FINAL DECISION

REVIEW OF THE FINAL DETERMINATION
OF THE ANTIDUMPING INVESTIGATION
ON IMPORTS OF HIGH FRUCTOSE CORN SYRUP,
ORIGINATING FROM THE UNITED STATES OF AMERICA
CASE: MEX-USA-98-1904-01

Courtesy Translation
PUBLIC VERSION

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AUGUST 3, 2001

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GLOSSARY

AA	Agreement related to the Application of Article VI of the 1994 General Agreement of Tariffs and Trade
Ad Hoc Group	*Ad Hoc* Group of the Soda Bottling Industry
ADM	Archer Daniels Midland Company
Almex	Almidones Mexicanos, S.A. de C.V.
Anti-dumping Investigation	Determination of the Initiation of the Anti-dumping investigation on the imports of high fructose corn syrup, a good classified under tariff sections 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Tariff Code of the General Imports Tax Law, originating from the United States of America, regardless the country of export, published on February, 1997. The Determination fixed the period of investigation as January 1st to December 31st, 1996.
AR	Administrative Record filed by the Investigating Authority to the Mexican Section of the Secretariat of the Free Trade Agreements
Arancia	Arancia, CPC, S.A. de C.V.
Cargill Mexico	Cargill de Mexico, S.A. de C.V.
Cargill, Inc.	Cargill Incorporated
Cerestar	Cerestar USA, Inc.
CFPC (Mexican acronym)	Federal Code of Civil Procedures
CFT	Code of Foreign Trade
Complainants	ADM, Almex, Cargill Mexico, Cargill, Inc., Cerestar, Corn Products, Staley y CRA, jointly or separately according to the context.
Corn Products	Corn Products International Inc.
CRA	Corn Refiners Association
DGATJ (Mexican acronym)	Adjunt Office of General Technical and Legal Affairs
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
FCC	Federal Civil Code (previously known as Civil Code for the Mexican Republic in Federal Matters and for the Federal District in Common Matters)
FFC	Federal Fiscal Code
FFT	Federal Fiscal Tribunal
FOG	Federal Official Gazette
GATT	1994 General Agreement of Tariffs and Trade
GEA (Mexican acronym)	Group of Associated Economists

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HFCS	High Fructose Corn Syrup
IA	Investigating Authority
INEGI	National Institute of Statistics, Geography and of Information Storage
LOAPF (Mexican acronym)	Federal Law on the Administration of Public Bodies
NAFTA	North American Free Trade Agreement
Original Determination	Final DETERMINATION on the anti-dumping investigation on the imports of high fructose corn syrup, a good classified under tariff sections 1702.40.99 and 1702.60.01 of the Tariff Code of the General Imports Tax Law, originating from the United States of America, regardless the country of export, published in the Federal Official Gazette on January 23, 1998.
Preliminary Determination	Preliminary DETERMINATION on the anti-dumping investigation on the imports of high fructose corn syrup, a good classified under tariff sections 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Tariff Code of the General Imports Tax Law, originating from the United States of America, regardless the country of export, published in the Federal Official Gazette on June 25, 1997.
RCFT	Regulations of the Code of Foreign Trade
Record 2	Administrative record integrated by the authority to issue its Revised Determination of September 20, 2000
Revised Determination	Final Determination that revises, based on the conclusion and recommendation of the Special Group of the Dispute Settlement Body of the World Trade Organization, the final determination of the anti-dumping investigation on the imports of high fructose corn syrup, a good classified under tariff sections 1702.40.99 and 1202.60.01 of the Tariff Code of the General Imports Tax Law, originating from the United States of America, regardless of the country of origin, published in the Federal Official Gazette on September 20, 2000.
RTTF (Mexican acronym)	Federal Fiscal Tribunal Magazine
Rules	NAFTA Article 1904 Rules of Procedure
SE (Mexican acronym)	Ministry of Economy
SECOFI (Mexican acronym)	Ministry of Commerce and Industrial Development

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Secretariat	Mexican Section of the Secretariat of the Free Trade Agreements
SG-WTO	Special Group before the World Trade Organization Dispute Settlement Body
SHCP (Mexican acronym)	Ministry of Treasury and of Public Credit
SIC-MEX (Mexican acronym)	Mexican System of Trade Information
Staley	A.E. Staley Manufacturing Company
Sugar Chamber	National Chamber of the Sugar and Alcohol Industries
UPCI (Mexican acronym)	International Unfair Trade Practice Unit
US	United States of America
USDA	United States Department of Agriculture
WTO	World Trade Organization

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EXECUTIVE SUMMARY

The Chapter 19 Dispute Resolution Panel created under the North American Free Trade Agreement to review the anti-dumping duties imposed by the Mexican government on import of high fructose corn syrup from the United States in 1997, is issuing its decision today finding that the Secretary of the Economy has failed to establish threat of injury to the Mexican sugar industry because of these imports. Under the terms of the Panel Order, the SE must either terminate the duties and refund those amounts already collected, or thoroughly reconsider the basis for their decision, and establish legitimate grounds for the duties.

This case was initiated by the United States' exporters of HFCS in February of 1998 when they filed their complaint with the Mexican Section of the NAFTA Secretariat. A series of delays in appointment of the members of the Panel resulted in the case not being heard until August of 2000, while procedural motions and challenges to the authority of the Panel have resulted in the delay of the final decision until this date.

In part because of these delays, a case challenging these anti-dumping duties was brought against Mexico by the United States before the World Trade Organization. In January of 2000, the WTO Dispute Settlement Body found that Mexico had failed to establish the threat of injury to the sugar industry necessary to justify the duties. Mexico accepted that decision and conducted a proceeding to reconsider its first finding. As a result of this Mexico found that there was in fact threat of injury and that the duties should remain the same. The United States again complained to the WTO, and in June the WTO Panel found that Mexico has still not established that the sugar industry was sufficiently threatened to justify the anti-dumping duties.

