-44 (citing US-16 to US-19).

<sup>465</sup> Final Determination, para.149, US-1.

were ever issued to the parties for information to aid in this investigation, no argument was ever received or held, and no agency memorandum was ever included in the record explaining SECOFI's analysis.<sup>466</sup> SECOFI's failure properly to examine whether to apply a lesser-duty necessarily had the consequence that it did not determine "whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less..., if such lesser duty would be adequate to remove the injury to the domestic industry".<sup>467</sup>

5.584 The United States argues that SECOFI may not now claim that it conducted this examination "in its head". The *Guatemala-Cement* Panel recently recognized the importance of including critical facts and analysis on the record so that they may be evaluated by the reviewing Panel. That Panel sustained Mexico's claim that Guatemala failed to provide sufficient evidence to justify initiation of its investigation, as required by Article 5.3 of the AD Agreement. The Panel stated:

"We note that Guatemala asserted that the Ministry "knew" certain information [regarding threat of material injury]... and that such knowledge was brought to bear on its evaluation of the information... While such facts may have been known to the Ministry, there is no reference to them in the application, in the evaluation prepared by the two advisors, or in the resolution itself. Indeed, there is no reference whatsoever... Thus, we cannot consider such facts in evaluating whether the Ministry properly concluded that there was sufficient evidence to justify initiation in this case".<sup>468</sup>

The United States contends that, similarly, in this case a reviewing body cannot be expected to read SECOFI's mind as to what it might have "known" about facts which might have substantiated that it conducted a proper examination of the lesser-duty rule. SECOFI must state those facts on the record, either in the final determination or in a separate report in sufficient detail to explain its findings of facts and to support the conclusions of law it drew on the basis of those facts.

5.585 The United States maintains that, in fact, SECOFI is capable of such investigation and sophisticated analysis, according to an extensive discussion Mexico recently provided to the WTO about its lesser-duty methodology.<sup>469</sup> Mexico outlined

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<sup>466</sup> According to the United States, Mexico indicated at the 12 June 1998 consultations that a "government confidential" document exists which explains its application of the lesser-duty rule. A two-page hand-written document, the SECOFI "Communication Report", US-17, provides no such explanation. It merely records the meeting of counsel for CRA and Almex with SECOFI officials, at which meeting counsel expressed their concern that provisional measures not be extended beyond the four-month period allowed by Article 7.4. This document contains no SECOFI evaluation of the facts and no SECOFI analysis of whether to apply a lesser-duty. It therefore does not substantiate that SECOFI undertook the examination required by Article 7.4. Were there to be another explanatory document, whatever its status, it was not available in SECOFI's record to the U.S. producers or importers in Mexico (See AD Agreement, Article 6.4) and can have no relevance at this stage. See *Guatemala-Cement Panel Report*, footnote 242.

<sup>467</sup> AD Agreement, Article 9.1.

<sup>468</sup> *Guatemala-Cement Panel Report*, *supra*, footnote 8, footnote 242. See also *Brazil-Milk Powder Panel Report*, para. 294.

<sup>469</sup> See *Compilation of Information Provided by Members Regarding Lesser-Duty Rule* (WTO Compilation) G/ADP/AHG/W/43, 16 April 1998 pp. 5-6, US-22.

two approaches: (1) the unitary international price approach or exogenous price method; and (2) the endogenous production cost or price approach.<sup>470</sup> Mexico further discussed the cases in which it has applied this sophisticated analysis.<sup>471</sup> Yet nowhere in SECOFI's final determination nor in its administrative record is there any evidence of such analysis in this case. SECOFI simply failed to apply the requirement of Article 7.4 that it "*examine* whether a duty lower than the margin of dumping would be sufficient to remove injury" (emphasis added by the United States). Accordingly, SECOFI's extension of provisional measures from four to six months violated Article 7.4 of the AD Agreement.

5.586 The United States submits that SECOFI further violated Article 7.4 of the AD Agreement by continuing provisional measures nearly another full month beyond the two-month extension period allowed for application of the lesser-duty rule - from 26 December 1997 to 24 January 1998.<sup>472</sup> There can be no justification under any provision of the AD Agreement for this unwarranted extension of provisional measures. Indeed, SECOFI offered none. Accordingly, SECOFI's extension of provisional measures for a third month beyond the four-month period also violated Article 7.4.

5.587 Mexico disputes the argument by the United States that SECOFI violated Article 7.4 of the AD Agreement. Mexico asserts that United States is in error when suggesting that in extending the period of application of provisional measures from four to six months SECOFI did not consider the possibility of applying a lesser duty. Mexico also disputes the argument by the United States that there is no documentation on the record showing that SECOFI engaged in an examination of the application of a lesser duty that would permit it to extend the period of the provisional measure.

5.588 Mexico asserts that, in the course of the investigation, SECOFI determined to examine whether the establishment of a duty lower than the margin of dumping would be enough to remove the threat of injury to the domestic sugar industry. To this end, SECOFI extended the period of application of the provisional measure from four to six months, in view of the possibility afforded to the investigating authority by the second part of Article 7.4 of the AD Agreement. This determination appears in a memorandum by SECOFI dated 24 October 1997, which is in the administrative record.<sup>473</sup> It was reiterated in paragraph 149 of the *Final Determination*.

5.589 Mexico notes that paragraphs 542 through 544 and 552 of the *Final Determination*<sup>474</sup> explain the methodology, the results and the final conclusions of SECOFI's examination of the possibility to apply an anti-dumping duty lower than the margin of dumping. In particular, SECOFI established that:

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<sup>470</sup> *Ibid.* p. 5.

<sup>471</sup> *Ibid.* p. 6.

<sup>472</sup> Final Determination, para. 562, US-1. The United States points out that, since 24 January 1998 was a Saturday, the provisional measures most likely extended until Monday, 26 January 1998.

<sup>473</sup> See the SECOFI Memorandum of 24 October 1997, showing the investigating authority's determination to extend the period of application of the provisional measure pursuant to Article 7.4. of the AD Agreement, MEXICO-41.

<sup>474</sup> It should also be noted that these are included in the preambular section which, in the case of notices of imposition of definitive anti-dumping duties, includes all relevant information on issues of fact and law and the reasons behind the imposition of definitive anti-dumping measure, in keeping with the requirements of AD Agreement Article 12, MEXICO-6.

"542. In this connection, on the basis of the preliminary determination referred to in paragraph 19 of this determination and the anti-dumping duties established therein, the Ministry decided to consider the possibility of establishing duties lower than the margin of price discrimination. On the basis of the margins of dumping determined in the final stage of the investigation, the prices of imports inclusive of the application of possible anti-dumping duties were calculated and then compared against the prices of refined and standard sugar.

543. The Ministry observed from the results of this comparison that, even by eliminating the margin of dumping through definitive anti-dumping duties, the prices of HFCS imports in the domestic market would be below the price of the domestic product. Thus, the weighted average price of HFCS-42 would be 17 per cent below the weighted average price of standard sugar, while the price for HFCS-55 would be 16 per cent below the price of refined sugar.

544. Accordingly, the Ministry considered that the purpose of establishing anti-dumping duties is not to restrict HFCS imports or to avoid trade substitution of sugar by HFCS but to restore fair trading conditions".

5.590 According to Mexico, from reading these paragraphs it can be inferred that, in fulfilment of the requirement posed by Article 7.4 of the AD Agreement, SECOFI conducted an examination to determine the appropriateness of applying a lower anti-dumping duty that would be sufficient to remove the threat of injury to domestic production or whether it was appropriate to apply anti-dumping duties for the total amount of the margin of dumping.

5.591 In Mexico's view, SECOFI's findings indicated that, even including an anti-dumping duty equal to the margin of dumping determined in the final stage of the investigation, the price of competing HFCS imports from the United States would still have been below the price of domestic sugar. Therefore, SECOFI stated in its *Final Determination* that it was:

"552. ... appropriate to impose<sup>2</sup> an anti-dumping equal to the margin of price discrimination calculated in the course of the investigation".<sup>475</sup>

Mexico concludes that SECOFI acted in accordance with the rights and obligations incumbent on it under the AD Agreement when it extended the application of the provisional measure, since it was fully entitled to do so and did actually conduct the examination required under Article 7.4 of the AD Agreement.

5.592 Mexico argues that paragraphs cited above demonstrate the irrelevance of the United States' complaint about the alleged violations of Articles 7.4 of the AD Agreement, as well as the irrelevance of United States' assertion that "... in this case, a reviewing body cannot be expected to read SECOFI's mind as to what it might have 'known' about the facts which might have substantiated that it conducted an exami-

<sup>475</sup> See MEXICO-6.

nation of whether to apply a lesser duty ...".<sup>476</sup> Such paragraphs also disprove the statement by the United States that "... Nowhere in the final determination did SECOFI provide any explanation of its supposed determination whether a definitive duty below the level of the dumping margin would suffice to eliminate the threat of injury to domestic sugar production ...".<sup>477</sup> In addition, Mexico contends that the United States is in error when stating that SECOFI did not carry out "... an appropriate examination of the lesser duty rule ...", that it "... failed...to conduct any substantive examination, based on factual information and critical analysis ...", and that such an examination could have been expected to have been conducted on the basis of the methodology recently presented by Mexico as part of its contribution to the discussions at the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices on the subject of the lesser duty rule.<sup>478</sup>

5.593 Mexico asserts that comments made in the course of meetings at the Ad Hoc Group of the Committee on Anti-Dumping Practices cannot create obligations that are not established in the AD Agreement. Mexico's obligations under Article 7.4 of the AD Agreement are confined exclusively to carrying out an examination of applying a duty lower than the margin. This Article does not set out any kind of indicator, guideline or methodology to perform an examination of a lesser duty that would be sufficient to remove injury; up to now this has been left to the discretion of each importing Member.

5.594 Mexico also notes in this respect that, when introducing its contribution on the subject of the lesser duty rule at the meeting of the Ad Hoc Group in October 1997, Mexico made it perfectly clear that the methodology presented in its contribution did not in any way represent its practice and said so specifically in its document:

"While the explanation that follows does not in any way represent Mexico's practice with respect to this matter, it does provide general guidelines which Mexico considers of interest in trying to arrive at a common stance".<sup>479</sup>

5.595 Mexico observes that, while it was very much interested in contributing comments on the application of the lesser duty rule that could help develop clearer and more uniform criteria in this regard, it also recognized that for an examination of the lesser duty rule it is important to take account of the conditions of each particular case. Indeed, in every investigation in which such an examination takes place, such examination must be performed in light of the actual characteristics and circumstances of the case in question. Mexico also observes that, although it was under no obligation to do so, in its examination of the lesser duty rule SECOFI did act in accordance with its comments submitted to the Ad Hoc Group's document.

5.596 With regard to the continuation of the provisional measure for 28 days beyond the six-month period established in conformity with Article 7.4 of the AD Agreement, Mexico states that SECOFI was aware at all times of the 6-month limit imposed by the AD Agreement for the duration of provisional measures. For this

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<sup>476</sup> United States first submission, para. 150.

<sup>477</sup> *Ibid.* para. 46.

<sup>478</sup> See United States first submission, paras. 145 and 149, referring to the WTO Compilation.

<sup>479</sup> See WTO Compilation, p. 5.

reason, before this period expired, SECOFI made every possible effort to complete the investigation and issue the appropriate public notice in due course. Mexico also asserts that, when the six-month period ended and the foregoing objective was not achieved because of the complexity involved in conducting the final stage of the investigation, SECOFI faced the dilemma of suspending the provisional measure or continue to apply it for a short period.

5.597 Mexico holds that, faced with this dilemma, SECOFI considered that there were no reasons to suppose that the circumstances that had motivated the application of the provisional measure imposed in conformity with Article 7.1 of the AD Agreement had ceased. On the contrary, SECOFI now had weightier evidence about the existence of dumping, threat of injury and a causal link between the two. Mexico argues that, in this context, SECOFI concluded that the suspension of the provisional measure would not only further expose the domestic industry threatened by dumped imports, but that such suspension would also favour the continuation of dumping, even if only for a short period. Mexico argues further that SECOFI decided to continue applying the provisional measure, bearing in mind the spirit of Article VI of the GATT 1994, namely, to condemn dumping if it causes or threatens to cause injury to a domestic industry, and knowing that all the conditions conferring the right to impose an anti-dumping measure still prevailed.<sup>480</sup> This decision was taken with the certainty that in a very short time the final determination would be adopted and the corresponding notice published, and for this reason the provisional measure was continued for the shortest possible period.<sup>481</sup>

5.598 In addition, Mexico contends that, while the provisional duties lasted 28 days longer than the six-month period established in conformity with Article 7.4 of the AD Agreement, it is also true that SECOFI conducted the investigation in a shorter time than that mentioned in Article 5.10 of the AD Agreement as the ideal time for completing an investigation. This shows Mexico's genuine concern in this case, as well as in others, to make sure that investigation periods are as short as possible. Finally, Mexico states that the continuation of the application of the provisional measure for a further 28 days was for the shortest possible time, and hence it cannot

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<sup>480</sup> In *Brazil - Measures Affecting Desiccated Coconut (Brazil-Desiccated Coconut)*, WT/DS/22/R (*Brazil-Desiccated Coconut Panel Report*), DSR 1997:I, 189, WT/DS/22/AB/R (*Brazil-Desiccated Coconut AB Report*), adopted 20 March 1997, DSR 1997:I, 167, even though countervailing duties were involved, the Appellate Body confirmed that Article VI and the interpretative agreements not only impose "obligations" but also confer "rights". It said:

"... Article VI and the relevant Agreements ... impose on those who apply countervailing duties obligations that take the form of conditions which they have to discharge in order to impose a duty, but they also confer the right to impose a countervailing duty when such conditions are fulfilled" (emphasis added by Mexico). *Brazil-Desiccated Coconut AB Report*, *supra*, footnote 480, at 181-182, confirming what had been established by the Panel in the same case. *Brazil-Desiccated Coconut Panel Report*, *supra*, footnote 480, para. 246.

<sup>481</sup> The application of the provisional measure ended with the publication of the final determination on 23 January 1998.

be construed as an attempt to set up a barrier to normal trade or an attempt to adopt a protectionist stance.<sup>482</sup>

5.599 In response to a question from the United States, Mexico confirmed its view that the extension of provisional measures beyond 6 months is grounded on Article VI of the GATT 1994 and the AD Agreement interpreting this Article.<sup>483</sup>

5.600 The United States acknowledges that SECOFI has provided a permissible interpretation of its reasons for extending provisional measures two extra months - from four to six months - in order to perform a lesser-duty rule analysis under Article 7.4 of the AD Agreement. The United States has therefore decided not to pursue further the lesser-duty rule aspect of the provisional measures issue.

5.601 The United States notes that Mexico effectively concedes that SECOFI continued its provisional measures an extra month (twenty-eight days) beyond the maximum period of six months which could apply under Article 7.4 in this case. In the view of the United States, Mexico can cite to no specific provisions of the provisional measures rules of the AD Agreement to justify this extension. Instead, Mexico claims that the "spirit" of the AD Agreement - to protect domestic industries against injury caused by unfair competition - is sufficient to justify this minor slip, and notes that it completed its investigation in less than the twelve-month minimum time specified in Article 5.10.

5.602 The United States submits that these reasons cannot justify SECOFI's deviation from the strict time limitations for provisional measures of the AD Agreement. There is no provision for the "spirit" of the AD Agreement with regard to those measures. In addition, SECOFI's admirable hard work and efficiency in completing a massive anti-dumping investigation in less than twelve months from initiation to final determination cannot relieve it of its responsibility to comply with the rules regarding the length of time over which provisional measures may be imposed. To do otherwise would allow an investigating authority to re-arrange its internal schedule, between the initiation and final, to suit its needs, without regard to the carefully con-

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<sup>482</sup> In this regard, Mexico refers to the report of the Group of Experts, GATT Sales No. GATT/1961-2 (1961) on anti-dumping duties and countervailing duties, quoted in Stewart, p. 34, US-21.

<sup>483</sup> See Answer of Mexico to question no. 26 by the United States, 6 May 1999. Specifically, Mexico noted that towards the end of the investigation there was no evidence suggesting that the circumstances under which the provisional measure imposed pursuant to Article 7.1 of the AD Agreement had ceased to exist. On the contrary, there was already firmer evidence of dumping, threat of injury and causal link between the two. Thus, the provisional measures continued to be applied for a further period of 28 days, pursuant to Article VI of the GATT 1994 and the AD Agreement itself interpreting that Article, and considering that Article VI condemns dumping when it causes or threatens to cause injury to a domestic industry and that, in this case, all of the conditions conferring the right to impose an anti-dumping measure continued to exist. Mexico also noted that, during the final stage of the investigation, the activities of SECOFI were temporarily suspended by the "Agreement Suspending the Work of the International Trade Practices Unit of the Ministry of Trade and Industrial Development during the Indicated Period".

This Agreement established the days from 22 December 1997 to 6 January 1998 as non-working days and this, together with the procedures involved in the signing and publication of the final determination in the Official Journal, which took several days, resulted in a delay in the issue of the corresponding public notice.

structed rules, so long as it met the final target deadline. Finally, it is well established, that pursuant to Article 31 of the *Vienna Convention*, a treaty must be read in accordance with the ordinary meaning to be given to its terms. It cannot be interpreted flexibly to allow the "spirit" of the overall treaty - however that could possibly be interpreted - to override the carefully spelled out and specific provisions of the treaty. The United States therefore reiterates its view that SECOFI's extension of provisional measures for a seventh month beyond the six-month period violated Article 7.4.

5.603 Mexico disputes what it views as the United States' allegations that the extension of provisional measures for 28 days past the six-month deadline reflected a desire on the part of SECOFI to impede normal trade and a protectionist stance. On the contrary, SECOFI's administrative procedures tended to reduce the time periods involved, as shown by the fact that SECOFI went beyond what could be expected under the AD Agreement and concluded the investigation in less than one year, despite the well-known complexity thereof, particularly in the final stage. Mexico states that the suspension of the provisional measures until the conclusion of the threat of injury investigation came to an end could only have been harmful to the domestic industry and favoured the dumped imports which were indisputably taking place. The United States' argument overlooks the importance of Article VI of the GATT 1994 which condemns dumping if it causes or threatens to cause injury to a domestic industry. Finally, Mexico argues that the only possible conclusion with respect to this matter is that SECOFI acted in conformity with the principles of Article VI of the GATT 1994. An insignificant extension of 28 days can in no way be described as a barrier to normal trade or a protectionist instrument.

*F. Retroactive Levying of Anti-Dumping Duties for the Period of Application of the Provisional Measure*

5.604 The United States argues that, in finding threat of material injury in the final determination, SECOFI failed to examine whether the effect of the dumped imports would, in the absence of provisional measures, have led to a determination of injury. In so doing, SECOFI violated Articles 10.2 and 10.4 of the AD Agreement, which provide a special rule for imposing anti-dumping measures in threat cases on imports during the period of application of provisional measures. Article 10.2 provides that anti-dumping measures cannot be applied retroactively, to the date of imposition of provisional measures, without such an examination and determination:

"[I]n the case of a final determination of...threat of injury, where the effect of the dumped imports would, in the absence of provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied".

In other words, anti-dumping duties may not be applied retroactively to the date of the preliminary determination in a threat of injury case, such as this one, without a finding that the dumped imports would have led to a determination of injury if there had not been the preliminary measures.

5.605 In the view of the United States, this is a way of allowing anti-dumping duties to be assessed only from the date of the final determination forward in threat of injury cases, unless this special finding is made. Article 10.4 makes this clear:

"Except as provided in paragraph 2 above [*i.e.*, Article 10.2], where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner".

5.606 The United States contends that SECOFI also violated - and continues to violate - Article 10.4 by failing expeditiously to release the bonds posted and/or return the cash deposits paid on entries of HFCS into Mexico between the effective dates of SECOFI's preliminary and final determinations.

5.607 Mexico disputes the argument by the United States that SECOFI infringed the provisions of Article 10.2 when levying anti-dumping duties retroactively. Mexico notes that SECOFI's determination concerning the retroactive application of anti-dumping duties is contained in paragraph 562 of the *Final Determination*. While this notice did not set out SECOFI's determination regarding this matter in precisely the terms the United States would have liked, the fact is that SECOFI's analysis and examination of the issue of the impact of material injury caused by dumped HFCS imports in the absence of provisional measures are evidenced through various inquiries undertaken in the course of the investigation and recorded in the administrative file.

5.608 Mexico points out that the findings of fact and conclusions of law in this respect are contained in the *Final Determination*, particularly in paragraphs 446 to 552,<sup>484</sup> which set out the factors which led SECOFI to determine that, in the face of substantially increased imports of the product at dumped prices, the circumstances that prevailed in the period under investigation would change in such a way as to create a situation in which dumping would cause injury. It is apparent from a perusal of these paragraphs that injury would actually have been caused to the domestic sugar industry in the absence of provisional anti-dumping duties. These findings and conclusions validly enabled the investigating authority to make a final determination of threat of injury and decide to apply anti-dumping duties retroactively, under Article 10.2 of the AD Agreement, thereby complying with the requirements of Article 12.2 and Article 12.2.2.

5.609 Mexico observes that, at the time of the preliminary determination, the increase in imports of HFCS at dumped prices was already a reality. Accordingly, the situation referred to in Article 10.2 of the AD Agreement had been witnessed by SECOFI since the preliminary stage of the investigation, as was pointed out in the notice of imposition of provisional anti-dumping measures,<sup>485</sup> particularly in paragraphs 294 and 306, which state:

"294. Furthermore, the import statistics of the Ministry's Mexican Trade Information System indicate that, for tariff headings 1702.40.99 and 1702.60.01 of the Tariff of the General Import Duty Act alone, imports of high fructose corn syrup from the United States of America rose by 71 per cent in the first quarter of 1997 over the first quarter of

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<sup>484</sup> See MEXICO-6.

<sup>485</sup> See MEXICO-2.

1996, confirming the rising trend and the increased demand for further imports".

"306. On the basis of Article 57.1 of the Foreign Trade Act, Articles 80 and 83 of the Regulations thereto and Article 7 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and in keeping with paragraph 294 of this determination, the investigating authority deems it necessary to establish provisional countervailing duties to prevent injury being caused during the investigation ..." (emphasis added by Mexico).

5.610 The Panel asked Mexico what specific documentation was available on the record to substantiate SECOFI's conclusion that "the effect of the dumped imports would, in the absence of provisional measures, have led to a determination of injury". Mexico replied that, above all, consideration must be given to the documentation submitted to the Panel concerning SECOFI's analysis of the factors covered by Articles 3.2, 3.4 and 3.7, as well as the information on imports subsequent to the investigation period. The analysis of all the information concerning the factors set forth in Articles 3.2, 3.4 and 3.7, and the analysis of imports subsequent to the investigation period, brought out the specific fact that, if provisional anti-dumping measures had not been applied, injury would have been caused to the domestic sugar industry given the growing volume of dumped imports. SECOFI found that, during the period January-September 1997, HFCS imports had increased by 75 per cent compared with the same period of 1996 (see paragraph 460 of the *Final Determination*). Consequently, if there was a substantial increase in imports after the application of provisional anti-dumping duties, the increase would have been even greater if no such anti-dumping duties had been applied, with consequentially adverse effects on domestic production.<sup>486</sup>

5.611 Mexico also disputes the argument by the United States that SECOFI has failed to comply with Article 10.4 of the AD Agreement by failing to release bonds or cash deposits guaranteeing payment of anti-dumping duties during the period of application of the provisional measure. Mexico contends that the United States' position is mistaken, since SECOFI acted under the terms of Article 10.2 of the AD Agreement itself. According to the information available to SECOFI, it was justified to decide on the retroactive application of anti-dumping duties given that, in the absence of a provisional measure, the effect of imports at dumped prices would have been such as to lead to a determination of material injury. Mexico notes that it is compulsory to return the cash deposits and release the bonds posted during the application of the provisional measures only when the retroactive application of definitive duties is not justified; or put another way, when the situation described in AD Agreement Article 10.2 has not occurred. That was not the case in the investigation under review. Hence, there is no basis to argue that such cash deposits and bonds should had been released nor to argue that there was a possible infringement of Article 10.4.

5.612 The United States submits that, because of the prospective nature of threatened, rather than actual, injury, definitive anti-dumping duties for the period of pro-

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<sup>486</sup> See Answer of Mexico to question no. 25 by the Panel, 6 May 1999.

visional measures cannot be finally imposed, unless the investigating authority makes a special determination, pursuant to Article 10.2 of the AD Agreement, that, in the absence of provisional measures, imports would have led to a determination of injury. SECOFI failed to make this finding. If the special finding is not made, as in this case, Article 10.4 requires that the investigating authority refund any cash deposits collected and release any bonds imposed for the period of provisional measures, in an expeditious manner.

5.613 In the view of the United States, Mexico responds that its finding may be divined by reading paragraph 562 of its *Final Determination*, as well as by reviewing over a hundred paragraphs in that determination regarding threat of injury. None of these paragraphs specifically addresses this issue, however.

5.614 The United States notes that paragraph 562 of the *Final Determination* merely authorizes the appropriate ministry to collect the definitive anti-dumping duties; it does not provide any explanation concerning the period of provisional measures. The paragraph states:

"562. The Ministry of Finance and Public Credit shall be entrusted with collecting the aforesaid definitive countervailing [*sic*, anti-dumping] duties and encashing corresponding guarantees furnished by importers to protect the government's financial interests in the event of the non-payment of any established countervailing [*sic*, anti-dumping] duties under the provisions of Article 65 of the Foreign Commerce Act, as well as with releasing or modifying the terms of such guarantees or, where applicable, refunding the value of payments or over-payments of corresponding penal sums".

There is no discussion or analysis in this paragraph about Articles 10.2 and 10.4 of the AD Agreement and the rationale for collecting definitive anti-dumping duties retroactively, in a case where the final injury finding is one of threat.

5.615 The United States observes that, likewise, there is no such analysis in the more than one hundred paragraphs (paragraphs 446-552) which Mexico cites as constituting its findings and conclusions of fact and law regarding this issue. To the contrary, these paragraphs fall under the section of the final determination entitled "analysis of the threat of injury and causal connection".<sup>487</sup> They all lead to SECOFI's conclusion that the domestic sugar industry is threatened with material injury by reason of the dumped imports. They do not address the question whether the industry would have experienced actual material injury if the provisional measures had not been imposed.

5.616 According to the United States, Mexico nevertheless claims that it is "apparent from a perusal of these paragraphs" that it performed the proper Article 10.2 analysis. To the contrary, such analysis is not at all apparent from even a close reading of these paragraphs. Mexico simply cannot expect a reviewing body, including this Panel, to do its work for it by studying over a hundred paragraphs analyzing complex factual and legal material. The *Guatemala-Cement* Panel recognized the importance of including critical facts and analysis on the record so that they may be evaluated by the reviewing panel:

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<sup>487</sup> *Final Determination*, paras. 426-427, US-1.

"We note that Guatemala asserted that the Ministry "knew" certain information [regarding threat of material injury]...and that such knowledge was brought to bear on its evaluation of the information...While such facts may have been known to the Ministry, there is no reference to them in the application, in the evaluation prepared by the two advisors, or in the resolution itself. Indeed, there is no reference whatsoever...Thus, we cannot consider such facts in evaluating whether the Ministry properly concluded that there was sufficient evidence to justify initiation in this case".<sup>488</sup>

The United States contends that, similarly, the Panel cannot be expected to divine what SECOFI might have "known" about facts which might have substantiated that it conducted a proper Article 10.2 examination of retroactive application of definitive anti-dumping duties.

5.617 The United States further contends that Mexico's argument that SECOFI's analysis is "evidenced throughout the various proceedings carried out in the course of the investigation and [is] shown in the administrative file" likewise commits the very type of error which the *Guatemala-Cement* panel condemned. The investigating authority must state its facts on the record - either in the final determination or in a separate report - in sufficient detail to explain its findings of facts and to support the conclusions of law it drew on the basis of those facts. Only such an explicit analysis will enable the reviewing panel to make a judgment as to the authority's determination.

5.618 According to the United States, Mexico points to two isolated statements in SECOFI's *Preliminary Determination* as further justification for its imposition of definitive anti-dumping duties for the period of provisional measures. These paragraphs are similarly off point. The first, paragraph 294, merely notes that imports of HFCS from the United States rose by 70 per cent in the first quarter of 1997, as opposed to the first quarter of 1996, thereby establishing a rising trend in imports. This does not tie the impact of that rising trend to the many other factors, elucidated in Article 3 of the AD Agreement, which are necessary to determine whether material injury would have occurred to the domestic industry in the absence of provisional measures.

5.619 The United States asserts that the second paragraph which Mexico cites, paragraph 306, merely announces SECOFI's preliminary finding that provisional measures are being imposed, in order to prevent injury being caused during the investigation. Again, the paragraph provides nothing in the way of the analysis which would be needed to meet the Article 10.2 requirement. Indeed, it could not, because Article 10.2 requires the retroactive analysis to be done at the final determination. This is only logical, because one cannot determine whether to collect definitive anti-dumping duties retroactively, unless one is looking backwards in time, to analyze whether there would have been material injury to the domestic industry, but for the provisional measures. In other words, because these paragraphs are in the preliminary

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<sup>488</sup> *Guatemala-Cement Panel Report, supra*, footnote 8, footnote 242. See also *Brazil-Milk Powder Panel Report*, para. 294.

determination, they cannot anticipate and constitute the type of analysis which Article 10.2 requires, in the context of the final determination of threat of injury.

5.620 Mexico asked the United States how Mexico could have acted inconsistently with AD Articles 10 and 12 in applying anti-dumping duties retroactively to the period of application of the provisional measures, given that the facts motivating this decision were duly established and adequately recorded in the notice of imposition of the definitive measure. Mexico also asked the United States how the United States reconciled their position on this issue with the provisions of AD Article 17.6. The United States responded that SECOFI had failed to examine, as required by Article 10, whether, but for the imposition of provisional measures, there would have been material injury to the Mexican sugar industry. The United States' position reconciled fully with Article 17.6 of the AD Agreement, since the latitude which that Article allowed the Panel to grant SECOFI "permissible" legal interpretations, "proper" factual establishment, and "unbiased and objective" factual evaluation, did not extend to wrong interpretations, a lack of factual establishment, and a biased or unobjective evaluation of what facts Mexico had tried to cite in support of its improper application of provisional measures.<sup>489</sup>

5.621 Mexico notes that, when an investigating authority imposes a provisional measure, it does so for the sole purpose of preventing injury to the domestic industry during the course of the investigation. SECOFI already recognized this when it issued the preliminary determination, by stating that there was a need to establish such measures in order to ensure that dumped HFCS imports from the United States did not cause injury to domestic sugar production. According to Mexico, the fact that SECOFI had already indicated in the preliminary determination the reasons why there would have been injury to the domestic industry had it not applied those measures,<sup>490</sup> added to the fact that the investigation period was not modified in the course of the investigation, necessarily leads to the conclusion that the justification for imposing the provisional duties was to be found in Article 10.2 of the AD Agreement, which states that the effect of the dumped imports, in the absence of the provisional measures, would have led to a determination of injury.

5.622 In response to a question from the United States as to why Mexico had cited paragraphs in its preliminary determination in connection with an Article 10.2 finding, Mexico stated that the reference to paragraphs 294 and 306 of the preliminary determination was intended simply as evidence that, from the preliminary stage of the investigation, the accelerating growth of imports was already a reality and that the circumstances which made the application of a provisional measure necessary to ensure that HFCS imports did not cause injury to the domestic sugar industry during the investigation pursuant to Article 7.1 of the AD Agreement were already foreseen. This reference was in no way intended to suggest that these were the findings required by Article 10.2, which were included in the final determination. The final determination contained the relevant findings and the reasons why in the absence of provisional measures there would have been injury to the domestic industry as required by Article 10.2 of the AD Agreement.<sup>491</sup>

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<sup>489</sup> See Answer of the United States to question no. 69 by Mexico, 6 May 1999.

<sup>490</sup> See *Preliminary Determination*, para. 306.

<sup>491</sup> See Answer by Mexico to question no. 25 by the United States, 6 May 1999.

5.623 In Mexico's view, Article 10.2 of the AD Agreement implies that a number of aspects should be considered to justify the likelihood that the effect of the dumped imports would have led to a determination of injury during the period in which the provisional measures were applied. Owing to the variety of factors to be considered, this analysis is complex. SECOFI examined all of the factors that it considered to be relevant and reached the conclusion that, if the dumped imports were to continue, as was clearly foreseeable and imminent, such imports would cause injury to the domestic sugar industry. To avoid this situation SECOFI imposed provisional anti-dumping measures. In so doing, SECOFI met the requirements of Article 10.2 of the AD Agreement, as recorded in paragraphs 446 to 552 of the *Final Determination*.<sup>492</sup> None of these paragraphs could by itself establish the circumstances set forth in the second part of Article 10.2, but all of them taken together established the facts constituting those circumstances.

5.624 Mexico contends that, as it is clear that the circumstances set forth in Article 10.2 of the AD Agreement existed, the question of refunding of cash deposits and releasing the bonds posted during the period of application of the provisional duties does not arise.

*G. Insufficiencies in the Final Notice Relating to the Duration of the Provisional Measure and the Retroactivity of Definitive Anti-Dumping Duties*

5.625 The United States submits that SECOFI failed to provide its findings and conclusions of fact and law for its extension of provisional measures beyond the four-month time limitation, in violation of Articles 12.2 and 12.2.2 of the AD Agreement. Article 12.2 provides:

"Public notice shall be given of any preliminary or final determination, whether affirmative or negative... Each such notice shall set forth or otherwise make available through a separate report in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities".

In turn, Article 12.2.2 provides:

"A public notice of conclusion... of an investigation... providing for the imposition of a definitive duty... shall contain or otherwise make available through a separate report all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures... The notice of report shall in particular contain... the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers".

5.626 According to the United States, nowhere in the final determination does SECOFI set forth or otherwise make available its factual findings and legal conclusions regarding its extension of provisional measures beyond the four-month maximum allowed under Article 7.4. Moreover, no separate report exists providing sufficient detail for such findings and conclusions. SECOFI simply asserted that it had

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<sup>492</sup> See MEXICO-6.

examined whether to apply a lesser duty; it provided no reasoning as to the conduct of that examination and the resulting decision to impose duties in the full amount of the margins of dumping determined for the companies investigated.<sup>493</sup> Furthermore, it failed to provide any authority or reasoning whatsoever for extending provisional measures a seventh month beyond the maximum six-month period which proper application of the lesser-duty rule would have allowed, where no exporters representing a significant percentage of the trade requested an extension. Finally, SECOFI failed to provide any reasons for its rejection of the U.S. exporters' arguments, made in writing and in a meeting with SECOFI, that the measures not be extended beyond four months, as required by Article 12.2.2.

5.627 In the view of the United States, SECOFI is fully capable of providing sophisticated and high-quality reasoning and analysis about application of the lesser-duty rule, as its submission for discussion in the Ad Hoc Group shows.<sup>494</sup> In light of that submission, one might expect that in this case SECOFI would have explained which methodology it considered - the unitary international or exogenous price method, or the endogenous production cost or price approach - and then issued findings of fact accordingly. This would have included, under the first method, international HFCS prices, and, under the second method, cost of production and profit information from Mexican HFCS producers. Yet none of these facts are set forth in the final determination or in a separate report. One would also expect that, based on these facts, SECOFI would have discussed its application of its methodology to the facts and have issued its conclusion of law about whether an anti-dumping duty lower than the margin would be sufficient to remove injury, as provided in Article 7.4. Nowhere in the final determination or in a separate report are such conclusions to be found.

5.628 The United States maintains that any reading of Articles 12.2 and 12.2.2 which obviates an investigating authority's responsibility to explain the reasons for its actions - including its findings and conclusions of law and fact - would allow anti-dumping authorities to conceal the bases upon which they make their determinations. This would prevent all parties from becoming aware of authorities' bases for anti-dumping decisions and interested parties from taking positions with respect thereto. Similarly, in this case a reviewing body cannot be expected to read SECOFI's mind as to what it might have "known" about facts which might have substantiated that it conducted an examination of whether to apply a lesser-duty.<sup>495</sup> SECOFI must state those facts on the record, either in the final determination or in a separate report in sufficient detail to explain its findings of facts and to support the conclusions of law it drew on the basis of those facts. That determination, or report, must as well address the U.S. exporters' stated opposition to extension of the provisional measures beyond the four-month period, as required by Article 12.2.2.

5.629 The United States contends that, as in this instance SECOFI failed to provide "all relevant information... and reasons which have led to the imposition of final measures... as well as the reasons for the acceptance or rejection of relevant argu-

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<sup>493</sup> See United States first submission, paras. 43-44 (citing US-16 to US-19).

<sup>494</sup> See US-22.

<sup>495</sup> In this regard, the United States refers to *Guatemala-Cement Panel Report*, *supra*, footnote 8, footnote 242, and *Brazil-Milk Powder Panel Report*, para. 294.

ments or claims made by the exporters", it violated both Articles 12.2 and 12.2.2 of the AD Agreement.

5.630 The United States also submits that SECOFI's failure to provide any findings of fact and conclusions of law for its retroactive application of anti-dumping duties in this threat of injury case violated Articles 12.2 and 12.2.2 of the AD Agreement. These provisions obligated SECOFI to provide public notice and justification of its determination, as well as analysis of the comments of exporters and importers, and SECOFI failed to do so.<sup>496</sup>

5.631 Mexico disputes the United States' claim that SECOFI violated Articles 12.2 and 12.2.2 of the AD Agreement. In particular, Mexico contends that the United States is in error when asserting that the notice of imposition of definitive anti-dumping duties does not show that SECOFI engaged in an examination of the application of a lesser duty that would permit it to extend the period of the provisional measure. According to Mexico, SECOFI determined that it would examine whether the establishment of a duty lower than the margin of dumping would be enough to remove the threat of injury to the domestic sugar industry and, to this end, extended the duration of the provisional measure from four to six months, in view of the possibility afforded to the investigating authority by the second part of Article 7.4 of the AD Agreement. This determination is in a memorandum of SECOFI in the administrative file,<sup>497</sup> and was reiterated in paragraph 149 of the *Final Determination*.

5.632 Mexico holds that in paragraphs 542 through 544 and 552 of the *Final Determination*,<sup>498</sup> SECOFI explained the methodology, the results and the final conclusions reached in its examination of the possibility of applying an anti-dumping duty lower than the margin of dumping. In particular, SECOFI established:

"542. In this connection, on the basis of the preliminary determination referred to in paragraph 19 of this determination and the countervailing duties established therein, the Ministry decided to consider the possibility of establishing duties lower than the margin of price discrimination. On the basis of the margins of dumping determined in the final stage of the investigation, the prices of imports inclusive of the application of possible anti-dumping duties were calculated and then compared with the prices of refined and standard sugar.

543. The Ministry observed from the results of this comparison that, even by eliminating the margin of dumping through definitive anti-dumping duties, the prices of HFCS imports on the domestic market would be below the price of the domestic product. In this way, the

<sup>496</sup> The United States asserts that the importers brought this issue to SECOFI's attention and it was not dealt with, at least not in the final determination.

<sup>497</sup> See the SECOFI Memorandum of 24 October 1997, showing the investigating authority's determination on extending the period of the provisional measure pursuant to Article 7.4. of the AD Agreement, MEXICO-41. See also United States first submission, footnote no. 66, US-18.

<sup>498</sup> It should also be noted that these are included in the preambular section which, in the case of notices of imposition of definitive anti-dumping duties, includes all relevant information on issues of fact and law and the reasons behind the imposition of the definitive anti-dumping measure, in keeping with the requirements of AD Agreement Article 12, MEXICO-6.

weighted average price of HFCS-42 would be 17 per cent below the weighted average price of standard sugar, while the price for HFCS-55 would be 16 per cent below the price of refined sugar".

5.633 Mexico asserts that, from reading these paragraphs it can be inferred that, in fulfilment of the requirement posed by Article 7.4 of the AD Agreement, SECOFI conducted an examination to determine the appropriateness of applying a lower anti-dumping duty that would be sufficient to remove the threat of injury to domestic production, or whether it was appropriate to apply anti-dumping duties in the full amount of the dumping margin. Mexico notes that SECOFI's findings indicated that, even with an anti-dumping duty equal to the margins of dumping determined in the final stage of the investigation, the prices of competing HFCS imports from the United States would have still been below the price of the domestic sugar. Therefore, SECOFI concluded in its *Final Determination* that it was:

"552. ... appropriate to impose a countervailing duty equal to the margins of price discrimination calculated in the course of the investigation".<sup>499</sup>

Mexico submits that SECOFI set out in sufficient detail in the final determination the findings and conclusions that it had reached as a result of the above examination, in full conformity with the terms of Articles 12.2 and 12.2.2 of the AD Agreement.

5.634 According to Mexico, the United States also alleges a supposed failure of SECOFI to comply with Articles 12.2 and 12.2.2. of the AD Agreement by means of misrepresenting the arguments made before SECOFI by the United States exporters' and the importing firm Almex. To disprove this allegation, Mexico notes that:

- (a) Before the date of expiry of the four-month period of application of the provisional measure, a number of United States' exporters (CRA, Progold, Minnesota Corn Processors and ADM) and an importing firm (Almex) asked SECOFI to terminate the application of the provisional measure as from 26 October 1997.<sup>500</sup>
- (b) Contrary to the assertion of the United States, neither the exporters nor Almex, the importer, "stated opposition to [the] extension".<sup>501</sup>
- (c) Their arguments were confined exclusively to requesting SECOFI to terminate the duration of the provisional measures because the four-month period was completed and reference was made to Article 7.4 of AD Agreement. At no time was there any kind of challenge to the possibility that SECOFI decided, as it had, to extend the duration of the provisional measures from four to six months, pursuant also to the second part of Article 7.4 of the AD Agreement, in order to analyze

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<sup>499</sup> See MEXICO-6.

<sup>500</sup> See letters dated 24 October 1997 addressed to Gustavo Uruchurtu, of SECOFI, sent by CRA, Progold Limited Liability Company and Minnesota Corn Processors (signed by Luis Bravo Aguilera); Almex (signed by David Hurtado Badiola); ADM (signed by Javier Pandal Pérez) and Staley (Javier Gallardo Guzmán, submitted on 28 October 1997). The corresponding Memorandum was attached to each letter and SECOFI's earlier determination was repeated. These are in the administrative file, MEXICO-42.

<sup>501</sup> See United States first submission, paras. 139 and 150.

whether a duty lower than the margin would remove the threat of injury.

- (d) SECOFI acknowledged the right of exporters and importers to request an extension of the period of application of the provisional measures, pursuant to Article 7.4 of the AD Agreement, and even to request termination of that period, as happened in this case. Indeed, SECOFI officials held a meeting with lawyers for CRA and Almex at which they submitted their request. However, neither in their letters nor at that meeting did those representatives state anything of any kind that implied opposition to the extension.<sup>502</sup>
- (e) The above argument disregards the possibility open to the investigating authority under Article 7.4 AD Agreement to extend the application of the provisional measures with a view to determine whether the imposition of a duty lower than the margin of dumping would be sufficient to remove the threat of injury to the domestic industry.

5.635 Mexico argues that at no time did SECOFI fail to respond to the exporters' and importers' request to terminate the provisional duties. In fact, SECOFI directly informed the exporters and Almex of its determination, as set out in the memorandum of 24 October 1997, to examine whether a duty lower than the margin would be sufficient to remove the threat of injury and the consequent extension of the application of the provisional measure for a further two months, in conformity with Article 7.4 of the AD Agreement. SECOFI did so at the meeting held on that same date.

5.636 Mexico observes that on 29 October 1997 SECOFI issued several official letters<sup>503</sup> addressed to the exporters and the importer, Almex, where it explained to these parties that it had determined a need to examine whether a definitive measure lower than the margin of dumping would be sufficient to remove the threat of injury to the domestic sugar industry, *i.e.* the reason why the application of the provisional measure was being extended to six months in accordance with Article 7.4 of the AD Agreement.

5.637 According to Mexico, it is clear then that the statement by the United States that SECOFI infringed Article 12.2.2. of the AD Agreement by failing to discuss in a public notice the requests made by the certain parties with respect to the termination of the provisional measures is groundless. The United States disregards the fact that

<sup>502</sup> See report of SECOFI submission, 24 October 1997 (handwritten), US-17 and letters contained in MEXICO-42.

<sup>503</sup> In this respect Mexico asserts that the United States is wrong in stating that SECOFI's determination recorded in the memorandum dated 24 October 1997 was in response to the exporters and at the request of an importer. Hence it is equally incorrect to assert that "SECOFI *also* answered CRA and other firms in letters dated 29 October 1997" (emphasis added by Mexico). A distinction should be drawn between the memorandum of 24 October 1997, which was the earlier determination of the authority, and the official letters from SECOFI to CRA, Almex, ADM and Staley, which actually explained the reasons for SECOFI's decision, contrary to their request, to extend the duration of the provisional measure in order to conduct a lesser duty examination, in conformity with AD Agreement Article 7.4. See letters issued by SECOFI on 29 October 1997 addressed to the representatives of CRA, Progold and Minnesota Corn Processors, Almex, ADM and Staley, MEXICO-43 and United States first submission, para. 44. and footnote 67, citing US-19.

the above provision allows the investigating authority to set out the reasons for the acceptance or rejection of parties' arguments in a separate report. In this case an explanation was provided in official letters to each of the parties concerned, setting out SECOFI's reasons for deciding to extend the duration of the provisional measures in conformity with Article 7.4 of the AD Agreement. This explains why the final determination does not specifically refer to SECOFI's consideration of the application to terminate the provisional measures, submitted by the exporters and one importer.

5.638 In addition, Mexico observes that paragraphs 542, 543, 544 and 552 of the *Final Determination* record the findings and conclusions that SECOFI reached as a result of the lesser-duty duty examination. Thus, in conformity with Articles 12.2 and 12.2.2 of the AD Agreement, this public notice contains in sufficient detail all the issues of fact and law and the reasons that led SECOFI to impose the final measure, including the reasons why the authority imposed duties equal to the margins of dumping calculated in the course of investigation, in view of the fact, *inter alia*, that even by removing the margins of dumping through the final measure import prices of HFCS would continue to be below domestic sugar prices, which made it inappropriate to apply a duty lower than the margins of dumping calculated.

5.639 The United States responds that it has decided not to pursue the lesser-rule aspect of the provisional measures, including the issue of SECOFI's public notice and explanation of its determination regarding this aspect.<sup>504</sup>

5.640 The United States reiterates its view that SECOFI's retroactive application of provisional measures violated Articles 12.2 and 12.2.2. of the AD Agreement. In the view of the United States, Mexico fails to explain how SECOFI satisfactorily met the obligations of Article 12.2 and 12.2.2 of the AD Agreement with regards to this issue, which require the investigating authority to set forth its findings and conclusions of law and fact in support of its determinations.<sup>505</sup> This is the essence of transparency and an essential requirement for effective panel review. A reviewing body cannot be expected to read SECOFI's mind as to what it really meant about a host of complex and interrelated facts. SECOFI must state those facts on the record, either in the final determination or in a separate report, in sufficient detail to explain its findings of facts and to support the conclusions of law it drew on the basis of those facts. It cannot leave the matter to guesswork.

5.641 In Mexico's opinion, the United States argues that Articles 12.2 and 12.2.2 of the AD Agreement require final determinations to express any conclusions of the investigating authority concerning the applicability of Article 10.2 of the AD Agreement through a specific formula or in specific terms. Mexico holds that Article 12.2.1 of the AD Agreement clearly does not specify the form in which the applicability of Article 10.2 must be expressed. Nor does Article 12.2.2 provide any specific indications concerning the second part of Article 10.2 of the AD Agreement. What is

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<sup>504</sup> See the oral statement by the United States at the first meeting of the panel with the parties, para. 52, and the United States second submission, footnote 159.

<sup>505</sup> The United States cites Article 12.3 of the Agreement, which makes clear that the obligations of Article 12 apply to Article 10. Article 12.3 states that "[t]he provisions of this Article shall apply *mutatis mutandi* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively".

required is that public notices contain all relevant information on the matters of fact and law and the reasons which have led to the imposition of final measures.

5.642 Mexico maintains that the argument put forward by the United States to allege violations of Articles 12.2 and 12.2.2 of the AD Agreement is excessive. None of these provisions imposes any precise formula or specific terms for the investigating authority to express its conclusions concerning the applicability of Article 10.2 of the AD Agreement. Rather, the investigating authority is required to establish in the final determination, in sufficient detail, all of the facts, circumstances and conclusions showing that the circumstances described in Article 10.2 have materialized.

5.643 Mexico argues that, in the present case, paragraphs 446 through 552 and 562 of the *Final Determination* record in sufficient detail the findings, conclusions and reasons which led SECOFI to apply anti-dumping duties retroactively under Article 10.2 of the AD Agreement. Again, while no single paragraph of the final determination can alone establish the facts of the situation provided for in the second part of Article 10.2, the paragraphs cited above, taken together, establish the facts constituting the materialization of the situation foreseen in Article 10.2.

5.644 Mexico also argues that, in trying to invalidate SECOFI's final determination on the matter of the retroactivity, the United States focuses on purely formal aspects and loses sight of the fact that, according to the facts and conclusions established in the final determination, SECOFI was perfectly justified to apply anti-dumping duties retroactively in order to avoid injury to the domestic sugar industry, as provided by Article 10.2 of the AD Agreement. A purely formal approach would overlook the substantial purpose of the second part of Article 10.2, which is to try to avoid an injury situation caused by the effect of the increase in dumped imports.

5.645 Mexico submits that, in any case, even if one were to go to the extreme of considering it relevant that the situation described in Article 10.2 of the AD Agreement should be set out in the form that the United States would like, this would not be a sufficient reason to invalidate SECOFI's action, since in the final determination the facts are properly established and there is a record of an unbiased and objective evaluation in conformity with Article 17.6 of the AD Agreement.

5.646 The Panel asked the parties whether one could argue that a negative conclusion regarding the issue arising under Article 10.2 of the AD Agreement requires less explanation than an affirmative conclusion under that Article, since the affirmative is the unusual case, allowing the unusual remedy of retroactive levying of final anti-dumping duties.

5.647 The United States said that they would agree that this is a permissible interpretation of the above provision.<sup>506</sup>

5.648 Mexico stated that it did not agree with this interpretation of Article 10.2, since it is incorrect to consider that an affirmative conclusion under Article 10.2 is the unusual case. In Mexico's view, Article 10.2 establishes the authority to apply anti-dumping duties retroactively in the case of a determination of material injury and in the case of a determination of threat of material injury; the two hypotheses lie on the same level, merely laying down the circumstances required in a threat of injury case. In other words, Article 10.2 establishes an authority to levy anti-dumping

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<sup>506</sup> See Answer of the United States to question no. 5 by the Panel, 22 June 1999.

duties retroactively both in the case of material injury and in the case of threat of material injury, simply establishing a qualified standard for cases of threat of material injury: *i.e.* where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of material injury. There is no basis in the language of this provision for the interpretation that in either of the two cases raised, a negative conclusion regarding the issue arising under Article 10.2 is the usual case, and an affirmative conclusion the unusual case. According to Mexico, the AD Agreement does not recognize the exercise of the authority established (*i.e.* an affirmative conclusion) in Article 10.2 as an unusual case, nor is there any suggestion that refraining from exercising that authority (*i.e.* a negative conclusion) should be construed as the general rule; it simply provides for two hypotheses at the same level for the decision to levy or not to levy retroactive anti-dumping duties according to the particular circumstances of the case. Thus, Mexico argues that, whatever the conclusion adopted under Article 10.2, an explanation is required since either a negative or an affirmative determination could affect the interests of the different parties (exporters, importers, domestic producers, consumers and the governments involved).<sup>507</sup>

5.649 The Panel also asked the parties the following question. Article 10.2 of the AD Agreement allows in certain circumstances the retroactive levying of anti-dumping duties for the period for which provisional measure were applied. However, the text of Article 10.2 does not explicitly require a determination that those circumstances are found to exist. On the other hand, Article 12.2 requires that a public notice (or separate report) of a final determination must set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". In light of these requirements, would the parties please explain precisely what they consider is required in order to comply with these requirements?

5.650 According to the United States, in threat of injury cases, the provisions the Panel references require investigating authorities to determine that injury would occur in the absence of the imposition of provisional measures (Article 10.2), and publish public notice of this determination in accordance with Articles 12.2 and 12.3. Article 12.3 of the public notice provisions states that "[t]he provisions of this Article [regarding public notice] shall apply... to decisions under Article 10 to apply duties retroactively" (emphasis added). By referring to "decisions" under Article 10, the authors of the Agreement were explicitly requiring that "decisions", or determinations, regarding retroactivity be reflected in the public notice.<sup>508</sup> Article 10.2 makes clear that its provisions relating to retroactive application apply in the case of final determinations of injury, "*but not of a threat thereof*" unless "the effect of the dumped imports would, in the absence of the provisional measures, have led to a *determination of injury..*". (emphasis added by the United States). Although this may be a hypothetical determination, set in the past conditional, the text of the Article still requires that a "determination" be made that those circumstances would have existed.

5.651 The United States argues that, given that a determination must be made under Article 10.2, and published according to the requirements of Articles 12.2 and 12.3,

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<sup>507</sup> See Answer of Mexico to question no. 5 by the Panel, 22 June 1999.

<sup>508</sup> See United States second submission, footnote 158.

this requires that some meaningful explanation must be given of the authority's finding, pursuant to Article 10.2, that "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury". Precisely what is considered to comply with these requirements is a matter for the Panel's judgment, consistent with what it deems to be a permissible interpretation of those requirements under Article 17.6(ii) of the Agreement. The United States has argued that Mexico's interpretation of these requirements as applied to this case is impermissible, because Mexico has been unable to cite to any reasonable explanation of SECOFI's alleged Article 10.2 finding in its final determination. Instead, Mexico has cited to virtually the entire injury finding - an impossibly and impermissibly vague notice by any standard. A lack of specificity in Article 12 as to the exact format of the required notice does not mean that no notice or impossibly vague notice will suffice. That argument is not credible even under a generous interpretation of Article 12.2 and its requirements. Some reasonable explanation, with specific reference to the Article 10.2 requirement, must be given, either in the final determination or in a separate report.<sup>509</sup>

5.652 Mexico replied to the same question from the Panel by noting that, indeed, Article 10.2 of the AD Agreement does not explicitly require a determination that the circumstances for the retroactive application of anti-dumping duties are found to exist. Nor does Article 12.2 explicitly require a determination that the circumstances allowing the retroactive levying of anti-dumping duties are found to exist in a threat of injury case, and although it does indeed require the notice of final determination to set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities", it does not establish any precise or specific form or terms in which they must be recorded. Thus, Mexico considers that in order to use the authority provided for in Article 10.2 in a threat of injury case, the notice of final determination must simply contain the findings and conclusions of the authority in support of the existence of the circumstances set forth in Article 10.2 for a threat of injury case, but does not need to do so in the precise terms or language of that Article.

5.653 Mexico also asserted that, while this question makes no specific reference to the case at issue, in this investigation under review, the behaviour of imports was analyzed over a period following the investigation and they were found to have grown, not only as a trend, but also as a factual situation (see paragraphs 459 and 460 of the *Final Determination*); and this, added to the comprehensive analysis of threat of injury to the sugar industry conducted with respect to the investigation period and the corresponding findings and conclusions (see the conclusions in paragraphs 551 and 552 of the *Final Determination*) showing, in particular, that had the dumped imports continued to grow, they would have resulted in material injury, provided a sufficiently detailed basis for concluding that the circumstances set forth in Article 10.2 of the AD Agreement existed, thereby supporting SECOFI's decision to apply anti-dumping duties retroactively even though that decision was not expressed in the terms of Article 10.2 of the AD Agreement.<sup>510</sup>

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<sup>509</sup> See Answer of the United States to question no. 6 by the Panel, 22 June 1999.

<sup>510</sup> See Answer of Mexico to question no. 6 by the Panel, 22 June 1999.

*H. Arguments Presented by Third Parties*

5.654 Jamaica and Mauritius, as third parties in this dispute, made a joint oral statement before the Panel in order to set forth their interest arising from the dispute between Mexico and the United States; in particular, to highlight the potential impact this dispute may have on the trade in sugar by Jamaica, Mauritius and many other WTO Members in securing continued, predictable and increased opportunities for access to the United States market in accordance with the provisions of Article XIII of the GATT 1994.<sup>511</sup>

5.655 Jamaica and Mauritius state that, as third parties, they are cognizant of the fact that the issue at hand concerns imports of High Fructose Corn Syrup (HFCS) into the market of Mexico. Under the terms of reference established by the Dispute Settlement Body, the panel is required to determine whether Mexico has, through improper procedures, imposed duties in violation of the AD Agreement. They submit, however, that the issue should also be examined in the broader context in which this dispute is taking place, namely in relation to the North American Free Trade Agreement (NAFTA), a regional trade agreement notified to the WTO, and one which is alleged by the parties to be in conformity with the relevant WTO Rules.

5.656 Jamaica and Mauritius also state that the present dispute is but one facet of a much broader disagreement over sweetener trade between these two countries. This broader controversy involves not only HFCS exports from the United States to Mexico, but also sugar imports by the United States from Mexico pursuant to NAFTA. According to Jamaica and Mauritius, the broader disagreement between Mexico and the United States has spawned several other international dispute resolution proceedings, namely:

- (i) this current dispute within the WTO.
- (ii) a NAFTA dispute proceeding initiated by Mexico to challenge the limits imposed on its sugar exports to the United States during the implementation of the NAFTA.
- (iii) a proceeding initiated by the United States Corn Refiners Association under the so-called Section 301 procedures of United States law to challenge, as an unfair trade practice, an agreement between the Mexican Sugar Industry and the Mexican soft-drink bottlers pursuant to which the soft-drink industry has allegedly agreed to limit its consumption of imported HFCS. In the Section 301 proceeding, the United States Corn Refiners Association has requested that the United States impose sanctions on Mexico for its alleged unfair trade practice, and it has been suggested that an appropriate sanction would be to limit or ban sugar imports from Mexico.

These related proceedings are currently ongoing.

5.657 Jamaica and Mauritius observe that the interrelation between these disputes is clearly underscored by the fact that the initiation of the anti-dumping investigation in question was initiated in response to a request by the Mexican sugar industry. In ad-

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<sup>511</sup> A written version of their oral statement was submitted to the Panel. The third parties made no separate submissions.

dition, in various statements in the press and other public fora, representatives of the Mexican sugar industry have clearly and repeatedly stated that HFCS and sugar disputes are interrelated and that one cannot be resolved without resolving the other.

5.658 Jamaica and Mauritius note that, prior to the entry into force of the NAFTA Agreement in 1994, Mexico was a net importer of sugar. The NAFTA Agreement provided for a gradual increase in the duty-free access of sugar from Mexico, over its GATT 1994 Article XIII share of the United States tariff rate quota of 7,258 tonnes per annum, but only on the basis that Mexico became a net surplus producer. Mexico therefore has taken advantage of the preferential provisions of NAFTA to expand its domestic production, and thereby its market share in the United States market. Mexico has seen its initial market share of 7,258 tonnes per annum for the period 1994 - 96 grow to 25,000 tonnes until the 2000-2001 quota year, and this may increase to as much as 250,000 tonnes per annum thereafter until 2008, at which time NAFTA would allow Mexico unlimited access at zero tariff for its sugar exports.

5.659 Jamaica and Mauritius note further that United States sugar imports have gradually declined since 1985 and the United States tariff rate quota on sugar is today only slightly above the minimum level bound by the United States in the Uruguay Round. Access by the traditional suppliers has been reduced correspondingly.

5.660 Jamaica and Mauritius equally note that the United States has given assurances in responding to queries at the WTO Committee on Agriculture that,

- (i) The raw cane sugar tariff quotas are allocated according to Article XIII of GATT 1994;
- (ii) Mexico's NAFTA allocation of 25,000 tonnes does not count in a country's share allocation (G/AG/N/USA/15 at page 22 of G/AG/R/16) in the TRQ; and
- (iii) Mexico does not receive additional access if there are subsequent tariff quota allocations (G/AG/N/USA/13 at page 18 of G/AG/R/14).

5.661 Jamaica and Mauritius express concern that their share as traditional sugar suppliers in the United States market in strict compliance of Article XIII of GATT 1994 may be seriously eroded as from the year 2000 as a result of the substantial increase of Mexico's access of 250,000 tonnes per annum until 2008 and without restriction thereafter.

5.662 Jamaica and Mauritius argue that any further increase in Mexico's sugar exports to the United States - as a direct or indirect result of the resolution of this present dispute or other proceedings between Mexico and the United States - will not only undermine the undertakings given by the United States, but possibly exacerbate the existing prejudice to the other WTO members who have been traditional sugar suppliers to the United States. It is in this broader context that the dispute may prejudice the interests of Jamaica, Mauritius and 37 other countries that are traditional suppliers of sugar to the United States. Many of these suppliers are WTO Members with small developing economies whose trade, finance and development needs depend on sugar exports. Jamaica and Mauritius submit that it is of vital importance that the resolution of the present dispute does not prejudice the legitimate interests of these WTO Members by not upsetting the balance of benefits which ensures continued, predictable and increased opportunities for access to the US sugar market.

5.663 In addition, Jamaica and Mauritius assert that their interest in this dispute also coincides with the issue at the heart of any anti-dumping investigation - that of 'like

products' and the unfair competition that any dumped product may have on domestic production - Although the concept of 'like products' within the meaning of Article 2.6 of the AD Agreement is not the primary focus of this Panel, in reviewing the merits of the case, the Panel may deem it necessary to examine the meaning of this concept in the context of this dispute. According to Jamaica and Mauritius, the concept of 'like products' spans a range of interpretation depending on the context of the WTO Agreement being invoked and the particular case involved. In this regard, Jamaica and Mauritius refer to an extract from the Appellate Body Report on *Japan-Alcoholic Beverages* which states that:

"The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply".

In the view of Jamaica and Mauritius, the Appellate Body acknowledged the variable interpretation to be given to the concept of "like products" within the context of the applicable WTO Agreements on a case by case basis. They also draw the attention of the Panel to the Appellate Body Report on *Japan-Alcoholic Beverages* wherein it is stated that adopted panel reports are "not binding except with respect to resolving the particular dispute between the parties to that dispute".

5.664 Thus, Jamaica and Mauritius submit that, should the Panel make a determination that HFCS and sugar are "like products" within the meaning of Article 2.6 of the AD Agreement, such a finding should be seen only in the context of this specific case and should be without prejudice to the rights of WTO Members if a similar issue involving the same products arises in the context of this and any other WTO Agreement.

5.665 Jamaica and Mauritius conclude that, while fully recognizing the need for a mutually satisfactory solution between the Parties in this case, they wish also to remind the Panel and the Parties that the outcome in this case and any finding of this Panel should not be applied in a manner which could result in any negative or adverse effects on the trade of Jamaica, Mauritius or any of the other 37 suppliers to the US market.

## VI. INTERIM REVIEW

6.1 On 20 October 1999, the United States and Mexico submitted comments requesting review of parts of the interim report issued to the parties on 6 October 1999. In addition, Mexico requested a meeting with the Panel. Such a meeting, originally scheduled for 12 November 1999, was held on 9 December 1999, having been postponed due to the inability of the Chairman to travel to Geneva for the originally scheduled meeting.

6.2 In our approach to interim review, we are governed by Article 15.2 of the DSU, which states that "a party may submit a written request for the panel to review **precise aspects** of the interim report prior to circulation of the final report to Mem-

bers" (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 et 5.639, and footnotes 16, 24, 52, 252, 253, 255, 281, 299 and 501. However, we did not make changes which would, in our view, have changed in some material respect the arguments presented by the United States in its written and oral submissions, which related to Mexico's arguments, or which requested stylistic changes which were inconsistent with other parts of the report. Thus, requested changes were not made to paragraphs 5.31, 5.38, 5.48, 5.76, 5.114, 5.267, 5.327, 5.403, 5.476, 5.482, 5.483, 5.484, 5.485 and 5.486, and footnotes 41, 44, 221, 353, 356, 365, 366 and 444.

6.10 Mexico made a number of comments regarding the descriptive part of the report. These comments included substantive suggestions intended to ensure that its arguments were accurately reflected, comments requesting corrections to translations, corrections of typographical and stylistic inconsistencies. After reviewing Mexico's submissions to ensure that arguments were not being changed, expanded upon, added, or deleted, and having consulted with experts in the Secretariat regarding translation, we made clarifying changes and corrections to paragraphs 5.192, 5.202, 5.254, 5.256, 5.278, 5.290, 5.335, 5.413, 5.471, 5.553, 5.572, 5.589 and 5.561, and footnotes 6, 466, 476 and 478. However, we did not make changes which would, in our view, have changed in some material respect the arguments as originally presented by Mexico in its written and oral submissions. Thus, requested changes were not made to paragraphs 5.198, 5.208, 5.241, 5.260, 5.334, 5.344, 5.376, 5.444, 5.567 and 7.4, and footnotes 362 and 433.

6.11 The United States also requested changes to the findings in order to more accurately reflect its arguments. After reviewing the United States' submissions in this regard, we made changes to more accurately reflect the United States' arguments in paragraphs 7.58, 7.76, 7.79, and 7.80. We also made a clarifying punctuation change to footnote 555.

6.12 The United States requested that we change paragraph 7.2 in order to prevent the last sentence of this paragraph from being misread to mean that parties only filed submissions in April and May 1997. We made a clarifying change in this regard.

6.13 The United States requested changes to paragraph 7.57, asserting that "relevant" domestic industry is not wording from the text of Article 4.1 of the Antidumping Agreement, and that use of the word "relevant" in this context connotes that a proper assessment has been conducted. Therefore, for consistency with the AD Agreement, and to avoid misinterpretation, the United States suggested different terminology. We made clarifying changes to paragraph 7.57 in this regard. The United States also argues that it is an undisputed fact that there were only two companies in Mexico that could have been producing HFCS prior to initiation, but that paragraph 7.57 did not make this clear. We have made a change in order to clarify this point.

6.14 Mexico also commented that its arguments were not accurately reflected in our findings. After reviewing Mexico's submissions in this regard, we made changes to more accurately reflect Mexico's arguments in paragraphs 7.19, 7.25, 7.35 -7.37, and footnote 535.

6.15 Mexico requested that we re-examine our findings in Section VII.B.1 of the Report, alleged failure to assert claims under Article 6.2 of the DSU and Article 17.4 of the AD Agreement.

6.16 Mexico notes that paragraph 7.11 indicates that the Panel considered the issue before it in this dispute to be whether the United States' request set forth, with sufficient specificity, claims regarding the anti-dumping measure identified in the request. Mexico argues that, the Panel's findings do not deal adequately with the issue before it and should be re-examined. In particular, Mexico disagrees that the United States' request for the establishment of a panel can be said to fulfil the requirements of Article 6.2 of the DSU and 17.4 of the AD Agreement merely on the basis of the criterion established in the *European Communities-Bananas* case, i.e. that "it identifies the measure in question, the final anti-dumping measure, and lists the provisions of the WTO Agreements alleged to have been violated in paragraph 4 of the request" (paragraph 7.14), or by referring to the requests in both cases as brief and sufficient.

6.17 Mexico does not agree that the Panel, in paragraph 7.14, should base its conclusions merely on the criterion or "minimum threshold"<sup>512</sup> established in this single precedent<sup>513</sup> because this completely ignores the arguments and precedents presented by Mexico. Mexico asserts that it is important to bear in mind that:

- (a) During these proceedings, Mexico has stressed that the United States' request not only did not present the matter clearly, but that it did not contain any "claims" in that it did not indicate the basis for each one of its assertions, and consequently, it did not properly submit a "matter". Particularly relevant in this connection is the *EC-Yarn* case, in which the Panel considered that "there could be more than one legal basis for alleging a breach of the same provision of the Agreement and that, accordingly, a claim in respect of one of these would not also constitute a claim in respect of the other. A separate and distinct claim would be required", adding that "a claim was the specification of the particular legal and factual basis upon which it was alleged that a provision of the Agreement had been breached".<sup>514</sup>
- (b) As a second step in its examination, after having shown that the United States request did not contain "claims", Mexico recalled in these proceedings that the "claims" were one of the essential elements of the "matter". It was important to refer to the report of the Appellate Body in *Guatemala-Cement*, which stands out for its interpretations of the dispute settlement provisions in the context of anti-dumping cases. In this case, the Appellate Body stated (paragraph 77) that "the word 'matter' ('cuestión' or 'asunto') has the same meaning in Article 17 of the AD Agreement as it has in Article 7 of the DSU. It consists of two

<sup>512</sup> Mexico notes that paragraph 7.13 states that the *European Communities-Bananas* case "sets the minimum threshold for an acceptable request for establishment under Article 6.2 of the DSU".

<sup>513</sup> Mexico argues that, according to the rules of public international law, the *European Communities-Bananas* case, as a WTO precedent, is a secondary source without any binding force, and as such has no more authority than other GATT/WTO decisions or precedents that were also adopted and disregarded.

<sup>514</sup> In this regard, Mexico refers, in particular, to Mexico's first submission, paragraphs 23 and 24; Mexico's second submission, paragraphs 12-13 and 20-24; and Mexico's replies to questions 1 and 2 of the Panel on 6 May 1999. Mexico maintains that it is important to note that in its reply to question 8 of Mexico on 6 May 1999, the United States was unable to identify the number of "claims" in its request.

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.

6.19 The same applies to Mexico's argument that the United States' request for the establishment of a panel did not present the problem clearly. In Mexico's view, the Panel simply observed that the equally brief request submitted in the *European Communities-Bananas* case was considered sufficient and decided that in this case the request was also sufficient in that respect. Mexico cannot agree with this finding because it does not take account of the arguments or of the bases presented by Mexico.

6.20 Mexico recalls that although in paragraph 7.15, the Panel states that "we do not consider that Mexico was prejudiced in its ability to defend its interests in this dispute", the lack of clarity in the presentation of the problem in the United States' request did in fact affect Mexico's ability to defend its interests in this dispute. Mexico had argued that it had been unable to find out what the United States' complaints were before reading the first written submission of the United States. Before that, Mexico maintains that it did, in fact, encounter considerable practical difficulties in understanding what the specific complaints of the United States were with respect to the various provisions of the AD Agreement governing the application of definitive measures. More importantly, Mexico argues, for months the lack of clarity in presenting the problem and specifying the factual and legal basis for the assertions contained in the United States' request engendered an expenditure or squandering of resources that could otherwise have been devoted to preparing a timely defence.

6.21 In Mexico's view, further evidence of this emerged from the first substantive meeting of the Panel with the Parties, at which Mexico asserts that the United States itself proved unable to state how many claims its request contained. Thus, Mexico insists on the fact that the United States' request is so extraordinarily confused that neither the United States itself, nor Mexico, nor the Panel could say how many claims it contained.

6.22 Mexico considers that if the Panel had taken account of the above reasoning and bases, it would inevitably have reached a different conclusion. It therefore requests that we re-examine Mexico's arguments concerning the failure to comply with Article 6.2 of the DSU and 17.4 of the AD Agreement.

6.23 After considering Mexico's arguments in this regard, we have made changes to paragraph 7.12-7.14 in order to clarify our reasoning.<sup>515</sup>

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<sup>515</sup> *But see* note 530, *infra*.

6.24 Mexico asks that we re-examine our findings in Section 0 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 was alleged, while in the second case, which is the correct case, what counts is whether there is an indication of how the nullification or impairment took place.

6.27 Mexico asserts that it did not argue that Article 17.5 of the AD Agreement required a "specific" allegation of nullification or impairment, but that that requirement must be fulfilled "explicitly", and not implicitly as, in Mexico's view, the United States had contended. Proceeding on the basis of this distortion of Mexico's argument, Mexico asserts that the Panel failed to explain how it was possible for a "special or additional provision" of the DSU to be complied with implicitly regardless of the fact that it is special or additional.

6.28 Nor did Mexico limit its arguments to whether the United States had used the "magic words" nullification or impairment. What it objected to and argued was that the United States request contained no indication of how a benefit was nullified or impaired. The fact that these magic words were not included in the United States' request was simply mentioned as one example among many others in support of Mexico's objection, which is very different from the Panel's conclusion that Mexico's objection boils down to the failure by the United States to use the magic words.

6.29 Mexico asserts that, as regards the rest of Mexico's arguments, the Panel failed to explain why those contained in paragraphs 5.64, 5.65, 5.66, 5.68, 5.69, 5.70, 5.71 and 5.76 were inadmissible. In Mexico's view, the failure to consider these arguments led the Panel to mistaken conclusions with respect to the relationship between Article 3.8 of the DSU and Article 17.5 of the AD Agreement. As indicated, for example, in paragraphs 5.69 and 5.70, Article 3.8 of the DSU speaks of a presumption of nullification or impairment which in most cases may be corroborated subsequently, while Article 17.5 contains an obligation to indicate how a benefit "has been" nullified or impaired. In other words something which has already happened.

6.30 In Mexico's view, the conclusion in paragraph 7.28 that "a request for establishment that alleges violations of the AD Agreement which, if demonstrated, will constitute a prima facie case of nullification or impairment under Article 3.8 of the DSU, contains a sufficient allegation of nullification or impairment for purposes of Article 17.5(i)" wrongly implies that:

- (a) All requests for the establishment of a panel containing allegations of violation of the provisions of the AD Agreement would automatically comply with Article 17.5(i) of the AD Agreement, which would mean that this special or additional provision would have no *raison d'être*, except in cases of non-violation;
- (b) the only cases in which it would be necessary to comply explicitly with Article 17.5(i) of the AD Agreement would be those involving a request for the establishment of a panel in which it is alleged that benefits have been nullified or impaired as a result of a measure which does not violate the AD Agreement (non-violation complaints) which makes no sense, since the actual language of Article 17.5(i) contains no indication in this respect and there are no non-violation precedents in the anti-dumping area to suggest that the drafters of this provision had any such concern;
- (c) the United States request would partially violate Article 17.5(i), since for all of the allegations of violation in which it was found that there was no violation, there would not be any nullification or impairment of benefits either (which shows that paragraph 7.30 is incorrect, since in accordance with the overall results of the Report the most that could be concluded was that the United States request was proper only where there were, in fact, violations);
- (d) although Article 17.5(i) of the AD Agreement establishes a requirement that clearly concerns the complaining Member, the Panel not only failed to take this requirement into consideration, but in fact transferred it to the defending Member, since according to the second paragraph of Article 3.8 of the DSU, it is up to the Member against whom the complaint has been brought to rebut the charge (of adverse impact, and not of nullification or impairment);
- (e) Article 17.5(i) is poorly drafted, since (i) it should refer to "allegations of violation" rather than to the obligation to indicate "how a benefit [...] has been nullified or impaired", and (ii) the verbs should be in the future tense, and not the past tense, to allow for subsequent checking of whether a presumption can ultimately be corroborated;
- (f) the "additional requirements" referred to by the Appellate Body in respect of Article 17 of the AD Agreement in the *Guatemala-Cement* case do not exist, since they can be fulfilled at the same time and in the same way as the DSU requirements. In other words, there is nothing special or additional in the AD Agreement with respect to Article 6.2 of the DSU.

6.31 Furthermore, Mexico argues that while it is true that in the *Guatemala-Cement* case the Appellate Body concluded that Articles 6.2 of the DSU and 17.5 of the AD Agreement were complementary, in this case the Panel did not examine the

relationship between Article 3.8 of the DSU and Article 17.5(i) of the AD Agreement before concluding that the former replaced the latter. Nowhere in the Interim Report is there any indication or mention of the discrepancy or complementarity between these two provisions, why there is such a relationship and the legal consequences thereof.

6.32 Mexico considers that over and above any GATT/WTO precedents pointing to one thing or another, in any dispute within the context of the AD Agreement it is necessary to interpret the general rules of dispute settlement set forth in the DSU (in this case Articles 6.2 and 3.8) in direct connection with the special dispute settlement provisions of the AD Agreement (in this case Articles 17.4 and 17.5). And it is on the basis of that interpretation only that compliance with the dispute settlement provisions of the AD Agreement and the DSU should be examined, including the requirements for requests for the establishment of a panel, in accordance with the particular circumstances of each case. What would be the point or purpose of Article 17 of the AD Agreement if not to provide rules or requirements that are additional or supplementary or, where applicable, different from the general rules of the DSU (i.e. in case of inconsistency with the DSU). If this were not the purpose, then this special dispute settlement provision of the AD Agreement would be pointless.

6.33 In view of the above considerations, Mexico requests that we re-examine our findings with respect to the interpretation of Articles 6.2 and 3.8 of the DSU and 17.4 and 17.5(i) of the AD Agreement, and with respect to the request for the establishment of a panel submitted by the United States in this dispute.

6.34 As noted above, we made changes to paragraphs 7.19 and 7.25 in order to more accurately reflect Mexico's arguments. In addition, after careful consideration of Mexico's comments, we have made changes to paragraphs 7.24 and 7.26-7.29 in order to clarify our reasoning and conclusions.

6.35 Mexico requested that we re-examine the structure of Section VII.B.4 of the Report, allegedly improper references to consultations. As noted above, we made changes to paragraphs 7.35-7.37 in order to more accurately reflect Mexico's argument. We also made a change to paragraph 7.43 in order to clarify our reasoning and conclusions.

6.36 Mexico requested that we re-examine our conclusions in Section VII.B.5 of the Report, claims addressing the provisional measure.

6.37 In Mexico's view, the Panel overstepped its authority by ruling on a measure that does not come under its terms of reference. Consequently, Mexico asserts, the finding contained in Part VII.B.5 of the Report is out of place, and should be deleted from the Report.

6.38 Mexico asserts that, as can be seen from the Report itself and as confirmed by the United States, the request for the establishment of a panel by the United States contains only one "specific measure at issue", i.e., the definitive anti-dumping measure. Consequently, in Mexico's view, the Panel should not have addressed in any way the issue of the consistency of the provisional measure applied by Mexico with the provisions of the AD Agreement on provisional measures.

6.39 In Mexico's view, the argument according to which the United States did not challenge the provisional measure as such, but rather as one of its "legal claims" (paragraph 7.46) neither settles nor obviates the obligation whereby the request for the establishment of a panel must contain the specific measures at issue if they are to come under the terms of reference of the panel.

6.40 Mexico argues that the quotation from the Appellate Body report in the *Guatemala-Cement* case in paragraph 7.51 does not imply that the terms of reference of a panel can be expanded through the claims brought. All that this quotation says is that "there is a difference between the specific measures at issue - in the case of the AD Agreement, one of the three types of anti-dumping measure described in Article 17.4 - and the claims or the legal basis of the complaint referred to the DSB relating to those specific measures". Thus, Mexico asserts, the Panel's conclusion in the case at issue should have been that if the provisional measure was not included in the request for the establishment of a panel, it would have to reject all of the claims and legal bases relating to the provisional measure.

6.41 Mexico maintains that, instead of proceeding as indicated in the last sentence of the previous paragraph, the Panel preferred to examine whether a complaint concerning the period of application of a provisional measure was related to the definitive anti-dumping duty. Mexico does not agree with the Panel's reasoning, since as indicated in the first sentence of paragraph 7.53, "a claim regarding the period for which a provisional measure was applied does not, on its face, constitute a challenge to the definitive anti-dumping duty in this dispute".

6.42 In Mexico's view, the Panel's statement that the United States' claim under Article 7.4 of the AD Agreement was "nevertheless related to Mexico's definitive anti-dumping duty" not only contradicts the first sentence of paragraph 7.53 without any explanation, but is also wrong. The only thing that the references to Article 10 of the AD Agreement show is that a claim regarding the duration of a provisional measure is related to the provisional anti-dumping duty, and not, as the Panel erroneously contends, to the definitive duty.

6.43 Mexico asserts that this becomes clear when it is borne in mind that the fact that there is a relationship between the retroactive application of definitive anti-dumping duties and the duration of the provisional measure does not mean that there is also necessarily a relationship between the duration of the provisional measure and the application of definitive anti-dumping duties. The first relationship exists in all cases, while the second relationship may or may not exist depending on the circumstances. Paragraph 7.53 confuses the relationship between the retroactive application of duties and the duration of the provisional measure, on the one hand, with the relationship which is not even stipulated in Article 10 of the AD Agreement between the duration of the provisional measure and the application of definitive anti-dumping duties, on the other.

6.44 Mexico argues that the Panel's conclusion is so obvious that in paragraph 7.54 of the report, the Panel itself felt obliged to interpret the scope of Article 17.4 of the AD Agreement incorrectly by asserting that although Article 17.4 "literally" refers to Article 7.1 of the AD Agreement "(and not a claim under Article 7.4 of the AD Agreement)", "a ruling that a claim under Article 7.4 could not be pursued in a dispute where the specific measure challenged is a definitive anti-dumping duty would mean that a Member would never be able to pursue an Article 7.4 claim". In Mexico's view, this conclusion is so flawed that the Panel itself recognizes, in the same paragraph of the Report, that it cannot be correct by introducing it with the words "if this conclusion is correct".

6.45 Mexico asserts that this shows that in spite of what was said by the Appellate Body in *Guatemala-Cement*, Article 17.4 of the AD Agreement is a timing provision (which indicates when a matter may be referred to the Dispute Settlement Body) and

not a coverage provision (which establishes in a restrictive manner the measures which may be challenged as specific measures at issue in the dispute in anti-dumping cases). If Article 17.4 of the AD Agreement refers expressly to Article 7.1 neither the Appellate Body nor any panel has the authority to conclude that it also covers Article 7.4.

6.46 Having carefully considered Mexico's arguments in this regard, we have concluded that no changes to our findings are necessary, but have made a clarifying change in paragraph 7.53.

6.47 Mexico comments that the United States wishes the Panel to infringe the provisions of Article 17.6 of the AD Agreement. In this regard, Mexico asserts that the Interim Report completely ignored this objection, not only in the findings section, but also in the descriptive part. In Mexico's view, this is yet another example of the observations that were disregarded in the examination stage of the descriptive part. Mexico states that it does not understand the reasoning which lead to the elimination of an entire portion of its arguments, as if they had never been made. Indeed, it notes that it expressly referred to this aspect in its two written submissions.<sup>516</sup> Mexico requests that this argument be included in the descriptive part and that the Panel issue a ruling on the matter.

6.48 We have made several changes to the descriptive part in order to more clearly reflect Mexico's arguments in this regard, and have made a change to footnote 535 to clarify our reasoning.

6.49 Mexico comments that the Panel has mistaken the relevance of the Panel report in *Guatemala-Cement*. Mexico notes the Panel's statement in footnote 556, that the decision on the merits of the Panel in *Guatemala-Cement* (WT/DS60/R) has no legal status and thus does not create legitimate expectations, and makes the following observations in this connection:

- (a) The report of the Appellate Body and the report of the Panel in the *Guatemala-Cement* case were adopted at the meeting of the Dispute Settlement Body of 26 November 1998.
- (b) The report of the Appellate Body in *Guatemala-Cement* did not overrule any of the conclusions of the Panel concerning the violations of Articles 5.3 and 5.5 of the AD Agreement committed by Guatemala during the investigation or any of the recommendations and suggestions of the Panel under Article 19.1 of the DSU.
- (c) Contrary to footnote 556, footnote 1 of the first written submission of the United States<sup>517</sup> shows that the United States recognized that the report of the Panel in *Guatemala-Cement* had been adopted by the DSB, indicating that it was not adopted "on other grounds". In Mexico's view, this means that in the opinion of the United States, the conclusions of the Panel that were overruled by the decision of the

<sup>516</sup> See in particular Mexico's first written submission, paragraphs 64-68, and its second written submission, paragraphs 70 to 74. It should be recalled that this objection was also discussed in the first substantive meeting with the parties.

<sup>517</sup> In footnote 1 to its first written submission, the United States refers to the Panel report in *Guatemala-Cement* as follows: "WT/DS60/R, Report of the Panel circulated 19 June 1998 ("*Guatemala-Cement*")", *not adopted on other grounds ...*" (Emphasis added by Mexico).

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.

- (d) According to the report of the Appellate Body in *Japan-Taxes on Alcoholic Beverages*, "adopted panel reports are an important part of the GATT *aquis* (...). They create legitimate expectations among WTO Members, and, therefore, should be taken into account when they are relevant to any dispute". The same report recognizes that unadopted panel reports have no legal status.<sup>518</sup>
- (e) Consequently, apart from the findings of the Panel that were overruled by the Appellate Body regarding the question of whether the dispute had been properly brought before the Panel, and which in this respect only have no legal status, the Panel report in *Guatemala-Cement*, having been adopted by the DSB, has the same legal status as any other report adopted by the DSB.<sup>519</sup>

6.50 Having considered Mexico's argument, we have made changes to footnote 556 of the Report to clarify our reasoning.

6.51 Mexico makes the following comments or clarifications concerning paragraphs 7.176 (on the basis of Mexico's reply to question 15 of the Panel on 22 June 1999) and 7.177:

- (a) To begin with, when Mexico points out "that the alleged restraint agreement was made after the period of investigation, and thus any limitation on imports started from the already significantly increased levels that had been reached", it is not trying to substantiate its determination on the basis of anything other than the likelihood of increased imports. On the contrary, in determining that there was such a likelihood in the future, the analysis of the behaviour of imports beyond the period investigated (from January to September 1997) was particularly significant in that it revealed not only the growth trend in imports, but also confirmed those trends starting from levels of demand and substitution that had actually been reached during and outside the period investigated, in addition to a confirmed dynamism of those levels.
- (b) In the circumstances of an anti-dumping investigation, the analysis conducted by the investigating authority with respect to imports beyond or outside the period investigated clearly cannot go on indefinitely and must stop somewhere (in this case in September 1997), although the AD Agreement does not contain any clear indications in this respect. When the analysis of the imports within the period investigated and outside the period investigated shows not only growth trends, but already confirmed substantial increases, the levels already reached are relevant for the purposes of determining the likelihood of substantially increased imports.

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<sup>518</sup> See *Japan-Taxes on Alcoholic Beverages*, *supra*, footnote 43 at 107

<sup>519</sup> *Supra*, footnote 8, as recognized in paragraph 7.94.

- (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 enabled it to be aware of its binding nature and true scope. On the other hand, the dynamism of the demand for imports and the degree of substitution of HFCS observed during and outside the period investigated did constitute sufficient evidence of the fact that beverage producers, other industrial users and the soft drink bottlers themselves had increased and could have continued, in the future, to increase their consumption of HFCS in an amount sufficient to cause a further substantial increase in imports.
  - (ii) Nor is it by any means true that SECOFI concluded that HFCS imports would have continued increasing "by inertia". The likelihood of a substantial increase in imports was based, as we said before, on the analysis of the levels of demand for imports and for domestic HFCS by soft drink bottlers, manufacturers of other beverages and other industrial users, and on the observation that these levels of demand were not static, but that on the contrary, not only did they show an upward trend, but there had been a confirmed increase within and outside the period investigated. Similarly, the study concerning the degree of substitution of HFCS for sugar, on which the conclusion that there was a likelihood of a substantial increase in imports was based as well, also showed a significant growth, including for other industrial users (which could be considered more limited in an initial stage), even though at that point substitution was not in full swing.
- (d) Finally, the fact that the final determination did not address in detail the elements supporting SECOFI's analysis of the potential impact of the alleged restraint agreement in relation to its conclusion concerning the likelihood of a substantial increase in HFCS imports, or that this conclusion was not worded in the best possible way, does not imply any violation of Article 3.7(i) of the AD Agreement.

6.52 Mexico asks that we re-examine our conclusions in this regard.

6.53 Having carefully considered Mexico's arguments in this regard, we have concluded that no changes to our findings are necessary.

## VII. FINDINGS

### A. Introduction

7.1 This dispute involves the imposition of a definitive anti-dumping measure by the Mexican Ministry of Trade and Industrial Development (SECOFI) on imports of high-fructose corn syrup (HFCS) from the United States. The United States raises claims concerning the initiation of the investigation, the final determination imposing the measure, the period of application of the provisional measure, and the retroactive application of the final anti-dumping measure for the period during which the provisional measure was in effect.

7.2 On 14 January 1997, Mexico's National Chamber of Sugar and Alcohol Industries (Sugar Chamber) filed an application for an anti-dumping investigation with SECOFI alleging that imports of HFCS from the United States were being exported to Mexico at dumped prices and threatened Mexico's sugar industry with material injury. On 27 February 1997, SECOFI published a notice in Mexico's *Diario Oficial* announcing the initiation of an anti-dumping investigation on imports of HFCS, grades 42 and 55, originating in the United States.<sup>520</sup> SECOFI established the period from 1 January 1996 to 31 December 1996 as the period of investigation. Parties filed responses to investigation questionnaires and to requests for supplementary information in April and May 1997, and also filed other submissions throughout the investigation.