The existence of the parallel proceeding before the WTO raised some novel questions for this NAFTA Panel and the decision includes a discussion of the relationship between the two proceedings, and an explanation for why the Panel adopted some of the findings of the WTO panel. While Mexico argued that the NAFTA Panel no longer had authority to decide the case after the first WTO decision, this Panel found that its jurisdiction continued over the revised decision that Mexico make after the initial WTO case.

The NAFTA Panel resolved a number of issues raised by the parties to this case in its decision. It found in favor of the Mexican SE in upholding the authority of the agency to bring the action, its correct identification of the product, HFCS, as the subject of the

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inquiry, and the procedures used in conducting its inquiry.

1. On the central question of whether the SE had established that imports of HFCS truly threatened the economic health of the sugar industry, the Panel found against it. The Panel held that the explanation given by Mexico justifying its finding failed to meet the standard required by both the General Agreement on Tariffs and Trade (GATT) and by Mexican law. The Panel has given the SE 90 days to either revoke the duties or complete a new procedure to determine if they are justified.

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1 **I. ANTECEDENTS**

2. **I.1. Administrative Proceedings of the Investigation**

3. On January 14, 1997, the National Chamber of the Sugar and Alcohol Industries (hereinafter the Sugar Chamber), filed a request with the Secretaria de Comercio y Fomento Industrial (known in English as the Ministry of Commerce and Industrial Development, hereinafter referred to as SECOFI), for the initiation of the investigation of the imports of high fructose corn syrup (HFCS), a good classified under sections 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Tariff Code of the General Imports Tax Law, originating from the United States of America, regardless of country of export, entering at dumped prices.

4. On February 27, 1997, the Determination accepting the request for, and declaring the initiation of, the investigation of HFCS imports, a good classified under tariff sections 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Tariff Code of the General Imports Tax Law, originating from the US, regardless of the country of export, (hereinafter the "Anti-dumping Investigation"), was published in the Federal Official Gazette (hereinafter FOG). The Determination fixed the period of investigation as January 1st to December 31st, 1996.

5. On June 25, 1997, the Preliminary Determination of the anti-dumping investigation of the imports of HFCS, a good classified under tariff sections 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Tariff Code of the General Imports Tax Law, originating from the United States of America, regardless of the country of export (hereinafter Preliminary Determination), by which provisional compensatory duties were imposed on HFCS-42 and HFCS-55, was published in the FOG.

6. Within the parameters set by the law, Almidones Mexicanos, S.A. de C.V. (hereinafter Almex), Arancia CPC, S.A. de C.V. (hereinafter Arancia), Cargill de Mexico, S.A. de C.V. (hereinafter Cargill Mexico), A.E. Staley Manufacturing Company (hereinafter Staley), Archer Daniels Midland Company (hereinafter ADM), Cargill Incorporated (hereinafter Cargill, Inc.), Corn Refiners Association (hereinafter CRA), and the Sugar Chamber requested technical meetings with the purpose of familiarizing themselves with the methodology used by the Investigating Authority (hereinafter IA) in the Preliminary Determination for the determination of the dumping margins and the threat of injury, as well as for the causal relationship.

7. On June 27 and 30, and July 1st, 2nd, and 4th, 1997, technical meetings for informational purposes were carried out with each of the parties mentioned in the previous paragraph.

8. From September 23 to 26, 1997, the IA conducted a verification visit at the premises of Arancia; and from September 29 to October 2, 1997, the IA conducted a verification visit at Almex's facilities. On October 10, 1997, Cargill Mexico objected to the verification visit of its premises; while from October 20 to 22, 1997, the IA

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conducted a verification visit at the facilities of the Sugar Chamber.

9. From October 20 to 23, 1997, the IA conducted a verification visit at the facilities of ADM; from October 27 to 30, 1997, the IA conducted a verification visit at Staley's facilities; and from October 31 to November 5, 1997, the IA conducted a verification visit at Corn Products International, Inc.'s facilities (hereinafter Corn Products), successor of CPC International, Inc.

10. On October 24, 1997, the IA included in the Administrative Record (hereinafter AR) a report justifying the extension of the provisional dumping duties.

11. On December 1 and 2, 1997, the Complainants Almex and CRA requested that the administrative investigation be concluded, arguing that the Sugar Chamber confirmed the existence of a restraint agreement for the use of the HFCS, entered into by the Sugar Chamber and the representatives of the Mexican Soda Bottling Industry, as well as the Mexican Government's assignment of a subsidy oriented to support the sugar mills.

12. On January 23, 1998, the Final Determination (hereinafter referred to as the Original Determination), in which it was decided that the imports of HFCY, levels 42 and 55, classified under tariff sections 1702.40.99 and 1702.60.01 of the Tariff Code of the General Imports Tax Law, originating from the United States of America, regardless of the country of export, were imported under conditions of dumping and that these imports represented a threat of injury to the Mexican sugar industry, was published on the FOG. Dumping quotas were imposed on HFCS-42 and HFCS-55.

13. On February 20, 1998, the Complainants ADM, Almex, Cargill Mexico, Cargill Inc., Cerestar USA, Inc. (hereinafter Cerestar), Corn Products, CRA and Staley, filed before the Mexican Section of the Secretariat of the Free Trade Agreements (hereinafter referred to as the Secretariat), the request for the appointment of a panel, pursuant to NAFTA Article 1904 and Article 1904 of Rules of Procedure (hereinafter referred to as the Rules), to review the Original Determination published in the FOG, on January 23, 1998.

14. I.2. Proceedings before the World Trade Organization

15. On May 8, 1998, the US Government requested consultations with the United Mexican States Government regarding the final determination published by the IA in the FOG of January 23, 1998. These governmental consultations were carried out on June 12, 1998, under the Agreement related to the Application of Article VI of the 1994 General Agreement of Tariffs and Trade (hereinafter referred to as the AA) and the understanding related to the norms and proceedings governing the World Trade Organization (hereinafter referred to as the WTO) Dispute Settlement Proceeding.

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16. On October 8, 1998, the US Government requested the formation of a Special Group before the World Trade Organization Dispute Settlement Body (hereinafter referred to as the SG-WTO), to examine the anti-dumping procedure conducted by SECOFI, contained in file I.A. 01/97, against the imports of HFCS, for violations of the Rules of Article VI of the GATT 1994 (hereinafter referred to as the GATT).

17. On January 14, 2000, the SG-WTO Final Report was issued, which contained the conclusions and recommendations of the case.

18. On February 24, 2000, the Dispute Settlement Body (hereinafter referred to as the DSB) adopted the report and recommendations of the SG-WTO in the matter of Mexico-Anti-dumping Investigation of High Fructose Corn Syrup from the United States (WT/DS132/R). In that report, the Panel concluded that Mexico´s imposition of the definitive anti-dumping duties on the imports of HFCS, grades 42 and 55, from the US was inconsistent with the requirements of the AA. The Panel and the DSB accordingly recommended that Mexico bring its measure into conformity with its obligations under the AA.

19. On May 15, 2000, SECOFI published in the FOG the DETERMINATION that revises, based on the conclusion and recommendation of the Special Group before the DSB of the World Trade Organization, the final determination of the anti-dumping investigation on the imports of HFCS, a good classified under sections 1702.40.49 and 1702.60.01 of the Tariff Code of the General Imports Tax Law, originating from the United States of America, regardless of their country of export, complying with the Determination issued on January 14, 2000 by the SG-WTO, committing itself to issue a new decision on the pertinent terms, no later than September 22, 2000.

20. On September 20, 2000, SECOFI published, in the FOG, the DETERMINATION that revises, based on the conclusion and recommendation of the Special Group of the Dispute Determination Body of the World Trade Organization, the final determination of the anti-dumping investigation on the imports of HFCS, a good classified under tariff sections 1702.40.99 and 1702.60.01 of the Tariff Code of the General Imports Tax Law, originating from the United States of America, regardless of their country of origin. (hereinafter referred to as the Revised Determination).

21. On October 12, 2000, the US submitted a communication seeking recourse to Article 21.5 of the Dispute Settlement Understanding (DSU) (WT/DS132/6). In that communication, the US indicated its view that the measures taken by Mexico to comply with the recommendations and rulings of the DSB were not consistent with the AA, and requested that the DSB refer the disagreement to the original panel, if possible.

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22. At its meeting on October 23, 2000, the DSB decided, in accordance with article 21.5 del DSB, to refer to the original panel the matter raised by the US in document WT/DS132/6. The DSB further decided that the Panel should have the standard terms of reference as follows:

23. "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS132/6, 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."

24. The SG-WTO met with the parties on February 20-21, 2001, and with the third parties on February 21, 2000.

25. The SG-WTO submitted its interim report to the parties on May 11, 2001.

26. On June 22, 2001, the SG-WTO issued its report regarding the Recourse of the US to paragraph 5 of Article 21.5 of the DSU and concluded that Mexico´s imposition of definitive anti-dumping duties on imports of HFCS from the US on the basis of the SECOFI Revised Determination is inconsistent with the requirements of the AA in that Mexico´s inadequate consideration of the impact of dumped imports on the domestic industry, 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, 3.4, 3.7 and 3.7(i) of the AA. As a consequence, the SG recommended that the DSB request that Mexico bring its measure into conformity with its obligations under the AA.

27. I.3. Proceedings before the Panel

28. I.3.1 Chronology of Actions.

29. On February 20, 1998, ADM, Almex, Cargill Mexico, Cargill Inc., Cerestar, Corn Products, CRA and Staley, submitted before the Secretariat the request for the establishment of a panel, pursuant to NAFTA Article 1904 and the Rules to review the Final Determination of January 28, 1998. This request was published on the FOG on March 10, 1998.

30. On March 20, 1998, ADM, Almex, Cargill Mexico, Cargill Inc., Cerestar, Corn Products, CRA and Staley (hereinafter the Complainants) submitted their claims before the Secretariat. In general terms, the Complainants argued that:

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31. *SECOFI incorrectly determined that the Sugar Chamber had the legal standing to request the initiation of the investigation.

32. * SECOFI erroneously recognized the authority of those who appeared as representatives of the Sugar Chamber, when their powers of attorney did not fulfill the legal requirements.

33. * SECOFI incorrectly determined that HFCS and sugar are like products.

34. * SECOFI incorrectly ignored the fact that Sugar is not a good produced in the previous immediate stage of the same continuous line of production.

35. * SECOFI did not examine the accuracy and truthfulness of the information and evidence, related to the request for investigation, regarding the national production of HFCS.

36. * SECOFI should have considered that HFCS was produced in Mexico and incorrectly excluded the Mexican producers of HFCS, considering them related parties or importers.

37. * SECOFI initiated the investigation even though the request lacked information regarding HFCS and sugar prices, the structure of the sugar industry, financial information, and investment projects of the sugar mills.

38. * SECOFI conducted the investigation in a deficient manner.

39. * SECOFI did not permit the submission of evidence related to the alleged restraint agreement between the Sugar Chamber and the Mexican Soda Bottlers.

40. * SECOFI improperly gave access to the Sugar Chamber to confidential information of the AR.

41. * SECOFI erroneously determined a residual anti-dumping duty for the non-exporters who cooperated submitting information, and it did not justify the residual duty; also, it erroneously applied the concept of the best information available for the determination of the duties.

42. * SECOFI erroneously extended the term of the provisional anti-dumping duties.

43. * SECOFI did not demonstrate that the threat of injury to the domestic industry is an effect of the HFCS imports.

44. * SECOFI did not take into account the national interest during the investigation.

45. * The Adjunct Director General of the Adjunct Office of General Technical and Legal Affairs (hereinafter DGATJ) of SECOFI was an incompetent authority to conduct the investigation.

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46. On March 30, on April 3 and on April 6, 1998, the Sugar Chamber, Arancia, and the so called Ad-Hoc Group of the Soda Bottling Industry (hereinafter Ad-Hoc Group) filed its notice of appearance before the Secretariat.