7.3 On 25 June 1997, SECOFI published a notice announcing a preliminary determination imposing provisional anti-dumping duties ranging from 66.57 to 125.30 U.S. dollars per metric ton in the case of imports of HFCS grade 42, and 65.12 to 175.50 U.S. dollars per metric ton in the case of imports of HFCS grade 55.<sup>521</sup> The provisional measures remained in place until the final determination was published.

7.4 On 23 January 1998, SECOFI published a notice announcing the final determination that dumped imports of HFCS from the United States threatened material injury to the Mexican sugar industry. The final determination imposed definitive anti-dumping duties ranging from 63.75 to 100.60 U.S. dollars per metric ton in the

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<sup>520</sup> *Resolución por la que se acepta la solicitud de parte interesada y se declara el inicio de la investigación antidumping sobre las importaciones de jarabe de maíz de alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.01, 1702.40.99, 1702.60.01 y 1702.90.99 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia.* (Decision to accept the request of the interested parties and to start the antidumping investigation of high fructose corn syrup imports, merchandise classified in tariff classifications 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Schedule to the General Import Duties Act, originating in the United States of America, irrespective of the country of export). US-3, MEXICO-1 (*Initiation Notice*).

<sup>521</sup> *Resolución preliminar de la investigación antidumping sobre las importaciones de jarabe de maíz de alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.01, 1702.40.99, 1702.60.01 y 1702.90.99 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia.* (Preliminary determination in the antidumping investigation of high fructose corn syrup imports, merchandise classified in tariff classifications 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Schedule to the General Import Duties Act, originating in the United States of America, irrespective of the country of export). US-2, MEXICO-2 (*Preliminary Determination*).

case of imports of HFCS grade 42, and 55.37 to 175.50 U.S. dollars per metric ton in the case of imports of HFCS grade 55.<sup>522</sup> The notice provides that the Ministry of Finance and Public Credit was entrusted with collecting the definitive anti-dumping duties, and the latter was directed to collect such duties retroactively to the date of the imposition of the provisional measure.

### *B. Preliminary Issues*

7.5 Mexico argues, on two separate bases, that the United States' request for establishment of this Panel is not consistent with the requirements of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Articles 17.4 and 17.5(i) of the Agreement on Implementation of Article VI of GATT 1994 (AD Agreement), and therefore argues that we must terminate the proceeding without reaching the substance of the United States' claims. Mexico also raises two issues relating to the admissibility of certain evidence referred to by the United States, arguing that we must reject this evidence. Finally, Mexico argues that the United States' claim concerning the period of application of the provisional measure is not within our terms of reference, and therefore may not be considered.

#### *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 "reasoning". 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

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<sup>522</sup> *Resolución final de la investigación antidumping sobre las importaciones de jarabe de maíz de alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.99 y 1702.60.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia.* (Final determination in the antidumping investigation of high fructose corn syrup imports, merchandise classified in tariff classifications 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Schedule to the General Import Duties Act, originating in the United States of America, irrespective of the country of export). US-1, MEXICO-6 (*Final Determination*).

confused and fails to "present the problem clearly" and therefore fails to comply with Article 6.2 of the DSU. Mexico maintains that the obligation to present the problem clearly is not a mere formality, as it is intended to provide notice to the opposing Member of the substance of the dispute, establish the terms of reference of a panel, and safeguard the rights of WTO Members to decide whether they should participate as third parties.

7.9 The United States contends that its request for the establishment of a panel is sufficient under the DSU and the AD Agreement. Citing the report of the Appellate Body in *European Communities -Bananas*<sup>523</sup>, the United States asserts that the *minimum* requirement of Article 6.2 is that a request for establishment set forth the measure in question, and identify the legal claims. The United States asserts that its request in this case does at least this much: the measure in question is set forth (the final anti-dumping measure) and the request identifies legal claims (alleged violation of Articles 1-7, 10 and 12 of the AD Agreement, and Article VI of GATT 1994).

7.10 Moreover, the United States asserts that its request for establishment exceeds these minimum requirements, as the request links the specific measure and the various claims, describing in detail the United States' problems with the Mexican measure, using the language of the cited provisions of the AD Agreement, in paragraphs (a)-(k), thereby stating the problem clearly. The United States further maintains that Mexico's arguments concerning the notice function of the request, and confusion resulting from the asserted inadequacy of the request, are not credible. The United States, relying on the Appellate Body report in *European Communities -Computer Equipment*,<sup>524</sup> argues that a panel request fails to be "sufficient to state the problem clearly" in accordance with DSU Article 6.2 if the request is so flawed that the defending party's rights of defense are prejudiced, and maintains that Mexico cannot demonstrate that any imperfections in the United States' request for establishment rise to this level.

7.11 In considering this issue, we note first that the Appellate Body has stated that Article 6.2 of the DSU and Article 17.4 of the AD Agreement are complementary and should be applied together in disputes under the AD Agreement.<sup>525</sup> It has further stated that:

"the word "matter" has the same meaning in Article 17 of the *Anti-Dumping Agreement* as it has in Article 7 of the DSU. It consists of two elements: The specific "measure" and the "claims" relating to it, both of which must be properly identified in a panel request as required by Article 6.2 of the DSU".<sup>526</sup>

Moreover, it has specified that:

"in disputes under the *Anti-Dumping Agreement* relating to the initiation and conduct of anti-dumping investigations, a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure must be identified as part of the matter referred to the DSB

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<sup>523</sup> *European Communities-Bananas AB Report*, supra, footnote 22, para. 18.

<sup>524</sup> *European Communities-Computer Equipment AB Report*, supra, footnote 26, paras. 68-70.

<sup>525</sup> *Guatemala-Cement AB Report*, supra, footnote 16, para. 75.

<sup>526</sup> *Ibid.*, para 76.

pursuant to the provisions of Article 17.4 of the *Anti-Dumping Agreement* and Article 6.2 of the DSU".<sup>527</sup>

The United States' request for establishment identifies the measure in question - the final anti-dumping measure on HFCS imposed by Mexico. The issues before us in this dispute are whether the United States' request sets forth claims regarding that measure, and whether it does so with sufficient specificity to present the problem clearly.

7.12 Mexico argues that the request for establishment does not contain any claims within the meaning of Article 6.2 of the DSU because it does not indicate the basis for each assertion.<sup>528</sup> It is clear on the face of the United States' request for establishment that violations of the AD Agreement are alleged. In our view, these allegations of violations present "claims" within the meaning of Article 6.2 of the DSU.

7.13 The issue which we must then decide is whether the summary of the legal basis of the complaint - the claims - is "sufficient to present the problem clearly". The Appellate Body addressed this question most recently in *Korea-Dairy Safeguard*,<sup>529</sup> stating that:

"Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. There may be situations where the simple listing of the articles of the agreement involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple 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

<sup>527</sup> *Ibid.*, para. 80.

<sup>528</sup> In this regard, Mexico relies on the report of the Panel in *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil (EC-Yarn)*, ADP/137 (*EC-Yarn Panel Report*), adopted 30 October 1995.

<sup>529</sup> *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, circulated 14 December 1999 (*Korea-Dairy Safeguard AB Report*). This decision, like others by the Appellate Body and panels considering Article 6.2 of the DSU, was in the context of considering whether the request for establishment presented specific claims with sufficient clarity, rather than in the context of determining whether the request for establishment set forth any claims at all.

actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated".<sup>530</sup>

7.14 In considering the arguments relating to Article 17.4 of the AD Agreement, we note first that Article 17.4 does not, in our view, set out any further or additional requirements with respect to the degree of specificity with which claims must be set forth in a request for establishment challenging a final anti-dumping measure.<sup>531</sup> Therefore, a request for establishment that satisfies the requirements of Article 6.2 of the DSU in this regard also satisfies the requirements of Article 17.4 of the AD Agreement.

7.15 The United States' request for establishment in this case does not merely list the articles alleged to have been violated. The request also sets forth facts and circumstances describing the substance of the dispute. In our view, the request is sufficiently detailed to set forth the legal basis of the complaint so as to inform the defending Member, Mexico, and potential third parties of the claims made by the United States.

7.16 We find that Mexico has not demonstrated to us that it was prejudiced in its ability to defend its interests in the course of the proceedings in this dispute. Mexico asserts that it had to wait until the first written submission of the United States, more than four months after the request for establishment, to have a clear idea of what the United States' arguments in support of its assertions were. Mexico argues that as a result of the failure of the United States to present the problem clearly and specify the factual and legal basis for the request, it was obliged to spend that time working "in the dark". In its comments on interim review, Mexico asserts that this resulted in the expenditure or squandering of resources that could otherwise have been devoted to preparing a timely defence.

7.17 In our view, the totality of the United States' request for establishment sets out claims with sufficient specificity to present the problem clearly and allow Mexico to defend its interests. Mexico's assertions as to the effect of the alleged inadequacies in the request for establishment do not, in our view, rise to the level of demonstrating that Mexico's rights of defense in this panel proceeding were affected, given the actual course of the panel proceedings.<sup>532</sup> Similarly, we do not find that the inter-

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<sup>530</sup> *Korea-Dairy Safeguard AB Report, supra*, footnote 529, paras. 124 and 127 (footnote omitted, emphasis in original).

We recognize that the Appellate Body's decision *Korea-Dairy Safeguard* was circulated after the interim review stage of this proceeding, and hence could not be taken into account by the parties in formulating their arguments. As the decision directly addresses the legal issue under Article 6.2 of the DSU which is before us in this dispute, we have made our findings on this issue in light of that decision. We note, however, that this course of action did not affect our conclusion regarding the sufficiency of the United States' request for establishment under Article 6.2 of the DSU and Article 17.4 of the AD Agreement, which would have been the same had we not taken that decision into account.

<sup>531</sup> We note that Article 17.4 does not refer to "claims".

<sup>532</sup> In this regard, we recall the decision of the Appellate Body in *European Communities-Bananas* that "Article 6.2 of the DSU requires that the *claims*, and not the *arguments*, must be specified sufficiently in the request for establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint". *European Communities-Bananas AB Report, supra*, footnote 22, para. 143 (emphasis in original).

ests of any Members as potential third parties were prejudiced by a lack of detail in the request for establishment.<sup>533</sup>

7.18 We therefore reject Mexico's arguments and determine that the United States' request for establishment satisfies the requirements of Article 6.2 of the DSU and Article 17.4 of the AD Agreement.

2. *Alleged Insufficiency of the Request for Establishment under Article 17.5(i) of the AD Agreement*

7.19 Mexico also contends that the United States' request for establishment is insufficient under Article 17.5(i) of the AD Agreement because it does not indicate how Mexico's final anti-dumping measure nullifies or impairs benefits accruing to the United States under the AD Agreement, and does not indicate how the achieving of the objectives of the AD Agreement was being impeded by that measure.

7.20 The United States asserts that Mexico's argument is inconsistent with the text and context of Article 17.5(i) in interpreting that provision to require an explicit statement alleging nullification or impairment, or that the achieving of the objectives of the AD Agreement has been impeded. The United States, referring to Article 3.8 of the DSU, argues that an allegation of violation of a covered agreement constitutes an allegation of nullification or impairment of benefits accruing to it under the AD Agreement, and that it alleged such violations in its request for establishment.

7.21 Moreover, the United States points out that Article 17.5(i) requires that complaining parties provide a written statement "**indicating how** a benefit has been directly or indirectly nullified or impaired, or the achieving of the objectives of the Agreement is being impeded" (emphasis added by the United States). In the United States' view, an "indication" is distinct from a detailed discussion and suggests that examination of the entire request is important, not simply determining whether certain magic words have been used. The phrase "indicating how", the United States asserts, requires a description of "how" benefits have been nullified or impaired. The United States asserts that its request contains the required description "indicating how" benefits accruing to the United States under the AD Agreement have been nullified or impaired, in the fourth paragraph of the request, and in particular in the detailed information and summary arguments found in indents (a)-(k).

7.22 In considering this issue, we note Article 17.5(i) of the AD Agreement, which provides:

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

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

<sup>533</sup> The fact that the third parties presented arguments largely directed at issues other than the specific claims in dispute is, in our view, not a function of any confusion on their part, but rather relates to the nature of their interest in the dispute, as expressed in their joint oral statement.

7.23 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.

7.24 The Appellate Body has ruled that the provisions of the DSU must be read together with the provisions of special or additional rules for dispute settlement in covered agreements, such as those set forth in Article 17.5 of the AD Agreement, unless there is a difference between them. The Appellate Body has further ruled, in *Guatemala-Cement*, that:

"there is no *inconsistency* between Article 17.5 of the *Anti-Dumping Agreement* and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together. A panel request made concerning a dispute brought under the *Anti-Dumping Agreement* must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU".<sup>534</sup>

We have already concluded that the United States' request for establishment satisfies the requirements of Article 6.2 of the DSU. The questions we must now resolve are, first, what (if anything) is required by Article 17.5(i) of the AD Agreement in addition to what is required under Article 6.2 of the DSU, and second, assuming there are additional requirements under Article 17.5(i), whether the United States' request for establishment satisfies those further requirements.

7.25 With respect to the first question, Mexico argues that Article 17.5(i) requires an explicit statement indicating how benefits accruing to the complaining Member have been nullified or impaired or the achieving of the objectives of the Agreement has been impeded, in order for a request for establishment of a panel alleging violations of the AD Agreement to be sufficient. Mexico argues that the concepts of nullification or impairment, or impeding the achieving of the objectives of the Agreement, appear nowhere in the United States' request for establishment. Mexico argues that the requirements of Article 17.5(i) cannot be satisfied "implicitly", and maintains that the United States' request for establishment contains no indication of how a benefit was nullified or impaired. We do not agree with Mexico's conclusion.<sup>535</sup>

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<sup>534</sup> *Guatemala-Cement AB Report, supra*, footnote 16, para. 75 (emphasis in original).

<sup>535</sup> In our examination of the AD Agreement, we act in accordance with the principles of interpretation of public international law (Article 3.2 of the DSU) which include Articles 31 and 32 of the Vienna Convention on the Law of Treaties. As provided in these articles and as applied by panels and the Appellate Body, we shall interpret the provisions of the AD Agreement on the basis of the ordinary meaning of the terms of its provisions in their context, in the light of the object and purpose of the AD Agreement, the GATT 1994 and the WTO Agreement. We note also Article XVI:1 of the WTO Agreement which provides that "... the WTO shall be guided by the decisions, procedures and customary practices followed by CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947". Finally, we note that Article 17.6 of the AD Agreement establishes the standard of review to be applied by panels in disputes under that Agreement. In this regard, Mexico argued that the United States "invited" us to "infringe" the provisions of Article 17.6 of the AD Agreement, and in its comments on interim review specifically asked the Panel to rule on this question. In our view, there is no basis for such a ruling, as we have scrupulously followed the

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".

7.28 At least one GATT Panel has described the presumption of nullification or impairment arising from a violation of GATT provisions "in practice as an irrefutable presumption".<sup>536</sup> In our view, a request for establishment that alleges violations of the AD Agreement which, if demonstrated, will constitute a *prima facie* case of nullification or impairment under Article 3.8 of the DSU, contains a sufficient allegation of nullification or impairment for purposes of Article 17.5(i). In addition, as noted above, the request must indicate how benefits accruing to the complaining Member are being nullified or impaired.

7.29 Turning to the second question, the United States' request does contain allegations of violation of the AD Agreement which, if demonstrated, will constitute a *prima facie* case of nullification or impairment under Article 3.8 of the DSU. In addition, the statements in paragraphs (a) through (k) of the request for establishment describe the factual and legal circumstances alleged to constitute the asserted violations of the cited provisions of the AD Agreement in some detail. These statements, in our view, suffice to "indicate how" benefits accruing to the United States under the AD Agreement have been nullified or impaired, as required by Article 17.5(i).

7.30 Based on our consideration of the entirety of the United States' request for establishment, we conclude that it is consistent with the requirements of Article 17.5(i) of the AD Agreement.<sup>537</sup>

### 3. *Allegedly Improper References to SECOFI's Submission in on-Going NAFTA Proceedings*

7.31 Mexico asserts that we may not take into account in our examination of this dispute various references by the United States to SECOFI's submission in a pro-

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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.

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

<sup>537</sup> The two elements of Article 17.5(i), nullification or impairment of benefits, and impeding the achieving of the objectives of the Agreement, are expressed in the disjunctive in Article 17.5(i), meaning that only one of these elements must be satisfied. In view of our conclusion with respect to the consistency of the United States' request with the first element of Article 17.5(i), we do not address the question of its consistency with the second element.

ceeding presently being conducted under Chapter XIX of the North American Free Trade Agreement (NAFTA). In Mexico's view, the arguments SECOFI made in a pending case in a different forum subject to different procedural and substantive rules are irrelevant to this dispute. Mexico also argues that the standard of review in NAFTA proceedings is different from that in this dispute, and that while the AD Agreement is controlling law in Mexico, there are additional elements of Mexican law that are relevant in NAFTA proceedings that are not relevant here. Moreover, Mexico argues that the arguments put forth by SECOFI against the positions of private parties (importers and exporters) in the NAFTA proceeding, under Mexican law, are not intended to demonstrate that its final measure is consistent with the AD Agreement. Mexico points out that the NAFTA panel is an on-going procedure, with no decision as yet. Finally, Mexico notes that our terms of reference are confined to the AD Agreement and GATT 1994, and argues that we should adhere to the GATT/WTO practice of not examining other agreements except in cases where they are *per se* violations of the WTO Agreements.<sup>538</sup>

7.32 The United States argues that the Panel should accept and give significant weight to this evidence. In the United States' view, consideration of this evidence is appropriate because the measure at issue in the two proceedings is the same, many of the issues are the same, and the same determination, based on the same record, is before us and the NAFTA panel. The United States maintains that while the referenced portions of SECOFI's brief to the NAFTA panel do not represent evidence which we can or may consider in evaluating SECOFI's factual determinations, under the applicable standard of review set forth in Article 17.6(i), they are highly relevant, as they reflect legal positions of the Government of Mexico that differ from those taken in this dispute. The United States asserts that there is no WTO rule or jurisprudence in support of the conclusion that all references to the NAFTA submissions should be excluded from WTO dispute settlement proceedings. The United States refers to the Appellate Body's statement regarding the fact-finding role of panels in *United States - Shrimp*, that "[i]t is particularly within the province and the authority of a panel... to ascertain the **acceptability and relevancy** of information and advice received, and to decide **what weight to ascribe to that information or advice** or to conclude that no weight at all should be given to what has been received".<sup>539</sup> In the United States' view, it is clear that we have the power to consider this evidence pursuant to Article 13 of the DSU, and the only question is the weight to be accorded it.<sup>540</sup> The United States suggests that we may take into account the discrepancies

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<sup>538</sup> In this regard, Mexico cites the Guide to GATT Law and Practice (Volume 2, page 720), which refers to an arbitration award between Canada and the European Communities in which the arbitrator found that "In principle a claim based on a bilateral agreement cannot be brought under the multilateral dispute settlement procedures of the GATT". In our view, this argument is inapposite, as the United States has not presented any claims based on the NAFTA in this dispute, it has merely cited arguments made by SECOFI in a NAFTA proceeding as evidence.

<sup>539</sup> See *United States - Shrimp AB Report*, supra, footnote 78, paras. 104-106, (emphasis added by the United States).

<sup>540</sup> Indeed, the United States argues that, consistent with the Appellate Body's decision in *United States - Shrimp*, it could attach as an Exhibit to its submission the phonebook of Mexico City. The issue would not be its admissibility, but rather what evidentiary weight the Panel should attach to the information in the phone book.

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 containing the challenged references. Mexico argues that the fact that the requirements for third party participation in consultations are more limiting than for third party participation in panel proceedings, and that parties can veto third party participation in consultations but not in panel proceedings, allows for great flexibility in discussions during consultations. Mexico argues that there are aspects of consultations that only those with the right to participate in those consultations are entitled to know. Mexico recognizes that the United States was obliged to present its first written submission to the third parties, but argues that the references to the consultations violate the requirement of confidentiality. On this basis as well, Mexico requests that we not take into account any information from the June 1998 consultations cited by the United States.

7.37 Mexico also asserts that the United States improperly included information obtained in earlier consultations that are not part of the present dispute. In the questions put to Mexico in the June 1998 consultations in this dispute, the United States incorporated by reference questions put to Mexico on 8 October 1997, in consultations carried out concerning the provisional measure imposed by Mexico on HFCS imported from the United States. Mexico points out that those consultations were

carried out pursuant to a different and distinct request (WT/DS101/1) from the consultations underlying this dispute, and therefore any information from those consultations cannot be used in this dispute.

7.38 The United States acknowledges that there may be issues of fact as to what was said at the consultations, but maintains that neither the DSU nor the Working Procedures preclude parties from submitting information to panels regarding what occurred at the consultations. In the United States' view, the Panel should, if necessary, resolve issues of fact regarding what occurred at consultations,<sup>541</sup> and accord to the evidence regarding the consultations the weight it considers appropriate.

7.39 With regard to the issue of confidentiality, the United States argues that the Panel in *Korea-Alcohol*<sup>542</sup> addressed the substantive need for parties to be able to disclose information acquired during the consultations in ensuing dispute settlement proceedings, stating "it would seriously hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings".<sup>543</sup> The United States also points out that the Appellate Body in *India-Patents* emphasized that fact-finding is a major function of the consultation process.<sup>544</sup>

7.40 The United States argues that Mexico's approach, which would preclude references to information obtained in the consultations (even in cases where the information was in written form, and thus there was no question of fact), is inconsistent with past panel and Appellate Body rulings. On the one hand, it is clear that parties are to freely disclose facts in consultations. In the United States' view, they cannot then be prohibited from using the information thus obtained during panel proceedings. Moreover, third parties cannot be excluded from access to facts and information provided during consultations. In this regard, the United States notes that Article 10.1 of the DSU provides that third party interests "be fully taken into account", and the Working Procedures of the Panel facilitate this by instructing parties to serve their submissions on third parties and allow third parties to be present "during the entirety of the session".<sup>545</sup> Finally, third parties, like parties to panel proceedings, are required to maintain the confidentiality of the proceedings. Thus, the United States argues that there is no breach of confidentiality in disclosing facts to third parties to the panel proceeding who were not third parties to the consultations.

7.41 In our view, it would seriously hamper the dispute settlement process if a party could not use information obtained in the consultations in subsequent panel proceedings merely because a third party which did not participate in the consultations chooses to participate in the panel proceedings.<sup>546</sup> As Mexico points out, third

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<sup>541</sup> The United States notes that in at least one previous dispute, the Panel asked the parties written questions in order to resolve issues of fact relevant to events that occurred at the consultations. See *Korea-DRAMS Panel Report, supra*, footnote 96, paras. 6.7-6.8.

<sup>542</sup> *Korea-Alcohol Panel Report, supra*, footnote 93.

<sup>543</sup> *Korea-Alcohol Panel Report, supra*, footnote 93, para. 10.23.

<sup>544</sup> *India-Patents AB Report, supra*, footnote 33, para. 94.

<sup>545</sup> See DSU, Appendix 3, para. 6.

<sup>546</sup> See *Korea-Alcohol Panel Report, supra*, footnote 93, 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

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.

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hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings". *Ibid.* 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". *Ibid.* 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.<sup>547</sup> Accordingly, our examination of Mexico's preliminary objection will focus on the admissibility of that claim.<sup>548</sup>

7.49 In considering Mexico's preliminary objection, we note that the situation under consideration by the Appellate Body in *Guatemala-Cement* was different from that in this dispute. In *Guatemala -Cement*, the complainant had not specifically identified any measure among the three types of measures set forth in Article 17.4 of the AD Agreement in its request for establishment. The Panel nonetheless concluded that it could consider the "matter" in dispute. The Appellate Body reversed, finding that the Panel had erred in concluding that the complaining Member did not need to identify the specific measure at issue.<sup>549</sup> It noted that the "matter referred to the DSB" under Article 6.2 of the DSU and Article 17.4 of the AD Agreement "consists of two elements: the specific measure at issue and the legal basis of the complaint (or claims)".<sup>550</sup> It further stated that:

"We find that in disputes under the *Anti-Dumping Agreement* relating to the initiation and conduct of anti-dumping investigations, **a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure must be identified** as part of the matter referred to the DSB pursuant to the provisions of Article 17.4 of the AD Agreement and Article 6.2 of the DSU".<sup>551</sup>

7.50 The United States' request for establishment of a panel in this dispute specifically identifies "SECOFI's final anti-dumping measure".<sup>552</sup> Thus, the United States has properly identified a definitive anti-dumping duty as the specific measure challenged in this dispute. However, the United States did not in its request for establishment identify Mexico's provisional measure as a specific measure challenged in this dispute, although it did note the imposition of a provisional measure and referred to "actions by SECOFI preceding" the imposition of the final measure. Consequently, we must consider whether, in a dispute where the specific measure challenged is a definitive anti-dumping duty, the United States may assert a claim of violation of Article 7.4 of the AD Agreement, which establishes maximum time periods for which provisional measures may be imposed, or whether, as Mexico contends, the United States' claim under Article 7.4 relates to the provisional measure and can only

<sup>547</sup> The United States originally raised another claim concerning imposition of the provisional measure for a period of six months instead of four months. However, the United States explicitly withdrew this claim at our first meeting with the parties.

<sup>548</sup> Mexico further contends that any *arguments* relating to the provisional measure are outside our terms of reference. While our terms of reference define the scope of the matter before us, they do not limit the scope of *arguments* that may be made with respect to that matter. See *European Communities-Bananas AB Report, supra*, footnote 22, para. 141. Accordingly, we cannot rule that any arguments referring to the provisional measure are outside our terms of reference.

<sup>549</sup> *Guatemala-Cement AB Report, supra*, footnote 16, para. 79.

<sup>550</sup> *Ibid.*, para. 72.

<sup>551</sup> *Ibid.*, para. 80 (emphasis added).

<sup>552</sup> WT/DS132/2 ("[t]he United States considers that SECOFI's final anti-dumping measure, including actions by SECOFI preceding this measure, is inconsistent with the obligations of Mexico under Articles 1, 2, 3, 4, 5, 6, 7, 10 and 12 of the Antidumping Agreement and Article VI of GATT 1994").

be addressed in the context of a dispute where that measure has been identified in the request for establishment as a specific measure being challenged.

7.51 In *Guatemala - Cement*, the Appellate Body, after finding that, in the case of a dispute under the AD Agreement, the request for establishment must identify a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure as a specific measure at issue, went on to address the question of the claims that might be included in a dispute under the AD Agreement.

"This requirement to identify a specific anti-dumping measure at issue in a panel request in no way limits the nature of the **claims** that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the *AD Agreement*. As we have observed earlier, there is a difference between the specific measures at issue - in the case of the *Anti-Dumping Agreement*, one of the three types of anti-dumping measure described in Article 17.4 - and the claims or the legal basis of the complaint referred to the DSB **relating to those specific measures**".<sup>553</sup>

7.52 The Appellate Body Report in *Guatemala-Cement* indicates that a complainant may, having identified a specific anti-dumping duty in its request for establishment, bring any claims under the AD Agreement **relating to** that specific measure. That there should be a relationship between the measure challenged in a dispute and the claims asserted in that dispute would appear necessary, given that Article 19.1 of the DSU requires that, "where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned 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.

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<sup>553</sup> *Guatemala -Cement AB Report, supra*, footnote 16, para. 79 (emphasis added).

7.54 In arriving at this conclusion, we are cognizant that, under Article 17.4 of the AD Agreement, in light of the Appellate Body's decision in *Guatemala -Cement*, any other conclusion could leave Members without the possibility of bringing a claim under Article 7.4 of the AD Agreement. In this respect, we note that Article 17.4 provides that a provisional measure may be the subject of a panel proceeding "[w]hen a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of **paragraph 1** of Article 7" (emphasis added).

Read literally, this provision could be taken to mean that in a dispute where the specific measure being challenged is a provisional measure, the **only** claim that a Member may pursue is a claim under Article 7.1 of the AD Agreement (and not a claim under Article 7.4 of the AD Agreement). If this conclusion is correct, a ruling that a claim under Article 7.4 could not be pursued in a dispute where the specific measure challenged is a definitive anti-dumping duty would mean that a Member would never be able to pursue an Article 7.4 claim. In our view, it would be incorrect to interpret Article 17.4 of the AD Agreement in a manner which would leave Members without any possibility to pursue dispute settlement in respect of a claim alleging a violation of a requirement of the AD Agreement.

7.55 For the foregoing reasons, we deny Mexico's request for a ruling that any claims or arguments relating to the provisional measure are outside our terms of reference.

### *C. Alleged Violations Regarding the Initiation of the Investigation*

#### *1. Overview*

7.56 The United States raises a series of related claims regarding the initiation of the investigation. Our consideration of these issues requires us to address various provisions of the AD Agreement which establish requirements for the initiation of anti-dumping investigations. Specifically, we must address the requirements established for the contents of applications in Article 5.2. We must also address the nature of the obligation imposed on the investigating authority under Article 5.3, and in particular whether Article 5.3 requires the investigating authority to make specific determinations in initiating an investigation. Finally, we must consider what, if anything, the investigating authority must make known regarding the substance of the decision to initiate, and what, if anything, it must include in the public notice of initiation concerning the substance of the decision to initiate. In order to address these questions, we must interpret the relevant provisions of the AD Agreement, and their relationship to one another, in order to arrive at a coherent understanding of the obligations pertaining to the initiation of an anti-dumping investigation.

7.57 The investigation underlying the definitive anti-dumping measure at issue in this dispute was initiated by SECOFI based on an application filed by the Sugar Chamber, representing Mexican sugar producers, alleging that dumped imports of HFCS from the United States threatened material injury to the domestic industry producing sugar. SECOFI found that the Sugar Chamber had "standing" to file the

application - that is, that it represented the relevant domestic industry, sugar producers, and that the application had the support of those producers.<sup>554</sup> The AD Agreement defines the term "domestic industry" for purposes of an anti-dumping investigation in Article 4. In general, the term "domestic industry" refers to the domestic producers of the "like product". However, Article 4.1 provides that the domestic industry may be interpreted as not including certain domestic producers of the like product, and specifically includes in the category of producers which may thus be "excluded" from the domestic industry those domestic producers who are themselves importers of the allegedly dumped product. A central question underlying the United States' claims concerning the initiation is SECOFI's exclusion of two Mexican companies from consideration as the domestic industry.

7.58 The United States argues that the application contained contradictory information concerning whether there was production of HFCS in Mexico by two importers of HFCS from the United States. The United States maintains that, in examining the accuracy and adequacy of the information in the application as required by Article 5.3, and in determining that the Sugar Chamber had standing as required by Article 5.4, SECOFI failed to resolve the question of whether there was such production. Without deciding whether there was, in fact, production of HFCS in Mexico by the two companies in question, the United States argues, SECOFI could not properly have made a decision to exclude them from the domestic industry. The United States asserts that the record available to the parties in the proceeding does not contain evidence establishing that SECOFI made a proper determination as to the domestic industry, and thus SECOFI initiated the investigation in violation of Articles 5.3 and 5.8 of the AD Agreement. Moreover, the United States alleges, the notice of initiation does not state that SECOFI determined to exclude these two companies from the domestic industry, in violation of Article 12.1 of the AD Agreement.

7.59 Mexico, on the other hand, argues that SECOFI considered the question whether there was production of HFCS in Mexico, and found that there was, but also found that the two companies in question accounted for the vast majority of the allegedly dumped imports. Therefore, SECOFI concluded that these producers could not be considered as the relevant domestic industry, and further found that the Sugar Chamber, representing Mexican producers of sugar, a "like product" to HFCS,<sup>555</sup> had standing to file an application for anti-dumping relief on behalf of the domestic sugar industry. Thus, Mexico argues, SECOFI carefully carried out its obligation to examine the accuracy and adequacy of the information in the application, properly defined the relevant domestic industry, and concluded that there was sufficient evidence to justify initiation of the investigation.

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<sup>554</sup> See Article 5.4 of the AD Agreement.

<sup>555</sup> We note that the United States does not challenge SECOFI's conclusion that sugar was the "like product" at issue in this case under Article 2.6 of the AD Agreement, which sets forth the definition of "like product" in anti-dumping investigations. The United States does argue that given that the like product, sugar, and the imported product, HFCS, are not identical, the question of production of HFCS in Mexico was a critical one which SECOFI was required to resolve and address in defining the relevant domestic industry, and that its decision in this regard was required to be reflected in the notice of initiation.

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*<sup>556</sup>, the United States argues that because the AD Agreement defines the term "injury" to include threat of material injury,<sup>557</sup> evidence both of threat of material injury and of a causal link between the

<sup>556</sup> *Guatemala-Cement Panel Report, supra*, footnote 8, 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-Alcohol AB Report, supra*, footnote 43, at 108. However, the United States argues that we may take it into account if we consider its reasoning persuasive on any point. See *Ibid*. The Appellate Body reversed the *Guatemala-Cement* Panel's ruling on its authority to consider the dispute in that case, finding that no "matter" had been presented to the Panel. Consequently, the Appellate Body found that the Panel should never have considered the substance of the dispute, and further stated that it could not, itself, rule on the substantive issues raised on appeal. It is this decision that was adopted by the Dispute Settlement Body, together with the Panel's report "as reversed by the Appellate Body report". WT/DS60/12. Thus, we are of the view that the Panel's ruling on the substance of the dispute in *Guatemala-Cement* has no legal status, but that we may take the reasoning of the Panel in that case into account in our decision, to the extent we consider it persuasive.

<sup>557</sup> See AD Agreement, footnote 9.

allegedly dumped imports and the alleged threat of material injury is required where, as here, an application alleges threat of material injury.

7.64 The United States asserts that, contrary to the requirements of Article 5.2 of the AD Agreement, the application filed by the Sugar Chamber requesting the initiation of an anti-dumping investigation did not contain sufficient evidence of threat of material injury, because it lacked sufficient information regarding the likely impact of allegedly dumped imports of HFCS on the domestic industry, and the attendant relevant economic factors and indices bearing on the likely state of the domestic industry. In addition, the United States argues that, because the application did not contain sufficient evidence regarding the alleged threat of injury, it did not contain sufficient evidence of the causal link between the allegedly dumped imports and the alleged threat of injury.

7.65 The United States notes that the Sugar Chamber alleged in the application that it represented all but two domestic sugar mills, and, as stated in the initiation notice, its membership collectively accounted for 98 per cent of domestic sugar production. Accordingly, the United States maintains that information regarding the likely impact on the domestic industry and relevant economic factors was clearly and uniquely within the applicant's control. Nonetheless, the United States asserts, the Sugar Chamber did not even respond to the pertinent questions in SECOFI's application form requesting such information, responding "N/A" (not applicable) to the relevant portions of the application form. The United States contends that, by answering "N/A", the Sugar Chamber was stating to SECOFI its belief that the likely impact on the industry and the factors set forth in Article 3.4 were not relevant to the initiation of an investigation on the basis of allegations of threat of material injury. Similarly, the United States maintains that the Sugar Chamber did not respond to the specific questions in the application form regarding causal link, but again responded "N/A", effectively stating to SECOFI its belief that information regarding causal link was not relevant to the initiation of an investigation on the basis of allegations of threat of material injury. Accordingly, the United States maintains that the application contains no explanation or discussion of causal link.

7.66 Mexico considers that the application submitted by the Sugar Chamber contained the information that was reasonably available to it and that it included sufficient information concerning dumping, threat of injury and a causal relationship between the two as well as evidence concerning the factors and indices mentioned in Article 5.2(i) to (iv) of the AD Agreement. Mexico points out that Article 5.2(iv) of the AD Agreement expressly stipulates that the application must contain information on "the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, **such as** those listed in paragraphs 2 and 4 of Article 3" (emphasis added by Mexico). In Mexico's view, the ordinary meaning of the terms "relevant" and "such as" in Article 5.2(iv) makes it clear that the requirement is not a strict one as regards the factors and indices. The reference to Articles 3.2 and 3.4 of the AD Agreement is simply illustrative.

7.67 Furthermore, Mexico stresses that Article 3.7 is a specific provision which sets forth the factors which an investigating authority must take into account in determining whether there is a threat of injury. In the case of an application for initiation of an investigation specifically relating to threat of injury, the investigating authority must consider, in particular, the factors in Article 3.7 of the AD Agreement.

Thus, in Mexico's view, the presence of information in the application concerning the Article 3.7 factors is extremely important, and the Sugar Chamber's application contained such information.<sup>558</sup>

7.68 Mexico sets forth the asserted correlation between the information in the application and the requirements of Article 5.2(i) - (iv) of the AD Agreement in its submissions as follows:

- (a) Article 5.2(i) of the AD Agreement:
  - Identity of the applicant: paragraphs 2.1, 2.2 and 2.3 of the application;<sup>559</sup>
  - description of the volume and value of the domestic production of the like product: paragraphs 4.15 and 4.16 of the application and Annex 6A thereto;<sup>560</sup>
  - list of domestic producers of the like product: paragraph 2.4 of the application and Annex 2.4.<sup>561</sup>
- (b) Article 5.2(ii) of the AD Agreement:
  - complete description of the dumped product: Section B3 of the application and Annexes 2.10, 2.15 and 4.3(iii) thereto. See also a comparative study conducted by an academic institution of the characteristics and composition of HFCS and sugar, and various specialized publications in the field of sweeteners which reveal a diversity of uses and applications among the product investigated as well as their commercial substitutability;<sup>562</sup>
  - the names of the country or countries of origin or export in question: Section B3, paragraph 2.13 of the application and Annexes 3.4 and 3.6;<sup>563</sup>
  - identity of each known exporter or foreign producer and list of importers of the investigated product: Section B2, paragraphs 2.7, 2.8 and 2.9 of the application and Annexes 2.15, 3.15, 3.16 and 4.3(i) as well as Table 2.9.<sup>564</sup>
- (c) Article 5.2(iii) of the AD Agreement:

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

<sup>559</sup> See the Application for initiation of the investigation submitted by the Sugar Chamber (Application), MEXICO-16.

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

<sup>561</sup> See Application, MEXICO-16. See Annex 2.4 to Application, MEXICO-18.

<sup>562</sup> See Application, MEXICO-16, Annex 2.10 to Application, MEXICO-19, Annex 2.15 to Application, MEXICO-20 and Annex 4.3 (iii) to Application, MEXICO-21.

<sup>563</sup> See Application, MEXICO-16 and Annexes 3.4 and 3.6 to Application, MEXICO-10.

<sup>564</sup> See Application, MEXICO-16, Annex 2.15 to Application, MEXICO-20, Annexes 3.15 and 3.16 to Application MEXICO-22, Annex 4.3(i) to Application, MEXICO-23 and Table 2.9 to Application, MEXICO-24.

- data concerning the normal value and the export price of the like product: paragraph 2.6 and Section C of the application, Annexes 3.1, 3.4 and 3.6, 3.12, 3.15 and 3.16;<sup>565</sup>
  - information on prices at which the investigated product is sold when destined for consumption in the domestic markets of the country of origin or export and information on export prices: paragraph 2.6 and Section C of the application, and Annexes 3.4 and 3.6, 3.12, 3.15 and 3.16 thereto.<sup>566</sup>
- (d) Article 5.2(iv) of the AD Agreement:
- information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry: Section D of the application, and Annexes 3.4 and 3.6, 4.3(i), 4.3(ii), 4.3(iii), 4.3(v), 4.9, 4.12 and 4.14, 4.22, 4.23, 4.24 and 6-A to the same document;<sup>567</sup>
  - in addition to the above, Mexico points out that the application by the Sugar Chamber contained such information as was reasonably available to it concerning the relevant factors and indices having a bearing on the domestic sugar industry some of which are among those listed in Articles 3.2 and 3.4 of the AD Agreement: (i) domestic sugar market indicators, in thousands of tonnes, for production, sales, exports, imports, consumption, inventories and employment<sup>568</sup>; (ii) financial indicators (cash flow statement, financial statement, income statement, statement of production costs and financial ratios)<sup>569</sup>; (iii) installed capacity of each mill and the methodology used to determine the installed capacity<sup>570</sup>; (iv) investment projects in the sugar industry<sup>571</sup>; (v) HFCS import statistics and annual statement of imports drawn up by the applicant

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<sup>565</sup> See Application for the initiation of the investigation submitted by the Sugar Chamber, MEXICO-16, Annex 3.1(i) to Application, MEXICO-25, Annexes 3.4 and 3.6 to Application, MEXICO-10, Annex 3.12 to Application, MEXICO-26 and Annexes 3.15 and 3.16 to Application, MEXICO-22.

<sup>566</sup> See Application, MEXICO-16, Annexes 3.4 and 3.6 to Application, MEXICO-10, Annex 3.2 to Application, MEXICO-26 and Annexes 3.15 and 3.16 to Application, MEXICO-22.

<sup>567</sup> Application, MEXICO-16, Annexes 3.4 and 3.6 to Application, MEXICO-10, Annex 4.3(i) to Application, MEXICO-23, Annex 4.3(ii) to Application, MEXICO-7, Annex 4.3(iii) to Application, MEXICO-21, Annex 4.3(v) to Application, MEXICO-27, Annex 4.9 to Application, MEXICO-28, Annexes 4.12 and 4.14 to Application, MEXICO-29, Annex 4.22 to Application, MEXICO-30, Annex 4.23 to Application, MEXICO-31, Annex 4.24 to Application, MEXICO-32 and Annex 6-A to Application, MEXICO-17.

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

<sup>569</sup> See Application, MEXICO-16 and Annexes 4.19, 4.20 and 4.21 to Application, MEXICO-33.

<sup>570</sup> See Application, MEXICO-16 and Annex 4.22 to Application, MEXICO-30.

<sup>571</sup> See Application, MEXICO-16 and Annex 4.24 to Application, MEXICO-32.

with information from the SHCP<sup>572</sup>; (vi) list of average weighted market prices according to the category of sugar and the supply centre.<sup>573</sup>

7.69 In Mexico's view, Article 5.2(iv) leaves the investigating authority with the authority to determine the relevant indices and factors by which the consequent impact of the dumped imports can be evaluated.<sup>574</sup> Thus, it is up to the investigating authority to decide whether the information submitted with the application for the investigation deals with relevant factors and indices. Mexico asserts that SECOFI carried out a comprehensive analysis of the information submitted, as is clear from paragraphs 24 to 99 of the notice of initiation, in order to reach the conclusion that the application submitted by the Sugar Chamber met the requirements of Article 5.2 of the AD Agreement. Mexico acknowledges that in parts of the questionnaire the Sugar Chamber indicated that the question was not applicable ("N/A"). However, Mexico asserts that this was not because the required information was irrelevant in supporting the alleged threat of injury, but because the Sugar Chamber, following the order of the questionnaire, incorporated the information in other sections.

7.70 In addressing this issue we must consider first, what information Article 5.2 requires to be in an application, and second, whether SECOFI's conclusion that the Sugar Chamber's application 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 in-

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

<sup>573</sup> See Application, MEXICO-16, Annex 4.3(iii) to Application, MEXICO-21 and the information collected by SECOFI which appears in the injury investigation file, MEXICO-34.

<sup>574</sup> The United States does not argue that information reasonably available to the applicant on **all** of the Article 3.4 factors must be included in the application, but rather argues that the application did not contain information on **relevant** factors which was reasonably available to the Sugar Chamber.

dustry, such as those listed in paragraphs 2 and 4 of Article 3".

7.72 It is clear from the text of the provision that an application must contain "information", in the sense of evidence, regarding the consequent impact of the (allegedly dumped) imports on the domestic industry. It is also clear from the text that this "information" must "demonstrate" the consequent impact of the imports on the domestic industry.<sup>575</sup>

7.73 However, the inclusion in Article 5.2(iv) of the word "relevant" and the phrase "such as" in the reference to the factors and indices in Articles 3.2 and 3.4 in our view makes it clear that an application is **not** required to contain information on **all** the factors and indices set forth in Articles 3.2 and 3.4. Rather, Article 5.2(iv) requires that the application contain information on factors and indices relating to the impact of imports on the domestic industry, and refers to Articles 3.2 and 3.4 as illustrative of factors which may be relevant.<sup>576</sup> Which factors and indices are relevant to demonstrate the consequent impact of imports on the domestic industry will vary depending on the nature of the allegations made by the industry, and the nature of the industry itself. If the industry provides information reasonably available to it concerning factors which are relevant to the allegation of injury (or threat of injury) it makes in the application, and the information concerning those factors demonstrates, that is, "shows evidence of", the consequent impact of dumped imports on the domestic industry, we believe that Article 5.2(iv) is satisfied.<sup>577</sup>

7.74 Obviously, the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury. Moreover, the applicant need only provide such information as is "reasonably available" to it with respect to the relevant factors. Since information regarding the factors and indices set out in Article 3.4 concerns the state of the domestic industry and its operations, such information would generally be available to applicants. Nevertheless, we note that an application which is consistent with the requirements of Article 5.2 will not necessarily contain sufficient evidence to justify initiation under Article 5.3.<sup>578</sup>

7.75 The application submitted by the Sugar Chamber on its face contains information on relevant Article 3.4 factors, and that information shows evidence of the allegations of threat of injury and causal link in the application. Some of this information is contained in confidential Annexes to the application. Some of this information is requested in sections of the SECOFI application form to which the Sugar

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<sup>575</sup> We do not understand "demonstrate" in this context to mean "prove", but rather to mean "show evidence of; describe or explain by help of specimens...". *Concise Oxford Dictionary*, 1976.

<sup>576</sup> However, as discussed in section VII.D.1. below, the requirements of Article 3.4 are not merely illustrative in the context of final determinations.

<sup>577</sup> This does not mean that such an application is or would necessarily be sufficient for purposes of initiation. That is a separate issue, which is addressed further below.

<sup>578</sup> *Guatemala-Cement Panel Report, supra*, footnote 8, 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. *Ibid.* para. 7.53.

Chamber responded "N/A".<sup>579</sup> However, we do not consider that whether the Sugar Chamber filled out the application form provided by SECOFI in the clearest and best manner is in any way dispositive of whether the application satisfied the requirements of Article 5.2. Rather, we look to whether the necessary information was actually provided.

7.76 The Sugar Chamber alleged that dumped imports of HFCS threatened the domestic industry with material injury. The application contained information showing increases in imports, and information showing that market prices for sugar did not reach the maximum price level, while HFCS was priced below sugar, HFCS substitutes for sugar, and producers in the United States could reduce their prices. The application also contained information, *inter alia*, on the Mexican sugar producers' production, sales, exports, imports, consumption, inventories and employment<sup>580</sup>; cash flow, financial situation, income, production costs and financial ratios<sup>581</sup>; installed capacity<sup>582</sup>; and investment projects in the sugar industry<sup>583</sup>. The United States argues that an application alleging only threat of material injury must contain some "meaningful analysis" of the likely impact of allegedly dumped imports on the domestic industry, and that the Sugar Chamber's application in this case did not. However, Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations. While we recognize that some analysis linking the information and the allegations would be helpful in assessing the merits of an application, we cannot read the text of Article 5.2 as requiring such an analysis in the application itself.<sup>584</sup>

7.77 This information, if read in the light of the allegations, provides evidence in support of the allegation that dumped imports of HFCS from the United States threatened material injury to the Mexican sugar industry. The United States has concentrated much of its argument on the proposition that the application should have contained information concerning "potential negative effects" on various of the Article 3.4 factors. In this regard, we note that information, in the sense of evidence,

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<sup>579</sup> We note in this regard that SECOFI's application form instructs applicants, in para. 4.4 "It is important to mention that an antidumping investigation cannot be initiated for injury and threat of injury simultaneously, given that the two concepts are mutually exclusive". US-5(a) & (b). This instruction may be the reason the Sugar Chamber responded "N/A" to section 4.2 of the application form, which sets out the information SECOFI requires for applications alleging injury, but provided information in response to section 4.3 of the application, which sets out the information SECOFI requires for applications alleging threat of injury. Section 4.3 of the application form requests information on the Article 3.7 factors, and on expected return on investments, but does not specifically mention information concerning consequent impact on the domestic industry, or refer to the Article 3.2 and 3.4 factors. The Sugar Chamber's application includes information on these latter as annexes to its response under section 4.3 of the application.

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

<sup>581</sup> See Application, MEXICO-16 and Annexes 4.19, 4.20 and 4.21 to Application, MEXICO-33.

<sup>582</sup> See Application, MEXICO-16 and Annex 4.22 to Application, MEXICO-30.

<sup>583</sup> See Application, MEXICO-16 and Annex 4.24 to Application, MEXICO-32.

<sup>584</sup> Of course, the investigating authority must examine the accuracy and adequacy of the information in the application to determine whether there is sufficient evidence to justify initiation, pursuant to Article 5.3, a question which is addressed further below. However, this obligation falls on the investigating authority, and does not imply a requirement for analysis resting on the applicant.

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 summarizing 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 summarizing the grounds for the allegation of injury to the domestic industry previously defined as relevant.

7.83 Mexico asserts that SECOFI had other evidence, in addition to the Sugar Chamber's allegations that there was no Mexican production of HFCS, which led it, prior to deciding to initiate, to conclude that the domestic industry was the sugar producers. Mexico asserts that the United States has misread the notice of initiation, which repeats the Sugar Chamber's allegation that there was no production of HFCS in Mexico, in paragraph 7. However, Mexico maintains that this paragraph does not represent SECOFI's views, but merely restates the applicant's allegation. Mexico also points to paragraphs 89 and 90 of the notice of initiation as showing that SECOFI, prior to the initiation of the investigation, examined the evidence and information establishing the existence of HFCS producers in Mexico. Mexico argued that it was obvious that the two Mexican producers were excluded because they were the principal importers of HFCS from the United States. Mexico observed during the second meeting with the parties that, if one is giving a party, one does not inform those not invited of the fact that they have not been invited.

7.84 Our decision regarding this issue requires us to consider Article 12.1, which governs the contents of public notices of the initiation of anti-dumping investigations. It provides:

"When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report<sup>23</sup>, adequate information on the following:

- (i) the name of the exporting country or countries and the product involved;
- (ii) the date of initiation of the investigation;

- (iii) the basis on which dumping is alleged in the application;
- (iv) a summary of the factors on which the allegation of injury is based;
- (v) the address to which representations by interested parties should be directed;
- (vi) the time-limits allowed to interested parties for making their views known.

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

7.85 In considering this issue, we are faced with the questions whether Article 12.1.1(iv) requires that the notice of initiation contain (1) information concerning the allegations in the application regarding the relevant domestic industry, and/or (2) the factors and analysis underlying, and the investigating authority's conclusion regarding, the definition of the relevant domestic industry.<sup>585</sup>

7.86 In our view, the text of Article 12.1 and 12.1.1 is clear with respect to the first question. Article 12.1 requires that a public notice of initiation shall be given "[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5". It then goes on to require, in Article 12.1.1, that the notice (or separate report) contain "adequate information" on specific items, set forth in sub-parts (i)-(vi). Article 12.1.1(iv), which is specifically relied upon by the United States, requires "a summary of the factors on which the allegation of injury is based". We do not consider that the phrase "a summary of the factors on which the allegation of injury is based" can reasonably be read to encompass a requirement that the notice of initiation contain a summary of the allegations pertaining to the specific issue of the definition of the relevant domestic industry.<sup>586</sup> Still less can it reasonably be read to establish a requirement that the notice of initiation contain a summary of the allegations on the even more particular point of exclusion of some producers from consideration as the relevant domestic industry.

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<sup>585</sup> There is no dispute that the notice contained the information required under sub-headings (i)-(iii) and (v)-(vi) of Article 12.1.1.

In considering the interpretation of Article 12.1, as well as other provisions of the AD Agreement, we are mindful of the requirements of Article 17.6(ii) of the AD Agreement, which provides in pertinent part:

"Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations".

<sup>586</sup> In any event, we note that, in this case, the notice of initiation could in fact be viewed as containing a summary of the factors on which the allegation of 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.

7.87 However, the United States' claim under Article 12.1 goes further, as the United States argues that the notice of initiation must set forth the investigating authority's conclusion regarding the relevant domestic industry, and the bases on which that conclusion was reached. We recall, however, that Article 12.1.1(iv) merely requires that the notice of initiation contain "a **summary** of the factors on which the **allegation** of injury is based" (emphasis added). It does not require a summary of the **conclusion** of the investigating authority regarding the definition of the relevant domestic industry. Nor does it require a summary of the factors and analysis on which the investigating authority based that conclusion. Still less does it require a summary of the factors and analysis on which the investigating authority based its conclusion regarding exclusion of some producers from consideration as the relevant domestic industry. In other words, in our view, Article 12.1.1 cannot reasonably be read to require that the notice of initiation contain an explanation of the factors underlying, or the investigating authority's conclusion regarding, the definition of the relevant domestic industry.<sup>587</sup>

7.88 Our interpretation of the plain meaning of the text of Article 12.1 is bolstered by consideration of the remainder of Article 12, which serves as context for Article 12.1. Article 12.2, which governs the contents of public notices of preliminary and final determinations, requires the investigating authority to set forth "in sufficient detail the findings and conclusions on all issues of fact and law considered material by the investigating authorities". Article 12.1, on the other hand, 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

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<sup>587</sup> Of course, an investigating authority is free to include in a notice of initiation information and explanations that are not specifically required to be included under Article 12.1. Such practice, in our view, adds to the transparency of the proceeding, and the ability of parties and the public to understand, and in the case of parties, participate effectively in the proceeding.

domestic industry by the investigating authority in satisfying itself that there is sufficient evidence of injury to justify initiation.

7.90 The notice of initiation issued by SECOFI in this case contained adequate information concerning a summary of the factors on which the allegation of threat of injury was based. The allegations concerning threat of injury in the Sugar Chamber's application, and the supporting evidence for those allegations, are summarized in the notice. While we believe that the interests of the parties and the public in transparency of anti-dumping proceedings would be better served by a notice of initiation which included information concerning such aspects of a decision to initiate as the investigating authority's conclusion concerning the relevant domestic industry, we can find no requirement to do so in the Agreement. We therefore conclude that the notice of initiation was consistent with the requirements of Articles 12.1 and 12.1.1 of the AD Agreement.

4. *Alleged Insufficiency of the Examination of the Accuracy and Adequacy of the Evidence and Alleged Insufficiency of the Evidence to Justify Initiation*

7.91 The United States argues that the application did not contain sufficient evidence regarding the impact on the domestic industry of allegedly dumped HFCS imports and the causal link between the allegedly dumped imports and the alleged threat of injury, and SECOFI did not independently gather sufficient evidence to justify initiation of the investigation or request that the Sugar Chamber submit additional information. Consequently, the United States asserts that SECOFI did not have sufficient evidence of threat of material injury to the Mexican sugar industry or of a causal link between the allegedly dumped imports of HFCS from the United States and the alleged threat of injury to justify initiation of the investigation. Therefore, the United States argues that the initiation was inconsistent with Article 5.3 and that the application should have been rejected under Article 5.8.

7.92 Mexico maintains that the application did contain relevant information which, together with information obtained by SECOFI itself, was considered sufficient to justify initiation of the investigation. Mexico asserts that SECOFI conducted an extensive analysis of the information in accordance with Article 5.3 of the AD Agreement, which is set forth in paragraphs 61 to 98 of the notice of initiation. Moreover, Mexico argues that the information concerning causal link is discussed throughout the notice of initiation, and specifically and extensively in paragraphs 61 to 98 of that notice.

7.93 As discussed above, we have concluded that the application filed by the Sugar Chamber was consistent with the requirements of Article 5.2. However, this does not dispose of the question whether the initiation was consistent with the requirements of Article 5.3 of the AD Agreement, to which we now turn. We begin our consideration of this issue by noting the text of Article 5.3 of the AD Agreement, which provides:

"The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation".

7.94 With respect to the question of whether the evidence may be deemed sufficient under the AD Agreement for purposes of initiation, we note the findings of the

Panel in *Guatemala -Cement*, which took into account the reasoning of the Panel in *United States-Softwood Lumber*.<sup>588</sup> We recognize that, because the Appellate Body reversed the *Guatemala-Cement* Panel's conclusion on the issue of whether the dispute was properly before it, that Panel's conclusions in this regard have no legal status.<sup>589</sup> However, the Panel's report sets out a standard that we consider instructive in this case:

"7.54 What constitutes "sufficient evidence" to justify the initiation of an anti-dumping investigation is not defined in the ADP [*sic*] Agreement. In this case, of course, we are bound by the requirements of Article 17.6(i) of the ADP Agreement as the standard of review applicable to our examination of the Ministry's decision to initiate. Article 17.6(i) provides:

"in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned".

7.55 The Panel in *United States - Measures Affecting Imports of Softwood Lumber From Canada* considered much the same question as faces us here in a dispute challenging the self-initiation of a countervailing duty investigation, on the basis, *inter alia*, of allegedly insufficient evidence to warrant initiation.<sup>235</sup> The Panel observed:

"In analyzing further what was meant by the term "sufficient evidence", the Panel noted that the quantum and quality of evidence to be required of an investigating authority prior to initiation of an investigation would necessarily have to be less than that required of that authority at the time of making a final determination. At the same time, it appeared to the Panel that "sufficient evidence" clearly had to mean more than mere allegation or conjecture, and could not be taken to mean just "any evidence". In particular, there had to be a factual basis to the decision of the national investigative authorities and this factual basis had to be susceptible to review under the Agreement. Whereas the quantum and quality of evidence required at the time of initiation was less than that required to establish, pursuant to investigation, the required Agreement elements of subsidy, subsidized imports, injury and causal link

<sup>588</sup> *Guatemala-Cement Panel Report, supra*, footnote 8; *United States-Measures affecting Import of Softwood Lumber from Canada*, SCM/162, BISD40S/358, adopted 27-28 October 1993.

<sup>589</sup> *See Japan-Alcohol AB Report, supra*, footnote 43, at 108.

between subsidized imports and injury, the Panel was of the view that the evidence required at the time of initiation nonetheless had to be relevant to establishing these same Agreement elements".<sup>236</sup>

7.56 The Panel then addressed the appropriate role of a panel in reviewing whether a decision to initiate an investigation was consistent with the requirements of the Tokyo Round Subsidies Code, and set out the standard it applied in evaluating the issue:

"The Panel considered that in reviewing the action of the United States authorities in respect of determining the existence of sufficient evidence to initiate, the Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities. Rather, in the view of the Panel, the review to be applied in the present case required consideration of whether a reasonable, unprejudiced person could have found, based upon the evidence relied upon by the United States at the time of initiation, that sufficient evidence existed of subsidy, injury and causal link to justify initiation of the investigation".<sup>237</sup>

7.57 We believe that the approach taken by the Panel in the *Softwood Lumber* dispute is a sensible one and is consistent with the standard of review under Article 17.6(i). Thus, we agree with the Panel in *Softwood Lumber* that our role is not to evaluate anew the evidence and information before the Ministry at the time it decided to initiate. Rather, we are to examine whether the evidence relied on by the Ministry<sup>238</sup> was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiating the investigation. Moreover, we agree with the view expressed by the Panel in *Softwood Lumber* that the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation.<sup>239</sup> That is, evidence which would be insufficient, either in quantity or in quality, to justify a preliminary or final determination of dumping, injury or causal link, may well be sufficient to justify initiation of the investigation.

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<sup>235</sup> SCM/162. While the *Softwood Lumber* report analyzed the sufficiency of evidence for the initiation of a countervailing duty investigation, these aspects of the report are equally applicable to anti-dumping investigations.

<sup>236</sup> *Ibid.*, para. 332.

<sup>237</sup> *Ibid.*, para. 335.

<sup>238</sup> We note that we are not entirely persuaded that the information in the application was, in fact, all that was reasonably available to the applicant, particularly with respect to the question of threat of material injury. However, for the purposes of our analysis, we have assumed that this was the case.

<sup>239</sup> *Softwood Lumber* at para. 332<sup>n</sup>.<sup>590</sup>

7.95 Our approach in this dispute will similarly be to examine whether the evidence before SECOFI at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence, could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiation. We base our analysis principally on the notice of initiation, but also take into account information that was before SECOFI at the time of its determination, to the extent that consideration of it can be discerned from the notice.

7.96 SECOFI had before it information provided by the applicant, as well as information it obtained itself, concerning increases in imports, price effects of imports, and the condition of the domestic sugar industry. SECOFI, in the notice of initiation, observed that HFCS was used as a sweetener, substituting for sugar, had almost entirely replaced sugar as a sweetener in soft-drinks in the United States over a ten year period, was priced significantly below sugar, and that imports from the United States had increased significantly since 1994, and accounted for an increasing share of consumption in the industrial sector of the sugar market in Mexico. SECOFI also noted that US producers had significant available capacity, and that Mexico was an attractive market for US producers of HFCS. SECOFI observed that there was information concerning the adverse effects the industry could suffer should the growing trend of low-priced HFCS imports continue. The notice of initiation does not proceed to analyze or discuss the information concerning factors relevant to assessing the consequent impact of imports on the domestic industry under Article 3.4. However, this information is contained in the application, and is explicitly referred to in the notice at paragraph 23. We see no basis to conclude that SECOFI ignored this information.

7.97 As the Panel in *Guatemala-Cement* stated, "There is clearly a different standard applicable to making a preliminary or final **determination** of material injury, including threat of material injury, than to determining whether there is sufficient evidence of material injury, including threat of material injury to justify initiation of an investigation,...the subject-matter, or **type** of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of threat of injury, although the quality and quantity is less".<sup>591</sup> Moreover, as we concluded regarding the need to provide information on the Article 3.4 factors in the application, in our view, the AD Agreement does not require the investigating authority to have or consider information on all the Article 3.4 factors in order to determine that there is sufficient evidence to justify initiation. While we would certainly have found it preferable had SECOFI proceeded further to analyze 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.

<sup>590</sup> *Guatemala-Cement Panel Report, supra*, footnote 8, paras. 7.54 -7.57 (footnotes in original).

<sup>591</sup> *Ibid.* para. 7.77 (emphasis in original).

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".

In our view, Article 5.8 does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of an investigation. That is, if there is sufficient evidence to justify initiation under Article 5.3, there is no violation of Article 5.8 in not rejecting the application. Having determined that the initiation of the investigation was not inconsistent with the requirements of Article 5.3, we further conclude that there was no violation of Article 5.8 of the AD Agreement.

7.100 The United States has raised an additional issue concerning the initiation in this dispute. The United States argues that SECOFI failed to resolve a conflict in the evidence concerning whether there was domestic production of HFCS, which was an essential element of the conclusion that the relevant domestic industry for purposes of considering injury was the Mexican sugar industry, and consequently an essential element underpinning the initiation. In the United States' view, SECOFI failed to examine, as required by Article 5.3, the accuracy and adequacy of the evidence provided in the application concerning the domestic industry because it failed to resolve this conflict, and thus did not make a proper decision concerning the relevant domestic industry. Mexico points to a privileged staff working paper, made available in this panel proceeding as Exhibit MEXICO-13, as demonstrating the information relied on by SECOFI in resolving this issue and the exclusion of Mexican producers of HFCS from consideration as the relevant domestic industry.

7.101 It is true, as the United States asserts, that this question of fact is not specifically resolved in the notice of initiation. We have interpreted Article 12.1, which sets out the requirements for public notices of initiation, as **not** requiring the notice of initiation to contain information concerning the factors on the basis of which the domestic industry is defined, or the investigating authority's conclusion in that regard. The question facing us under Article 5.3, however, goes further than this. It requires us to consider whether the investigating authority is required to resolve **all** questions of fact regarding issues inherent to initiation, such as the relevant domestic industry, in particular those relating to the exclusion of certain domestic producers from consideration as the relevant domestic industry, in the context of carrying out its obligation to determine whether there is sufficient evidence of injury under Article 5.3. We must also consider whether, and if so how, the investigating authority is required to make the resolution of **all** such questions of fact, and the consequent disposition of the issue, in this case the exclusion of producers from consideration as the relevant domestic industry, known to the parties. Finally, we must consider on

what basis it may be demonstrated that the investigating authority complied with the obligations of Article 5.3 in the event its actions are challenged before a WTO dispute settlement panel.

7.102 Article 5.3 requires investigating authorities to "examine the accuracy and adequacy of the evidence provided in the application". This examination of the evidence has a purpose - "to determine whether there is sufficient evidence to justify the initiation of an investigation". However, in our view, Article 5.3 only requires the investigating authority to determine whether there is sufficient evidence to justify initiation. As discussed above, we have concluded that SECOFI made such a determination consistently with the requirements of Article 5.3. In our view, Article 5.3 does not impose an obligation on the investigating authority to set out its resolution of **all** underlying issues considered in making that determination.

7.103 Our conclusion in this regard is bolstered by consideration of the differences between the public notices required at the initiation of an investigation, and following a preliminary or final determination. As noted above, in notices of preliminary and final determinations, pursuant to Articles 12.2 and 12.2.2, the investigating authority is required to set forth findings and conclusions reached on all issues of fact and law considered material, as well as respond to the arguments of parties. That is, a notice of preliminary or final determination must set forth explanations for **all** material elements of the determination. A notice of initiation, on the other hand, pursuant to Article 12.1, must set forth specific information regarding certain factors, but need not contain explanations of or reasons for the resolution of **all** questions of fact underlying the determination that there is sufficient evidence to justify initiation.

7.104 This distinction, in our view follows from the fact that the notice of initiation merely begins the process of investigation, putting the public on notice of the fact of initiation, and the product, countries, parties, and allegations involved. The interested parties, in addition to the notice of initiation, are provided a non-confidential version of the application pursuant to Article 6.1.3, which provides more detailed information relevant to their participation in the investigation. During the investigation, parties are entitled to participate in the proceeding, make their arguments to the investigating authority, and have access to certain information developed in the investigation. However, at the point of preliminary or final determination, when a stage of the process of investigation is completed, the investigating authority reaches its conclusions based on the information and arguments developed to that point in the investigation, and preliminary or definitive anti-dumping measures are either imposed or not. The parties', and the public's, interest in a full understanding of the reasons for the imposition of measures, or of a negative determination, is much greater, and the requirement in Article 12.2 that the investigating authority set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" is directed at that interest.<sup>592</sup>

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<sup>592</sup> See *Korea-Anti-Dumping Duties on imports of Polyacetal Resins from the United States (Korea-Resins)*, ADP/92, adopted 27 April 1993, BISD 40S (*Korea-Resins Panel Report*), paras. 209-210, where the Panel noted that the purpose of the requirement for explanations of final determinations in public notices under Article 8:5 of the Tokyo Round Anti-Dumping Code was transparency, that this purpose would be frustrated if, in dispute settlement, the country imposing the measure could rely on reasons not set forth in the public notice, which latter would be inconsistent with or-

7.105 Thus we conclude that Article 5.3 does not establish a requirement for the investigating authority to state specifically the resolution of questions concerning the exclusion of certain producers involved in defining the relevant domestic industry in the course of examining the accuracy and adequacy of the evidence to determine whether there was sufficient evidence to justify initiation. Of course, when SECOFI's actions in this regard were challenged in this dispute settlement proceeding, it became incumbent upon Mexico to show that it had exercised its rights consistently with its obligations under the AD Agreement.<sup>593</sup> In addition to relying on the notice of initiation, Mexico has produced a document, Exhibit MEXICO-13, which it proffers as demonstrating SECOFI's analysis and conclusion regarding the definition of the relevant domestic industry. Mindful of the standard of review and Article 17.5(ii), we note that we may consider in our examination of this issue only what was actually available to the investigating authority at the time of the initiation in evaluating the consistency of the initiation with Article 5.3, and must consider whether SECOFI's establishment of the facts was proper and its evaluation of those facts was unbiased and objective.

7.106 The United States objects to our consideration of MEXICO-13, arguing that it is not part of the record before SECOFI, and may therefore not be taken into account, that it is a privileged document<sup>594</sup> that was not, and could not have been, available to the parties to the investigation, and that in any event, its substance fails to demonstrate that SECOFI resolved the question of the existence of Mexican production of HFCS. The United States argues that, in the absence of a clear resolution of this issue, made available to the parties to the investigation at the time of initiation, either in the public notice thereof or some other form, the parties are deprived of their right to see, in a timely fashion, information relevant to the presentation of their case, in violation of Article 6.4 of the AD Agreement.

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

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derly dispute settlement, because a full statement of reasons "enabled Parties to the Agreement to assess whether recourse to the dispute settlement mechanism...was appropriate...".

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

<sup>594</sup> Mexico does not claim that MEXICO-13 contains confidential information in the sense of Article 6.5 of the AD Agreement.

could not have had access<sup>595</sup>, but asserted that it was included in the administrative record in the NAFTA proceeding. Mexico contended that the document demonstrated SECOFI's consideration of the evidence on the question of the existence of domestic production of HFCS, and the decision to exclude related Mexican HFCS producers from consideration as the relevant domestic industry. We are satisfied, based on Mexico's arguments and submissions in this proceeding, that MEXICO-13 is genuine, and may be considered in this dispute under Article 17.5(ii). We draw no conclusions as to whether MEXICO-13 was or was not omitted, properly or improperly, from the record submitted in the NAFTA proceeding - that question arises under the NAFTA rules, and is not within the scope of our terms of reference.

7.109 Concerning the question whether SECOFI should have made the substance of MEXICO-13 known to the parties at initiation, pursuant to Article 6.4, in our view, the obligation imposed on the investigating authority under that provision must take into account the stage of the proceeding, and the substantive obligations of the investigating authority at that point. As we have concluded above, at initiation the investigating authority is not required to set out its resolution of questions of fact relating to the exclusion of some producers from consideration as the domestic industry the investigating authority deems relevant in determining whether there is sufficient evidence of injury to justify initiation. Pursuant to Article 6.1.3, the investigating authority is required to provide the parties with a copy of the application, due regard being paid to the requirement to protect confidential information as provided for in Article 6.5. The parties in this case were provided with a non-confidential version of the application, which, it has not been contested, included information relied upon in MEXICO-13.<sup>596</sup> Moreover, while not addressed in any detail, the notice of initiation does refer, in paragraphs 89 and 90, to the information on HFCS production capacity, which is referred to in MEXICO-13. It is clear from the fact that SECOFI found that the Sugar Chamber had standing, and initiated the investigation, that SECOFI was satisfied that the sugar producers comprised the relevant domestic industry. We agree that the information concerning the domestic industry is relevant to the presentation of the parties' cases. We also consider that, in this case, the parties had sufficiently timely opportunities to see the information.<sup>597</sup> This is particularly true since SECOFI's preliminary determination sets out in more detail the underlying information, and explains SECOFI's 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 inter-

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

<sup>596</sup> We have no reason to believe that the relevant information was not provided to the parties with it. The United States has not disputed this point. The United States has acknowledged that the parties received a non-confidential version of the application, including the non-confidential annexes, and Mexico does not claim that the document contains confidential information in the sense of Article 6.5.

<sup>597</sup> We note that Article 6.4 states a requirement to allow parties to see "information" that is relevant to the parties' presentation of their cases, that is not confidential, and that is used by the authorities. It is thus not clear whether Article 6.4 necessarily applies to conclusions drawn by the authority on the basis of information, or only applies to the information itself. However, we need not resolve this question, as in this case we find that the Article 6.4 obligation was not violated by Mexico.

puted to impose an independent obligation on the investigating authority to issue explanations or conclusions that are not required to be issued under Article 5.3.

7.110 Turning to the substance of MEXICO-13, we note that it reflects the information on domestic production capacity of Mexican producers of HFCS provided in the annexes to the Sugar Chamber's application, contains information on these producers' imports of HFCS, and states that pursuant to the relevant legislation, it could be considered that the two companies in question were not domestic producers of the identical product. Thus, MEXICO-13 is relevant to a particular question of fact at issue - the existence of domestic production of HFCS - the resolution of which permitted the exclusion of two HFCS producers from consideration as the relevant domestic industry. MEXICO-13 pertains only to this question, which is a subsidiary underlying issue that is not, in our view, dispositive of the determination whether there was sufficient evidence to justify initiation required by Article 5.3. That determination is reflected in the notice of initiation, as we have noted above.<sup>598</sup> We conclude that MEXICO-13, together with the notice of initiation, does demonstrate that SECOFI examined the evidence concerning this underlying question of fact, and resolved the issue of whether there was domestic production of HFCS, and concluded that the two Mexican producers of HFCS should not be considered the relevant domestic industry based on their status as importers of HFCS. The United States' arguments relating to SECOFI's consideration of the exclusion of the two producers do not persuade us that SECOFI's determination of the sufficiency of the evidence to justify initiation fails to meet the requirements of Article 5.3. In our view, Article 5.3 cannot be interpreted to require the investigating authority to issue an explanation of how it has resolved **all** underlying questions of fact at initiation. That is a requirement that arises at later stages of the proceeding, and is explicitly set forth in Article 12.2. Although we consider it would be beneficial for investigating authorities to consider and decide such questions explicitly, and make their reasons known at initiation, at least to the parties to the investigation, we can find no requirement to do so in the text of the AD Agreement.

#### *D. Alleged Violations Regarding the Final Determination*

##### *1. Consideration of Impact of Dumped Imports in a Threat of Injury Determination*

7.111 The United States contends that SECOFI's final determination of threat of material injury is insufficient to satisfy the requirements of Article 3 of the AD Agreement. In the United States' view, a determination of threat of injury cannot be based only on an examination of the factors set forth in Article 3.7 of the AD Agreement, which is what the United States contends SECOFI did in this case. Rather, the United States argues, a determination of threat of injury also requires an assessment of the impact of imports on the domestic industry through an examination of the relevant economic factors set forth in Article 3.4.

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<sup>598</sup> We note, moreover, that the resolution of this question of fact would not have been determinative of the sufficiency of the evidence of threat of injury to the domestic industry to justify initiation.

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 imminent", and (2) the investigating authorities must conclude that "further dumped exports are imminent and that, unless protective action is taken, material injury would occur".<sup>599</sup> In the view of the United States, SECOFI could not properly reach either of these conclusions without considering the economic factors set forth in Article 3.4.

7.113 In addition, the United States argues that limiting threat of injury analysis to an examination of Article 3.7 factors ignores the nonexclusive terms of Article 3.7 itself. Article 3.7 only states that in making a threat determination the investigating authority "should consider, inter alia, such factors as" the enumerated factors set forth in Article 3.7(i)-(iv). The use of permissive, rather than mandatory, language (i.e., "should consider"), and of the term "inter alia" (i.e., "among other things"), clearly implies that a number of factors other than those specifically enumerated may also be relevant to a threat determination.

7.114 The United States concludes that the AD Agreement clearly intended an assessment of the likely impact of imports and the relevant economic factors set forth in Article 3.4. Otherwise, an investigating authority could merely evaluate the likely trends in, and projections of, volume increases, capacity increases, prices, and increases in inventories with respect to the dumped imports (i.e., the four specific threat factors set forth in Article 3.7(i)-(iv)), without ever considering whether those imports would have any impact whatsoever on the pertinent domestic industry. Such a result is contrary to the plain language of both Articles 3.4 and 3.7.

7.115 The United States also argues that a failure to consider the likely effect of dumped imports on the pertinent domestic industry in determining threat of material injury violates Article VI:6(a) of GATT 1994.

7.116 Mexico maintains that SECOFI's final determination of threat of injury was based on an assessment of the impact of dumped HCFS imports on the domestic

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<sup>599</sup> The United States cites in this connection *Korea-Resins Panel Report*, para. 271 ("a proper examination of whether threat of material injury was caused by dumped imports necessitated a **prospective analysis of a present situation** with a view to determining whether a 'change in circumstances' was 'clearly foreseen and imminent'") (emphasis added by the United States); *Ibid.* 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).

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;
- (h) magnitude of the margin of dumping;
- (i) return on investments; and
- (j) cash flow.

7.117 Mexico asserts that SECOFI properly established the factors to be considered in examining the impact of the dumped imports. In doing so, SECOFI gave greater weight to the Article 3.7 factors, because they were fundamental in concluding that imports of HFCS at dumped prices would substantially increase in the immediate future, thus creating a situation in which such imports would cause injury. Mexico argues that SECOFI's comprehensive examination of all the factors deemed relevant demonstrated that there was a threat of injury to the domestic industry and that, unless anti-dumping measures were imposed, imports at dumped prices would continue and cause material injury to such industry.

7.118 Consideration of this issue requires us to interpret the provisions of Article 3 of the AD Agreement, and establish what, if any, are the interrelationships between them.<sup>600</sup> Article 3 is entitled "Determination of Injury". Footnote 9 is appended to the title of Article 3, and provides "Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article". Article 3.1 is a general provision, and establishes that a determination of "injury"

"shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products".

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

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 analyzing a "product line" broader than the like product if information specific to the domestic production of the like product is not obtainable. Article 3.7 establishes specific factors to be considered in determining threat of injury ("In making a determination regarding the existence of a threat of material injury, the authorities should consider, inter alia, such factors as..."). Article 3.8 specifies that special care must be used in deciding cases of threat of material injury.

7.120 It is undisputed in this case that Mexico considered the factors set out in Article 3.7 in making its final determination of threat of injury.<sup>601</sup> The parties are also in general agreement that some consideration of the impact of the dumped imports on the domestic industry is required in making a final determination of threat of material injury. The difference between the parties centers on how this consideration is to be conducted, and whether in fact SECOFI undertook such consideration.

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

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<sup>601</sup> As discussed further below in section VII.D.3, the United States claims that Mexico's consideration under Article 3.7(i) was inconsistent with the requirements of that provision.

factors, as fundamental to the finding that dumped HFCS imports would increase in the immediate future, creating a situation in which material injury would occur.

7.123 Thus, the dispute before us requires us to determine whether a specific analysis of the impact of the dumped imports on the domestic industry is required in a threat of injury determination, and if so, what is the nature of the analysis required.

7.124 In our view, the text of the AD Agreement is clear on the first point. Article 3.7 sets forth several factors which must be considered, **among others**, in making a determination regarding the existence of threat of injury. Article 3.7 then concludes: "No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur". This language, in our view, recognizes that factors other than those set out in Article 3.7 itself will necessarily be relevant to the determination.

7.125 Moreover, it is clear that in making a determination regarding the threat of material injury, the investigating authority must conclude that "**material injury would occur**" (emphasis added) in the absence of an anti-dumping duty or price undertaking. A determination that material injury would occur cannot, in our view, be made solely on the basis of consideration of the Article 3.7 factors. Rather, it must include consideration of the likely impact of further dumped imports on the domestic industry.

7.126 While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry. The Article 3.7 factors relate specifically to the questions of the likelihood of increased imports (based on the rate of increase of imports, the capacity of exporters to increase exports, and the availability of other export markets), the effects of imports on future prices and likely future demand for imports, and inventories. They are not, in themselves, relevant to a decision concerning what the "consequent impact" of continued dumped imports on the domestic industry is likely to be. However, it is precisely this latter question - whether the "consequent impact" of continued dumped imports is likely to be material injury to the domestic industry - which must be answered in a threat of material injury analysis. Thus, we conclude that an analysis of the consequent impact of imports is required in a threat of material injury determination.

7.127 Turning to the question of the nature of the analysis required, we note that Article 3.4 of the AD Agreement sets forth factors to be evaluated in the examination of the impact of dumped imports on the domestic industry. Nothing in the text or context of Article 3.4 limits consideration of the Article 3.4 factors to cases involving material injury. To the contrary, as noted above, Article 3.1 requires that a determination of "injury", which includes threat of material injury, involve an examination of the impact of imports, while Article 3.4 sets forth factors relevant to that examination. Article 3.7 requires that the investigating authorities determine whether, in the absence of protective action, material injury would occur. In our view, consideration of the Article 3.4 factors in examining the consequent impact of imports is required in a case involving threat of injury in order to make a determination consistent with the requirements of Articles 3.1 and 3.7.

7.128 The question which next must be answered is what is the nature of the consideration of the Article 3.4 factors required in a threat of injury determination. The text of Article 3.4 is mandatory:

"The examination of the impact of the dumped imports on the domestic industry concerned **shall include** an evaluation of **all relevant economic factors** and indices having a bearing on the state of the industry, **including**..." (emphasis added).

In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.<sup>602</sup>

7.129 A decision in the area of special safeguard measures for textiles under the Agreement on Textiles and Clothing (ATC), as well as two recently circulated panel reports addressing Article XIX safeguard measures imposed under the Safeguards Agreement, have reached the same conclusion in analogous contexts. These Panels held that in addressing the question of injury in the respective safeguards contexts, the responsible authorities are required to consider, and their determination must reflect the consideration of, all the factors concerning injury set out in the relevant provisions of the relevant WTO Agreements.<sup>603</sup> Moreover, the Panels concluded that, while the authorities may determine that some factors are not relevant to or do not weigh significantly in the decision, the authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. Thus, for example, the Panel in *United States - Shirts and Blouses*<sup>604</sup>, observed that the wording of Articles 6.2 and 6.3 of the ATC makes it clear that all 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

<sup>602</sup> In this regard, we note the text of Article 12.2.2, which provides:

"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures..."

<sup>603</sup> We are aware that the standard for injury determinations in safeguards cases (serious injury or serious damage) is different from that applied to injury determinations in the anti-dumping context (material injury). However, the same type of analysis is provided for in the respective agreements - evaluation, or examination, of a listed series of factors to be considered in determining whether the necessary injury exists.

<sup>604</sup> *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India (United States - Shirts and Blouses)*, WT/DS33/R (*United States - Shirts and Blouses Panel Report*), as upheld by WT/DS33/ABR (*United States - Shirts and Blouses AB Report*), adopted 23 May 1997, para. 7.25.

appropriate explanation. The relevant language of the ATC is quite similar to that of Article 3.4, providing in pertinent part:

"the Member **shall examine** the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment".<sup>605</sup>

The Panel concluded that the use of the phrase "shall examine" "makes clear that each of the listed factors is not only relevant but must be examined".<sup>606</sup>

7.130 In *Korea-Dairy Safeguard*, the Panel was considering Article 4.2 of the Agreement on Safeguards, which provides, in language much like that of Article 3.4 of the AD Agreement, that the competent authority, in making a determination of serious injury or threat thereof:

"**shall evaluate** all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, **in particular**, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment" (emphasis added).

The Panel concluded that the text of this provision made it clear that:

"among "all relevant factors" that the investigating authorities "shall evaluate", the consideration of the factors listed is always relevant and therefore required, even though the authority may later dismiss some of them as not having a bearing on the situation of that industry".<sup>607</sup>

The Panel continued to note that in reviewing the Korean authorities' determination, it would examine

"whether at the time of the determination all factors listed in Article 4.2 were appropriately considered; whether the Korean authorities explained how each factor considered supports (or detracts from) a finding of serious injury; and whether valid reasons have been put forward for dismissing a considered factor as not being relevant to the serious injury determination in this case".<sup>608</sup>

7.131 In sum, we consider that Article 3.7 requires a determination whether material injury would occur, Article 3.1 requires that a determination of injury, including threat of injury, involve an examination of the impact of imports, and Article 3.4 sets out the factors that must be considered, among other relevant factors, in the exami-

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<sup>605</sup> Article 6.3 of the Agreement on Textiles and Clothing (emphasis added).

<sup>606</sup> *United States-Shirts and Blouses Panel Report*, *supra*, DSR 1997:I, 343, para. 7.25.

<sup>607</sup> *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea-Dairy Safeguard)*, WT/DS98/R (*Korea-Dairy Safeguard Panel Report*), circulated 21 June 1999, para. 7.55. See also *Argentina-Safeguard Measures on Imports of Footwear (Argentina-Footwear Safeguard)*, WT/DS121/R (*Argentina-Footwear Safeguard Panel Report*), circulated 25 June 1999, para. 8.123.

<sup>608</sup> *Korea-Dairy Safeguard Panel Report*, para. 7.55.

nation 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.

7.132 In our view, this conclusion is mandated by the language of Article 3.7 of the AD Agreement itself. Moreover, the entirety of Article 3, which serves as context for the interpretation of Article 3.7, supports this conclusion. Article 3 as a whole deals with the determination of injury in anti-dumping investigations, which is defined as material injury, threat of material injury, or material retardation of the establishment of a domestic industry. With respect to the question of threat of material injury, we believe an investigating authority cannot come to a reasoned conclusion, based on an unbiased and objective evaluation of the facts, without taking into account the Article 3.4 factors relating to the impact of imports on the domestic industry. These factors all relate to an evaluation of the general condition and operations of the domestic industry - sales, profits, output, market share, productivity, return on investments, utilization of capacity, factors affecting domestic prices, cash flow, inventories, employment, wages, growth, ability to raise capital. Consideration of these factors is, in our view, necessary in order to establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7.

7.133 Moreover, even if a consideration of all the Article 3.4 factors were not required in a threat of injury determination by the text of the AD Agreement, in our view Article 3.7 would nonetheless require that the investigating authorities consider relevant economic factors concerning the impact of imports on the domestic industry, in order to reach a reasoned conclusion regarding threat of material injury. Such an analysis would be necessary in order to explain the present, and anticipated future, condition of the domestic industry sufficiently to support the conclusion that "material injury would occur", as provided in Article 3.7, unless protective action is taken. Moreover, that analysis could not take into account only factors which support an affirmative determination, but would have to account for all relevant factors, including those which detract from an affirmative determination, and explain why the particular factors considered were deemed relevant.

7.134 The question we turn to next is whether SECOFI's conclusion of threat of material injury, specifically with respect to analysis of the impact of dumped imports on the domestic industry, as reflected in its final determination, satisfies the requirements of Articles 3.7 and 3.4.<sup>609</sup>

7.135 SECOFI's analysis of threat of injury is developed in paragraphs 427 through 550 of the final determination. Paragraphs 427 through 447 describe the international and Mexican markets for HFCS. Of particular relevance to our consideration of the issues in this case are the following:

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<sup>609</sup> In this regard, we bear in mind the standard of review applicable to the investigating authorities' assessment of the facts, as set forth in Article 17.6(i). We base our analysis of the consistency of SECOFI's determination with Mexico's obligations under the AD Agreement on the Notice of *Final Determination*, US-1, MEXICO-6. See Articles 12.2 and 17.5(ii) of the AD Agreement.

- (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
- (g) paragraphs 534 through 550, which address other injury issues.

7.136 Paragraphs 529 and 530 concern investment projects by the domestic industry. SECOFI specifically acknowledges that "it did not have sufficient information at its disposal to evaluate the general situation of investment projects in the sugar industry". Paragraph 531 states SECOFI's conclusion that in the event of continuing dumped imports the cash flow and the capacity to pay of the sugar mills would be adversely affected. However, there is no analysis of the state of the domestic industry's finances, or its ability to generate funds in order to pay off debts.

7.137 Paragraph 532 describes arguments made by the exporters attributing the threat of injury to factors other than the dumped imports; in particular, excessive indebtedness, excess inventories, and domestic production surpluses. These arguments are dismissed by SECOFI in paragraph 533, which concludes that such problems do not "eliminate or exclude" threat of injury being caused by the dumped imports. There is no analysis of the actual or projected level of indebtedness of the industry, or its ability to service its debt, either in the past, or projected for the future.

7.138 Paragraphs 534 through 550 address other injury issues, chiefly the impact of eventual anti-dumping measures on imports of HFCS upon the economy as a whole, whether a lesser-duty should be applied (paragraphs 542 through 544) and the effect of an alleged agreement between soft-drink bottlers and sugar producers to limit the former's imports of HFCS (paragraphs 545 through 547).

7.139 Paragraphs 551 through 556 set forth the conclusions of SECOFI, and paragraphs 557 through 566 set forth the decision concerning the amount of anti-dumping duties and instructions for collection.

7.140 The final determination reflects no meaningful analysis of a number of the Article 3.4 factors: the Mexican sugar industry's profits, output, productivity, utilization of capacity, employment, wages, growth, or ability to raise capital.<sup>610</sup> Moreo-

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<sup>610</sup> There is some information concerning some of these elements reflected in the determination. However, the mere recitation of data does not constitute explanation, or findings and conclusions, sufficient to satisfy the requirements of Article 12.2 of the AD Agreement. Mexico also pointed to certain working papers in the administrative file which contain information on certain of the Article 3.4 factors. However, unless consideration of a factor is reflected in the final determination, we do

ver, 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 capacity of the exporting producers, but there is no meaningful analysis, based on facts, concerning the likely impact of further dumped imports on the domestic industry in the final determination, e.g., whether such increased imports are likely to account for an increased share of the growing Mexican market, have an effect on production or sales of sugar, or affect the profits of the domestic producers, etc, in such a manner as to constitute material injury. SECOFI also concluded that the dumped imports undersold the domestic product during the period of investigation, and that the dumping margins were responsible for the low prices of the dumped imports. SECOFI therefore concluded that a jump in demand for dumped imports could be expected, forcing sugar prices downward. However, there is no discussion of movements in prices of either Mexican sugar or the dumped imports - that is, there is no discussion of whether sugar prices had been "forced downward" during the period of investigation, which in our view leaves the conclusion that dumped imports in the future would force prices down in the realm of speculation. Merely that imports are likely to continue to be priced below the domestic product does not necessarily lead to the conclusion that there is a threat of injury.<sup>611</sup> If the price level of the domestic product generates sufficient revenues and profits, injury may be unlikely.