47. On April 6, 1998, the IA filed its notice of appearance before the Secretariat, opposing all of the arguments of the Complainants; and on April 21, 1998, it submitted to the Secretariat the AR, in its confidential and non confidential versions, as well as the corresponding index, of the referenced case.

48. On June 22, 23, and 24, 1998, the Complainants submitted their memorials and annexes to the Secretariat.

49. On August 5, 1998, the CRA submitted an errata containing 193 changes to its brief of June 22, 1998. This was the first of a series of motions that resulted in the issuance of several Orders of the Panel (See, infra, "Motions and Orders").

50. On August 19, 1998, the Sugar Chamber submitted its memorial to the Secretariat, while on August 21, 1998.

51. On August 21, 1998, the IA submitted its memorial to the Secretariat.

52. On August 21, 1998, SECOFI filed privileged information which it argued forms part of the AR and which corresponds to the Working Documents that the IA used for its analysis during the administrative investigation. This resulted in a series of motions that the Panel has resolved (See, infra, "Motions and Orders").

53. On August 21, 1998, the IA submitted a motion challenging the compliance of counsel to the Complainants and the Ad-Hoc Group with the necessary requirements of law to act and appear before this Panel. The Panel resolved this motion and all other motions related to it (See, infra, "Motions and Orders").

54. On September 7 and 8, 1998, the Complainants filed their memorials in response to the memorial of the IA.

55. On September 9, 1998, the Complainants, ADM, Almex, Cargill Mexico, Cargill, Inc., Cerestar, Corn Products and Staley, and the Ad Hoc Group of the Soda Bottling Industry, designated the CRA as their representative.

56. On September 17, 1998, the CRA filed the annexes to the memorials as designated representative.

57. On October 6, 1998, the CRA filed a motion with the Secretariat requesting a meeting prior to the Public Hearing. (See, infra, "Motions and Orders").

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58. On June 8, 1999, the Panel was established and the selection of Panel members was initiated on June 9, 1999.

59. On June 22, 1999 the proceeding was suspended, due to the resignation of panelist William P. Alford. The proceeding was resumed on December 27, 1999, following the appointment of a panelist to replace Mr. Alford, but the meetings did not begin until March, 2000.

60. On January, 14, 2000, the SG-WTO issued its final report as a result of the WTO dispute settlement proceeding regarding Mexico´s anti-dumping investigation of HFCS imports. This report was adopted by the WTO-DSB on February 24, 2000 (hereinafter WTO Order).

61. On January 17, 2000, Corn Products filed a motion requesting to be recognized as the successor of CPC International Inc. and to be given the corresponding legal standing to appear in the proceeding. The Panel granted this motion (See, infra, "Motions and Orders").

62. On March 31, 2000, the Panel issued an Order instructing the parties to submit annotated memorials with references to the AR.

63. On May 17, 2000, the IA brought to the attention of the Panel and of the parties the "DETERMINATION that revises, based on the conclusion and recommendation of the Special Group of the Dispute Settlement Body of the World Trade Organization, the original final determination of the anti-dumping investigation on the imports of high fructose corn syrup, a good classified under tariff sections 1702.40.99 and 1702.60.01 of the Tariff of the Code of the General Imports Tax, originating from the United States, regardless of their country of export", published in the FOG, on May 15, 2000.

64. From May 23 to May 29, 2000, the Complainants submitted their memorials, with notes and references to the AR as required by the Panel.

65. On June 29, 2000, the Panel issued an Order setting the date for the Public Hearing on August 22 and 23, 2000. This Order resulted in a number of motions which the Panel resolved in due course (See, infra, "Motions and Orders").

66. On July 31, 2000, the CRA filed a request for the Panel to consider a supervening legal precedent relevant to the review. The Panel solved this and other motions requesting the consideration of supervening legal precedents in due course. (See, infra, "Motions and Orders").

67. On August 22 and 23, 2000, the Public Hearing, called on June 29, 2000 by the Panel, was held.

68. On August 22, 2000, the IA filed a motion requesting the Panel to terminate the

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review of the Final Determination of the Anti-dumping investigation on the imports of HFCS. (See, infra, "Motions and Orders").

69. On August 23, 2000, the Sugar Chamber submitted a motion requesting the Panel to reject the oral arguments filed during the Public Hearing regarding the restraint agreement. (See, infra, "Motions and Orders").

70. On September 1, 2000, Staley filed a document by which it answered the Panel's request for additional information made at the Public Hearing of August 22 and 23, 2000.

71. On September 5, 2000, the Sugar Chamber filed, before the Secretariat, the written arguments that it had presented orally at the Public Hearing of August 22 and 23, 2000. (See, infra, "Motions and Orders").

72. On September 21, 2000, the IA brought to the attention of the Panel the REVISED DETERMINATION, published in the FOG on September 20, 2000. This announcement gave place to the submission of motions and documents that the Panel attended to in due course. (See, infra, " Motions and Orders").

73. On September 25, 2000, Cargill Inc. and Cargill Mexico officially sent a document and the corresponding annexes on the information requested by the Panel at the Public Hearing.

74. On October 30, 2000, the Sugar Chamber filed a motion requesting to add a supervening document to the AR which supported its expert opinions. (See, infra, "Motions and Orders").

75. On November 17, 2000, the Panel issued an Order advising the parties that it would postpone the issuance of its final decision until Wednesday, February the 28, 2001.

76. On December 8, 2000, the IA, until then SECOFI, notified the Panel of its name change resulting from an amendment to the Federal Law on the Administration of Public Bodies (hereinafter known as the LOAPF, using its Mexican acronym) and other related legal provisions. Henceforth, this body was to be known as the "Secretaría de Economía" (hereinafter referred to as the SE).

77. On February 6, 2001, the Panel delivered an Order rejecting the request of the IA, and supported by the Sugar Chamber, for the termination of the review before the Panel of the Final Determination.