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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.

<sup>611</sup> This is particularly true since it appears that there is a "natural" price difference between sugar and HFCS, with HFCS priced below sugar. Notice of Initiation, US-3, MEXICO-1, para. 79. Although this price difference was mentioned in the preliminary determination, US-2, MEXICO-2, para. 277, there is no mention of it in the final determination. Nor is there any analysis as to the extent of any such "natural" price difference as compared with the observed price undercutting.

7.142 In sum, SECOFI's determination of threat of material injury fails to adequately address the factors set forth in Article 3.4 concerning the impact of the dumped imports on the domestic industry. We therefore conclude that SECOFI's determination of threat of material injury is inconsistent with Mexico's obligations under Article 3.1, 3.4 and 3.7 of the AD Agreement.<sup>612</sup>

2. *Determination of Threat of Injury on the Basis of Consideration of the Industry as a Whole*

7.143 The United States notes that SECOFI concluded in the final determination that the relevant domestic industry for purposes of its threat of injury determination consisted of Mexican sugar producers. The United States argues that SECOFI's analysis of threat of injury was fundamentally flawed, because SECOFI considered only a portion of the industry's production, that serving the industrial market for sugar, and never considered the impact of dumped imports on the domestic industry as a whole. In the United States' view, while the AD Agreement does not preclude an analysis of a particular market served by a domestic industry in the context of an examination of "all relevant economic factors and indices having a bearing on the state of the industry" (Article 3.4), it does not permit a determination of material injury or threat thereof to a part of the domestic industry's production to be equated with injury or threat to the industry as a whole.

7.144 Rather, the United States argues, the AD Agreement requires an assessment of material injury or threat thereof to be based upon the impact of dumped imports on the entire domestic industry (or a substantial portion thereof). The AD Agreement explicitly provides for only two circumstances in which it may be relevant and permissible to examine less than the entire domestic industry: (1) exclusion of related parties and (2) division of the Member's territory into smaller competitive regions.<sup>613</sup> Neither of these circumstances justified SECOFI's decision in this case to focus its threat analysis in the final determination solely on the part of the domestic industry's production serving the industrial sugar market.

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.

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<sup>612</sup> In light of our conclusion, we consider it unnecessary to address whether Mexico's determination is inconsistent with Article VI:6(a) of GATT 1994 in this respect.

<sup>613</sup> See Article 4.1(i)-(ii) of the AD Agreement.

7.146 Mexico maintains that SECOFI considered in its analysis all sugar producers and thus made a determination of threat of injury to the domestic industry as a whole. Mexico acknowledges that SECOFI separately identified the production consumed by the industrial sector from production consumed by the household sector, in view of the specific competition of the former with HFCS imports, and considered that information particularly relevant. Mexico argues that SECOFI had sufficient information for separate identification of domestic sugar production sold in the industrial sector and production sold in the household sector, which allowed it to consider the threat of injury to production sold in the industrial sector of the market, relying on Article 3.6 of the AD Agreement. Moreover, Mexico asserts that the affirmative threat of injury determination would not have involved a substantial change if household consumption had also been taken into consideration.

7.147 In considering this issue, we note that Article 4.1 defines the term "domestic industry" as "referring to the **domestic producers as a whole** of the like products or to **those of them** whose collective output of the products constitutes a major proportion of those products" (emphasis added).<sup>614</sup> An anti-dumping duty may only be applied if there is an affirmative determination of "injury", which as previously noted is defined in footnote 9 as "material injury to a **domestic industry**, threat of material injury to a **domestic industry**, or material retardation of the establishment of **such an industry**" (emphasis added). In our view, the definition of the domestic industry in an anti-dumping investigation has unavoidable consequences for the conduct of the investigation and the determination that must be made. These two provisions inescapably require the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1, that is, the domestic producers of the like product as a whole, or those of them whose collective output of the like product constitutes a major proportion of the domestic production of the like product.

7.148 In the case before us, SECOFI defined the domestic industry as "manufacturers of cane sugar".<sup>615</sup> Thus, SECOFI was required, by the explicit terms of the AD Agreement, to consider and determine the question of threat of material injury with respect to that industry.<sup>616</sup> The question before us is whether SECOFI did so.

7.149 In determining threat of injury, SECOFI concluded that there was a significant rate of increased imports of HFCS from the United States, indicating the likelihood of substantially increased importation, based on a finding that dumped imports had increased substantially both absolutely and in relative terms. SECOFI found that imports of HFCS from the United States had increased from 61,000 tons in 1994, to

<sup>614</sup> There are two situations set out in Article 4.1 in which the definition of domestic industry may be modified: exclusion of related parties (Article 4.1(i)), and a case involving a regional industry (Article 4.1(ii)). It is undisputed that this case does not involve either of these situations.

<sup>615</sup> *Final Determination*, para. 441.

<sup>616</sup> There is no dispute that SECOFI had information enabling it to distinguish sugar sold in the industrial market from that sold in the household market, and thus had information specific to sales in the industrial market. Mexico insists on the reliability of the information concerning the industrial market. Even assuming its reliability, however, merely that the information was reliable does not constitute a legal justification for basing a determination of threat of injury to the sugar industry on information regarding only part of that industry's production of the like product.

91,000 tons in 1995 (49% above the previous year) and 193,000 tons in 1996 (112% above the previous year).<sup>617</sup>

7.150 SECOFI also found that the increased market share of imports supported the conclusion that increased imports were likely. Specifically, SECOFI found that subject imports had increased from 3% of sugar consumption in 1994, to 4% in 1995 and 9% in 1996.<sup>618</sup> However, SECOFI excluded sales to household users from sugar consumption for purposes of calculating market share. This is clearly stated in the final determination:

"[T]he petitioner argued that all imports of HFCS are destined to the industrial sector and not to the household sector, and thus **the Ministry calculated the apparent domestic consumption that corresponds specifically to the former sector**" (emphasis added).<sup>619</sup>

7.151 Likewise, SECOFI concluded that imports were entering at prices that will have a significant depressing effect on domestic prices, likely increasing demand for further imports, on the basis of a finding that the prices of subject imports were significantly below Mexican sugar prices during the period of investigation. In particular, SECOFI found that, during the period of investigation, on average, the price of imported HFCS-42 was 40 per cent below the price of standard sugar, and the price of imported HFCS-55 was 33 per cent below the price of refined sugar.<sup>620</sup>

7.152 However, SECOFI calculated the average domestic prices of standard and refined sugar once again excluding sales to household users:

"For calculating the domestic price of refined and standard sugar ...the Ministry ... considered the information of domestic producers concerning **sales invoices for refined and standard sugar, corresponding to their main clients in the industrial sector**" (emphasis added).<sup>621</sup>

7.153 Sales to the industrial sector of the Mexican sugar market accounted for 53 per cent of total Mexican sugar consumption.<sup>622</sup> Thus, SECOFI's analysis and findings concerning market share and prices<sup>623</sup> are based on information accounting for only 53 per cent of the production of the domestic industry, and not on information regarding the domestic industry as a whole, and thus are not consistent with the requirements of Article 3.1, 3.2 and 3.7 of the AD Agreement.

7.154 It is important to differentiate the consideration of factors relevant to the injury analysis on a sectoral basis, so as to gain a better understanding of the actual functioning of the domestic industry and its specific markets and thus of the impact of imports on the industry, from the **determination** of injury or threat of injury on the basis of information regarding only production sold in one specific market sector, to the exclusion of the remainder of the domestic industry's production. There is cer-

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<sup>617</sup> *Final Determination*, para. 453.

<sup>618</sup> *Ibid.*, para. 469.

<sup>619</sup> *Ibid.*, para. 461.

<sup>620</sup> *Ibid.*, para. 499.

<sup>621</sup> *Ibid.*, para. 496.

<sup>622</sup> *Ibid.*, para. 465.

<sup>623</sup> *See also Ibid.*, 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).

tainly 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 analysis limited to that portion of the domestic industry's production sold in one market sector is sufficient for establishing injury or threat of injury to the domestic industry, consistently with the AD Agreement. It is undisputed in this case that SECOFI defined the domestic industry as consisting of all sugar producers. What SECOFI failed to do, however, was assess the question of injury to those producers on the basis of their production of the like product, sugar. Instead, it assessed the question of threat of injury only with reference to that portion of sugar producers' production that was sold in the industrial market, and took no account of the fact that almost half of production was sold in the household market.<sup>624</sup>

7.155 We recognize that a conclusion that there is injury or threat of injury to a specific sector could be indicative of injury or the threat of injury to the industry, as long as the sector in question were sufficiently representative of the industry concerned as a whole. However, if this is the basis of the investigating authority's determination, there must be an explanation of why the information and conclusions relating to the specific market sector are considered by the investigating authority to be representative of the domestic industry as a whole.<sup>625</sup> There is nothing in the final determination to suggest that SECOFI considered that the situation of the domestic industry with regard to the portion of its production sold in the industrial market to the situation of the sugar industry represented the situation of the domestic industry with regard to its production of the like product, sugar. There is no consideration of the impact of the household sector of the market on the situation of the industry.

7.156 SECOFI justified its focus on production for the industrial sector on the basis of Articles 65 and 66 of the Regulations of the Mexican Foreign Trade Law, which it

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<sup>624</sup> Mexico argues that sugar sold in the industrial market constitutes a "major proportion" of the domestic production within the meaning of Article 4. However, we note that there is no explicit discussion of this in the final determination. In any event, this aspect of the definition of domestic industry allows the consideration of **producers** whose collective output of the like product constitutes a major proportion of domestic production of that product as the domestic industry. It does not allow a finding of injury, or threat of injury, on the basis of the effects of imports on a major proportion of the **production** of the like product of all producers.

<sup>625</sup> A similar conclusion has been reached in the context of the serious injury determination in safeguards investigations in two recently circulated Panel reports, *Korea-Dairy Safeguard Panel Report*, *Argentina-Footwear Safeguard Panel Report*. The issue addressed in each report is similar to that raised by this case. In both instances, the investigating authorities considered separate sectors of domestic production and the domestic market in conducting their analysis of whether there was serious injury to the domestic industry. Article 4.1(c) of the Safeguards Agreement defines the domestic industry in terms almost identical to those of the AD Agreement, as "the producers as a whole of the like or directly competitive products ..., or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". Both Panels concluded that the failure of the investigating authorities to either consider all sectors, or to relate their conclusions concerning specific sectors to the industry as a whole, resulted in injury determinations that were not based on injury to the industry "as a whole", inconsistent with the requirements of the Safeguards Agreement. *Korea-Dairy Safeguard Panel Report*, para. 7.58, *Argentina-Footwear Safeguard Panel Report*, para. 8.137 & fn. 514.

concluded allowed the Ministry to study industries on a sectoral basis and to "separately identify" the domestic production of the like product on the basis of sales to different market sectors.<sup>626</sup> Article 66 of those Regulations reflects Article 3.6 of the AD Agreement, and Mexico relied on Article 3.6 in making its argument before us. Article 3.6 provides:<sup>627</sup>

"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 produc-

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<sup>626</sup> *Final Determination*, para. 463. It should be noted that, when discussing this issue in its first submission, Mexico omitted all references to Mexican law, but did rely on Article 3.6 of the AD Agreement.

<sup>627</sup> Article 66 of Mexico's Regulations provides:

"The effect of imports subject to unfair practices shall be evaluated in relation to domestic production of the identical or like product when the available data allow its separate identification on the basis such criteria as the production process, sales by producers and their profits. If it is not possible to identify production separately, the effect of such imports shall be assessed by analysing production of the narrowest group or range of products which includes the identical or like product for which all the necessary information to show injury can be provided".

Article 65 of Mexico's Regulations, which has no analogue in the AD Agreement, provides:

"The Ministry shall evaluate the economic factors described in the preceding Article in the context of the economic cycle and conditions of competition specific to the industry affected. For that purpose, the requesting parties shall submit information on the relevant factors and indicators and characteristics of the industry covering at least the three years preceding the submission of the request, including the period under investigation, unless the enterprise concerned had not been established for the whole of this period. In addition, domestic producers making a request or the organizations representing them shall submit economic studies, case studies, technical literature and national and international statistics on the performance of the market concerned, or any other documentation permitting identification of economic cycles and conditions of competition specific to the industry affected".

There is nothing in this provision which refers to or justifies consideration of injury to the domestic industry on the basis of information concerning a particular market segment.

tion 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.<sup>628</sup> 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.<sup>629</sup>

7.159 In the course of the proceeding, this approach, which was reflected in the notice of initiation, and was explicit in the preliminary determination, was challenged by certain of the parties. In the final determination, SECOFI dismissed the arguments of the importers in this regard, and explained its decision to exclude sales to the household user sector of the market from its analysis of threat of material injury:

"assessing the threat of injury to all sugar production would mean including production earmarked for household consumption, which was never threatened by imports of HFCS from the United States...".

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"[T]he Ministry decided to assess the impact of the imports under investigation taking into account the specific nature of competition within this industry and, thus, to pinpoint domestic production threatened by the presence of imports of HFCS from the United States of America, finding that it had sufficient information at its disposal to isolate the industrial segment of the domestic market for purposes of its investigation".<sup>630</sup>

That is, in order to determine whether there was threat of injury to the domestic industry, SECOFI deliberately excluded from its analysis production sold in the household market **because** that portion of the industry's market, accounting for 47 per cent of sugar consumption, would not be affected by the imports. However, Mexico acknowledged before us that events in the household market would have an impact on

<sup>628</sup> The fact that SECOFI was able to identify the portion of the domestic industry's production of the like product sold in the industrial market is irrelevant to the question whether the AD Agreement permits an injury determination on the basis of only the portion of the industry's production of the like product sold in that market.

<sup>629</sup> Mexico argues that SECOFI considered information from all sugar producers, and therefore complied with the requirements of Article 3. However, the requirement to determine injury to the domestic industry as a whole cannot be satisfied by examining information regarding all producers, but only part of their production.

<sup>630</sup> *Final Determination*, paras. 463, 467.

the domestic industry.<sup>631</sup> Absent consideration of production sold in the household market, or an explanation of why the production sold in the industrial market represented the industry as a whole, SECOFI could not make a conclusion regarding threat of injury to the domestic industry consistent with the requirements of the AD Agreement.

7.160 SECOFI's approach amounts to determining threat of injury to a sector of the domestic industry, that producing sugar for the industrial market, rather than on the basis of the domestic industry as a whole, despite the fact that the sugar sold in one market is indistinguishable from that sold in the other (except by the identity of the purchaser) and all sugar producers apparently sold sugar in both markets. SECOFI's reasoning for undertaking this approach was basically that sugar production destined for household consumption cannot be hurt by dumped imports of HFCS.<sup>632</sup> In SECOFI's view, injury or threat of injury should be determined only for that segment of domestic production which directly competes with subject imports. As noted above, while an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the AD Agreement, such an analysis does not excuse the investigating authority from making the determination required by that Agreement - whether dumped imports injure or threaten injury to the domestic industry as a whole. By limiting its analysis to the portion of the domestic industry's production sold in the industrial market, SECOFI ignored possible effects of imports on the portion of the domestic industry's production sold in the household sector, and ignored the effect of the household sector on the condition of the domestic producers of sugar. Thus, SECOFI failed to make a determination of threat of material injury to the domestic industry as a whole consistently with the requirements of the AD Agreement.

7.161 Mexico argued before us that threat of injury would have been found even if consumption by the household sector had been taken into consideration. However, we can find nothing in the final determination to suggest that such an analysis was undertaken by SECOFI in reaching its determination.

7.162 We therefore conclude that Mexico's determination of threat of injury is inconsistent with its obligations under Article 3.1, 3.2, 3.4 and 3.7 of the AD Agreement.

### 3. *Determination of Likelihood of Substantially Increased Importation*

7.163 The United States contends that SECOFI did not consider the likelihood of substantially increased imports, as required by Article 3.7(i) of the AD Agreement, because it failed to take into consideration an alleged agreement between Mexican sugar refiners and soft-drink bottlers to restrain the bottlers' use of HFCS. The importers had argued before SECOFI that there was no basis for finding a threat of material injury in light of the alleged agreement.<sup>633</sup>

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<sup>631</sup> Answer of Mexico to Question No. 15 of the Panel, 22 June 1999.

<sup>632</sup> *Final Determination*, para. 463.

<sup>633</sup> *Ibid.*, para. 28L.

7.164 The United States notes that in the final determination, SECOFI declined to find that a restraint agreement existed solely on the basis of the importers' contentions.<sup>634</sup> However, the United States asserts that the record contained more than simple assertions by the importers. In this regard, the United States referred to a statement made by SECOFI Secretary Herminio Blanco, referring to the agreement and characterizing it as restraining purchases of fructose.<sup>635</sup>

7.165 The United States also notes that in the final determination SECOFI stated that, assuming it existed, such an agreement would not eliminate the threat of injury to the Mexican sugar industry. SECOFI explained that the existence of a restraint agreement "does not rule out the possibility of these bottling plants and other industries using HFCS for a number of different applications, continuing to purchase the imported product at discriminatory prices as a sugar substitute".<sup>636</sup> The United States argues that a possibility of continued imports does not support a conclusion of likelihood of increased imports.

7.166 In the United States' view, SECOFI's conclusion that the use of imported HFCS was likely to increase substantially assumed that the bottlers had taken no action that would restrict their future use of HFCS. This conclusion rested, inter alia, on findings that the beverage industry accounted for 81 per cent of the subject imports during the period of investigation, that the Mexican beverage industry was an attractive market for US exporters of HFCS, and that the Mexican soft-drink industry was growing steadily.<sup>637</sup> However, the United States argues, if a restraint agreement did exist, it would severely limit, if not eliminate, bottlers' ability to increase their HFCS purchases. There would be no reason for bottlers to purchase HFCS if they could not use it to sweeten beverages. Moreover, in light of SECOFI's finding that the beverage industry accounted for 81 per cent of consumption of HFCS imports from the United States, if bottlers' purchases of HFCS did not increase significantly, SECOFI's own findings indicated that it would be very unlikely that overall purchases of HFCS in Mexico would increase significantly.

7.167 In the United States' view, SECOFI's finding that Mexican users of HFCS would continue to purchase dumped imported HFCS whether or not a restraint agreement was in effect cannot be reconciled with SECOFI's rationale concerning why the imports were likely to increase. Therefore, the United States argues, SECOFI's determination of threat of material injury by reason of the allegedly dumped HFCS imports does not satisfy the requirements of Article 3.7(i) of the AD Agreement.

7.168 Mexico maintains that, although the importers and exporters argued in the final stage of the investigation that there was an alleged restraint agreement potentially limiting HFCS consumption, the supporting documentation concerning this alleged agreement was submitted too late, on 22 January 1998, not only after the public hearing, but after the decision to impose a final anti-dumping measure had been made and the Final Decision had been prepared and sent for publication in the *Diario Oficial*, which publication occurred on 23 January 1998.

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<sup>634</sup> *Ibid.*, para. 546.

<sup>635</sup> US-13.

<sup>636</sup> *Final Determination*, para. 547.

<sup>637</sup> *Ibid.*, paras. 464, 481, 486.

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, analyze the possible effects of the alleged agreement. SECOFI analyzed the potential effects of such an agreement, assuming it existed, on the likelihood of an imminent substantial increase in dumped imports. In this regard, Mexico points in particular to paragraph 547 of the final determination, in which SECOFI refers to the alleged agreement, and concludes that the arguments submitted by the importers and exporters were not sufficient to determine that an imminent and substantial increase in dumped HFCS imports would be avoided.

7.170 Mexico asserts that SECOFI concluded that, even if Mexican soft-drink bottlers limited their consumption of HFCS, threat of injury to the domestic industry still remained. Mexico argues that this conclusion was based on the following considerations:

- (a) imports during the period of investigation showed a significant rate of increase, which together with other factors - such as low prices, increasing substitution, freely disposable and increasing capacity in the United States, and the genuine importance of Mexico as a destination for United States' exports - indicated a likelihood that there would be a substantial increase in the future,<sup>638</sup>
- (b) SECOFI's threat of injury determination was based on information for 1996. However, SECOFI also considered import information for the period January to September 1997, which showed that imports of HFCS rose 75 per cent over the same period in 1996,<sup>639</sup> further demonstrating a likelihood of a substantial increase in imports,
- (c) Other industries, in addition to the soft-drinks industry, use imported HFCS in their activities and they would not be subject to the restrictions in the alleged restraint agreement. These industries accounted for approximately 46 per cent of the industrial sector's total sugar consumption.<sup>640</sup>
- (d) Both the soft-drinks industry and the other industries could purchase the imported product at low prices as a result of dumping, thereby causing sugar prices to shift and deteriorate.

7.171 In Mexico's view, the United States wrongly asserts that SECOFI did not identify the various applications, other than soft-drinks, for which the bottlers could purchase HFCS. Moreover, the United States confuses the soft-drink bottlers with the beverage industry as a whole, and fails to take into consideration that the latter consists both of manufacturers of bottled soft-drinks and 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

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<sup>638</sup> *Ibid.*, paras. 449-470.

<sup>639</sup> *Ibid.*, para. 460, *see* import statistics, MEXICO-40.

<sup>640</sup> *Final Determination*, para. 465.

81 per cent of HFCS imports.<sup>641</sup> Mexico argues that in reaching its conclusion regarding likelihood of increased imports, SECOFI also considered HFCS consumption by other industries using HFCS in applications such as processed foods, preserves, confectionery, bakery products, dairy products, etc. In Mexico's view, these users would also continue to purchase imported HFCS, gradually displacing their consumption of sugar, thus indicating that imports would continue to increase even assuming the existence of an agreement between soft-drink bottlers and the sugar refiners.

7.172 Accordingly, Mexico maintains that SECOFI's affirmative determination of threat of injury to the domestic industry complied with the requirements of AD Agreement Article 3.7(i), given that SECOFI analyzed the possible repercussions of the alleged restraint agreement in finding a likelihood of substantially increased importation.

7.173 Our consideration of this issue requires us to determine whether SECOFI properly evaluated the facts concerning, and explained its conclusions regarding, the effects of the alleged restraint agreement in its consideration of the likelihood of substantially increased importation under Article 3.7(i). Mexico acknowledged that allegations concerning the alleged restraint agreement were made by the parties during the course of the final proceeding, but asserted that no supporting documentation was submitted until 22 January 1998, one day before the final determination was published. Mexico did, in response to the allegations, inquire of the Sugar Chamber whether such an agreement existed, to which the response was that there was no such agreement. Mexico asserts that it was not within SECOFI's authority to determine whether the alleged restraint agreement actually existed, but that in any event, SECOFI did consider the arguments on this issue, on the assumption that there was such an agreement. In the final determination, SECOFI noted that it had been unable to confirm the existence of such agreement and stated that, in any event, the alleged agreement "does not eliminate the possibility that bottlers as well as other sectors that use HFCS in multiple applications continue importing it under conditions of price discrimination to replace sugar".<sup>642</sup>

7.174 A first question in this regard is whether the existence of the alleged agreement could, or should, have been determined by SECOFI as a matter of fact on the basis of the investigative record. Mexico asserts that SECOFI lacks authority to make determinations in this regard. In our view, the question for purposes of an anti-dumping investigation is not whether an alleged restraint agreement in violation of Mexican law existed, an issue which might well be beyond the jurisdiction of an anti-dumping authority to resolve, but whether there was evidence of and arguments concerning the effect of the alleged restraint agreement<sup>643</sup>, which, if it existed, would be relevant to the analysis of the likelihood of increased dumped imports in the near

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<sup>641</sup> *Ibid.*, para. 464. See Working Papers on the Analysis of Sales of HFCS Imports on the Mexican Market, MEXICO-39.

<sup>642</sup> *Final Determination*, paras. 545-47.

<sup>643</sup> We note in this regard that Article 12.2.2 of the AD Agreement requires that the notice of final determination contain "the reasons for the acceptance of relevant arguments or claims made by the exporters and importers". It is clear that the arguments concerning the alleged restraint agreement were relevant.

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 eliminated the alleged threat of injury] does not rule out the possibility of these bottling plants as well as other industries using HFCS for a number of different applications, continuing to purchase the imported product at discriminatory prices as a sugar substitute. Thus, their contention that the situation described above eliminates the threat of injury to the sugar industry is invalid".<sup>644</sup>

In response to a question by the Panel, Mexico clarified that the record indicated that 68 per cent of imported HFCS was consumed by soft-drink bottlers, 13 per cent by other beverage producers, and 19 per cent by other industrial users. Mexico also clarified that other beverage producers are fully able to substitute HFCS for sugar, while the substitutability in other industrial uses varies from 10 per cent to 100 per cent. Thus, it is clear that soft-drink and other beverage manufacturers, who can freely substitute HFCS for sugar, accounted for the lion's share of imports, and that the possibilities of substituting HFCS for sugar in goods other than soft-drinks and other beverages, which accounted for less than 20 per cent of HFCS imports, are more limited. This suggests that the alleged restraint agreement would have had at least some, and potentially a significant, effect on future levels of imports, and does not support the conclusion that substantially increased importation is likely. Mexico's references to the increasing trend of HFCS imports suggest that somehow SECOFI concluded that such imports would have continued increasing by inertia, given the significant increases recorded during the period of investigation and through September 1997, even if they were not demanded in significantly increased amounts by the soft-drink bottlers, the leading consumers of imported HFCS. Mexico points out that the alleged restraint agreement was made after the period of investigation, and thus any limitation on imports started from the already significantly increased levels that had been reached. However, the question for purposes of analysis of threat of material injury is not the level of imports already reached, but the likelihood of **increased** imports.

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<sup>644</sup> *Final Determination*, para. 547.

7.177 Mexico's contention that users of imported HFCS other than soft-drink bottlers could have increased their consumption in amounts sufficient to constitute a substantial increase in imports is in our view questionable.<sup>645</sup> However, even assuming this to be the case, there is no discussion in the final determination of the share of imports and domestic production consumed by soft-drink bottlers, other beverage manufacturers, and other industrial users, and the degree of substitutability of HFCS and sugar in their products. Moreover, the alleged restraint agreement affected purchasers accounting for 68 per cent of the imports, suggesting that it would at least slow any further increases in imports. In addition, most other purchasers' ability to substitute HFCS for sugar was limited, suggesting that, if the alleged restraint agreement existed, any further increases in imports would be less than they had been in the past. None of these elements is addressed in SECOFI's final determination. We note, moreover, that the final determination states that the alleged restraint agreement does not "rule out the **possibility**" (emphasis added) that bottlers and other users would continue their purchases of imported HFCS. However, not ruling out the possibility that imports would continue does not support the conclusion that there is a "**likelihood** of substantially **increased** importation" (emphasis added), as provided for in Article 3.7(i).

7.178 We conclude that SECOFI's consideration of the potential effects of the alleged restraint agreement was inadequate. Therefore, we determine that SECOFI's conclusion that there was a "likelihood of substantially increased importation" is inconsistent with the requirements of Article 3.7(i) of the AD Agreement.

#### *E. Period of Application of the Provisional Measure*

7.179 The provisional anti-dumping measure imposed by SECOFI on imports of HFCS from the United States on 25 June 1997 was not terminated until 24 January 1998, more than six months later.<sup>646</sup> The United States claims that the extension by SECOFI of the period of application of the provisional measure beyond six months violated Article 7.4 of the AD Agreement, and notes that there is nothing in the final determination explaining this action. In the United States' view, there can be no justification under any provision of the AD Agreement for this extension of the provisional measure.<sup>647</sup>

7.180 Mexico admits that the provisional measure was applied for longer than the six-month period provided for in Article 7.4 of the AD Agreement. However, Mexico asserts that it applied the provisional measure for the shortest possible period in

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<sup>645</sup> We note that the distinction between soft-drink bottlers and other beverage producers is not clear from the final determination. However, we have relied on the information Mexico provided from the underlying record in this regard.

<sup>646</sup> The United States asserts that the extension of the provisional measures encompassed a full third month, or until 26 January 1998, because 24 January was a Saturday. The *Final Determination* was published on a Friday, 23 January 1998. The additional days are not relevant to our legal analysis.

<sup>647</sup> The United States originally also claimed that the application of the provisional measure for six months, rather than four, violated Article 7.4, asserting that Mexico did not, in fact, consider whether the application of a lesser duty would be sufficient to remove the injury, as required by that Article to justify the longer period. The United States expressly withdrew this claim at our first meeting with the parties, and therefore it is no longer before us.

the spirit of Article VI of the GATT 1994. Mexico maintains that SECOFI considered that suspension of the provisional measure at the end of the six month period would not only further expose the domestic industry threatened by dumped imports but would also favour dumping, even if only for a short period. Since Article VI condemns dumping if there is a threat of injury to the domestic industry, Mexico argues that the choice not to terminate the provisional measure was justified. Moreover, Mexico asserts this choice was made with the certainty that the final determination would be adopted shortly.<sup>648</sup> Mexico points out SECOFI conducted the investigation in a shorter time than that provided for in Article 5.10 of the AD Agreement. Therefore, Mexico asserts that the application of the provisional measure for the additional period cannot be construed as an attempt to set up a barrier to normal trade.

7.181 In considering this issue, we note that Article 7.4 of the AD Agreement provides:

"The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively".

7.182 The language of Article 7.4 is clear and explicit on the question of the allowable duration of a provisional measure. Unless exporters representing a significant percentage of the trade involved request an extension of the period of application, a situation which undisputedly did not arise in this case, Article 7.4 limits the period of application of a provisional measure to a period no longer than six months, and provides no basis for extension of that period. Indeed, Mexico has made no legal argument to the contrary, relying instead on general assertions of its good intentions and that the additional period of application of the provisional measure was for the shortest time possible.

7.183 The AD Agreement contains specific rules for the implementation of Article VI of GATT 1994 with respect, *inter alia*, to the period of application of provisional measures.<sup>649</sup> Those rules are binding on all Members, and arguments based on refer-

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<sup>648</sup> Mexico also notes that SECOFI's activities were suspended from 22 December 1997 to 6 January 1998, which together with the procedures involved in signing and publication of the *Final Determination*, which took several days, resulted in a delay in the issuance of the notice of the final determination.

<sup>649</sup> We note in this regard that Article 1 of the AD Agreement provides:

"An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated<sup>1</sup> and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

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<sup>1</sup> The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5".

ences 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.

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

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We also note Article 18.1 of the AD Agreement, which provides:

"No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."<sup>24</sup>

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<sup>24</sup> This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate".

absence of a provisional measure are evidenced throughout the various proceedings carried out in the course of the investigation and are shown in the administrative file. Moreover, Mexico asserts that it is apparent from the findings of fact and conclusions of law in this case that injury would actually have been caused to the domestic sugar industry in the absence of provisional anti-dumping duties. In Mexico's view, the entirety of the findings and conclusions enabled SECOFI to make a final determination of threat of injury and decide to levy anti-dumping duties retroactively. Mexico also points out that at the time of the preliminary determination, the increase in imports of dumped HFCS was already a reality. Accordingly, the situation referred to in Article 10.2 of the AD Agreement had been considered by SECOFI since the preliminary stage of the investigation, when it determined that it was necessary to apply a provisional measure to prevent injury being caused during the investigation. Mexico argues that it applied anti-dumping duties for the period of application of the provisional measure in order to prevent injury to the domestic industry, in conformity with Article 10.2 of the AD Agreement.

7.188 In considering this issue, we note that Article 10 of the AD Agreement governs the retroactive application of anti-dumping duties. Article 10.2, which is at issue here, provides:

"Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied".

Article 10.4 complements Article 10.2, providing:

"Except as provided for in [Article 10.2], where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner".

7.189 The United States argues, in essence, that there must be some specific examination of and conclusion regarding the issue of whether "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury" before final anti-dumping duties can be applied retroactively for the period of application of a provisional measure in a case where the final determination is one of threat of injury. Mexico, on the other hand, asserts that the entire analysis in the final determination, and indeed, the preliminary determination concluding that a provisional measure was necessary, demonstrate that in the absence of the provisional measure, there would have been a determination of material injury, rather than threat of material injury. Therefore, Mexico asserts that retroactive levying of final anti-dumping duties was justified in this case.

7.190 We cannot agree with Mexico's position. Mexico's interpretation of Article 10.2, would, as a practical matter, effectively allow the retroactive levying of final duties in every case in which a provisional measure is imposed and there is a final

determination of threat of material injury. However, it is clear from the language of Article 10.2 itself, and its context (in particular Article 10.4), that retroactive imposition of anti-dumping duties is permissible only in those instances in which the particular conditions set forth in Article 10.2 of the Agreement exist.<sup>650</sup>

7.191 Moreover, while Article 10.2 does not explicitly require a "determination" that "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury", there must be some specific statement in the final determination of the investigating authority from which a reviewing panel can discern that the issue addressed in Article 10.2 was properly considered and decided. Article 12.2 of the AD Agreement requires that the public notice of any final determination "set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". Article 12.3 further specifies that the "provisions of [Article 12] shall apply *mutatis mutandis* to ... decisions under Article 10 to apply duties retroactively". Thus, it is clear to us that the investigating authority must set out in sufficient detail its findings and conclusions on the issue of whether "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury" before final anti-dumping duties may, consistently with Article 10.2 of the AD Agreement, be levied for the period during which a provisional measure was in place.

7.192 In this case, it is undisputed that the only discussion concerning the retroactive application of anti-dumping duties is contained in paragraph 562 of SECOFI's final determination. That paragraph provides, in its entirety:

"562. The Ministry of Finance and Public Credit shall be entrusted with collecting the aforesaid definitive countervailing duties and encashing corresponding guarantees furnished by importers to protect the government's financial interests in the event of the non-payment of any established countervailing duties under the provisions of Article 65 of the Foreign Commerce Act, as well as with releasing or modifying the terms of such guarantees or, where applicable, refunding the value of payments or overpayments of corresponding penal sums".

There is no analysis of the situation that would have existed in the domestic industry in the absence of provisional measures in this statement. Article 17.6(i) of the AD Agreement specifies that, in assessing the facts of the matter, a panel "shall determine whether the authorities establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective". In this case, we have no record of SECOFI's establishment or evaluation of the facts concerning this issue. The directive to another Governmental body to collect final anti-dumping duties cannot reasonably be read as findings and conclusions by SECOFI establishing and evaluating facts leading to the conclusion that in the absence of provisional measures, material injury to the Mexican sugar industry would have occurred. Moreover, we

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<sup>650</sup> Or, of course, if any of the other circumstances justifying retroactive application of anti-dumping duties set forth in Article 10 exist. These are a final determination of material injury (Article 10.2) and the circumstances set forth in Article 10.6, as limited by Article 10.8. There is no contention that these circumstances existed in this case.

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.

## 2. *Claim under Article 12<sup>651</sup>*

7.194 The United States argues that SECOFI failed to provide any findings of fact and conclusions of law for its retroactive application of anti-dumping duties in this threat of injury case. As SECOFI failed to provide "all relevant information...and reasons which have led to the imposition of final measures...as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters", the United States maintains that it violated both Articles 12.2 and 12.2.2 of the AD Agreement.

7.195 Mexico asserts that the findings of fact and conclusions of law underlying SECOFI's determination that, in the face of substantially increased imports of the product at dumped prices, the circumstances that prevailed in the period under investigation would change in such a way as to create a situation in which dumping would cause injury, satisfy the requirements of Article 12.2 and Article 12.2.2 with respect to the decision to retroactively apply the final anti-dumping duty.

7.196 Articles 12.2 and 12.2.2 set forth the requirements for a public notice of an affirmative final determination providing for the imposition of anti-dumping duties. They provide:

"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, **in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.** All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein". (Emphasis added).

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<sup>651</sup> The United States asserted in its first submission that SECOFI failed to provide findings and conclusions of fact and law for its extension of provisional measures beyond the four-month time limitation, in violation of Articles 12.2 and 12.2.2 of the AD Agreement. However, the United States withdrew its claim of violation of Article 7.4 with respect to the extension of the provisional measure from four to six months. Therefore, its claim of violation of Article 12.2 and 12.2.2 in this respect has also been abandoned. We therefore make no conclusions on this issue.

"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.

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.

# UNITED STATES - TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS"

## Report of the Appellate Body

WT/DS108/AB/R

*Adopted by the Dispute Settlement Body  
on 20 March 2000*

United States, <i>Appellant/Appellee</i> European Communities, <i>Appellant/Appellee</i> Canada, Japan, <i>Third Participants</i>		Present: Lacarte-Muró, Presiding Member Bacchus, Member Feliciano, Member
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### TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1620
II. BACKGROUND .....	1622
A. Overview of Relevant United States Tax Laws .....	1622
B. The FSC Measure .....	1623
C. Exemptions Provided by the FSC Measure.....	1625
III. ARGUMENTS OF THE PARTICIPANTS .....	1626
A. Claims of Error by the United States - Appellant .....	1626
1. The SCM Agreement .....	1627
2. Articles 3.3, 8, 9.1(d) and 10.1 of the Agreement on Agriculture .....	1629
3. Article 4.2 of the SCM Agreement .....	1631
4. Appropriate Forum.....	1632
B. Arguments by the European Communities - Appellee.....	1633
1. The SCM Agreement .....	1633
2. Articles 3.3, 8, 9.1(d) and 10.1 of the Agreement on Agriculture .....	1634
3. Article 4.2 of the SCM Agreement .....	1636
4. Appropriate Forum.....	1637
C. Claims of Error by the European Communities - Appellant .....	1638
1. The FSC Administrative Pricing Rules .....	1638
2. Article 3.1(b) of the SCM Agreement.....	1638
D. Arguments by the United States - Appellee .....	1639
1. The FSC Administrative Pricing Rules .....	1639
2. Article 3.1(b) of the SCM Agreement.....	1640

	Page
E. Arguments by the Third Participants .....	1640
1. Canada .....	1640
2. Japan .....	1641
IV. ISSUES RAISED IN THIS APPEAL.....	1641
V. ARTICLE 3.1 OF THE SCM AGREEMENT .....	1641
VI. ARTICLES 3.3 AND 9.1(D) OF THE AGREEMENT ON AGRICULTURE.....	1657
VII. ARTICLE 4.2 OF THE SCM AGREEMENT .....	1665
VIII. APPROPRIATE TAX FORUM .....	1668
IX. FSC ADMINISTRATIVE PRICING RULES .....	1669
X. ARTICLE 3.1(B) OF THE SCM AGREEMENT.....	1670
XI. FINDINGS AND CONCLUSIONS .....	1670

## I. INTRODUCTION

1. The United States and the European Communities appeal certain issues of law and legal interpretations in the Panel Report, *United States - Tax Treatment for "Foreign Sales Corporations"* (the "Panel Report").<sup>1</sup> The Panel was established to consider a complaint by the European Communities with respect to "Sections 921-927 of the Internal Revenue Code and related measures establishing special tax treatment for 'Foreign Sales Corporations' ('FSCs')".<sup>2</sup> Pertinent aspects of this "FSC measure"<sup>3</sup> are described in Section II below.<sup>4</sup>

2. In the Panel Report, circulated on 8 October 1999, the Panel concluded that, through the FSC measure:

- (a) the United States has, except as provided in the *Agreement on Agriculture*, acted inconsistently with its obligations under Article 3.1(a) of the SCM Agreement by granting or maintaining export subsidies prohibited by that provision;
- (b) the United States has acted inconsistently with its obligations under Article 3.3 of the *Agreement on Agriculture* (and consequently with its obligations under Article 8 of that Agreement):
  - by providing export subsidies listed in Article 9.1(d) of the *Agreement on Agriculture* in ex-

<sup>1</sup> WT/DS108/R, 8 October 1999.

<sup>2</sup> The Panel's terms of reference, WT/DS108/3, 11 November 1998, refer to the European Communities' request for consultations, WT/DS108/1, 28 November 1997.

<sup>3</sup> In paragraph 7.34 and footnote 602 thereto of the Panel Report, the Panel identified sections 245(c), 921 through 927, and 951(e) of the United States Internal Revenue Code as the "primary" legal provisions constituting the FSC measure. This finding has not been appealed.

<sup>4</sup> The Panel describes the FSC measure in paragraphs 2.1 to 2.8 of the Panel Report.

cess of the quantity commitment levels specified in the United States' Schedule in respect of wheat;

- by providing export subsidies listed in Article 9.1(d) of the *Agreement on Agriculture* in respect of all unscheduled products.<sup>5</sup>

3. With respect to its conclusion regarding the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), the Panel recommended that the Dispute Settlement Body (the "DSB") request the United States "to withdraw the FSC subsidies without delay".<sup>6</sup> With respect to its conclusions regarding the *Agreement on Agriculture*, the Panel recommended that the DSB request the United States to bring the FSC measure into conformity with its obligations in respect of export subsidies under that Agreement.<sup>7</sup>

4. On 28 October 1999, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). For scheduling reasons, and pursuant to an agreement it had reached with the European Communities, on 2 November 1999 the United States notified the Chairman of the Appellate Body and the Chairman of the DSB of its decision to withdraw its 28 October 1999 notice of appeal. This withdrawal was made pursuant to Rule 30(1) of the *Working Procedures*, and was conditional upon the right of the United States to file a new notice of appeal pursuant to Rule 20 of the *Working Procedures*. On 26 November 1999, the United States once again notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures*. On 2 December 1999, the United States filed its appellant's submission.<sup>8</sup> On 7 December 1999, the European Communities filed its own appellant's submission.<sup>9</sup> On 17 December 1999, the United States<sup>10</sup> and the European Communities<sup>11</sup> each filed an appellee's submission. On the same day, Canada and Japan each filed a third participant's submission.<sup>12</sup>

5. The oral hearing in the appeal was held on 19-20 January 2000. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

<sup>5</sup> Panel Report, para. 8.1.

<sup>6</sup> *Ibid.*, para. 8.3.

<sup>7</sup> *Ibid.*, para. 8.4.

<sup>8</sup> Pursuant to Rule 21(1) of the *Working Procedures*.

<sup>9</sup> Pursuant to Rule 23(1) of the *Working Procedures*.

<sup>10</sup> Pursuant to Rule 23(3) of the *Working Procedures*.

<sup>11</sup> Pursuant to Rule 22 of the *Working Procedures*.

<sup>12</sup> Pursuant to Rule 24 of the *Working Procedures*.

## II. BACKGROUND

### A. *Overview of Relevant United States Tax Laws*

6. For United States citizens and residents, the tax laws of the United States generally operate "on a worldwide basis".<sup>13</sup> This means that, generally, the United States asserts the right to tax all income earned "worldwide" by its citizens and residents. A corporation organized under the laws of one of the fifty American states or the District of Columbia is a "domestic", or United States, corporation, and is "resident" in the United States for purposes of this "worldwide" taxation system.<sup>14</sup> Under United States tax law, "foreign" corporations are defined as all corporations that are *not* incorporated in one of the fifty states or the District of Columbia.<sup>15</sup>

7. The United States generally taxes any income earned by foreign corporations within the territory of the United States. The United States generally does not tax income that is earned by foreign corporations outside the United States.<sup>16</sup> However, such "foreign-source" income of a foreign corporation generally will be subject to United States taxation when such income is "effectively connected with the conduct of a trade or business within the United States".<sup>17</sup> United States tax laws and regulations provide for the tax authorities to conduct a factual inquiry to determine whether a foreign corporation's income is "effectively connected" income.

8. Many foreign corporations are related to United States corporations. Generally, a United States parent corporation is only subject to taxation on income earned by its foreign subsidiary when such income is transferred to the United States parent in the form of a dividend.<sup>18</sup> The period between the earning of such income by the subsidiary and the transfer to the United States parent company of a dividend is called "deferral" under the United States tax system, because the payment of tax on that income is deferred until the income is repatriated to the United States.<sup>19</sup>

9. The United States has also adopted a series of "anti-deferral" regimes that depart from the principle of deferral and that, in general, respond to specific policy concerns about potential tax avoidance by United States corporations through foreign affiliates. One of these regimes is Subpart F of the United States Internal Revenue Code (the "IRC"), which limits the availability of deferral for certain types of income earned by certain controlled foreign subsidiaries of United States corporations.<sup>20</sup> Under Subpart F, certain income earned by a foreign subsidiary can be imputed to its United States parent corporation even though it has not yet been repatriated to the

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<sup>13</sup> United States' appellant's submission, para. 21.

<sup>14</sup> Section 7701(a)(4) IRC; United States' appellant's submission, para. 21.

<sup>15</sup> Section 7701(a)(5) and (9) IRC; United States' appellant's submission, para. 22.

<sup>16</sup> United States' appellant's submission, para. 22. Panel Report, paras. 4.1127 and 4.1128.

<sup>17</sup> Section 882(a) IRC. However, the foreign corporation may be eligible for a foreign tax credit with respect to foreign income taxes that it has paid on such income.

<sup>18</sup> However, the United States parent may be eligible for an indirect foreign tax credit on some foreign income taxes paid by the foreign subsidiary. See United States' appellant's submission, para. 23.

<sup>19</sup> United States' appellant's submission, para. 23.

<sup>20</sup> Section 951 IRC; United States' appellant's submission, para. 24.

parent in the form of a dividend.<sup>21</sup> The effect of Subpart F is that a United States parent corporation is immediately subject to United States taxation on such imputed income even while the income remains with the foreign subsidiary.

10. These generally prevailing United States tax rules are altered for FSCs by the FSC measure.

### B. *The FSC Measure*

11. FSCs are foreign corporations responsible for certain sales-related activities in connection with the sale or lease of goods produced in the United States for export outside the United States. The FSC measure essentially exempts a portion of an FSC's export-related foreign-source income from United States income tax.<sup>22</sup> The relevant tax regime is comprised of three separate elements, which affect the tax liability under United States law of an FSC as well as of the United States corporation that supplies goods for export. These three exemptions are described in detail below, as well as in paragraphs 7.95, 7.96 and 7.97 of the Panel Report.<sup>23</sup>

12. A corporation must satisfy several conditions to qualify as an FSC.<sup>24</sup> To qualify, a corporation must be a foreign corporation organized under the laws of a country that shares tax information with the United States, or under the laws of a United States possession other than Puerto Rico.<sup>25</sup> The corporation must satisfy additional requirements relating to its foreign presence, to the keeping of records, and to its shareholders and directors.<sup>26</sup> The corporation must also elect to be an FSC for a given fiscal year.<sup>27</sup> There is no statutory requirement that an FSC be affiliated with or controlled by a United States corporation. The FSC measure is, however, such that the benefit to both FSCs and the United States corporations that supply goods for export will, as a practical matter, often be greater if the United States supplier is related to the FSC. As a result, many FSCs are controlled foreign subsidiaries of United States corporations.

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<sup>21</sup> With respect to such deferred income, the United States parent may be eligible for an indirect foreign tax credit on some foreign income taxes paid by the foreign subsidiary. See United States' appellant's submission, para. 24.

<sup>22</sup> This characterization of the FSC measure is not disputed by the participants. See Panel Report, para. 7.112.

<sup>23</sup> During the oral hearing, the United States accepted, in response to a question from the Division hearing this appeal, that paragraphs 7.95-7.97 of the Panel Report accurately describe the FSC exemptions.

<sup>24</sup> The description set forth here is intended to outline the main elements of the FSC measure which relate to this appeal. A comprehensive explanation of all the rules applicable to FSCs should be obtained from the text of the statutory provisions themselves or from specialized tax treatises, e.g., J. Isenbergh, *International Taxation*, 2<sup>nd</sup> ed. (Aspen Publishers Inc., 1999). We note here that special rules apply *inter alia* in the case of agricultural cooperatives, small FSCs, shared FSCs, FSCs owned by individual rather than corporate shareholders, and transactions involving military property.

<sup>25</sup> Sections 922(a)(1) and 927(d)(3) IRC. Typically an FSC is organized in a non-United States jurisdiction that does not tax, or applies a low tax rate to, corporate income.

<sup>26</sup> Section 922(a)(1) IRC.

<sup>27</sup> Section 922(a)(2) IRC.

13. The foreign-source income of an FSC may be broadly divided into "foreign trade income"<sup>28</sup> and all other foreign-source income. "Foreign trade income" is essentially the foreign-source income attributable to an FSC from qualifying transactions involving the export of goods from the United States. An FSC's other foreign-source income may include *inter alia* "investment income", such as interest, dividends and royalties, and active business income not deriving from qualifying export transactions. This appeal raises a number of issues with respect to the taxation of an FSC's *foreign trade income*. Foreign trade income is in turn divided into *exempt* foreign trade income and *non-exempt* foreign trade income.<sup>29</sup> As explained below, the United States tax treatment of an FSC's *exempt* foreign trade income differs from the United States tax treatment of an FSC's *non-exempt* foreign trade income.

14. An FSC's foreign trade income is its "foreign trading gross receipts" generated in qualifying transactions.<sup>30</sup> Qualifying transactions involve the sale or lease of "export property" or the performance of services "related and subsidiary" to such sale or lease. "Export property" is property manufactured or produced in the United States by a person other than an FSC, sold or leased by or to an FSC for use, consumption or disposition outside the United States, and of which no more than 50 per cent of its fair market value is attributable to imports.<sup>31</sup> In addition, for FSC income to be foreign trade income, certain economic processes relating to qualifying transactions must take place outside the United States<sup>32</sup>, and the FSC must be managed outside the United States.<sup>33</sup>

15. Under the FSC measure, an FSC may, at its option, choose to apply one of three transfer pricing rules in order to calculate its foreign trade income from qualifying transactions. These pricing rules serve two purposes. First, the transfer pricing rules allocate the income from transactions involving United States export property as between an FSC and its United States supplier. The part of this income attributable to the FSC is its foreign trade income (i.e. exempt and non-exempt foreign trade income). The second purpose of the transfer pricing rules is to determine how much of the income from transactions involving United States export property that is allocated to the FSC as foreign trade income is *exempt* foreign trade income, and how much of it is *non-exempt* foreign trade income. The transfer pricing rule applied to determine the amount of the FSC's foreign trade income must also be applied to determine the division of that foreign trade income into exempt and non-exempt foreign trade income.<sup>34</sup>

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<sup>28</sup> Section 923(b) IRC.

<sup>29</sup> Section 923(a) IRC.

<sup>30</sup> Section 924 IRC.

<sup>31</sup> Section 927(a) IRC; Panel Report, para. 2.1.

<sup>32</sup> Section 924(b)(1)(B) IRC.

<sup>33</sup> Sections 924(b)(1)(A) and 927(d)(3) IRC.

<sup>34</sup> Under the first transfer pricing rule, the "arm's length" rule, the allocation of income is based on the actual price paid by the FSC to its related United States supplier, subject to adjustment under Section 482 IRC. This rule may be used by any FSC. Provided that it meets certain *additional* requirements to perform distribution activities in respect of qualifying transactions; and that it is *related* to its United States supplier, an FSC may instead elect to use one of two other transfer pricing rules, known as the "administrative pricing" rules. Each administrative pricing rule allows an FSC to determine its foreign trade income by applying a formula which divides the combined total

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C. *Exemptions Provided by the FSC Measure*

16. The FSC measure establishes three main exemptions which affect the United States tax liability of the FSC, of its United States supplier and, possibly United States shareholders. The first exemption relates to the United States tax treatment of the foreign-source income of a foreign corporation.<sup>35</sup> Under United States law generally, the foreign-source income of a foreign corporation engaged in trade or business in the United States is taxable only to the extent that it is "effectively connected with the conduct of a trade or business within the United States".<sup>36</sup> This rule applies whether or not a foreign corporation is controlled by a United States corporation. To determine whether the foreign-source income of a foreign corporation is "effectively connected with the conduct of a trade or business within the United States", a factual inquiry is undertaken by the tax authorities.<sup>37</sup> Under the FSC measure, however, the exempt portion of an FSC's foreign trade income is "treated as foreign source income which is not effectively connected with the conduct of a trade or business within the United States".<sup>38</sup> In other words, the exempt portion of the FSC's foreign trade income is not subject to a factual inquiry to determine if it is "effectively connected with the conduct of a trade or business within the United States". Thus, under this first exemption, a portion of an FSC's foreign-source income is *legislatively determined not to be* "effectively connected" and, therefore, is not taxable in the hands of the FSC - without regard to what conclusion an administrative factual inquiry might come to in the absence of the FSC measure.

17. The second exemption relates to the United States tax treatment of certain income earned by a foreign corporation that is controlled by a United States corporation. Under United States law generally, a United States shareholder in a controlled foreign corporation must include in his gross income each year a *pro rata* share of certain forms of income of the foreign controlled corporation which has not yet been distributed to its United States parent.<sup>39</sup> Such income is known as "Subpart F income". The United States shareholder corporation is immediately subject to United States tax on its Subpart F income, even though it has not yet received the income from its foreign affiliate. Under the FSC measure, however, the foreign trade income of an FSC is generally exempted from Subpart F.<sup>40</sup> Thus, under this second exemp-

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income derived from qualifying transactions between the FSC and its related United States supplier. See Section 925 IRC and paras. 2.5 - 2.8 of the Panel Report.

<sup>35</sup> See Panel Report, para. 7.95.

<sup>36</sup> Section 882(a) IRC.

<sup>37</sup> Section 864 IRC sets out the rules for determining whether the income of a foreign corporation is "effectively connected with the conduct of a trade or business within the United States". Under United States tax law, the "effectively connected" concept is distinct from the "source-of-income" concept. The income of a foreign corporation may be "foreign-source" income under the rules for determining source of income (Sections 861-865 IRC), but may nevertheless be "effectively connected" with a trade or business within the United States and, on this basis, subject to taxation (see J. Isenbergh, *supra*, footnote 24, Vol. I, chapters 5 and 21).

<sup>38</sup> Section 921(a) IRC.

<sup>39</sup> Section 951(a) IRC.

<sup>40</sup> Panel Report, para. 7.96; Section 951(e) IRC. If an FSC uses the administrative pricing rules, then this second exemption applies with respect to both the *exempt* and the *non-exempt* portions of the FSC's foreign trade income. However, if an FSC uses the Section 482 arm's length transfer

tion, the parent of an FSC is *not* required to declare its *pro rata* share of the undistributed income of an FSC that is derived from the foreign trade income of the FSC, and is *not* taxed on such income.

18. The third exemption deals with the tax treatment of dividends received by United States corporations from foreign corporations.<sup>41</sup> Under United States law generally, dividends received by a United States corporation which are derived from the foreign-source income of a foreign corporation are taxable, unless such income has already been taxed under the Subpart F rules.<sup>42</sup> Under the FSC measure, however, United States corporate shareholders of an FSC generally may deduct 100 per cent of dividends received from distributions made out of the foreign trade income of an FSC.<sup>43</sup> Thus, under the third exemption, the parent of an FSC is generally not taxed on dividends received that are derived from the foreign trade income of the FSC.

### III. ARGUMENTS OF THE PARTICIPANTS

#### A. *Claims of Error by the United States - Appellant*

19. The United States urges the Appellate Body to take account of the historical background to this appeal. According to the United States, the FSC measure and the issues raised in this appeal cannot be reviewed in a vacuum, but can be understood only in the context of basic tax principles, the application of those principles through the FSC measure, and the historical events that led to the creation of the FSC regime.

20. The United States recalls that the origins of this dispute go back to the enactment by the United States of the Domestic International Sales Corporations ("DISC") tax provisions in 1971. In 1972, the European Communities requested dispute settlement consultations regarding the DISC measure, alleging that the DISC measure constituted an export subsidy. The United States then requested consultations with France, Belgium, and the Netherlands, contending that if the DISC measure were an export subsidy, then the tax exemptions provided by those countries for foreign-source income also were export subsidies. The panel reports in these four cases, the "*Tax Legislation Cases*", were issued in 1976<sup>44</sup>, and the panels found that both the

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pricing rules, then the United States shareholder must declare a *pro rata* share of the *non-exempt* portion of its FSC's foreign trade income and generally is subject to United States tax on that portion of the FSC's foreign trade income.

<sup>41</sup> See Panel Report, para. 7.97.

<sup>42</sup> *Ibid.*

<sup>43</sup> Section 245(c) IRC. If an FSC uses the administrative pricing rules, then this third exemption applies to dividends derived from both the *exempt* and *non-exempt* portions of that FSC's foreign trade income. However, if an FSC uses the Section 482 arm's length transfer pricing rules, then the United States shareholder generally is subject to tax on dividends received from distributions derived from the *non-exempt* portion of its FSC's foreign trade income, unless such income has already been taxed under the Subpart F rules.

<sup>44</sup> Panel reports, *Tax Legislation - United States Tax Legislation (DISC)*, L/4422, adopted 7-8 December 1981, BISD 23S/98; *Tax Legislation - Income Tax Practices Maintained By France*, L/4423, adopted 7-8 December 1981, BISD 23S/114; *Tax Legislation - Income Tax Practices Maintained By Belgium*, L/4424, adopted 7-8 December 1981, BISD 23S/127; *Tax Legislation -*

DISC measure and the European tax systems had characteristics of an export subsidy prohibited under Article XVI:4 of the GATT 1947. Under the GATT 1947 dispute settlement system, panel reports were only adopted by consensus of the contracting parties. Since the parties to the dispute would not, initially, agree to the adoption of the panel reports in the *Tax Legislation Cases*, these reports remained unadopted for several years.

21. In 1979, a number of contracting parties, including the countries involved in the *Tax Legislation Cases*, entered into the *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade* (the "*Tokyo Round Subsidies Code*"), which included footnote 2 to the Illustrative List of Export Subsidies. The United States points out that footnote 2 addressed key elements of the *Tax Legislation Cases*. The footnote incorporated the panels' analysis in these reports with respect to the issues of deferral and arm's length pricing, but departed from the panel's reasoning with respect to double taxation. Footnote 2 expressly provided that countries may take steps to avoid the double taxation of income.

22. In 1981, the parties finally agreed to the adoption of the panel reports in the *Tax Legislation Cases* by means of a GATT 1947 Council action which adopted the reports subject to an "understanding"<sup>45</sup>, and which was accompanied by a statement from the Chairman of the Council. According to the United States, that "understanding" effectively revised the panel reports by incorporating into them the principles of footnote 2 to the *Tokyo Round Subsidies Code's* Illustrative List. In 1984, the United States replaced the DISC provisions with the FSC provisions. According to the United States, the FSC provisions "were intended to provide a limited territorial-type system of taxation"<sup>46</sup> for United States exports that complied with GATT subsidy rules, in particular those laid out in footnote 2 of the *Tokyo Round Subsidies Code's* Illustrative List and the 1981 "understanding".

### 1. *The SCM Agreement*

23. In the view of the United States, the Panel's finding that the FSC measure constitutes an export subsidy was based on fundamental analytical errors. The Panel erred in failing to begin its analysis with footnote 59 to the Illustrative List of Export Subsidies (the "Illustrative List") in Annex I of the *SCM Agreement*, which is the "controlling legal provision" in this case. Footnote 5 to Article 3.1(a) of the *SCM Agreement* makes clear that a practice identified in the Illustrative List as *not* constituting an export subsidy is not prohibited by Article 3.1(a) or any other provision

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*Income Tax Practices Maintained By The Netherlands*, L/4425, adopted 7-8 December 1981, BISD 23S/137.

<sup>45</sup> The participants in this appeal have generally referred to the 1981 Council action on the basis of which the Council adopted the panel reports in the *Tax Legislation Cases* as the "1981 Understanding". *Tax Legislation*, L/5271, 7-8 December 1981, BISD 28S/114. As explained *infra* at footnote 76, we prefer the term "1981 Council action". In order faithfully to summarize the arguments of the participants, however, we use the term 1981 "understanding" within this section of our Report.

<sup>46</sup> United States' appellant's submission, para. 45.

of the *SCM Agreement*. Since, according to the United States, the FSC tax exemption is permitted under footnote 59, no further analysis is needed.

24. The United States does not, as a *general proposition*, disagree with the Panel's interpretation of the term "otherwise due" in Article 1.1(a)(1)(ii) of the *SCM Agreement* as establishing a "but for" test. However, this test must yield in situations where a specific standard exists for determining whether revenue is "otherwise due". In this case, the context of Article 1.1(a)(1)(ii), in particular footnote 59 of the *SCM Agreement* and the 1981 "understanding", demonstrates that such a specific standard exists - taxation of foreign-source income is deemed not to be revenue that is "otherwise due".

25. The United States considers that footnote 59 permits tax exemptions for foreign-source income even if it is "specifically in relation to exports".<sup>47</sup> Item (e) of the Illustrative List identifies certain tax practices as export subsidies, and the text of footnote 59 qualifies this characterization of some of such practices. The second sentence of footnote 59, in which Members "reaffirm" the principle of arm's length pricing, imposes parameters on the prices that may be charged between related parties in export transactions. According to the United States, the second sentence of footnote 59 *assumes* that foreign-source income *may* be exempted from tax or taxed to a lesser extent than domestic-source income, and would have no meaning if foreign-source income could *not* be exempted from tax.

26. The United States submits that the FSC measure is also not an export subsidy by virtue of the fifth sentence of footnote 59, which excludes from the scope of item (e) of the Illustrative List measures to prevent foreign-source income from being subjected to double taxation. The Panel erred by failing to find that, as a tax exemption measure to avoid the double taxation of foreign-source income, the FSC measure is permitted by footnote 59. The Panel erroneously stated that the United States had not asserted that the fifth sentence of footnote 59 applied to the FSC. In its first submission to the Panel, the United States asserted that "the FSC is designed to prevent double taxation of export income earned outside the United States..."<sup>48</sup>

27. The United States argues that the Panel's interpretation of Article 1.1(a)(1)(ii), as well as of Article 3.1(a), also failed to take into account the 1981 "understanding". The "understanding" specifically states that economic processes located outside the territory of the exporting country "should not be regarded as export activities." The import of this language is to remove such processes from the ambit of Article 3.1(a) and Annex 1 of the *SCM Agreement*, both of which deal exclusively with export subsidies. If foreign economic processes do not constitute "export activities," then exempting the income from such processes from taxation *cannot* be deemed to be an export subsidy.

28. The United States contends that it is also clear that, in adopting the 1981 "understanding", the GATT 1947 Council intended to establish principles of general applicability. The opening sentence of the "understanding" states that the "understanding" applies "in general". The background to the adoption of the 1981 "understanding" supports this interpretation. Footnote 2 of the *Tokyo Round Subsidies*

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<sup>47</sup> United States' appellant's submission, para. 101.

<sup>48</sup> Panel Report, para. 4.348.

*Code's* Illustrative List recognized that countries could take steps to avoid double taxation of foreign-source income, and that foreign-source income should be determined on the basis of the arm's length principle. The impasse regarding the *Tax Legislation Cases* was resolved through the 1981 "understanding", which accepted the principles codified in footnote 2 of the *Tokyo Round Subsidies Code*.<sup>49</sup>

29. The United States further argues that the 1981 "understanding" satisfies all of the criteria to constitute a "decision" under paragraph 1(b)(iv) of the language in Annex 1A incorporating the GATT 1994 into the *WTO Agreement*. Accordingly, the 1981 "understanding" has the same legal force as any other provision of the GATT 1994. In finding that the 1981 "understanding" is not an "other decision" within the meaning of paragraph 1(b)(iv), the Panel wrongly imposed a requirement - that such decisions must be a "legal instrument" - that is inconsistent with paragraph 1(b)(iv). Furthermore, the Panel misapplied this standard by declaring the phrase "in general" in the 1981 "understanding" to be ambiguous, and then misinterpreted the circumstances surrounding the adoption of the "understanding" to override the text itself. The Panel failed to appreciate that the Council took two separate actions, with independent significance: a *decision* to adopt the *Tax Legislation Cases* reports and an accompanying "*understanding*". Although the Chairman stated that the *decision* does not affect the interpretation of the *Tokyo Round Subsidies Code*, the Chairman did not make the same statement as regards the "*understanding*". To the contrary, the United States alleges that the third sentence of the "understanding" shows that it would affect future interpretations of the *Tokyo Round Subsidies Code*, and that this guidance has been carried forward into the WTO.

30. Even if the 1981 "understanding" were not a part of the GATT 1994, the United States submits that it would nevertheless be a "decision" within the meaning of Article XVI:1 of the *WTO Agreement*, by which panels and the Appellate Body should be guided. The Panel erred in finding that the "understanding" was not relevant to this dispute when, as the United States has demonstrated, the 1981 "understanding" and footnote 59 are inextricably bound together. Even though the 1981 "understanding" involved an interpretation of Article XVI of the GATT 1947, the text of the *SCM Agreement*, the jurisprudence of the Appellate Body<sup>50</sup>, as well as the interconnected history of the *SCM Agreement* and Article XVI, all make clear that the *SCM Agreement* and Article XVI are not to be construed in isolation from one another.

## 2. Articles 3.3, 8, 9.1(d) and 10.1 of the Agreement on Agriculture

31. The United States requests the Appellate Body to reverse the Panel's findings that the United States has acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture* by providing export subsidies listed in Article 9.1(d) of the *Agreement on Agriculture* in excess of the quantity commitment

<sup>49</sup> The United States refers to the statements of the Belgian, French, Dutch and Swiss representatives of 14 January 1981 (C/M/145).

<sup>50</sup> Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut* ("*Brazil - Desiccated Coconut*"), WT/DS/22/AB/R, adopted 20 March 1997, DSR 1997:I, 167.

levels specified in the United States Schedule in respect of wheat; and by providing export subsidies listed in Article 9.1(d) in respect of all unscheduled products.

(a) Article 9.1(d) of the *Agreement on Agriculture*

32. According to the United States, the Panel wrongly interpreted the phrase "to reduce the costs of marketing" in Article 9.1(d) of the *Agreement on Agriculture* and, as a consequence, erred in finding the FSC tax exemption to be an Article 9.1(d) export subsidy. The Panel defined an Article 9.1(d) subsidy in terms of the nature of the activities performed by the entity receiving the subsidy rather than the nature of the subsidy itself. In the view of the United States, the Panel's analysis suffers from a "fundamental flaw"<sup>51</sup>, namely the conclusion that subsidies which benefit export entities generally should be deemed specifically to "reduce the costs of marketing".

33. The United States considers the ordinary meaning of the phrase "costs of marketing" to refer to "marketing costs" - which would not include income taxes - and finds support for this meaning in the specific examples listed in Article 9.1. The Panel's interpretation of Article 9.1(d) ignores the context of that sub-paragraph and is so broad that it subsumes all but one of the other subparagraphs of Article 9.1 and renders them redundant. Additional relevant context to demonstrate the error in the Panel's analysis can, in the view of the United States, be found in paragraph 13 of Annex 3 of the *Agreement on Agriculture* (which sets out a calculation methodology for "marketing-cost reduction measures" that could not work if an income tax exemption were a marketing cost), the *SCM Agreement's* Illustrative List (which distinguishes tax-related subsidies from other types of subsidies), as well as footnote 59 to the *SCM Agreement* and the 1981 "understanding". The United States adds that the Panel's interpretation is inconsistent with the object and purpose of the *SCM Agreement*, in particular because it appears to assume that Article 9.1 is intended to cover *all* export subsidies to agricultural products, even though Article 10.1 makes it clear that the drafters did not intend Article 9.1 to be so broad in scope.

(b) Article 3.3 of the *Agreement on Agriculture*

34. The United States argues that the Panel erred in ruling that the mere availability of the FSC tax exemption for unscheduled products constituted a violation of Article 3.3 of the *Agreement on Agriculture*. The United States considers the Panel's reasoning on this issue to be inconsistent with established principles of treaty interpretation and with the meaning of the term "provide".

35. The United States contends that the Panel wrongly relied upon one dictionary definition of "provide", namely "make available", rather than upon the more common meaning of the term, namely "supply or furnish for use" or, in other words, to "grant or pay". That the latter definition of "provide" is the correct one under Article 3.3 is confirmed by reference to the equivalent verbs used in the French ("accorder") and Spanish ("otorgar") versions of Article 3.3. Further context supporting this meaning is found elsewhere in the *Agreement on Agriculture*. In Article 9.2(b), "provide" can only mean to "grant or pay". Articles 9.4 and 10.1 refer to Article 9.1 subsidies being "applied"; Articles 9.2(a)(ii) and 10.3 refer to an export subsidy being "granted"; and

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<sup>51</sup> United States' appellant's submission, para. 323.

Article 11 of the *Agreement on Agriculture* refers to an export subsidy "paid". Moreover, the United States considers that the Appellate Body has itself effectively defined "provided" as synonymous with "granted".<sup>52</sup> The United States adds that the Panel's analysis means that the word "provide" has a different meaning in the first clause of Article 3.3 than in the second clause, and that this reading "flies in the face of the basic interpretive principle that a word is presumed to mean the same thing when used in different parts of an agreement."<sup>53</sup>

### 3. *Article 4.2 of the SCM Agreement*

36. The United States requests the Appellate Body to reverse the Panel's refusal to dismiss the claims of the European Communities under Article 3 of the *SCM Agreement* on the grounds that the European Communities failed to include a statement of available evidence in its request for consultations, as required by Article 4.2 of that Agreement.

37. The United States emphasizes that Article 4.2 of the *SCM Agreement* creates a *supplemental* requirement - applicable to requests for consultations under Article 4.1 of the *SCM Agreement* involving prohibited subsidy claims - which is additional to the requirements contained in the DSU. The United States observes that Appendix 2 to the DSU specifically identifies Article 4.2 of the *SCM Agreement* as a "special or additional rule or procedure" which, pursuant to Article 1.2 of the DSU, may add to and prevail over provisions of the DSU. The United States contends that the term "shall" makes clear that the obligation to include a "statement of available evidence" under Article 4.2 is *mandatory*.<sup>54</sup>

38. The United States alleges that the Panel erred in refusing to rule on whether evidence subsequently submitted by the European Communities was "available" at the time of the requests for consultations. The Panel further erred in indicating that the European Communities' consultation requests, which simply identified the relevant provisions of the IRC, could satisfy Article 4.2. The Panel justified this conclusion based on its characterization of the European Communities' claims as involving a *de jure* export subsidy. This approach ignores the distinction between law and fact, and between arguments and evidence. In any event, the United States argues, this is not a *de jure* case, but a dispute that has been fact-intensive from the outset.

39. In the view of the United States, the Panel's determination that it lacked authority to dismiss the European Communities' Article 3 claims even if the European Communities violated Article 4.2 is inconsistent with the governing WTO provisions, previous WTO practice, and the significance accorded to consultations in the dispute settlement process. The failure of a complaining party to satisfy the mandatory requirement in Article 4.2 must have a consequence. As the Appellate Body has

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<sup>52</sup> Appellate Body Report, *Brazil - Export Financing Programme for Aircraft* ("Brazil - Aircraft"), WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, para. 148.

<sup>53</sup> United States' appellant's submission, para. 341.

<sup>54</sup> Panel report, *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather* ("Australia - Leather"), WT/DS126/R, adopted 16 June 1999, DSR 1999:III, 951, para. 9.29.

demonstrated, the fact that dismissal is not expressly provided for in the *SCM Agreement* or the DSU does not mean that such a remedy is not authorized.<sup>55</sup>

40. The United States also contests the Panel's conclusion that any failure by the European Communities to meet the requirements of Article 4.2 was excused by the fact that the United States did not object to the European Communities' request when it was made. This apparent exercise of "equitable powers" is contrary to Article 3.2 of the DSU.<sup>56</sup> The United States emphasizes that the obligation to include a statement of available evidence serves to ensure that defending Members receive due process - particularly in view of the short time periods applicable to subsidy claims.

#### 4. *Appropriate Forum*

41. The United States requests the Appellate Body to reverse the decision of the Panel not to dismiss or defer consideration of the European Communities' claims relating to the administrative pricing rules unless and until these rules had been raised in an appropriate tax forum. The United States believes that this issue is relevant even though the Panel did not make findings with respect to the FSC administrative pricing rules for two reasons: the Panel *did* make findings regarding footnote 59, and the European Communities has made clear throughout this dispute that it views arm's length pricing as integral to its claims.

42. The United States contends that the Panel misconstrued the meaning of the relevant portion of footnote 59, which directs Members to resort to appropriate tax fora before invoking WTO dispute settlement. According to the United States, "shall normally" should be read to mean that WTO Members raising transfer pricing issues are under a duty, in the absence of unusual, abnormal, or extraordinary circumstances, to invoke the assistance of a tax forum. In support of this interpretation, the United States refers to a previous interpretation of the term "shall normally" in Article 5.1 of the *Tokyo Round Agreement on Implementation of Article VI of the GATT 1947*<sup>57</sup>, as well as to the Appellate Body's interpretation of the word "should".<sup>58</sup>

43. The United States believes that the Panel's interpretation renders the fourth sentence of footnote 59 essentially unenforceable. There are compelling reasons for resorting to an appropriate tax forum, in particular because the application of the *SCM Agreement* to measures involving direct taxes raises complicated issues which implicate international tax principles and tax treaties. In this case, the European Communities did not attempt to raise its concerns about the administrative pricing rules through the facilities of existing bilateral tax treaties or other international institutions, such as the Organization for Economic Cooperation and Development.

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<sup>55</sup> Appellate Body Report, *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("Guatemala - Cement"), WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767.

<sup>56</sup> United States' appellant's submission, para. 381.

<sup>57</sup> Panel report, *United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, ADP/47, issued 20 August 1990 (unadopted), para. 5.20.

<sup>58</sup> Appellate Body Reports, *Canada - Measures Affecting the Export of Civilian Aircraft* ("Canada - Aircraft"), WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, para. 187; *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 133.

Finally, the United States argues that the fact that footnote 59 is not listed in Appendix 2 of the DSU as a "special or additional" rule is not relevant. Appendix 2 does not list special rules that apply *outside* the context of the DSU - such as the language of footnote 59 instructing Members to take transfer pricing issues first to a tax forum *outside* the WTO.

*B. Arguments by the European Communities - Appellee*

*1. The SCM Agreement*

44. The European Communities requests the Appellate Body to uphold the Panel's findings under the *SCM Agreement*, and to reject the United States' appeal against the Panel's "finding that a failure to tax foreign source income constitutes the foregoing of revenue that is 'otherwise due' within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*".<sup>59</sup>

45. The European Communities objects that the United States' argument that the FSC measure can be justified as a measure for the avoidance of double taxation within the meaning of the last sentence of footnote 59 is inadmissible. The United States is relying on a new "affirmative defence"<sup>60</sup>, which it did not raise before the Panel. As a practical matter, the Appellate Body cannot deal with this issue as it would require the examination of factual issues not examined by the Panel.

46. The European Communities rejects the order in which the United States claims the Panel should have addressed the issues in this appeal. In the view of the European Communities, the United States wants the analysis to begin with footnote 59 and its "controlling legal principle" so as to avoid dealing with the clear terms of Article 3.1(a) of the *SCM Agreement*. The European Communities agrees with the Panel that the correct order to interpret the relevant provisions is to begin with the definition of a subsidy in Article 1, examine contingency upon export performance under Article 3.1(a), and then consider whether the prohibition is confirmed by item (e) and footnote 59 of the Illustrative List or whether this provision contains an affirmative defence.

47. It seems to the European Communities that the United States accepts the Panel's interpretation of Article 1.1(a)(1)(ii) of the *SCM Agreement* and the "but for" test, but argues that an exception exists - that taxation of foreign-source income is never "otherwise due". However, neither footnote 5, footnote 59, nor the 1981 "understanding" relate to or can create such an exception. In this regard, the European Communities considers that even if all measures in the Illustrative List were contingent upon export, this does not mean that measures referred to as not constituting export subsidies are not subsidies. By its terms, footnote 5 cannot exempt measures from the Article 1 definition of a subsidy. Furthermore, footnote 59 has nothing to do with the general proposition that Members are not required to tax foreign-source income, and the 1981 "understanding" is irrelevant to the interpretation of revenue "otherwise due" under Article 1.1(a)(1)(ii) of the *SCM Agreement*. The European Communities notes in this regard that saying that "foreign source income

<sup>59</sup> European Communities' appellee's submission, para. 86.

<sup>60</sup> European Communities' appellee's submission, para. 13.

'need not be subject to taxation by the exporting country'" is not tantamount to saying that revenue is not "otherwise due"<sup>61</sup>, and that the 1981 "understanding" relates to Article XVI of the GATT 1947, which does not include a definition of subsidy.

48. The European Communities observes that the United States does not deny that the FSC measure provides subsidies that come within the general terms of Article 3.1(a) or within item (e) of the Illustrative List. However, for the footnote 5 exception to Article 3.1(a) to apply, the FSC measures must be referred to in Annex I as "not constituting export subsidies". Footnote 59 does not have such an effect. The second sentence of footnote 59 simply points out that allowing enterprises to use non-arm's length pricing may give rise to an export subsidy when this is done in connection with export-related measures. The fifth sentence is not properly before the Appellate Body, and in any case, the European Communities adds, the FSC regime is not intended "to avoid double taxation".

49. The European Communities asks the Appellate Body to uphold the Panel's findings that the 1981 "understanding" is not an "other decision" within the meaning of paragraph (1)(b)(iv) of the introductory language to GATT 1994. The European Communities rejects the United States' argument that the *decision* to adopt the *Tax Legislation Cases* reports and the "understanding" are separate acts. As the text of the 1981 "understanding" and the Chairman's statement clearly indicate, the Council adopted a single decision - the "understanding" and the adoption of the panel reports were inextricably connected. Even if the "understanding" were separate from the decision to adopt the *Tax Legislation Cases* reports, the European Communities does not accept that it would constitute a "legal instrument" under paragraph 1(b)(iv).

50. The European Communities adds that the 1981 "understanding" cannot be relevant context for the interpretation of the *SCM Agreement* because it is neither contemporaneous with, nor related to, that Agreement. Since Article XVI:4 of the GATT 1947 has been substantially modified by the new WTO system of rules, pre-1994 interpretations are doubly obsolete. Finally, the European Communities emphasizes that the 1981 "understanding" states that foreign "economic processes" *need not* be subject to tax, *not* that foreign "economic processes" may be *exempted* from tax on any condition a country wishes to impose, including export contingency. Since FSC subsidies are not granted to "foreign economic processes", the European Communities concludes that they cannot benefit from the 1981 "understanding".

2. *Articles 3.3, 8, 9.1(d) and 10.1 of the Agreement on Agriculture*

(a) *Article 9.1(d) of the Agreement on Agriculture*

51. The European Communities argues that, with respect to scheduled products, the Panel correctly held that the FSC measure is an export subsidy under Article 9.1(d) and therefore violates the first clause of Article 3.3 and Article 8 of the *Agreement on Agriculture*. In the alternative, the European Communities argues that

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<sup>61</sup> European Communities' appellee's submission, para. 214, referring to the United States' appellant's submission, para. 295.

even if the FSC measure is *not* an export subsidy under this provision, it nevertheless violates Article 10.1 and Article 8 of the *Agreement on Agriculture*.

52. The European Communities recalls that there are certain well-defined activities which an FSC *must* perform in order to be eligible to profit from FSC exemptions. All of these activities cover parts of the ordinary meaning of the term "marketing". Consequently, the European Communities believes that the Panel was correct in finding that the FSC measure "involves the provision of a subsidy to reduce the costs of marketing exports of agricultural products within the meaning of Article 9.1(d) of the *Agreement on Agriculture*."<sup>62</sup> In this regard, the European Communities also observes that the Panel's interpretation of Article 9.1(d) is much narrower than the characterization of it by the United States would imply. Only because the FSC measure is so intrinsically linked with the requirements to perform the specified "marketing" activities did the Panel decide that the purpose of the FSC measure is to reduce the costs of marketing exports, and that it is covered by Article 9.1(d).

53. The European Communities rejects the United States' argument that "income taxes" are not "marketing costs". Article 9.1(d) sets out such a wide range of illustrative examples (of different types of "marketing") that support the argument that the term "marketing" should be interpreted broadly. Furthermore, the *Agreement on Agriculture* contains contextual support demonstrating that tax-related subsidies are included in the scope of Article 9.1(d). The European Communities adds that the Panel's interpretation of Article 9.1(d) is supported by the object and purpose of the *Agreement on Agriculture* and, in particular, its export subsidy disciplines.

54. If the Appellate Body reverses the Panel's conclusion that the United States has provided export subsidies listed in Article 9.1(d) in excess of its reduction commitment levels for wheat, the European Communities requests, in the alternative, that the Appellate Body find a violation of Articles 10.1 and 8 of the *Agreement on Agriculture*. The European Communities recalls that all subsidies which are "contingent upon export performance" are subject to the provisions of Article 10.1 relating to the prevention of circumvention of export subsidy commitments.<sup>63</sup> In this case, the two elements of an Article 10.1 violation are present, namely: (1) "export subsidies not listed in paragraph 1 of article 9"; (2) which are "applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments". The first element is satisfied by the finding that the FSC measure is an "export subsidy" under Article 3.1(a) of the *SCM Agreement*. Regarding the second element, when Article 10.1 is read together with Article 10.3, it is clear that granting non-Article 9.1 export subsidies to a product subject to reduction commitments, in excess of the reduction commitment level, may threaten or lead to the circumvention of such commitments.<sup>64</sup> The United States presented no evidence to establish that no export subsidies have been granted with respect to wheat exports in excess of the reduction commitment levels.<sup>65</sup>

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<sup>62</sup> Panel Report, para. 7.159.

<sup>63</sup> Panel report, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by the Appellate Body Report, DSR 1999:VI, 2097.

<sup>64</sup> *Ibid.*

<sup>65</sup> Panel Report, para. 7.163.

55. Finally, the European Communities presents a further alternative argument. Article 8 of the *Agreement on Agriculture* is a "fundamental general provision" <sup>66</sup> that makes clear that Members must not grant export subsidies otherwise than in conformity with that Agreement. Since Article 9 is the principal provision of the *Agreement on Agriculture* that allows export subsidies, the European Communities argues that if the FSC subsidies are not covered by Article 9.1(d), then their availability for agricultural products is a violation of Article 8 of the *Agreement on Agriculture*.

(b) Article 3.3 of the *Agreement on Agriculture*

56. The European Communities asks the Appellate Body to uphold the Panel's finding that, with respect to unscheduled agricultural products, the United States has acted inconsistently with its obligations under the second clause of Article 3.3 (and Article 8) of the *Agreement on Agriculture* by "providing" subsidies listed in paragraph 9.1(d).

57. In the view of the European Communities, the Panel correctly found that the term "to provide" in the second clause of Article 3.3 *Agreement on Agriculture* includes "the notion of making something available as well as that of actually granting or paying that thing."<sup>67</sup> The European Communities does not believe that the French and Spanish texts of Article 3.3 of the *Agreement on Agriculture* differ in any way from the English text. The European Communities also refers to the context and the grammatical setting of the phrase "to provide" in support of the Panel's interpretation. The European Communities finds further support for its argument that the existence and availability of the FSC measure *itself* can be a ground for a violation of Article 3.3 of the *Agreement on Agriculture* in certain statements made and reasoning employed by panels<sup>68</sup> and by the Appellate Body.<sup>69</sup>

58. If the Appellate Body should find that the FSC subsidies are not subsidies listed in paragraph 9.1(d), the European Communities argues, in the alternative, that the availability of the FSC measure with respect to unscheduled agricultural products nevertheless violates Article 8, because the *Agreement on Agriculture* contains no explicit or implicit provision which *allows* Members to provide export subsidies of the kind involved in this case for unscheduled products.

3. Article 4.2 of the *SCM Agreement*

59. The European Communities argues that the Panel correctly interpreted Article 4.2 of the *SCM Agreement*, and correctly held that even if there had been non-compliance with the requirements of Article 4.2, this would not require dismissal of

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<sup>66</sup> European Communities' appellee's submission, para. 273, citing the Panel Report in *Canada - Milk*, *supra*, footnote 63, para. 7.27.

<sup>67</sup> Panel Report, para. 7.170 (all emphasis added by the European Communities).

<sup>68</sup> The European Communities refers to the Panel reports, *Australia - Leather*, *supra*, footnote 54, paras. 9.38 and 9.41; and *Canada - Aircraft*, WT/DS70/R, adopted 20 August 1999, as modified by the Appellate Body Report, *supra*, footnote 58, DSR 1999:IV, 1443.

<sup>69</sup> The European Communities refers to the Appellate Body Reports, *Brazil - Aircraft*, *supra*, footnote 52, para. 158; and *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, DSR 1998:III, 1003, para. 55.

any of the European Communities' claims. In the view of the European Communities, Article 4.2 of the *SCM Agreement* is a specific application to subsidy cases of the general requirements contained in the second sentence of Article 4.4 of the DSU. The European Communities underlines, however, that while both the panel and the consultation stages are important elements of dispute resolution, the procedural rules applicable to consultations are intended to be effective *only at the consultation stage*.

60. The European Communities believes that the Panel correctly determined the meaning of a statement of available evidence, and correctly found that the European Communities' request for consultations constituted "evidence" within the meaning of Article 4.2 of the *SCM Agreement*. Since the FSC measure is a case where the nature and existence of the subsidy derives from the law, no "evidence" is required other than the law itself. The European Communities further argues that the Panel correctly held that even non-compliance with the requirements of Article 4.2 of the *SCM Agreement* does not require the dismissal of any of the claims of the European Communities. The consequences, if any, for such non-compliance should be found at the consultation stage rather than the panel stage. The European Communities submits that the jurisprudence of the Appellate Body supports this approach.<sup>70</sup>

61. Finally, the European Communities does not accept that the United States' due process rights have been violated because: (1) the request for consultations did contain a statement of available evidence and the United States never argued otherwise during consultations; (2) the United States was well aware of the features of the FSC measure; and (3) although the United States had ample opportunity, it did not ask for further evidence during three rounds of consultations.

#### 4. *Appropriate Forum*

62. The European Communities requests the Appellate Body to uphold the Panel's findings on the fourth sentence of footnote 59 to the *SCM Agreement*. The WTO is the appropriate forum for these proceedings *because they involve export subsidies prohibited by the SCM Agreement*, and the "alternatives" suggested by the United States are in any case inappropriate.

63. The European Communities agrees with the Panel, and with the Appellate Body Report in *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*<sup>71</sup>, that Members have a fundamental right to resort to dispute resolution *at any time*, and that such right can only be restricted by clear and unambiguous language. No such basis exists in the non-obligatory language of footnote 59. To the contrary, as the Panel found, the fact that footnote 59 is not identified as a special or additional dispute settlement provision in Appendix 2 of the DSU confirms that footnote 59 cannot circumscribe the fundamental right of a Member to pursue dispute settlement at any time. Finally, since the United States did not raise its

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<sup>70</sup> The European Communities cites the Appellate Body Reports, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9; *Brazil - Aircraft*, *supra*, footnote 52; and *Korea - Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3.

<sup>71</sup> Appellate Body Report, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763.

arguments concerning the exhaustion of remedies in tax fora at the consultations stage, the European Communities argues that the objections by the United States must now be rejected because they were brought too late.

C. *Claims of Error by the European Communities - Appellant*

1. *The FSC Administrative Pricing Rules*

64. The European Communities requests the Appellate Body to find that the availability of the FSC administrative pricing rules either gives rise to a separate prohibited export subsidy for the reasons advanced by the European Communities before the Panel, or gives rise to a prohibited export subsidy when combined with the tax exemptions contained in the FSC measure. The European Communities considers that the Panel's findings encompassed the administrative pricing rules, because the Panel recommended in paragraph 8.3 of its Report that the United States "withdraw the FSC *subsidies*", and the term "FSC subsidies" was used throughout the proceedings to refer to *both* the exemptions and the administrative pricing rules.<sup>72</sup> To confirm this understanding, the European Communities has taken the precaution of bringing this cross-appeal, which is "conditional" upon "the unlikely event" that any of the Panel's recommendations are overturned.

65. The European Communities agrees with the Panel that the FSC exemptions by themselves are sufficient to justify a finding that there is a prohibited export subsidy, but adds that the administrative pricing rules make this conclusion even clearer since these rules can be considered to *compound* the subsidy. The European Communities alleges that a finding on the administrative pricing rules would not require the Appellate Body to engage in a complex examination of the functioning of the administrative pricing rules or make new factual findings. There are two administrative pricing rules, one of which may give a result up to twice as high as the other. Since the FSC and its parent may choose transaction by transaction whether to use the administrative pricing rules when these are available, as well as which of the two administrative pricing rules to use, it is clear that the *availability* of the administrative pricing rules increases the tax advantage that may be obtained.

2. *Article 3.1(b) of the SCM Agreement*

66. The European Communities requests that, *if* the Appellate Body concludes that the United States could bring the FSC measure into consistency with the Panel's recommendations *without* eliminating the provision that FSC subsidies are only available in respect of goods no more than 50 per cent of the fair market value of which is attributable to imports, the Appellate Body reverse the Panel's finding that there was no need to make a finding on the European Communities' claim under Article 3.1(b) of the *SCM Agreement*. In that event, the European Communities asks the Appellate Body to find that the FSC measure violates Article 3.1(b) of the *SCM Agreement*.