78. On February 12, 2001, the SE filed a document related to the Panel's Order of February 6, 2001. Through this document, the IA manifested its belief that the filing of the index and the integrated AR with the documentation based on the Revised Determination was inappropriate, explicitly stating that "… the present panel is competent to review all litigious points that (i) were not submitted and resolved by the

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Special Group of the WTO (SG-WTO) or (ii)that are not found sub iudice , by the SG-WTO. Amongst the litigious points that this investigating authority, respectfully, considers, appropriate for the exercise of the referenced competence of this Panel are, for example, the questions related to the determinations of dumping margins" (See, infra, "Motions and Orders").

79. On March 12, 2000, Cargill, Inc. filed a notice to initiate judicial review of the Determination of the IA to its application for administrative review of the compensatory duties applicable to the HFCS imports of Cargill, Inc., assessed by the Determination., published in the FOG on January 23, 1998. Cargill´ intention was to request the judicial review of the Determination dictated by the SE, dated February 15, 2001through which the IA rejected the application for revision presented by Cargill, Inc. on January 31, 2001, which referred to the third revision 04/01, which was not published in the DOF, but notified to Cargill, Inc. by persona service on February 19, 2001.

80. On March 5, 2001, the Complainants Almex, CRA, and Staley presented, as per the terms of the Panel's Order, dated February 06, 2001, the memorials required by the Panel.

81. On March 26, 2001, the Sugar Chamber filed a reply memorial to the memorials filed by the Complainants Almex, CRA, andStaley, as per the terms of the Panel's Order, dated February 6, 2001.

82. On April 5, 2001, the Panel issued an Order to inform the participants that due to reasons that shall be explained in a future Order, this Panel had decided to indefinitely postpone the Public Hearing to be held on April 19, 2001.

83. On April 10, 2001, the Panel ordered the IA to file with the Secretariat, no later than April 17, 2001, two copies of the index and two copies of the documents on the list referred to in the " administrative record integrated by the authority to formulate its Revised Determination, dated September 20, 2000" (hereinafter referred to as Record 2).

84. On April 17, 2001, the IA, under protest and ad cautelam, and in response to the Order of this Panel, delivered the Record 2, integrated with the purpose of complying with the conclusion and recommendation of the SG-WTO.

85. On April 19, 2001, the Panel, in view of the fact that the IA filed the AR, gave the Complainants an additional opportunity to file memorials no later than May 10, 2001; and to the IA and the Sugar Chamber, no later than May 30, 2001. As well, the Panel called a new Public Hearing for the day of June 19, 2001. Many documents and motions were filed with respect to this hearing. (See, infra, "Motions and Orders"). As well, a new date for the delivery of the final Decision was set for August 3, 2001.

86. On April 19, 2001, the CRA filed a motion objecting to the IA's rejection in allowing access to confidential information to its legal representative, Mr. Luis Bravo Aguilera.

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The purpose of this motion was seek that the Panel review the IA's decision and order it to grant access to the confidential information requested. (See infra "Motions and Orders").

87. On April 20, 2001, the Sugar Chamber filed a motion requesting the Panel to clarify its Order and the concurrent opinion of Panelist Sherman which were issued on April, 10, 2001. (See, infra, "Motions and Orders").

88. On April 30, 2001, Almex filed a motion applying for an extension of time to file its brief relative the modifications made by the IA to the Original Determination in its Revised Determination, pursuant this Panel's Order, dated April 19, 2001.

89. On May 10-11, 2001, the CRA filed its memorials, confidential and non-confidential versions, respectively, in response to the Order of the Panel dated April 19, 2001; on May 10, 2001, Staley filed its memorial in response to the same Panel´s Order and Almex filed its memorial adopting by reference CRA´s brief dated May 10, 2001.

90. On May 23, 2001, the CRA filed a document, pursuant to Rule 46(I) of the Rules, remitting 4 copies of the application for access to confidential information that was presented to the SE.

91. On May 30, 2001, the Sugar Chamber filed its response memorial to the memorials filed by the CRA, Almex and Staley on May 10, 2001.

92. On June 6, 2001, the CRA filed a motion requesting that the Panel procure the immediate disclosure of the HFCS Article 21.5 final report, by the SE and the USTR (See, infra, "Motions and Orders").

93. On June 11, 2001, the Panel notified the Parties of the Agenda for the Public Hearing scheduled for June 19, 2001 (See, infra, "Motions and Orders").

94. On June 18, 2001, the Sugar Chamber filed a document , ad cautelam and under protest, in terms pursuant to section VII of Article 344 of the Federal Code of Civil Procedures (FCCP), containing the "Notes of Allegations" of the Sugar Chamber and asked the Panel to take them into account in the Public Hearing scheduled for June 19, 2001.

95. On June 19, 2001, the Public Hearing was held in accordance with the Agenda and with the modifications undertaken during the hearing. The IA and the Sugar Chamber opted not to participate in the Public Hearing.

96. On June 20, 2001, the CRA filed a copy of the information contained in the slide films which were presented at the Public Hearing on the previous day, and which were requested by the Chairman of the Panel.

97. On June 22, 2001, Staley filed a document containing the oral arguments which it

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presented at the Public Hearing which was held on June 19, 2001.

98. **I.3.2. Motions and Orders**

99. During the proceedings, the participants submitted several motions, which are summarized in this section:

100. **I.3.2.1. Errata**

101. On August 5, 1998, the CRA submitted an errata containing 193 changes to its memorial of June 22, 1998.

102. On August 24, 1998, the Sugar Chamber objected to the admissibility of the changes requested by the CRA claiming that they lacked the necessary legal basis.

103. On April 11, 2000, the Panel issued an Order admitting the errata subject to specific comments and objections, granting all the participants 10 days to submit them.

104. On April 19, 2000, the Sugar Chamber filed comments and objections to 56 of the proposed modifications included in the CRA errata.