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<sup>72</sup> Panel Report, para. 4.274.

67. The European Communities explains that one of the conditions for obtaining the FSC subsidies is that foreign trade income must derive from transactions involving "export property". Subparagraph (C) of Section 927(a)(1) of the IRC imposes a requirement that not more than 50 per cent of the fair market value of "export property" be attributable to articles imported into the United States. This, the European Communities argues, makes the FSC subsidies contingent in law upon the use of domestic over imported goods, in violation of Article 3.1(b) of the *SCM Agreement*.

68. The European Communities observes that, if the United States could make the FSC measure consistent with Article 3.1(a) of the *SCM Agreement* by removing only the export contingency, for example by making the FSC measure available also to sales of goods by FSCs to domestic purchasers, then FSC subsidies would remain conditional on the sale of goods with no more than 50 per cent of their fair market value attributable to imports. In that case, the Panel's finding on Article 3.1(a) alone would not ensure that the United States complies with its obligations under the *SCM Agreement*, since the violation of Article 3.1(b) would persist.

#### D. Arguments by the United States - Appellee

##### 1. The FSC Administrative Pricing Rules

69. If the Appellate Body reverses the findings of the Panel under Article 3.1(a) of the *SCM Agreement*, the United States submits, the Appellate Body may complete the Panel's legal analysis "to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record...".<sup>73</sup> In that case, the United States believes that the factual findings of the Panel and/or the undisputed facts in the Panel record would require the Appellate Body to conclude that the European Communities has failed to satisfy its burden of proof, as complainant, of demonstrating that the FSC administrative pricing rules are inconsistent with the *SCM Agreement*.

70. The United States objects to the European Communities' assertion that the Panel's recommendation that the "FSC subsidies" be withdrawn means that the Panel also ruled on the administrative pricing rules. Examination of the Panel Report reveals that the Panel expressly refused to make such a finding. The United States also highlights that, in this appeal, it has not addressed possible implementation issues in any way.

71. The United States rejects the European Communities contention that the mere *availability* of a choice between transfer pricing methods can contravene the *SCM Agreement*. Determining whether or not a particular regime of transfer pricing rules is consistent with the principles set forth in footnote 59 is necessarily a fact-intensive task. The European Communities has presented no evidence that the administrative pricing rules improperly shift domestic-source income abroad in order to avoid payment of taxes. Finally, the United States argues that the European Communities has not satisfied the burden of proof imposed upon it under the third sentence of footnote

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<sup>73</sup> Appellate Body Report, *Australia - Measures Affecting Importation of Salmon* ("Australia - Salmon"), WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, para. 118; see also Appellate Body Report, *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* ("Korea - Dairy"), WT/DS98/AB/R, adopted 12 January 2000, para. 92.

59 to prove that the administrative pricing rules "result in a significant saving of direct taxes in export transactions".

## 2. *Article 3.1(b) of the SCM Agreement*

72. If the Appellate Body reverses the findings of the Panel under Article 3.1(a) of the *SCM Agreement*, then, the United States submits, the Appellate Body may complete the Panel's legal analysis "to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record...".<sup>74</sup> In this case, the United States believes that the factual findings of the Panel and/or the undisputed facts in the Panel record require the Appellate Body to conclude that the European Communities has failed to satisfy its burden of proof, as complainant, of demonstrating that the FSC definition of "export property" is inconsistent with Article 3.1(b) of the *SCM Agreement*.

73. The United States maintains that neither the tax exemption nor the FSC administrative pricing rules constitutes a prohibited export subsidy under Articles 3.1(a) or 3.1(b) of the *SCM Agreement* and neither is a "subsidy" within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*. Assuming *arguendo* that the FSC tax exemption and the FSC administrative pricing rules are not protected by footnote 5 of the *SCM Agreement* and that one or both measures constitutes a subsidy, the United States argues that in any case neither measure is contingent upon the use of domestic over imported goods. The requirement in section 927(a)(1)(C) applies to the overall *value* of the exported product, not to the domestic versus foreign content of its component parts. Therefore, a product could qualify under section 927(a)(1)(C) even if it consisted *entirely* of imported components, provided those components comprise no more than 50 per cent of the fair market value of the product. Since the European Communities has provided *no* evidence to support its assertion that section 927(a)(1)(C) forces a producer to make decisions on the sourcing of parts that would not be made in the absence of the 50 per cent requirement, the United States requests the Appellate Body to find that this requirement is not inconsistent with Article 3.1(b) of the *SCM Agreement*.

## E. *Arguments by the Third Participants*

### 1. *Canada*

74. Canada disagrees with the United States' assertion that taxation of foreign-source income is not "otherwise due" within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement* since, absent the FSC measure, income generated by export performance would be subject to United States taxation. Canada fully agrees with the Panel's conclusions regarding Article 3.1(a) of the *SCM Agreement*. With respect to the United States' argument, based on the fifth sentence of footnote 59, Canada observes that the FSC measure does not alleviate double taxation; rather, it enhances United States exports. Canada urges the Appellate Body to make a finding that the FSC measure is also a prohibited subsidy under Article 3.1(b) of the *SCM Agree-*

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<sup>74</sup> Appellate Body Report, *Australia - Salmon*, *supra*, footnote 73, para. 118.

ment. Finally, Canada notes that it agrees with the findings of the Panel under the *Agreement on Agriculture*.

## 2. Japan

75. Japan agrees with the Panel's interpretation of the term "otherwise due" in Article 1.1(a)(1)(ii) of the *SCM Agreement*, and requests that the Appellate Body confirm the Panel's findings and conclusions with respect to Article 3.1(a) of the *SCM Agreement*. Japan also supports the European Communities' request that the Appellate Body examine the consistency of the FSC measure with Article 3.1(b) of the *SCM Agreement*, as Japan considers that the FSC measure violates both Articles 3.1(a) and 3.1(b) of the *SCM Agreement*.

## IV. ISSUES RAISED IN THIS APPEAL

76. This appeal raises the following issues:

- (a) whether the Panel erred in finding that the FSC measure constitutes a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*, including whether the Panel erred in finding that the FSC measure involves a "subsidy" under Article 1.1 of the *SCM Agreement*;
- (b) whether the Panel erred in its interpretation and application of Article 3.3 of the *Agreement on Agriculture*, in particular:
  - i) in its interpretation and application of the term "costs of marketing" in Article 9.1(d) of the *Agreement on Agriculture*; and
  - ii) in its interpretation and application of the words "shall not provide such subsidies" in Article 3.3 of the *Agreement on Agriculture*.
- (c) whether the Panel erred in its interpretation and application of Article 4.2 of the *SCM Agreement*;
- (d) whether the Panel erred in its interpretation and application of footnote 59 of the *SCM Agreement* by declining to dismiss or defer the European Communities' claims regarding the FSC administrative pricing rules until the European Communities had attempted to resolve this matter through the facilities of existing bilateral tax treaties or other specific international instruments;
- (e) whether the Panel erred in finding that it was neither necessary nor appropriate to make findings with respect to the European Communities' claims under Article 3.1(a) of the *SCM Agreement* relating to the FSC administrative pricing rules;
- (f) whether the Panel erred in finding that it was neither necessary nor appropriate to make findings with respect to the European Communities' claims under Article 3.1(b) of the *SCM Agreement*.

## V. ARTICLE 3.1 OF THE SCM AGREEMENT

77. At the outset, the Panel stated that it would begin its examination of the dispute with the European Communities' claims under Article 3.1(a) of the *SCM*

*Agreement*, rather than with the United States' arguments under footnote 59 of that Agreement. Under Article 3.1(a), the Panel determined, first, whether the FSC measure involved a "subsidy" as that term is defined in Article 1.1 of the *SCM Agreement*. The Panel examined, in particular, whether the FSC measure involved the foregoing of "government revenue that is *otherwise due*" under Article 1.1(a)(1)(ii). (emphasis added) The Panel stated:

... we took the term "*otherwise due*" to refer to the situation that would prevail but for the measures in question. It is thus a matter of determining whether, absent such measures, there would be a higher tax liability. In our view, this means that a panel, in considering whether revenue foregone is "*otherwise due*", must examine the situation that would exist but for the measure in question. Under this approach, the question presented in this dispute is whether, if the FSC scheme did not exist, revenue would be due which is foregone by reason of that scheme.<sup>75</sup> (underlining added)

78. The Panel next considered whether this reading of the term "*otherwise due*" was altered by the 1981 Council action.<sup>76</sup> The Panel concluded that that action was "not a legal instrument with binding legal force on all contracting parties"<sup>77</sup> and that it did not, therefore, form part of the GATT 1994 under paragraph 1(b)(iv) of the language incorporating the GATT 1994 into the *WTO Agreement*.<sup>78</sup>

79. The Panel went on to find that the 1981 Council action was a "decision" which "guided" the WTO under Article XVI:1 of the *WTO Agreement*. However, the Panel took the view that the 1981 Council action was not "*relevant* to this dispute" because the 1981 Council action was limited to Article XVI:4 of the GATT 1947 and because Article XVI:4 of the GATT 1947 "differs dramatically from the export subsidy disciplines in the *SCM Agreement*".<sup>79</sup> (emphasis added)

80. The Panel also examined whether its reading of the term "*otherwise due*" was affected by footnote 59 of the *SCM Agreement*. The Panel opined:

... even assuming for the sake of argument that footnote 59 is predicated on the assumption that income arising from foreign economic processes is not as a general matter "*otherwise due*" within the meaning of Article 1.1(a)(1)(ii), we could at most conclude that a decision by a Member not to tax any income arising from foreign economic processes would not represent the foregoing of revenue "*otherwise due*". There is in our view however nothing in footnote 59 which would lead us to conclude that a Member that decides that it will tax income arising from foreign economic processes does not

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<sup>75</sup> Panel Report, para. 7.45.

<sup>76</sup> Throughout our findings, we use the term "1981 Council action" to refer to the action taken by the GATT 1947 Council when adopting the panel reports in the *Tax Legislation Cases*, *supra*, footnotes 44 and 45.

<sup>77</sup> Panel Report, para. 7.74.

<sup>78</sup> *Ibid.*, para. 7.85.

<sup>79</sup> *Ibid.*, paras. 7.79 and 7.85.

forego revenue "otherwise due" if it decides in a selective manner to exclude certain limited categories of such income from taxation.<sup>80</sup>

81. The Panel, therefore, dismissed the United States argument that footnote 59 altered the interpretation of the term "otherwise due". Thereafter, the Panel examined whether the FSC measure involves the foregoing of government revenue "otherwise due". The Panel found:

Viewed as an integrated whole, the exemptions provided by the FSC scheme represent a systematic effort by the United States to exempt certain types of income which would be taxable in the absence of the FSC scheme. Thus, application of special source rules for FSCs serves to protect a certain proportion of the foreign trade income of a FSC from direct taxation, whether or not that income would be taxable under the source rules provided for in Section 864 of the US Internal Revenue Code. The exemption from the anti-deferral rules of Subpart F of the US Internal Revenue Code ensure that the undistributed foreign trade income of a FSC is not immediately taxable to the US parent of a FSC, even though such income might otherwise be subject to the anti-deferral rules. Finally, the 100 per cent dividends-received deduction ensures that, even when the FSC distributes earnings attributable to foreign trade income to the US parent company, the US parent will not be subject to US income taxes on that income. Taken together, it is clear that the various exemptions under the FSC scheme result in a situation where certain types of income are shielded from taxes that would be due in the absence of the FSC scheme.<sup>81</sup>

82. The Panel, therefore, concluded that "the various exemptions under the FSC scheme, taken together, result in the foregoing of revenue which is otherwise due and thus give rise to a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement."<sup>82</sup> Having also found that the FSC measure involves a "benefit" to the recipients of the FSC tax exemptions<sup>83</sup>, the Panel concluded that the FSC tax exemptions "represent a subsidy within the meaning of Article 1 of the SCM Agreement."<sup>84</sup>

83. The Panel then considered whether the FSC subsidies are "contingent upon export performance" under Article 3.1(a) of the *SCM Agreement*. The Panel examined the provisions of the IRC, notably those relating to the "foreign trading gross receipts" of an FSC<sup>85</sup> and the definition of "export property".<sup>86</sup> In light of these provisions, the Panel concluded that the FSC tax exemptions are "contingent upon export performance" under Article 3.1(a) of the *SCM Agreement*. The Panel then examined footnote 59 again and reiterated that footnote 59 does not mean that "a Member is ... entitled to ... assert its taxing authority over income derived from for-

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<sup>80</sup> Panel Report, para. 7.92.

<sup>81</sup> *Ibid.*, para. 7.100.

<sup>82</sup> *Ibid.*, para. 7.102.

<sup>83</sup> *Ibid.*, para. 7.103.

<sup>84</sup> Panel Report, para. 7.104.

<sup>85</sup> Section 924 IRC.

<sup>86</sup> Section 927(a) IRC.

eign economic activities generally and then create an exemption from such taxation specifically for income derived from export activities."<sup>87</sup>

84. On the basis of this reasoning, the Panel concluded that the United States has "acted inconsistently with its obligations under Article 3.1(a) of the SCM Agreement by granting or maintaining export subsidies prohibited by that provision".<sup>88</sup>

85. The United States appeals, first, from the Panel's decision to begin its examination of the European Communities' claims under the *SCM Agreement* with Article 3.1 of that Agreement rather than with footnote 59, which the United States contends is the "controlling legal provision" in this case.<sup>89</sup> As regards the substantive interpretation of Article 1.1 of the *SCM Agreement*, the United States accepts, as a general proposition, the Panel's interpretation of the term "otherwise due" as establishing a "but for" test; however, the United States argues that this standard "is not unqualified" and "must yield" in situations where a specific standard exists for determining whether revenue is "otherwise due". In the view of the United States, footnote 59 provides such a "controlling" standard in this dispute.<sup>90</sup> The United States argues that this footnote provides the "most relevant context" for interpreting the term "otherwise due" because, under footnote 59, the FSC measure does not involve the foregoing of revenues "otherwise due".<sup>91</sup> The United States submits that this reading of footnote 59 is "confirmed" by the 1981 Council action.<sup>92</sup> In that regard, the United States appeals against the Panel's finding that the 1981 Council action is not part of the GATT 1994 and, in any event, has no relevance to this dispute. The United States contends that the 1981 Council action was a "decision" of the CONTRACTING PARTIES which entered into force before the *WTO Agreement* and which had a binding effect in determining the rights and obligations of all contracting parties to the GATT 1947. The United States concludes, accordingly, that the 1981 Council action is a "decision" under paragraph 1(b)(iv) of the language incorporating the GATT 1994 into the *WTO Agreement* and, therefore, may be relevant in dispute settlement proceedings.

86. The United States' appeal from the Panel's specific findings under Article 3.1(a) is limited to the Panel's treatment of footnote 59 and the 1981 Council action. The United States argues that footnote 59 means that "an exemption of foreign-source income from taxation, such as that provided by the FSC, does not fall within the scope of the prohibition [against export subsidies] even where the exemption in question is limited to income earned in export transactions."<sup>93</sup> The United States places particular reliance on the second and fifth sentences of footnote 59. It is "implicit" in the second sentence, argues the United States, that "foreign-source income may be exempted from tax or taxed to a lesser extent than domestic-source income."<sup>94</sup> Moreover, the United States contends that the fifth sentence of footnote 59

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<sup>87</sup> Panel Report, para. 7.119.

<sup>88</sup> *Ibid.*, para. 8.1.

<sup>89</sup> United States' appellant's submission, para. 64.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, para. 283.

<sup>92</sup> *Ibid.*, para. 133 and the heading on page 48.

<sup>93</sup> United States' appellant's submission, para. 65.

<sup>94</sup> *Ibid.*, paras. 74 and 83.

allows Members to adopt certain measures "to avoid double taxation", and that the FSC measure is such a measure. The United States maintains that this reading of footnote 59 is "confirmed" by the 1981 Council action, which is, therefore, relevant to this dispute.<sup>95</sup>

87. In reply, the European Communities supports the Panel's reasoning and findings on Article 3.1(a) of the *SCM Agreement*.

88. We will examine the United States' appeal on these various issues in the following order. First, we will consider whether the Panel ought to have begun its analysis with footnote 59, rather than with Articles 1.1 and 3.1 of the *SCM Agreement*. Second, we will examine the Panel's findings under Article 3.1(a) of the *SCM Agreement*, including the Panel's finding that the FSC measure involves a "subsidy" under Article 1.1 of the *SCM Agreement* and, in particular, the Panel's interpretation of the term "otherwise due" in Article 1.1. We will then address the Panel's finding that the FSC subsidy is "contingent upon export performance" and the United States' arguments that footnote 59, as "confirmed" by the 1981 Council action, means that the FSC measure is not an export subsidy.

89. We start with the United States' argument that the Panel erred by failing to begin its examination of the European Communities' claim under Article 3.1(a) of the *SCM Agreement* with footnote 59 of that Agreement. Instead, the Panel began its examination with the general definition of a "subsidy" that is set forth in Article 1.1 of the *SCM Agreement*.<sup>96</sup> This definition applies throughout the *SCM Agreement*, to all the different types of "subsidy" covered by that Agreement. In our view, it was not a legal error for the Panel to begin its examination of whether the FSC measure involves export *subsidies* by examining the general definition of a "subsidy" that is applicable to export *subsidies* in Article 3.1(a).<sup>97</sup> In any event, whether the examination begins with the general definition of a "subsidy" in Article 1.1 or with footnote 59, we believe that the outcome of the European Communities' claim under Article 3.1(a) would be the same.<sup>98</sup> The appropriate meaning of both provisions can be established and can be given effect, irrespective of whether the examination of the claim of the European Communities under Article 3.1(a) begins with Article 1.1 or with footnote 59.<sup>99</sup>

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<sup>95</sup> *Ibid.*, para. 133 and the heading on page 48.

<sup>96</sup> Panel Report, para. 7.39.

<sup>97</sup> We note that, in *Brazil - Aircraft*, we stated that in a dispute involving claims under Article 3.1(a) brought against a developing country Member, it is incumbent on the complaining Member to demonstrate, first, that the developing country Member in question is not in compliance with Article 27.4 of the *SCM Agreement*. The reason for this is that, in the circumstances described in Article 27, Article 3.1(a) *does not apply* to developing country Members. It is, therefore, necessary to establish, first, that Article 3.1(a) actually *applies* to the dispute (*supra*, footnote 52, para. 141). However, Article 27 does not apply to this dispute, which does not involve a complaint against a developing country Member, and the applicability of Article 3.1(a) is not, therefore, in issue.

<sup>98</sup> The United States agreed with this view in reply to questioning during the oral hearing.

<sup>99</sup> We note that the relationship between Article 1.1 and footnote 59 of the *SCM Agreement* is, therefore, different in this way from the relationship between the chapeau of Article XX of the GATT 1994 and the particular exceptions listed in sub-paragraphs (a) to (j) of that Article. In our Report in *United States - Import Prohibitions of Certain Shrimp and Shrimp Products* ("*United States - Shrimp*"), we observed that the application of the general standards of the chapeau of Article XX of the GATT 1994 is rendered very difficult, if not impossible, if the treaty interpreter does not, first,

(a) Article 1.1 of the *SCM Agreement*

90. We turn now to the definition of the term "subsidy" and, in particular, to Article 1.1(a)(1)(ii), which provides that there is a "financial contribution" by a government, sufficient to fulfil that element in the definition of a "subsidy", where "government revenue that is *otherwise due* is foregone or not collected". (emphasis added) In our view, the "*foregoing*" of revenue "*otherwise due*" implies that less revenue has been raised by the government than would have been raised in a different situation, or, that is, "otherwise". Moreover, the word "foregone" suggests that the government has given up an entitlement to raise revenue that it could "otherwise" have raised. This cannot, however, be an entitlement in the abstract, because governments, in theory, could tax *all* revenues. There must, therefore, be some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised "otherwise". We, therefore, agree with the Panel that the term "otherwise due" implies some kind of comparison between the revenues due under the contested measure and revenues that would be due in some other situation. We also agree with the Panel that the basis of comparison must be the tax rules applied by the Member in question. To accept the argument of the United States that the comparator in determining what is "otherwise due" should be something other than the prevailing domestic standard of the Member in question would be to imply that WTO obligations somehow compel Members to choose a particular kind of tax system; this is not so. A Member, in principle, has the sovereign authority to tax any particular categories of revenue it wishes. It is also free *not* to tax any particular categories of revenues. But, in both instances, the Member must respect its WTO obligations.<sup>100</sup> What is "otherwise due", therefore, depends on the rules of taxation that each Member, by its own choice, establishes for itself.

91. The Panel found that the term "otherwise due" establishes a "but for" test, in terms of which the appropriate basis of comparison for determining whether revenues are "otherwise due" is "the situation that would prevail but for the measures in question".<sup>101</sup> In the present case, this legal standard provides a sound basis for comparison because it is not difficult to establish in what way the foreign-source income of an FSC would be taxed "but for" the contested measure. However, we have certain abiding reservations about applying any legal standard, such as this "but for" test, in the place of the actual treaty language. Moreover, we would have particular misgivings about using a "but for" test if its application were limited to situations where there actually existed an alternative measure, under which the revenues in question would be taxed, absent the contested measure. It would, we believe, not be difficult to circumvent such a test by designing a tax regime under which there would be *no* general rule that applied formally to the revenues in question, absent the contested measures. We observe, therefore, that, although the Panel's "but for" test works in

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identify and examine the specific exception at issue (WT/DS58/AB/R, adopted 6 November 1998, para. 120).

<sup>100</sup> See *Japan - Taxes on Alcoholic Beverages* ("*Japan - Alcoholic Beverages*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 109-110, and *Chile - Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, paras. 59 and 60.

<sup>101</sup> Panel Report, para. 7.45.

this case, it may not work in other cases. We note, however, that, in this dispute, the European Communities does not contest either the Panel's interpretation of the term "otherwise due" or the Panel's application of that term to the facts of this case.<sup>102</sup> The United States also accepts the Panel's interpretation of that term as a general proposition.

92. The United States does, however, argue that the Panel erred because the general interpretation of the term "otherwise due" "must yield"<sup>103</sup> to the standard the United States perceives in footnote 59 of the *SCM Agreement*, which the United States contends, is the "controlling legal provision"<sup>104</sup> for interpretation of the term "otherwise due" with respect to a measure of the kind at issue.<sup>105</sup> In the view of the United States, footnote 59 means that the FSC measure is not a "subsidy" under Article 1.1 of the *SCM Agreement*. Thus, the United States does not read footnote 59 as providing context for the general interpretation of the term "otherwise due"; rather, the United States views footnote 59 as a form of exception to that general interpretation. The United States submits further that this reading of footnote 59 is "confirmed" by the 1981 Council action, which, it will be recalled, the United States contends forms part of the GATT 1994.

93. Article 1.1 sets forth the general definition of the term "subsidy" which applies "for the purpose of this Agreement". This definition, therefore, applies wherever the word "subsidy" occurs throughout the *SCM Agreement* and conditions the application of the provisions of that Agreement regarding *prohibited* subsidies in Part II, *actionable* subsidies in Part III, *non-actionable* subsidies in Part IV and countervailing measures in Part V. By contrast, footnote 59 relates to one item in the Illustrative List of Export Subsidies. Even if footnote 59 means - as the United States also argues - that a measure, such as the FSC measure, is *not* a prohibited *export* subsidy, footnote 59 does not purport to establish an exception to the general definition of a "*subsidy*" otherwise applicable throughout the entire *SCM Agreement*. Under footnote 5 of the *SCM Agreement*, where the Illustrative List indicates that a measure is not a prohibited *export* subsidy, that measure is *not* deemed, for that reason alone, not to be a "subsidy". Rather, the measure is simply *not prohibited* under the Agreement. Other provisions of the *SCM Agreement* may, however, still apply to such a "subsidy". We note, moreover, that, under footnote 1 of the *SCM Agreement*, "the exemption of an exported *product* from duties or taxes *borne by the like product* when destined for domestic consumption ... shall not be deemed to be a subsidy". (emphasis added) The tax measures identified in footnote 1 as not constituting a "*subsidy*" involve the exemption of exported *products* from *product-based* consumption taxes. The tax exemptions under the FSC measure relate to the taxation of *corporations* and not *products*. Footnote 1, therefore, does *not* cover measures such as the FSC measure.

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<sup>102</sup> In the Panel proceedings, the European Communities advanced an interpretation of the term "otherwise due" that differed from that retained by the Panel. The European Communities considered the Panel's interpretation to be "formalistic". See Panel Report, paras. 4.591 and 7.46.

<sup>103</sup> United States' appellant's submission, para. 279.

<sup>104</sup> *Ibid.*, para. 64.

<sup>105</sup> *Ibid.*, para. 111.

94. In light of the above, we do not accept the United States' argument that footnote 59 qualifies the general interpretation of the term "otherwise due". That being so, it is not necessary for us to examine, at this point, the United States' arguments on the interpretation of footnote 59 or the United States' belief that its interpretation of footnote 59 is "confirmed" by the 1981 Council action. These arguments will be examined below when we consider Article 3.1(a) of the *SCM Agreement* and footnote 59 of that Agreement, which is attached to item (e) of the Illustrative List.

95. The United States' appeal from the Panel's findings under Article 1.1 of the *SCM Agreement* is limited to its contention that the general interpretation of the term "otherwise due" is qualified by footnote 59. As we do not accept that sole ground of appeal, we uphold the Panel's finding that, under the FSC measure, the government of the United States foregoes revenue that is "otherwise due" under Article 1.1(a)(1)(ii) of the *SCM Agreement*. We note, in this respect, that the United States acknowledges that the FSC measure represents a departure from the rules of taxation that would "otherwise" apply to FSCs.<sup>106</sup> We note also that the United States does not contest that, absent the FSC measure, the tax liability of the FSCs would be higher.

(b) Article 3.1(a) of the *SCM Agreement*

96. The United States' appeal from the Panel's findings under Article 3.1(a) is limited to its contention that footnote 59, as "confirmed" by the 1981 Council action, means that the FSC measure is not an "export subsidy". Footnote 59 reads:

The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. *The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length.* Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member. (emphasis added)

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<sup>106</sup> In paragraphs 7.95, 7.96 and 7.97 of the Panel Report, the Panel described, in detail, the manner in which the three tax exemptions provided under the FSC measure constitute a departure from the rules of taxation that would "otherwise" apply. At the oral hearing, the United States confirmed the correctness of the description given of the rules of taxation that would "otherwise" apply and of the three FSC exemptions in paragraphs 7.95, 7.96 and 7.97 of the Panel Report. The FSC measure is also described, *supra*, in paragraphs 11 to 18.

97. We need to examine footnote 59 sentence by sentence. The first sentence of footnote 59 is specifically related to the statement in item (e) of the Illustrative List that the "full or partial exemption remission, or deferral specifically related to exports, of direct taxes" is an export subsidy. The first sentence of footnote 59 qualifies this by stating that "deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected." Since the FSC measure does not involve the *deferral* of direct taxes, we do not believe that this sentence of footnote 59 bears upon the characterization of the FSC measure as constituting, or not, an "export subsidy".

98. The second sentence of footnote 59 "reaffirms" that, in allocating export sales revenues, for tax purposes, between exporting enterprises and controlled foreign buyers, the price for the goods shall be determined according to the "arm's length" principle to which that sentence of the footnote refers. Like the Panel, we are willing to accept, for the sake of argument, the United States' position that it is "implicit" in the requirement to use the arm's length principle that Members of the WTO are not obliged to tax foreign-source income, and also that Members may tax such income less than they tax domestic-source income.<sup>107</sup> We would add that, even in the absence of footnote 59, Members of the WTO are *not* obliged, by WTO rules, to tax *any* categories of income, whether foreign- or domestic-source income. The United States argues that, since there is no requirement to tax export-related foreign-source income, a government cannot be said to have "foregone" revenue if it elects not to tax that income. It seems to us that, taken to its logical conclusion, this argument by the United States would mean that there could *never* be a foregoing of revenue "otherwise due" because, in principle, under WTO law generally, *no* revenues are ever due and *no* revenue would, in this view, ever be "foregone". That cannot be the appropriate implication to draw from the requirement to use the arm's length principle.

99. Furthermore, we do not believe that the requirement to use the arm's length principle resolves the issue that arises here. That issue is *not*, as the United States suggests, whether a Member is or is not obliged to tax a particular category of foreign-source income. As we have said, a Member is not, in general, under any such obligation. Rather, the issue in dispute is whether, *having decided to tax a particular category of foreign-source income*, namely foreign-source income that is "effectively connected with a trade or business within the United States", the United States is *permitted to carve out an export contingent exemption from the category of foreign-source income that is taxed under its other rules of taxation*. Unlike the United States, we do not believe that the second sentence of footnote 59 addresses this question. It plainly does not do so expressly; neither, as far as we can see, does it do so by necessary implication. As the United States indicates, the arm's length principle operates when a Member chooses not to tax, or to tax less, certain categories of foreign-source income. However, the operation of the arm's length principle is unaffected by the choice a Member makes as to *which* categories of foreign-source income, if any, it will not tax, or will tax less. Likewise, the operation of the arm's length principle is unaffected by the choice a Member might make to grant exemptions from the generally applicable rules of taxation of foreign-source income that it

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<sup>107</sup> United States' appellant's submission, para. 83.

has selected for itself. In short, the requirement to use the arm's length principle does not address the issue that arises here, nor does it authorize the type of export contingent tax exemption that we have just described. Thus, this sentence of footnote 59 does not mean that the FSC subsidies are not export subsidies within the meaning of Article 3.1(a) of the *SCM Agreement*.

100. The third and fourth sentences of footnote 59 set forth rules that relate to remedies. In our view, these rules have no bearing on the substantive obligations of Members under Articles 1.1 and 3.1 of the *SCM Agreement*. So, we turn to the fifth and final sentence of footnote 59. That sentence provides:

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.

101. On appeal, the United States maintains that the FSC measure is a measure "to avoid double taxation of foreign-source income" under footnote 59.<sup>108</sup> As a consequence, the United States further contends that the FSC measure is excluded from the prohibition against export subsidies in Article 3.1(a) of the *SCM Agreement*. During the oral hearing, we asked the United States to identify where it had asserted before the Panel that the FSC measure is a measure "to avoid double taxation of foreign-source income" under footnote 59. That is, we asked the United States to tell us specifically where it had invoked the fifth sentence of footnote 59 as a means of justifying the FSC measure. In reply, the United States pointed to its first written submission to the Panel. In that submission, in describing the FSC measure and before setting forth its legal arguments, the United States stated that "the FSC is designed to prevent double taxation of export income earned outside the United States by exempting a portion of the FSC's income from taxation."<sup>109</sup> The United States pointed also to certain general arguments it made before the Panel concerning the fifth sentence of footnote 59. However, the United States did not indicate that, in its substantive arguments to the Panel, it had justified the FSC measure as a measure "to avoid double taxation" under footnote 59. Nor do we find any indication in the Panel Record that the United States ever invoked this justification. We, therefore, conclude that the United States did not assert, far less argue, before the Panel that the FSC measure is a measure "to avoid double taxation of foreign-source income" under footnote 59. Our conclusion is confirmed by the Panel's statement, in footnote 682 of the Panel Report, that the United States had not asserted that the fifth sentence of footnote 59 was "relevant to this dispute".<sup>110</sup> It follows, therefore, that this issue was not properly litigated before the Panel and that the Panel was not asked to examine whether the FSC measure is a measure "to avoid double taxation of foreign-source income" under footnote 59.

102. We said, in our Report in *Canada - Aircraft*, that "new arguments are not *per se* excluded from the scope of appellate review, simply because they are new."<sup>111</sup> However, that statement should not be read as allowing *any* new argument to be

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<sup>108</sup> United States' appellant's submission, para. 268.

<sup>109</sup> United States' first submission to the Panel, para. 54, reproduced at para. 4.348 of the Panel Report.

<sup>110</sup> Panel Report, para. 7.118.

<sup>111</sup> *Supra*, footnote 58, para. 211.

raised for the first time on appeal. Our ability to consider new arguments is circumscribed by our mandate under Article 17 of the DSU. In *Canada - Aircraft*, for example, we declined to examine a new argument that would have required us "to solicit, receive and review new facts", which we cannot do under Article 17.6 of the DSU.<sup>112</sup>

103. Our mandate under Article 17.6 is to address "*issues of law* covered in the panel report and *legal interpretations* developed by the panel". The argument which the United States asks us to address under the fifth sentence of footnote 59 involves two separate legal issues: first, that the FSC measure is a measure "to avoid double taxation of foreign-source income" within the meaning of footnote 59; and second, that, in consequence, the FSC measure is *excluded* from the prohibition in Article 3.1(a) of the *SCM Agreement* against export subsidies. In our view, examination of the substantive issues raised by this particular argument would be outside the scope of our mandate under Article 17.6 of the DSU, as this argument does not involve either an "issue of law covered in the panel report" or "legal interpretations developed by the panel". The Panel was simply not asked to address the issues raised by the United States' new argument. Further, the new argument now made before us would require us to address legal issues quite different from those which confronted the Panel and which may well require proof of new facts. The United States appears in effect to be appealing from the failure of the Panel to make a ruling or legal interpretation concerning the fifth sentence of footnote 59. That failure seems to us due to the failure of the respondent Member properly to litigate the matter before the Panel. We, therefore, decline to examine the United States' argument that the FSC measure is a measure "to avoid double taxation" within the meaning of footnote 59, and we reserve our opinion on this issue.

104. We turn next to the 1981 Council action and to the United States' argument that this action confirms its reading of footnote 59 of the *SCM Agreement*. The United States contends that the 1981 Council action is relevant to this dispute because, contrary to the Panel's finding<sup>113</sup>, that action forms part of the GATT 1994 and that, as such, it "confirms" the United States reading of footnote 59.<sup>114</sup> For that reason, the United States also appeals from the Panel's finding that, although the 1981 Council action provides "guidance" to the WTO as a "decision" under Article XVI:1 of the *WTO Agreement*, it has no relevance to this dispute.<sup>115</sup>

105. The 1981 Council action arose out of four disputes, known commonly and collectively as the *Tax Legislation Cases*. These cases involved tax measures of, respectively, France, Belgium, the Netherlands and the United States.<sup>116</sup> Each of the tax measures was alleged to involve export subsidies under Article XVI:4 of the GATT 1947. The panels in these disputes, each of which had the same composition, circulated their reports to the contracting parties of the GATT 1947 in November 1976. In each dispute, the panels found that the tax measure at issue was inconsistent with Article XVI:4 of the GATT 1947. These panel reports proved to be highly con-

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<sup>112</sup> *Ibid.*

<sup>113</sup> Panel Report, para. 7.85.

<sup>114</sup> United States' appellant's submission, para. 133 and the heading on page 48.

<sup>115</sup> Panel Report, para. 7.79.

<sup>116</sup> *Supra*, footnote 44; Panel Report, paras. 7.52-7.54.

troversial with the contracting parties, and resulted in an impasse among them which, for some time, prevented the adoption of any of these reports under the rules of Article XXIII of the GATT 1947. After several years of deadlock, and, indeed, after some of the contracting parties had signed the *Tokyo Round Subsidies Code*, in December 1981, the CONTRACTING PARTIES adopted the four panel reports in the *Tax Legislation Cases*. These reports were adopted on the basis of a particular action, which we have called the "1981 Council action", which reads in full:

The Council adopts *these reports on the understanding that with respect to these cases, and in general*, economic processes (including transactions involving exported goods) located outside the territorial limits of the exporting country need not be subject to taxation by the exporting country and should not be regarded as export activities in terms of Article XVI:4 of the General Agreement. It is further understood that Article XVI:4 requires that arm's-length pricing be observed, i.e., prices for goods in transactions between exporting enterprises and foreign buyers under their or the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Furthermore, Article XVI:4 does not prohibit the adoption of measures to avoid double taxation of foreign source income.<sup>117</sup> (emphasis added)

106. The 1981 Council action was accompanied by a statement of the Chairman of the GATT 1947 Council:

Following the adoption of these reports the Chairman noted that the Council's decision and understanding does not mean that the parties adhering to Article XVI:4 are forbidden from taxing the profits on transactions beyond their borders, it only means that they are not required to do so. *He noted further that the decision does not modify the existing GATT rules in Article XVI:4 as they relate to the taxation of exported goods. He noted also that this decision does not affect and is not affected by the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII. Finally, he noted that the adoption of these reports together with the understanding does not affect the rights and obligations of contracting parties under the General Agreement.*<sup>118</sup> (emphasis added)

107. The first issue relating to the 1981 Council action is whether it forms part of the GATT 1994 as an "other decision" under paragraph 1(b)(iv) of the language incorporating the GATT 1994 into the *WTO Agreement*. Paragraph 1(b) stipulates that the GATT 1994 includes certain "legal instruments ... that entered into force under the GATT 1947", such as "other decisions of the CONTRACTING PARTIES to the GATT 1947" under sub-paragraph (b)(iv). As the Panel said, in terms of Article II:2 of the *WTO Agreement*, these various "legal instruments" are, in themselves, "integral parts" of the *WTO Agreement* and are "binding on all Members". The inclusion of these "legal instruments" in the GATT 1994 recognizes that the legal character of

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<sup>117</sup> *Supra*, footnote 45.

<sup>118</sup> *Supra*, footnote 45.

the rights and obligations of the contracting parties under the GATT 1994 is not fully reflected by the text of the GATT 1994 because those rights and obligations are conditioned by the "protocols", "decisions" and other "legal instruments" to which paragraph 1(b) refers.

108. In our Report in *Japan - Alcoholic Beverages*, we stated that not every decision of the CONTRACTING PARTIES to the GATT 1947 is an "other decision" within the meaning of paragraph 1(b)(iv) of the language incorporating the GATT 1994 into the *WTO Agreement*. In that respect, we disagreed with the view that "adopted panel reports in themselves constitute 'other decisions' of the CONTRACTING PARTIES to GATT 1947" for the purposes of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.<sup>119</sup> (emphasis added) The reason for this conclusion was that adopted panel reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute".<sup>120</sup> (emphasis added) As we said there, the decision to adopt a panel report was not intended by the GATT 1947 CONTRACTING PARTIES to "constitute a definitive interpretation of the relevant provisions of GATT 1947."<sup>121</sup> (emphasis added)

109. The opening clause of the 1981 Council action states: "The Council adopts these reports on the understanding that with respect to these cases, and in general...". The 1981 Council action is, therefore, somewhat equivocal in tenor. On the one hand, it is clear from the text that the 1981 Council action relates specifically to the *Tax Legislation Cases* and is an integral part of the resolution of those disputes. This would suggest that, consistently with our Report in *Japan - Alcoholic Beverages*, the Council action is binding only on the parties to those disputes, and only for the purposes of those disputes.

110. On the other hand, we note that the opening clause of the 1981 Council action also prefaces the substance of the statement with the words "in general". The United States argues that these words indicate that the 1981 Council action was an "authoritative interpretation" of Article XVI:4 of the GATT 1947 that has "general" application and that, therefore, bound all the contracting parties. The European Communities counters that the 1981 Council action formed part of the resolution of the *Tax Legislation Cases* and that, in adopting that decision, the GATT 1947 Council was acting in dispute settlement "mode".<sup>122</sup> The European Communities contends further that disputes are resolved on the basis of the generally applicable rules that are, first, interpreted "in general" and then applied to the facts of a specific dispute. It is in this limited sense that the European Communities contends that the GATT 1947 Council meant the term "in general".<sup>123</sup>

111. The remainder of the text of the 1981 Council action embodies the substantive statement of the GATT 1947 Council on Article XVI:4 of the GATT 1947 and does not, in our view, shed any additional light on whether that statement bound all

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<sup>119</sup> *Supra*, footnote 100, at 108.

<sup>120</sup> *Ibid.* In that Report, we noted that Article 59 of the Statute of the International Court of Justice makes explicit provision to the same effect (footnote 30 at 108).

<sup>121</sup> *Ibid.*, at 107.

<sup>122</sup> European Communities' appellee's submission, para. 154.

<sup>123</sup> *Ibid.*, para. 158.

the contracting parties or only the parties to the *Tax Legislation Cases*.<sup>124</sup> We, therefore, share the Panel's view that the text of the 1981 Council action alone does not resolve the ambiguity highlighted by the conflicting arguments of the United States and the European Communities.<sup>125</sup> Thus, we consider that the Panel was correct to examine the circumstances surrounding the 1981 Council action.

112. When the 1981 Council action was adopted, the Chairman of the GATT 1947 Council stated, *inter alia*, that "the adoption of these reports together with the understanding *does not affect the rights and obligations of contracting parties under the General Agreement*." In our view, if the contracting parties had intended to make an *authoritative* interpretation of Article XVI:4 of the GATT 1947, binding on all contracting parties, they would have said so in reasonably recognizable terms. We think it most unlikely that the Chairman would have stated that the action did "*not affect the rights and obligations of contracting parties*", if it represented an authoritative interpretation of Article XVI:4 of the GATT 1947.<sup>126</sup> In our view, an authoritative, and generally binding, interpretation of Article XVI:4 would, in all probability, have been perceived by the contracting parties as affecting their rights and obligations and would not, therefore, have been accompanied by such a statement.<sup>127</sup> Thus, we are of the view that the statement of the GATT 1947 Council Chairman is consistent with a reading of the 1981 Council action which views that action as an integral part of the resolution of the *Tax Legislation Cases*, binding only the parties to those disputes.

113. As the Panel observed<sup>128</sup>, it is also noteworthy that, in the report of the GATT 1947 Council to the CONTRACTING PARTIES on its actions during that year, the 1981 Council action was addressed under the heading "Recourse to Articles XXII and XXIII". This tends to support the view that the 1981 Council action was a part of the resolution of the *Tax Legislation Cases* and not an authoritative interpretation of Article XVI:4 of the GATT 1947, binding on *all* the contracting parties.

114. In light of these surrounding circumstances, we conclude that the Panel was correct to find, in paragraph 7.85 of the Panel Report, that the 1981 Council action is not an "other decision" under paragraph 1(b)(iv) of the language incorporating the GATT 1994 into the *WTO Agreement*, and does not form part of the GATT 1994.

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<sup>124</sup> We note, in that respect, that we do not share the Panel's misgivings regarding the use of the word "should" in a "legal instrument" (Panel Report, para. 7.65). In our view, many binding legal texts employ the word "should" and, depending on the context, the word may imply either an exhortation or express an obligation (see, further, *Canada - Aircraft*, *supra*, footnote 58, para. 187).

<sup>125</sup> Panel Report, para. 7.65.

<sup>126</sup> This view is borne out by the statements made by a number of delegations, speaking either before or after the adoption of the panel reports in the *Tax Legislation Cases*. These delegations also expressed the view that the 1981 Council action did not affect or diminish their rights and obligations under the GATT 1947 (Panel Report, paras. 7.70 - 7.72).

<sup>127</sup> The distinction between an authoritative interpretation and an interpretation made in dispute settlement proceedings is made clear in the *WTO Agreement*. Under the *WTO Agreement*, an authoritative interpretation by the Members of the WTO, under Article IX:2 of that Agreement, is to be distinguished from the rulings and recommendations of the DSB, made on the basis of panel and Appellate Body Reports. In terms of Article 3.2 of the DSU, the rulings and recommendations of the DSB serve only "to clarify the existing provisions of those agreements" and "cannot add to or diminish the rights and obligations provided in the covered agreements."

<sup>128</sup> Panel Report, para. 7.67.

115. We recognize that, as "decisions" within the meaning of Article XVI:1 of the *WTO Agreement*, the adopted panel reports in the *Tax Legislation Cases*, together with the 1981 Council action, could provide "guidance" to the WTO. The United States believes that the "guidance" to be drawn from the 1981 Council action, through footnote 59, is that the FSC measure is not an "export subsidy". The present dispute involves the interpretation and application of Article 3.1(a) of the *SCM Agreement* and the question of whether the FSC measure involves export subsidies *under that provision*. In contrast, the 1981 Council action addresses the interpretation and application of Article XVI:4 of the GATT 1947. The "guidance" that the 1981 Council action might provide, therefore, depends, in part, on the relationship between these different provisions.