105. On May 2, 2000, the CRA responded to 55 of the 56 comments and objections submitted by the Sugar Chamber.

106. On May 15, 2000, the Panel issued an Order where it rejected 10 of the corrections filed in the errata of the CRA, and accepted 56, ordering the CRA to include the approved changes in the brief that it had to submit before the Panel.

107. **I.3.2.2. Privileged Information**

108. On August 21, 1998, SECOFI submitted privileged information arguing that it was part of the AR, listed under numbers 1101, 1358, and 1912 of the index of the record, which had been filed to the Secretariat on April 21, 1998. This information corresponded to the Working Documents which were used by the Injury and Safeguards Adjunct General Office (Dirección General Adjunta de Daño y Salvaguarda) of the IA for its analysis during the administrative investigation related to the threat of injury and causality. SECOFI stated that these documents were limited to circulation amongst the Panelists and were not for the review of the parties.

109. On August 28, 1998, the CRA inquired whether the IA submitted confidential information as well as the privileged information.

110. On August 31, 1998, the Complainants CRA, Almex, and Staley filed preliminary motions requesting that SECOFI identifies the documents that it considered privileged information, and to tell the parties where in the record such documents were listed. ADM supported the motion of the CRA through its filing dated September 11, 1998.

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111. On September 10, 1998, the IA filed its response to the motion of the Complainants Almex, Staley, and the CRA referred to in paragraph above. The Sugar Chamber filed a response in support of the brief of the IA on September 21, 2000.

112. On September 11, 1998, ADM filed its support to the motions of the Complainants Almex, Staley and the CRA of August 31 of the same year.

113. On September 21, 1998, the Complainants CRA and Almex filed motions requesting the Panel to order the exclusion of all privileged information that SECOFI did not present before April 22, 1998. On September 30, 1998, Cerestar filed a motion with the same arguments.

114. On September 30, 1998, the IA submitted an objection with regards to the legal basis and the content of the motions of the CRA and of Almex of September 21, 1998.

115. On October 8, 1998, the Sugar Chamber requested, as if presented in a filing in support to SECOFI 's application to dismiss the counterclaims filed by the Complainants and requesting the Panel not to admit such counterclaims because they lacked the necessary legal basis.

116. On March 7, 2000, the IA filed a motion related to the partial waiver and in favor of disclosing privileged information to the Panel.

117. On March 28, 2000, the Panel issued an Order granting the IA a 10-day period to waive the privilege it claimed with regard to some or all of the documents that were filed with the Secretariat. In case that the IA would not renounce such privilege, the Panel would order that some or all of the documents be divulged to all the parties and not just the Panel.

118. On April 7, 2000, the IA filed a declaration waiving the privilege over the documents, but only partially and limited in favor of the members of the Panel.

119. On April 17, 2000, the Complainants CRA, Almex, Cerestar and ADM filed motions requesting that the Secretariat be instructed to return the documents containing privileged information to the IA.

120. On April 25, 2000, the Panel issued an Order requesting the Secretariat to retain the documents related to this motion until at least May 4, 2000, with the indication that if by that date any of the participants requested the disclosure of any or all the documents, then the Secretariat should retain them for 10 days after the date on which the Panel determine the legality of any motion filed in this respect.

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121. On May 15, 2000, in view of there being no request by any of the parties for the disclosure of the privileged information, the Panel instructed the Secretariat to return the documents containing the privileged information submitted by the IA.

122. On September 13, 2000, the IA filed with the Panel the working documents contained in the so called "MEXICO-13", and those that supported the sense of the determination, contained in the annexes of the request for initiation of the anti-dumping investigation. The SECOFI authorized, in the document, that the parties with access to the confidential information could review the privileged information.

123. On September 22, 2000, the Secretariat received a motion of the CRA requesting that the Panel reject the privileged information submitted by SECOFI in MEXICO-13 on September 13, 2000. That motion was supported by Almex and Staley.

124. On October 2, 2000, the IA filed its objection to legal basis of the content of the motions of the Complainants CRA, Almex, and Staley dated September 22, 2000.

125. On October 12, 2000, the Complainants Almex, Staley, and the CRA submitted a document with commentaries to the objection of the IA with respect to the legality and content of the motions of September 22, 2000.

126. On October 31, 2000, the CRA and on November 1, 2000 the Complainants Almex and Staley filed in separate motions requested the Panel to consider as supervening legal precedent a recent decision of the SG-WTO regarding privileged information. On November 1, 2000, the Sugar Chamber objected to the filing of this special report.

127. On March 2, 2000, the Panel rejected the motion of the IA requesting the acceptance of the documents known as MEXICO-13 as part of the AR.

128. I.3.2.3. Non Compliance of the Requirements by the Counsel of the Complainants

129. On August 21, 1998, the IA filed a motion arguing the lack of compliance, on the part of the representatives of the Complainants and the Ad-Hoc Group, with certain requirements which permit their appearance before the Panel. The Sugar Chamber filed a motion supporting SECOFI's motion, with accompanying brief on September 3, 1998.

130. On August 31, 1998, the Complainants CRA, Staley, Cerestar, ADM, and Almex, and the Ad-Hoc Group filed their responses to the motion of the IA, rejecting their arguments.

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131. On March 13, 2000, the Panel issued an Order rejecting the motion of the IA, recognizing the right of the counsel of the Complainants to appear before the Panel representing the Complainants, and stating that general powers of attorney need not to be limited only to licensed attorneys.

132. On March 23, 2000, SECOFI filed a motion related to the Order of the Panel of March 13, 2000, requesting the Panel to correct an "oversight, inaccuracy or omission" with regards to the application of NAFTA Article 1904.7.

133. On March 29, 2000, the CRA filed a motion opposing the motion of SECOFI of March 23, 2000.

134. On April 25, 2000, the Panel issued an Order rejecting the motions of SECOFI and of the CRA of March 23 and 29, 2000, respectively.

135. **I.3.2.4. Succession of Corn Products International Inc.**

136. On January 17, 2000, Corn Products filed a motion requesting that the Panel consider it the successor of CPC International, Inc., and to grant it the legal standing needed to appear in the proceeding.