116. Although we have not previously had an opportunity to examine the relationship between these two particular provisions, we have in the past examined the relationship between the provisions of the GATT 1994 and certain other Multilateral Agreements on Trade in Goods.<sup>129</sup> In *Brazil - Desiccated Coconut*, we observed that the "relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis."<sup>130</sup> In that case, we examined aspects of the relationship between the GATT 1994 and the provisions of Part V of the *SCM Agreement* relating to *countervailing duties*. The *SCM Agreement* has specific provisions that address the relationship between the provisions of the GATT 1994 and the *SCM Agreement* on countervailing duties.<sup>131</sup> Similarly, in *Korea - Dairy*<sup>132</sup> and *Argentina - Safeguard Measures on Imports of Footwear*<sup>133</sup>, we examined the relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards*. There, too, the "precise nature of the relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards*" was explicitly addressed in the *Agreement on Safeguards*, in Articles 1 and 11.1(a).<sup>134</sup>

117. In contrast, the provisions of the *SCM Agreement* do not provide explicit assistance as to the relationship between the export subsidy provisions of the *SCM Agreement* and Article XVI:4 of the GATT 1994.<sup>135</sup> In the absence of any such specific textual guidance, we must determine the relationship between Articles 1.1(a)(1) and 3.1(a) of the *SCM Agreement* and Article XVI:4 of the GATT 1994 on the basis

<sup>129</sup> In particular, the *Agreement on Safeguards* and Part V of the *SCM Agreement*.

<sup>130</sup> *Supra*, footnote 50, at 178.

<sup>131</sup> Articles 10 and 32.1 of the *SCM Agreement*. See *Brazil - Desiccated Coconut*, *supra*, footnote 50, at 180-181.

<sup>132</sup> *Supra*, footnote 73.

<sup>133</sup> Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000.

<sup>134</sup> *Ibid.*, para. 82.

<sup>135</sup> We note, however, that under Article 1.1(a)(2) of the *SCM Agreement*, a "subsidy" may exist if "there is any form of income or price support in the sense of Article XVI of GATT 1994". This is a reference to Article XVI:1 and not Article XVI:4 of the GATT 1994. Footnote 1 of the *SCM Agreement*, which is attached to Article 1.1(a)(1)(ii) of that Agreement, also makes reference to Article XVI of the GATT 1994 in connection with "the exemption of an exported product from duties or taxes borne by like products destined for domestic consumption ...". This is a reference to the Interpretative Note *Ad Article XVI* of the GATT and is not a specific reference to Article XVI:4 of the GATT 1994. This reference to the Interpretative Note also has no relevance to this dispute. These references do not, therefore, provide us with guidance in determining the relationship between the export subsidy provisions of the *SCM Agreement* and Article XVI:4 of the GATT 1994.

of the texts of the relevant provisions as a whole. It is clear from even a cursory examination of Article XVI:4 of the GATT 1994 that it differs very substantially from the subsidy provisions of the *SCM Agreement*, and, in particular, from the export subsidy provisions of both the *SCM Agreement* and the *Agreement on Agriculture*. First of all, the *SCM Agreement* contains an express definition of the term "subsidy" which is not contained in Article XVI:4. In fact, as we have observed previously, the *SCM Agreement* contains a broad package of new export subsidy disciplines that "go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947".<sup>136</sup> Next, Article XVI:4 prohibits export subsidies only when they result in the export sale of a product at a price lower than the "comparable price charged for the like product to buyers in the domestic market." In contrast, the *SCM Agreement* establishes a much broader prohibition against *any* subsidy which is "contingent upon export performance". To say the least, the rule contained in Article 3.1(a) of the *SCM Agreement* that all subsidies which are "contingent upon export performance" are prohibited is significantly different from a rule that prohibits only those subsidies which result in a lower price for the exported product than the comparable price for that product when sold in the domestic market. Thus, whether or not a measure is an export subsidy under Article XVI:4 of the GATT 1947 provides no guidance in determining whether that measure is a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*. Also, and significantly, Article XVI:4 of the GATT 1994 does not apply to "primary products", which include agricultural products. Unquestionably, the explicit export subsidy disciplines, relating to agricultural products, contained in Articles 3, 8, 9 and 10 of the *Agreement on Agriculture* must clearly take precedence over the *exemption* of primary products from export subsidy disciplines in Article XVI:4 of the GATT 1994.

118. Furthermore, as the Panel observed, the text of the 1981 Council action itself contains reference only to Article XVI:4, and the Chairman of the GATT 1947 Council stated expressly that the 1981 Council action did *not* affect the *Tokyo Round Subsidies Code*. We share the Panel's view that, in these circumstances, it would be incongruous to extend the scope of the action, beyond that intended, to the *SCM Agreement*.<sup>137</sup> If the 1981 Council action did not affect the *Tokyo Round Subsidies Code*, which existed in 1981, it is difficult to see how that action could be seen to affect the *SCM Agreement*, which did not.

119. Against this background, we agree with the Panel that the 1981 Council action does not dispose of the issue before us, in particular, with respect to the determination of what constitutes an "export subsidy" under Article 3.1(a) of the *SCM Agreement*. The 1981 Council action related to a different provision, Article XVI:4 of the GATT 1947, and not to the export subsidy disciplines established by Articles 1.1 and 3.1(a) of the *SCM Agreement*.

120. In any event, even if the United States had been correct that the 1981 Council action could be relevant to Article 3.1(a) of the *SCM Agreement*, we do not believe that the 1981 Council action is of guidance in resolving *this* dispute because, in our view, that action does not address the issues that arise in this dispute. Through the

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<sup>136</sup> *Brazil - Desiccated Coconut*, *supra*, footnote 50, at 181.

<sup>137</sup> Panel Report, para. 7.85.

1981 Council action, the GATT 1947 Council made a statement about the conclusions of the panel reports in the *Tax Legislation Cases*. The factual and legal issues that arose in those disputes were quite different from the issue that arises here. That is, the GATT 1947 Council was not addressing the issue of whether, *having decided to tax a particular category of foreign-source income*, namely foreign-source income that is "effectively connected with a trade or business within the United States", the United States may provide *an export contingent exemption from the category of foreign-source income that is taxed under its other rules of taxation*. We, therefore, believe that the 1981 Council action does not provide useful interpretative "guidance" in resolving the legal issue relating to the FSC measure that is raised in this appeal.

121. In light of all the foregoing, we uphold the Panel's conclusion, in paragraph 8.1 of the Panel Report, that the FSC tax exemptions involve subsidies contingent upon export performance that are prohibited under Article 3.1(a) of the *SCM Agreement*.

## VI. ARTICLES 3.3 AND 9.1(D) OF THE AGREEMENT ON AGRICULTURE

122. The Panel began its examination of the European Communities' claims under the *Agreement on Agriculture* by noting that an inconsistency with Article 3.3 of that Agreement could arise only if a Member had provided export subsidies *listed in Article 9.1 of that Agreement*.<sup>138</sup> Furthermore, the Panel pointed out that with respect to agricultural products for which Members have made specific export subsidy commitments in Section II of Part IV of its Schedule ("scheduled agricultural products"), an inconsistency under Article 3.3 would arise only if the Member provided export subsidies listed in Article 9.1 "in excess of the budgetary outlay and/or quantity commitment levels".<sup>139</sup> In contrast, the Panel observed that, with respect to agricultural products for which a Member has made no specific commitments in Part IV of its Schedule ("unscheduled agricultural products"), an inconsistency under Article 3.3 would arise if a Member provided *any* export subsidies listed in Article 9.1.<sup>140</sup> The Panel set out to determine whether the FSC measure was a subsidy "to reduce the costs of marketing exports" under Article 9.1(d), the only sub-paragraph of Article 9.1 that the European Communities had specified in its claim.

123. The Panel stated that:

... as a practical commercial matter and in ordinary parlance, *income taxes are a cost of doing business*. Because FSC subsidies reduce an exporter's income tax liability with respect to marketing activities, they *effectively reduce the cost of marketing agricultural products*.<sup>141</sup> (emphasis added)

124. The Panel added:

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<sup>138</sup> Panel Report, para. 7.146.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> Panel Report, para. 7.155.

In any event, *a subsidy such as the FSC, which is provided to offset costs of marketing agricultural products, should be considered to reduce the costs of marketing agricultural products.*<sup>142</sup> (emphasis added)

125. Thus, focusing on the "purpose and role of the subsidies", the Panel concluded that the FSC measure involved export subsidies as listed in Article 9.1(d).<sup>143</sup> This, in turn, led the Panel to conclude that the United States had acted inconsistently with Article 3.3 of the *Agreement on Agriculture*. With respect to *scheduled* agricultural products, the Panel found that that inconsistency related to FSC subsidies provided for wheat, the only scheduled product for which the European Communities had presented any evidence in relation to the relevant "budgetary outlay and quantity commitment levels".<sup>144</sup> With respect to *unscheduled* products, the Panel concluded that the word "provide" in the second clause of Article 3.3 means "making available", and the Panel held that, by establishing a statutory entitlement for qualifying corporations to receive FSC subsidies, the United States was acting inconsistently with Article 3.3 because it was "providing" or "making available" export subsidies, as listed in Article 9.1(d), with respect to all unscheduled products.<sup>145</sup>

126. The United States submits that the Panel erred in its interpretation of Article 9.1(d) by focusing on the nature of the activities carried out by the recipient of the subsidy and, in particular, on whether the recipient is engaged in marketing activities, rather than on the nature of the subsidy itself and whether it reduces "the costs of marketing exports".<sup>146</sup> The United States maintains that, although income taxes may, as the Panel said, be a cost of doing business, they are not part of the "costs of marketing exports" under Article 9.1(d). The United States also disagrees with the Panel's interpretation of the word "provide" in the second clause of Article 3.3 of the *Agreement on Agriculture*. The United States contends that "provide" must mean more than "make available" and should be read, instead, to mean "grant" or "pay". Thus, the United States maintains that the FSC measure does not "provide" subsidies merely by making them available as an entitlement by law to those who meet the law's requirements.

127. Article 3.3 of the *Agreement on Agriculture* reads:

Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member *shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitments levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.* (emphasis added)

128. Article 9.1(d) of the *Agreement on Agriculture* provides:

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<sup>142</sup> *Ibid.*, para. 7.156.

<sup>143</sup> *Ibid.*, paras. 7.156 and 7.159.

<sup>144</sup> *Ibid.*, para. 7.165.

<sup>145</sup> *Ibid.*, paras. 7.174-7.176.

<sup>146</sup> United States' appellant's submission, para. 309.

1. The following export subsidies are subject to reduction commitments under this agreement:

...

- (d) the provision of subsidies *to reduce the costs of marketing exports of agricultural products* (other than widely available export promotion and advisory services) including *handling, upgrading and other processing costs*, and the costs of international *transport and freight*; (emphasis added)

129. We turn, first, to the word "marketing" in Article 9.1(d), which is at the heart of the phrase "to reduce the costs of *marketing exports*" in Article 9.1(d). Taken alone, that word can have, as the Panel indicated, a range of meanings. The Panel noted the *Webster's Dictionary* meaning, according to which "marketing" is the "aggregate of functions involved in transferring title and in moving goods from producer to consumer including among others buying, selling, storing, transporting, standardizing, financing, risk bearing and supplying market information".<sup>147</sup> *The New Shorter Oxford Dictionary* provides a similar meaning: "The action, business, or process of promoting and selling a product...".<sup>148</sup> However, we must look beyond dictionary meanings, because, as we have said before, "dictionary meanings leave many interpretive questions open."<sup>149</sup>

130. The text of Article 9.1(d) lists "handling, upgrading and other processing costs, and the costs of international transport and freight" as examples of "costs of marketing". The text also states that "export promotion and advisory services" are covered by Article 9.1(d), provided that they are not "widely available". These are not examples of just *any* "cost of doing business" that "effectively reduce[s] the cost of marketing" products.<sup>150</sup> Rather, they are specific types of costs that are incurred *as part of* and *during* the process of selling a product. They differ from general business costs, such as administrative overhead and debt financing costs, which are not specific to the process of putting a product on the market, and which are, therefore, related to the marketing of exports only in the broadest sense.

131. It seems to us that income tax liability under the FSC measure can also be viewed as related to the business of marketing exports only in the very broadest sense. Income tax liability under the FSC measure arises only when goods are actually sold for export, that is, *when they have been the subject of successful marketing*. Such liability arises *because* goods have, in fact, been sold, and not as *part of the process* of marketing them. Furthermore, at the time goods are sold, the costs associated with putting them on the market - costs such as handling, promotion and distribution costs - have already been incurred and the amount of these costs is not altered by the income tax, the amount of which is calculated by reference to the sale price of

<sup>147</sup> Panel Report, para. 7.154, citing *Webster's Third International Dictionary*, Vol. II.

<sup>148</sup> *The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 1700.

<sup>149</sup> *Canada - Aircraft*, *supra*, footnote 58, para. 153.

<sup>150</sup> See Panel Report, para. 7.155.

the goods. In our view, if income tax liability arising from export sales can be viewed as among the "costs of marketing exports", then so too can virtually any other cost incurred by a business engaged in exporting. This cannot be what was intended by Article 9.1(d). We, therefore, hold that income tax liability arising from export sales is not part of the "costs of marketing" a product.

132. Accordingly, we do not agree with the Panel that the FSC measure is a subsidy "to reduce the costs of marketing exports of agricultural products" under Article 9.1(d), and we, therefore, reverse the Panel's finding, in paragraph 7.159 of the Panel Report, that the FSC measure involves export subsidies listed in Article 9.1(d) of the *Agreement on Agriculture*. A finding of inconsistency with Article 3.3 of the *Agreement on Agriculture* is dependent on the Member having provided export subsidies listed in Article 9.1. As we have reversed the Panel's finding that the FSC measure involves export subsidies listed in Article 9.1(d), and as the European Communities has not claimed that the FSC measure involves export subsidies listed in any other sub-paragraph of Article 9.1, we also reverse the Panel's finding that the United States has acted inconsistently with Article 3.3 of the *Agreement on Agriculture* by providing export subsidies as listed in Article 9.1 of that Agreement. Having reversed the Panel's finding under Article 3.3, we do not find it necessary to examine the United States' appeal that the Panel erred in its interpretation of the word "provide" in the second clause of Article 3.3 of the *Agreement on Agriculture*. As we have found that the FSC measure does not involve an export subsidy as listed in Article 9.1, and that, consequently, there is no inconsistency with Article 3.3, the Panel's interpretation of the word "provide" in the second clause of Article 3.3 is moot and of no legal effect.

133. As an alternative to its claims under Articles 3.3 and 9.1 of the *Agreement on Agriculture*, the European Communities claims that the FSC measure is inconsistent with Article 10.1, as read together with Article 8 of that Agreement. As we have reversed the Panel's findings under Articles 9.1 and 3.3 of the *Agreement on Agriculture*, it is necessary for us to examine this alternative claim under Articles 10.1 and 8 of that Agreement.

134. Article 8 of the *Agreement on Agriculture* stipulates:

Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule.

135. Article 10.1 of the *Agreement on Agriculture* reads:

Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; ... (emphasis added)

136. We observe that Article 1(e) of the *Agreement on Agriculture* states that the term "export subsidies" "refers to subsidies contingent upon export performance". However, we note also that the *Agreement on Agriculture* does not contain a definition of the terms "subsidy" or "subsidies". In our Report in *Canada - Milk*, a case that involved "export subsidies" under the *Agreement on Agriculture*, we stated that "a 'subsidy' involves a transfer of economic resources from the grantor to the recipient

for less than full consideration."<sup>151</sup> In making this statement, we drew, as context, upon the definition of a "subsidy" in Article 1.1 of the *SCM Agreement*:

... a "subsidy", within the meaning of Article 1.1 of the *SCM Agreement*, arises where the grantor makes a "financial contribution" which confers a "benefit" on the recipient, as compared with what would have been otherwise available to the recipient in the marketplace.<sup>152</sup>

137. Therefore, in this case, we will consider, first, whether the FSC measure involves a transfer of economic resources by the grantor, which in this dispute is the government of the United States, and, second, whether any transfer of economic resources involves a benefit to the recipient.

138. The alleged subsidy here involves a transfer of resources through the foregoing of revenue. We held, in *Canada - Milk*, that "export subsidies" under the *Agreement on Agriculture* may involve, not only direct payments, but also "revenue foregone".<sup>153</sup> We believe, however, that in disputes brought under the *Agreement on Agriculture*, just as in cases under Article 1.1(a)(1)(ii) of the *SCM Agreement*, it is only where a government foregoes revenues that are "otherwise due" that a "subsidy" may arise.

139. In our examination of the Panel's findings under Article 1.1 of the *SCM Agreement*, we concluded that the FSC measure involves the foregoing of fiscal revenues that are "otherwise due" under that Agreement. We see no reason to reach any different conclusion under the *Agreement on Agriculture*. Under the FSC measure, the fiscal treatment of agricultural products is not materially different, for present purposes, from the fiscal treatment of products falling within the scope of application of the *SCM Agreement*.

140. As to whether there is a benefit, the United States did not contest that if the FSC measure involved a "financial contribution" under Article 1.1 of the *SCM Agreement*, it also involved a "benefit" under Article 1.1(b) of that Agreement.<sup>154</sup> The tax exemptions provided by the FSC measure, whether provided for agricultural or other products, confer upon the recipient the obvious benefit of reduced tax liability and, therefore, reduced tax payments. We find, therefore, that the FSC measure involves a "subsidy" under the *Agreement on Agriculture*.

141. We turn next to the requirement that "export subsidies" under Article 1(e) of the *Agreement on Agriculture* be "contingent upon export performance". We see no reason, and none has been pointed out to us, to read the requirement of "contingent upon export performance" in the *Agreement on Agriculture* differently from the same requirement imposed by the *SCM Agreement*. The two Agreements use precisely the same words to define "export subsidies". Although there are differences

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<sup>151</sup> Appellate Body Report, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* ("Canada - Milk"), WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 October 1999, DSR 1999:V, 2057, para. 87.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Canada - Milk*, *supra*, footnote 151, para. 112. In reaching this conclusion, we observed that, under Article 1(c) of the *Agreement on Agriculture*, the terms "budgetary outlays" and "outlays" may include "revenue foregone".

<sup>154</sup> Panel Report, para. 7.103.

between the export subsidy disciplines established under the two Agreements, those differences do not, in our view, affect the common substantive requirement relating to export contingency. Therefore, we think it appropriate to apply the interpretation of export contingency that we have adopted under the *SCM Agreement* to the interpretation of export contingency under the *Agreement on Agriculture*.<sup>155</sup> We also recall that we have upheld the Panel's finding that the FSC measure involves subsidies contingent upon export performance under Article 3.1(a) of the *SCM Agreement*. In making that finding, the Panel stated:

The subsidy is only available with respect to "foreign trading income"; foreign trading income arises from the sale or lease of "export property" or the provision of services relating to the sale or lease of export property; and export property is limited in effect to goods manufactured, produced, grown or extracted in the United States which are held for direct use, consumption or disposition outside the United States. Thus, *the existence and amount of the subsidy depends upon the existence of income arising from the exportation of US goods or the provision of services relating to the exportation of such goods. The existence of such income, in turn, depends upon the exportation of US goods or, at a minimum, in the case of income from services related to the exportation of US goods, upon "anticipated exportation" within the meaning of footnote 4 to Article 3.1(a) of the SCM Agreement.*<sup>156</sup> (emphasis added)

142. We agree with the Panel that the provision of subsidies under the FSC measure, whether for agricultural or other products, is "contingent upon export performance". The provision of subsidies under the FSC measure is *dependent* or *conditional* upon either the *exportation* of "export property", or, in the case of services provided before exportation, at the very least, the *anticipation of that exportation*. For these reasons, we find that the FSC measure involves "subsidies contingent upon export performance" under the *Agreement on Agriculture*. Further, these subsidies have not been found to be listed in Article 9.1 of that Agreement.

143. We turn, consequently, to the issue of whether these subsidies have been "applied in a manner which *results in*, or which *threatens to lead to, circumvention of export subsidy commitments*". (emphasis added) We begin with the words "export subsidy commitments", because the meaning of those words defines the obligations that are to be protected under Article 10.1.

144. The word "commitments" generally connotes "engagements" or "obligations".<sup>157</sup> Thus, the term "export subsidy *commitments*" refers to commitments or obligations relating to export subsidies assumed by Members under provisions of the *Agreement on Agriculture*, in particular, under Articles 3, 8 and 9 of that Agreement.

145. Under Article 3, Members have undertaken two different types of "export subsidy commitments". Under the first clause of Article 3.3, Members have made a commitment that they will not "provide export subsidies listed in paragraph 1 of Ar-

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<sup>155</sup> See, further, *Canada - Aircraft*, *supra*, footnote 58, paras. 162 - 180.

<sup>156</sup> Panel Report, para. 7.108.

<sup>157</sup> *The New Shorter Oxford English Dictionary*, *supra*, footnote 148, p. 452.

article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitments levels specified therein". This is the commitment for *scheduled* agricultural products. Article 3.1 confirms that:

The domestic support and *export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization* and are hereby made an integral part of GATT 1994. (emphasis added)

146. Under the second clause of Article 3.3, Members have committed *not* to provide *any* export subsidies, *listed in Article 9.1*, with respect to *unscheduled* agricultural products. This clause clearly also involves "export subsidy commitments" within the meaning of Article 10.1. Our interpretation of this term is confirmed by the title of Article 9, which is "*Export Subsidy Commitments*". Consistently with our reading of that term, Article 9.1 relates *both* to (1) the commitments made for *scheduled* agricultural products, under the first clause of Article 3.3, and to (2) the general prohibition, in the second clause of Article 3.3, against providing export subsidies listed in Article 9.1 to *unscheduled* agricultural products.

147. We also find support for this interpretation of the term "export subsidy commitments" in Article 10 itself, which draws a distinction, in sub-paragraphs 1 and 3, between "export subsidy commitments" and "*reduction commitment levels*".<sup>158</sup> In our view, the terms "export subsidy commitments" and "reduction commitments" have different meanings. "*Reduction commitments*" is a narrower term than "export subsidy commitments" and refers only to commitments made, under the first clause of Article 3.3, with respect to *scheduled* agricultural products. It is only with respect to *scheduled* products that Members have undertaken, under Article 9.2(b)(iv) of the *Agreement on Agriculture*, to *reduce* the level of export subsidies, as listed in Article 9.1, during the implementation period of the *Agreement on Agriculture*.<sup>159</sup> The term "export subsidy commitments" has a wider reach that covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products.

148. We turn next to whether the subsidies under the FSC measure are "applied in a manner which *results in*, or which *threatens to lead to*, *circumvention* of export subsidy commitments". (emphasis added) The verb "circumvent" means, *inter alia*, "find a way round, evade...".<sup>160</sup> Article 10.1 is designed to prevent Members from circumventing or "evading" their "export subsidy commitments". This may arise in many different ways. We note, moreover, that, under Article 10.1, it is not necessary to demonstrate *actual* "circumvention" of "export subsidy commitments". It suffices that "export subsidies" are "applied in a manner which ... *threatens to lead to circumvention* of export subsidy commitments".

149. In determining whether the FSC measure in this case is "applied in a manner which ... threatens to lead to circumvention of export subsidy commitments", it is important to consider the structure and other characteristics of that measure. The FSC

<sup>158</sup> The term "reduction commitments" also appears in the chapeau to Article 9.1.

<sup>159</sup> Article 9.2(b)(iv) provides that, with respect to *scheduled* products, the budgetary outlay and quantity commitment levels must, by the end of the implementation period, not exceed certain threshold levels, expressed as a percentage of the 1986-1990 base period levels.

<sup>160</sup> *The New Shorter Oxford English Dictionary, supra*, footnote 148, Vol. I, p. 406.

measure creates, in itself, a *legal entitlement* for recipients to receive export subsidies, not listed in Article 9.1, with respect to agricultural products, both scheduled and unscheduled. As we understand it, that legal entitlement arises in the recipient when it complies with the statutory requirements and, at that point, the government of the United States must grant the FSC tax exemptions. There is, therefore, no discretionary element in the provision by the government of the FSC export subsidies. If the statutory eligibility requirements are met, then an FSC is entitled by law to the statutorily established tax exemption. Furthermore, there is no limitation on the amount of exempt foreign trade income that may be earned by an FSC. Therefore, the legal entitlement that the FSC measure establishes is unqualified as to the *amount* of export subsidies that may be claimed by FSCs. There is, in other words, no mechanism in the measure for stemming, or otherwise controlling, the flow of FSC subsidies that may be claimed with respect to any agricultural products. In this respect, the FSC measure is unlimited.

150. With respect to *unscheduled* agricultural products, Members are *prohibited* under Article 3.3 from providing *any* export subsidies as listed in Article 9.1. Article 10.1 prevents the application of export subsidies which "*results in, or which threatens to lead to, circumvention*" of that prohibition. Members would certainly have "found a way round", a way to "evade", this prohibition if they could transfer, through tax exemptions, the very same economic resources that they are prohibited from providing in other forms under Articles 3.3 and 9.1. Thus, with respect to the *prohibition* against providing subsidies listed in Article 9.1 on *unscheduled* agricultural products, we believe that the FSC measure involves the application of export subsidies, *not* listed in Article 9.1, in a manner that, at the very least, "*threatens to lead to circumvention*" of that "export subsidy commitment" in Article 3.3.

151. With respect to *scheduled* agricultural products, the nature of the commitment made under the first clause of Article 3.3 is different. Members are not subject to a general prohibition against providing export subsidies as listed in Article 9.1; rather, there is a *limited authorization* for Members to provide such subsidies up to the level of the reduction commitments specified in their Schedule. Given that the nature of the "export subsidy commitment" differs as between scheduled and unscheduled products, we believe that what constitutes "circumvention" of those commitments, under Article 10.1, may also differ.

152. As regards *scheduled* products, when the specific reduction commitment levels have been reached, the *limited authorization* to provide export subsidies as listed in Article 9.1 is transformed, effectively, into a *prohibition* against the provision of those subsidies. However, as we have seen, the FSC measure allows for the provision of an unlimited amount of FSC subsidies, and scheduled agricultural products may, therefore, benefit from those subsidies when the reduction commitment levels specified in the United States' Schedule for those agricultural products have been reached. In our view, Members would have found "a way round", a way to "evade", their commitments under Articles 3.3 and 9.1, if they could transfer, through tax exemptions, the very same economic resources that they were, *at that time*, prohibited from providing through other methods under the first clause of Article 3.3 and under 9.1.

153. Thus, we conclude that the FSC subsidies are applied in a manner that, at the very least, *threatens to lead to, circumvention* of the export subsidy commitments made by the United States, under the first clause of Article 3.3, with respect to scheduled agricultural products.

154. In light of the foregoing, we reverse the Panel's finding, in paragraph 7.159 of the Panel Report, that the FSC measure involves export subsidies as listed in Article 9.1(d) of the *Agreement on Agriculture*. However, we find that the United States has acted inconsistently with its obligations under Article 10.1 of the *Agreement on Agriculture* by applying FSC export subsidies, with respect to both scheduled and unscheduled agricultural products, in a manner that, at the very least, threatens to circumvent its export subsidy commitments under Article 3.3 of the *Agreement on Agriculture*. Moreover, and in consequence, by providing export subsidies that are inconsistent with Article 10.1, the United States has acted inconsistently with its obligation under Article 8 of the *Agreement on Agriculture* "not to provide export subsidies otherwise than in conformity with this Agreement...".

## VII. ARTICLE 4.2 OF THE SCM AGREEMENT

155. Before the Panel, the United States entered a preliminary objection that the claim by the European Communities under Article 3 of the *SCM Agreement* should be dismissed because the request for consultations by the European Communities did not include a "statement of available evidence", as required by Article 4.2 of the *SCM Agreement*.<sup>161</sup> The Panel denied this preliminary objection. The Panel explained in the Panel Report that "it may well be that the European Communities' request for consultations does contain a statement of available evidence", in part because "the primary evidence on which the European Communities relies is Sections 921 through 927 of the United States Internal Revenue Code".<sup>162</sup> The Panel also found that, in any event, no specific provision of the DSU or the *SCM Agreement* would require dismissal of a claim under Article 3 of the *SCM Agreement* as a consequence of a failure to comply with Article 4.2 of that Agreement.<sup>163</sup> Finally, the Panel did not agree with the argument by the United States that its due process rights had been violated by the alleged failure of the European Communities to provide a statement of available evidence.<sup>164</sup>

156. The relevant part of the European Communities' request for consultations in this case stated:

The European Communities wish to convey to the United States of America a request for consultations under Article 4 of the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (hereinafter also referred to as the "Understanding"), Article XXIII:1 GATT 1994, and Article 4 of the Agreement on Subsidies and Countervailing Measures (ASCM) *with respect to Sections 921-927 of the Internal Revenue Code and related measures establishing special tax treatment for "Foreign Sales Corporations" (FSC)*.<sup>165</sup> (emphasis added).

<sup>161</sup> Panel Report, para. 7.1.

<sup>162</sup> *Ibid.*, para. 7.6.

<sup>163</sup> *Ibid.*, para. 7.7.

<sup>164</sup> *Ibid.*, para. 7.10.

<sup>165</sup> WT/DS108/1, 28 November 1997.

157. In criticizing the content of this request, on appeal, the United States disagrees with the Panel that the requirement in Article 4.2 of the *SCM Agreement* "may ... be" satisfied solely by the reference to the relevant statutory provisions. The United States maintains that Article 4.2 is for the benefit of a *responding* Member, not a complaining Member, and that there must be a consequence for a failure to include a "statement of available evidence". In this case, the United States maintains that the consequence should be dismissal of the European Communities' claims under Article 3 of the *SCM Agreement*.

158. Article 4.2 of the *SCM Agreement* provides:

A request for consultations under paragraph 1 [of Article 4] shall include a statement of available evidence with regard to the existence and nature of the subsidy in question. (emphasis added)

159. Article 1.2 of the DSU states that "the rules and procedures of the DSU shall apply subject to the special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding". Article 4.2 of the *SCM Agreement* is listed as a "special or additional rule or procedure" in Appendix 2 to the DSU. In our Report in *Guatemala - Cement*, we said that "the rules and procedures of the DSU apply together with the special or additional provisions of the covered agreement" except that, "in the case of a conflict between them", the special or additional provision prevails.<sup>166</sup> Article 4.4 of the DSU requires that all requests for consultations, under the covered agreements, "give reasons for the request, including *identification of the measures at issue* and an *indication of the legal basis for the complaint*." (emphasis added) It is clear to us that Article 4.4 of the DSU and Article 4.2 of the *SCM Agreement* can and should be read and applied together, so that a request for consultations relating to a prohibited subsidy claim under the *SCM Agreement* must satisfy the requirements of both provisions.

160. Article 4 of the *SCM Agreement* provides for accelerated dispute settlement procedures for claims involving prohibited subsidies under Article 3 of the *SCM Agreement*. The determination of whether a prohibited subsidy is being granted or maintained under Article 3 of the *SCM Agreement* raises complex factual questions, particularly in the case of subsidies that are claimed to be *de facto* contingent upon export performance. Also, Article 4.5 of the *SCM Agreement* allows a panel to request the assistance of the Permanent Group of Experts on whether the measure is a prohibited subsidy. Given the accelerated timeframes for disputes involving claims of prohibited subsidies, and given that the issue of whether a measure is a prohibited subsidy often requires a detailed examination of facts, it is important to stress the requirement of Article 4.2 that there be "a statement of available evidence with regard to the existence and nature of the subsidy in question" at the consultation stage in a dispute.

161. We emphasize that this additional requirement of "a statement of available evidence" under Article 4.2 of the *SCM Agreement* is distinct from - and not satisfied by compliance with - the requirements of Article 4.4 of the DSU. Thus, as well as giving the reasons for the request for consultations and identifying the measure and

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<sup>166</sup> *Guatemala - Cement*, *supra*, footnote 55, para. 65.

the legal basis for the complaint under Article 4.4 of the DSU, a complaining Member must also indicate, in its request for consultations, the evidence that it has available to it, at that time, "with regard to the existence and nature of the subsidy in question". In this respect, it is available evidence of the character of the measure as a "subsidy" that must be indicated, and not merely evidence of the existence of the measure. We would have preferred that the Panel give less relaxed treatment to this important distinction.

162. Following the European Communities' request for consultations, the United States and the European Communities held three separate sets of consultations over a period of nearly five months.<sup>167</sup> It appears that, during this entire five-month period, the United States did not raise any objection to the content of the European Communities' request for consultations under Article 4.2 of the *SCM Agreement*. Once these proceedings reached the panel stage, the United States explained its view that nothing in either the DSU or the *SCM Agreement* "requires us to perfect the European Communities' pleadings for it".<sup>168</sup> The Panel, however, found that "the United States consciously chose not to seek clarification regarding the evidence in question at the point it received the request for consultations".<sup>169</sup>

163. Nor, it seems, did the United States object to the allegedly deficient request for consultations during those DSB meetings when the European Communities' request for establishment of a panel was on the agenda of the DSB and the Panel was established.<sup>170</sup> Indeed, the first occasion on which the United States objected to the request for consultations was in a request for preliminary findings, submitted to the Panel on 4 December 1998, more than a year after the date of the request for consultations.<sup>171</sup>

164. The thrust of the United States' position is that the European Communities' request for consultations is defective to the point that it cannot form the basis for proceedings before a panel. However, despite the defects that it saw in the request for consultations, the United States allowed that request to be acted upon and to form the basis of three sets of consultations with the European Communities about the FSC measure during a period of five months.

165. As we have said, a year passed between submission of the request for consultations by the European Communities and the first mention of this objection by the United States - despite the fact that the United States had numerous opportunities during that time to raise its objection. It seems to us that, by engaging in consultations on three separate occasions, and not even raising its objections in the two DSB meetings at which the request for establishment of a panel was on the agenda, the United States acted as if it had accepted the establishment of the Panel in this dispute, as well as the consultations preceding such establishment. In these circum-

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<sup>167</sup> Consultations were held on 17 December 1997, 10 February 1998, and 3 April 1998 (Panel Report, para. 1.3).

<sup>168</sup> Panel Report, para. 7.10.

<sup>169</sup> *Ibid.*

<sup>170</sup> The first request for establishment of a panel was on the agenda of the DSB at the meeting held on 23 July 1998 (WT/DSB/M/47). The panel was established at the DSB meeting held on 22 September 1998 (WT/DSB/M/48).

<sup>171</sup> Panel Report, p. 5, footnote 19.

stances, the United States cannot now, in our view, assert that the European Communities' claims under Article 3 of the *SCM Agreement* should have been dismissed and that the Panel's findings on these issues should be reversed. Accordingly, we decline the United States' appeal from the Panel's refusal to dismiss the European Communities' claim under Article 3 of the *SCM Agreement* due to the European Communities' alleged failure to comply with Article 4.2 of that Agreement. Thus, we do not find it necessary to rule on whether the European Communities' request for consultations includes a "statement of available evidence" that satisfies the requirements of Article 4.2 of the *SCM Agreement*.

166. Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law.<sup>172</sup> This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.

## VIII. APPROPRIATE TAX FORUM

167. Before the Panel, the United States argued that under footnote 59 to item (e) of the Illustrative List annexed to the *SCM Agreement*, the European Communities' claims regarding the FSC administrative pricing rules should have been raised first in an appropriate tax forum, before they could then be made the subject of WTO dispute settlement proceedings. The Panel concluded:

Even assuming that footnote 59 requires Members to attempt to resolve their differences through alternative tax fora, that footnote does not provide that the right to resort to WTO dispute settlement at any time is circumscribed by that alleged requirement.<sup>173</sup>

168. As a consequence, the Panel denied the United States' request to dismiss or defer the European Communities' claims regarding the FSC administrative pricing rules, pending consideration of these rules in an appropriate tax forum.<sup>174</sup>

169. The United States urges us to review the Panel's finding because "the Panel chose to rule on this issue"<sup>175</sup>, and because the European Communities has "framed

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<sup>172</sup> *United States - Shrimp*, *supra*, footnote 99, para. 158. In that report, we addressed the issue of good faith in the context of the chapeau of Article XX of the GATT 1994.

<sup>173</sup> Panel Report, para. 7.18.

<sup>174</sup> *Ibid.*, para. 7.22.

<sup>175</sup> United States' appellant's submission, para. 389.

this dispute as one involving transfer pricing issues".<sup>176</sup> The United States contends that footnote 59 *requires* Members raising transfer pricing issues to use the facilities of an appropriate tax forum before initiating WTO dispute settlement procedures, unless there are "unusual, abnormal or extraordinary circumstances".<sup>177</sup>

170. The relevant part of footnote 59 of the *SCM Agreement* provides:

... Any Member may draw the attention of another Member to administrative or other practices which may contravene [the arm's length] principle and which result in a significant saving of direct taxes in export transactions. *In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.* ... (emphasis added)

171. We note, first, that this issue of the appropriate tax forum relates *solely* to the European Communities' claim *regarding the FSC administrative pricing rules*.<sup>178</sup> The United States does *not* argue that the European Communities should have raised *its other claims* concerning the FSC measure in another forum. The Panel found that in light of the findings and conclusions it made under Article 3.1(a) of the *SCM Agreement*, "it would be neither necessary nor appropriate" for it to rule on the FSC administrative pricing rules.<sup>179</sup> We have, for our part, found it unnecessary to rule on the European Communities' conditional appeal with respect to the administrative pricing rules.<sup>180</sup> As neither we nor the Panel have examined, or ruled on, the European Communities' claim relating to the administrative pricing rules, we consider that the issue of whether the European Communities should have first availed itself of the facilities of a forum other than the WTO is moot. For this reason, we believe that it is not necessary for us to rule on this part of the United States' appeal, and we reserve our opinion thereon.

## IX. FSC ADMINISTRATIVE PRICING RULES

172. Before the Panel, the European Communities submitted that the FSC administrative pricing rules, which may be used by an FSC to determine both its foreign trade income and the exempt part of that income, are inconsistent with Article 3.1(a) of the *SCM Agreement*. The Panel ruled that:

... having found that the exemptions provided by the FSC scheme are an export subsidy inconsistent with the *SCM Agreement*, it would be neither necessary nor appropriate for us to make a further and independent ruling on the consistency of that scheme's administrative pricing rules.<sup>181</sup>

<sup>176</sup> *Ibid.*, para. 391.

<sup>177</sup> *Ibid.*, para. 400.

<sup>178</sup> *Ibid.*, para. 389.

<sup>179</sup> Panel Report, para. 7.127.

<sup>180</sup> See Section IX of this Report, *infra*.

<sup>181</sup> Panel Report, para. 7.127.

173. The European Communities makes a conditional appeal against this finding, the condition being that we have reversed or modified some aspect of the Panel's findings or recommendations so that it would then be necessary for us "to complete the Panel's work".<sup>182</sup> As we have upheld all the Panel's findings under the *SCM Agreement*, the condition on which the European Communities' appeal is predicated does not arise. In these circumstances, there is no need for us to examine the conditional appeal of the European Communities on the FSC administrative pricing rules.

## **X. ARTICLE 3.1(B) OF THE SCM AGREEMENT**

174. Before the Panel, the European Communities claimed that the FSC measure is also inconsistent with Article 3.1(b) of the *SCM Agreement*. The European Communities alleged that the definition of "export property," in Section 927(a) of the U.S. Internal Revenue Code, imposes a condition, contrary to Article 3.1(b) of the *SCM Agreement*, that makes the FSC subsidies contingent "upon the use of domestic over imported goods". Section 927(a)(1)(C) provides that "export property" is property "not more than 50 percent of the market value of which is attributable to articles imported into the United States". The Panel declined to examine this claim on the basis that, in light of its other findings on the FSC measure, it was neither necessary nor appropriate to do so.<sup>183</sup>

175. The European Communities makes a conditional appeal against this finding of the Panel. The conditions under which this appeal is made are, first, that we have reversed or modified some aspect of the Panel's findings or recommendations so that it would then be necessary for us "to complete the Panel's work" or, second, that we consider that the United States could implement the recommendations and rulings of the DSB in this case without removing the value-based condition found in Section 927(a)(1)(C) of the United States Internal Revenue Code.<sup>184</sup> As we have upheld all the Panel's findings under the *SCM Agreement*, we believe that the first condition on which the European Communities' appeal is predicated does not arise. As for the second condition, we do not consider that it is appropriate for us to speculate on the ways in which the United States might choose to implement the rulings and recommendations of the DSB.

176. For these reasons, we decline to rule on the European Communities' conditional appeal relating to Article 3.1(b) of the *SCM Agreement*.

## **XI. FINDINGS AND CONCLUSIONS**

177. For the reasons set out in this Report, the Appellate Body:

- (a) upholds the Panel's finding, in paragraph 7.130 of the Panel Report, that the FSC measure constitutes a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*;

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<sup>182</sup> European Communities' other appellant's submission, para. 62.

<sup>183</sup> Panel Report, para. 7.132.

<sup>184</sup> European Communities' other appellant's submission, para. 62.

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- (b) reverses the Panel's finding, in paragraph 7.159 of the Panel Report, that the FSC measure involves "the provision of subsidies to reduce the costs of marketing exports" of agricultural products under Article 9.1(d) of the *Agreement on Agriculture* and, in consequence, reverses the Panel's findings, in paragraphs 7.165 and 7.176 of the Panel Report, that the United States has acted inconsistently with its obligations under Article 3.3 of the *Agreement on Agriculture*;
  - (c) declines to examine the Panel's interpretation of the word "provide" in the second clause of Article 3.3 of the *Agreement on Agriculture*, since, in light of our findings in paragraph (b) above, that interpretation has no legal effect;
  - (d) finds that the United States acts inconsistently with its obligations under Articles 10.1 and 8 of the *Agreement on Agriculture* by applying export subsidies, through the FSC measure, in a manner which results in, or which threatens to lead to, circumvention of its export subsidy commitments with respect to both scheduled and unscheduled agricultural products;
  - (e) upholds the Panel's denial, in paragraph 7.11 of the Panel Report, of the United States' request to dismiss the European Communities' claims under Article 3 of the *SCM Agreement* on the ground that the European Communities failed to include in its request for consultations "a statement of available evidence regarding the existence and nature of the subsidy in question", as required by Article 4.2 of the *SCM Agreement*;
  - (f) declines to examine the Panel's denial, in paragraph 7.22 of the Panel Report, of the request by the United States that the Panel dismiss or defer the European Communities' claims regarding the FSC administrative pricing rules pending recourse by the European Communities to the facilities of an appropriate tax forum;
  - (g) declines to examine the Panel's finding, in paragraph 7.127 of the Panel Report, that it was neither necessary nor appropriate to make findings with respect to the European Communities' claims under Article 3.1(a) of the *SCM Agreement* relating to the FSC administrative pricing rules; and
  - (h) declines to examine the Panel's finding, in paragraph 7.132 of the Panel Report, that it was neither necessary nor appropriate to make findings with respect to the European Communities' claims under Article 3.1(b) of the *SCM Agreement*.

178. The Appellate Body *recommends* that the DSB request the United States to bring the FSC measure that has been found, in this Report and in the Panel Report as modified by this Report, to be inconsistent with its obligations under Articles 3.1(a) and 3.2 of the *SCM Agreement* and under Articles 10.1 and 8 of the *Agreement on Agriculture*, into conformity with its obligations under those Agreements.

179. We wish to emphasize that our ruling is on the FSC measure only. As always, our responsibility under the DSU is to address the legal issues raised in an appeal in a dispute involving a particular measure. Consequently, this ruling is in no way a judgement on the consistency or the inconsistency with WTO obligations of any

other tax measure applied by any Member. Also, this is not a ruling that a Member must choose one kind of tax system over another so as to be consistent with that Member's WTO obligations. In particular, this is not a ruling on the relative merits of "worldwide" and "territorial" systems of taxation. A Member of the WTO may choose any kind of tax system it wishes - so long as, in so choosing, that Member applies that system in a way that is consistent with its WTO obligations. Whatever kind of tax system a Member chooses, that Member will not be in compliance with its WTO obligations if it provides, through its tax system, subsidies contingent upon export performance that are not permitted under the covered agreements.

180. By entering into the *WTO Agreement*, each Member of the WTO has imposed on itself an obligation to comply with *all* the terms of that Agreement. This is a ruling that the FSC measure does not comply with *all* those terms. The FSC measure creates a "subsidy" because it creates a "benefit" by means of a "financial contribution", in that government revenue is foregone that is "otherwise due". This "subsidy" is a "prohibited export subsidy" under the *SCM Agreement* because it is contingent upon export performance. It is also an export subsidy that is inconsistent with the *Agreement on Agriculture*. Therefore, the FSC measure is not consistent with the WTO obligations of the United States. Beyond this, we do not rule.