137. On March 14, 2000, the Panel issued an Order by which it recognized Corn Products as the successor of CPC International Inc., ordering SECOFI to apply to Corn Products the anti-dumping duties determined for CPC International Inc.

138. On April 10, 2000, the IA filed a motion related to the succession of Corn Products, which was supported by the Sugar Chamber in its brief of April 13, 2000. The IA alleged that it had not been notified of the motion of Corn Products, and therefore requested the rejection of the related actions.

139. On April 17, 2000, it was demonstrated that the IA had been duly notified. On April 20, 2000, Corn Products, opposed the motion of the Sugar Chamber, arguing that it was filed out of time.

140. On May 15, 2000, the Panel issued an Order rejecting the above requests. On May 25, 2000, Corn Products requested the correction of a typographical error of the Order of the Panel of May 15. On August 24, 2000, the Panel corrected the Order of May 15, 2000, and maintained its decision with regard to the succession.

141. On September 18, 2000, the IA filed a copy of the devolution report adopted while complying the Order of the Panel of March 14, 2000.

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142. On April 2, 2001, Corn Products International Inc. filed a motion reminding the Secretariat that any communication sent to it shall be addressed to Corn Products International Inc. and not to CPC International Inc. according to Panel´s Orders dated March 14, 2000 and May 15, 2000.

143. I.3.2.5. Access to Confidential Information

144. On April 19, 2001, the CRA filed a motion opposing the IA's decision not to grant Mr. Luis Bravo Aguilera, one of its legal representatives, access to the proprietary information. The purpose of this motion was that the Panel review the IA's decision and order it to issue the access to the requested confidential information.

145. On April 30, 2001, the IA filed its answer to CRA's motion arguing that the Panel dismiss it for lack of legal standing.

146. On May 7, 2001, the Panel ordered that the IA grant CRA's legal representative access to the Confidential Information contained in the original file and in Record 2, including the information classified by the IA as "privileged" in the mentioned Record 2, for a maximum period of 24 hours.

147. On May 8, 2001, the IA filed a communication in which it informs the Panel of its fulfillment of the Order of May 7, 2001.

148. On May 23, 2001, the CRA filed a document with the Secretariat remitting, pursuant to Rule 46(I) of the Rules, 4 copies of the application of access to confidential information that was presented to the SE on this date.

149. I.3.2.6. Public Hearing of August 22 and 23, 2000

150. On October 6, 1998, the CRA filed a document with the Secretariat requesting a meeting prior to the Public Hearing which was to be held within the proceeding before the Panel. On October 8, 1998, the Sugar Chamber filed a brief opposing that meeting.

151. On June 29, 2000, the Panel issued an Order in which it denied the CRA's motion of October 6, 1998 and convoked a Public Hearing for the days of August 22 and 23, 2000.

152. On August 1, 2000, the Sugar Chamber filed a motion, regarding the Panel Order of June 29, 2000, requesting the differal of the Public Hearing, in virtue that the IA would issue a new determination on September 22, 2000.

153. On August 3 and 4, 2000, the Complainants CRA and Almex filed its responses to the motion of the Sugar Chamber, opposing to such motion.

154. On August 9, 2000, the Panel issued an Order rejecting the motion of the Sugar Chamber and confirming the Order of June 29, 2000.

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155. On August 22, 2000, the IA filed, with the Panel, a document, ad cautelam, at the Public Hearing, containing the written version of the allegations filed in the Hearing.

156. On August 23, 2000, the Sugar Chamber filed a motion requesting that the Panel dismiss the oral arguments made during the Public Hearing regarding the restraint agreement.

157. On August 29, 2000, the Sugar Chamber once again filed the above mentioned motion, arguing that the one filed on August 23 was incomplete.

158. On September 4, 2000, the CRA filed its response in opposition to the motion of the Sugar Chamber related to the oral arguments regarding the restraint agreement.

159. On September 5, 2000, the Sugar Chamber filed with the Secretariat a written version of the oral arguments that it presented at the Public Hearing on August 22 and 23, 2000.

160. On September 13, 2000, the CRA filed a motion, supported by Almex in its motion of September 14 of the same year, requesting the Panel to reject the brief filed by the Sugar Chamber on September 5, 2000.

161. On March 2, 2001, the Panel issued an Order in which it rejected the Sugar Chamber´s motion to eliminate references made to the restraint agreement during the Public Hearing of August 22 and 23, 2000. Likewise it rejected the Sugar Chamber´s request to include, in the AR, a written version of the oral arguments that it had presented at the Public Hearing.

162. **I.3.2.7. Supervening Legal Precedents**

163. On July 31, 2000, the CRA filed a request that the Panel to consider a supervening legal precedent relevant to the review.

164. On August 11, 2000, the CRA filed a request for the Panel to consider a supervening legal precedent relevant to the review. The corresponding precedent is the last paragraph of Article 14, of SECOFI's Internal Regulations, published in the FOG on August 10, 2000, regarding to the supervening legal precedent filed on July 31, 2000.

165. On August 21, 2000, the Secretariat received the IA's answer opposing the request of the CRA, to take into consideration the legal precedent filed on July 31 and of August 11, 2000, as irrelevant.

166. On August 21, 2000, the IA filed a document in response to the CRA's brief of August 11, 2000.

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167. On October 31, 2000, the Complainants CRA and Almex submitted as supervening legal precedent a recent decision of the SG-WTO regarding privileged information. Staley filed the same document on November 1, 2000.

168. On November 1, 2001, the Sugar Chamber filed a document opposing the requests of the CRA, Almex and Staley of October 31 and November 1, 2000, respectively, regarding the filing of supervening information.

169. On November 6, 2000, the IA filed an ad-cautelam response to the request of the CRA, Almex, and Staley, rejecting the consideration of the supervening legal precedent that the Complainants submitted to the Panel for its consideration on October 31 and November 1, 2000.

170. On January 23, 2001, the CRA filed a request for the Panel to consider a supervening legal precedent relevant to the review.

171. On January 23, 2001, the CRA filed a request for the Panel to consider a supervening legal precedent relevant to the review, where cases, different to the ones mentioned in the previous paragraph were included.

172. On January 29, 2001, the SE filed a document opposing to the requests of the CRA of January 23, 2001, to consider the information it submitted as supervening legal precedents relevant for the review.

173. On January 30, 2001, the Sugar Chamber requested the Panel to reject the supposed supervening legal precedents submitted by the CRA on January 23, 2001.

174. On February 20, 2001, the IA filed a request for the Panel to consider certain judicial decisions as supervening legal precedents relevant to the review.

175. On February 22, 2001, the CRA requested the Panel to reject the supposed supervening legal precedents filed by the IA on February 20,2001.

176. On March 2, 2001, the Panel issued an Order in which it accepted the motions of the Complainants CRA, Almex, and Staley of July 31, 2000; the CRA's motion of August 11, 2000; the motions of the Complainants CRA, Almex and Staley of October 31 and November 1, 2000, respectively; the motions of the CRA of January 23, 2001; and the IA's motion of February 20, 2001.

177. I.3.2.8. Termination of the Review before the Panel

178. On January 14, 2000, the SG-WTO issued its final report as the result of the WTO dispute settlement proceeding regarding Mexico´s anti-dumping investigation of HFCS imports. The final report was adopted by the WTO-DSB on February 24, 2000.

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179. On May 17, 2000, the IA brought to the attention of the Panel and of the parties the "DETERMINATION that revises, based on the conclusion and recommendation of the Special Group of the Dispute Settlement Body of the World Trade Organization, the original final determination of the anti-dumping investigation on the imports of high fructose corn syrup, a good classified under tariff sections 1702.40.99 and 1702.60.01 of the Tariff Code of the General Imports Tax Law, originating from the United States, regardless of the country of export", published in the FOG on May 15, 2000.

180. On May 29, 2000, Staley filed a motion relating to the motion by which the IA informed the Panel of the SG-WTO Determination of May 15, 2000.

181. On June 1, 2000, the Sugar Chamber filed a document opposing the motion of Staley of May 29, 2000.

182. On August 22, 2000, the IA filed a motion requesting the Panel to terminate the review of the Final Determination of the anti-dumping investigation on the imports of HFCS, based on NAFTA Article 1904 and Rules 61 and 71(1), and 55.

183. On August 29, 2000, the Sugar Chamber presented its support of the SECOFI motion filed on August 22, 2000, accepting the IA's arguments as its own and submitting additional arguments.

184. On September 1, 2000, the Complainants CRA, Almex, Staley, and ADM filed their response to the IA's motion, in which they argued that the Panel must maintain its jurisdiction over the Final Determination and resolve the claims therein.

185. On September 21, 2000, SECOFI notified the Panel of its Revised Determination, published in the FOG on September 20, 2000.

186. On September 26, 2000, SECOFI reiterated its position that the proceeding before the Panel should be concluded.

187. On October 6 and 9, 2000, the Complainants CRA, Almex, Staley, and ADM, filed their response to the SECOFI motion of September 26, 2000, in which they reiterated their argument that review proceeding before the Panel should be continued, limited to the Original Determination.

188. On February 6, 2001, the Panel issued an Order in which it determined that its jurisdiction over this review continued and that the Revised Determination is part of the same. As well, it recognized that the SG-WTO had completed its review of the Final Determination and consequently, its review is limited, in what it considers legally justified to the points not considered by the SG-WTO applying the Principle of Comity.

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189. On February 12, 2001, the IA filed its response to the Order of the Panel of February 6, 2000. In this response, the IA expressed its argument that the filing of the index and the integrated AR with documentation based on the Revised Determination, explicitly indicating that "the present panel has the competence to revise all the litigious points that (1) would not have been submitted to and solved by the SG-WTO or (ii) that are not found sub iudice by the SG-WTO. Amongst the litigious points that the IA would, respectively, consider to be properly exercised by this panel are, for example, questions related with the determinations of the margins dumping" (See, infra, "Motions and Orders")

190. On February 15, 2001, the Complainants Almex and CRA filed a motion related to the February 12, 2001 document of the IA that the previous paragraph refers to. The Complainants request that given that the IA failed to comply with the Order of the Panel in which it was directed to submit the index of the AR and the related documents, the Panel should base its final decision on the best available evidence, denying the IA any attempt to include additional information that was not presented before the Secretariat in the Panel process and that was not available for the parties at the Secretariat before February 12, 2001.

191. On February 26, 2001, ADM filed a document supporting the motions of Almex and CRA of February 15, 2001.

192. On February 26, 2001, the Sugar Chamber filed its response to the motion of the Complainants Almex and CRA of February 15, 2001. In the response, the Sugar Chamber requested the Panel to deny as inadmissible the motions of Almex and CRA and that the Panel Order dated February 6, 2001 be rendered moot.

193. On February 26, 2001, the Complainants Almex, CRA and Staley filed a motion requesting the Panel to order the IA to terminate the application of anti-dumping duties on imports of HFCS coming from the US, and to revoke the Original Determination and the Revised Determination, based on the argument that the IA denied the Panel the ability to comply with its obligation under the NAFTA to conduct a review of the Revised Determination based in the AR.

194. On March 5, 2001, the Complainants Almex, CRA and Staley filed their briefs in response to the Panel´s Order dated February 6, 2001. In these same documents, the Complainants filed a motion requesting a Panel Order to instruct the SE to revoke the Original Determination and the Revised Determination.

195. On March 9, 2001, the Sugar Chamber filed a response to the motion of the Complainants, Almex, CRA and Staley referred to in the previous paragraph, by which the Sugar Chamber requested that the Panel deny, as inadmissible, the arguments submitted by the Complainants.

196. On March 12, 2001, the Sugar Chamber filed its brief in response to the motions submitted by the Complainants Staley, Almex and CRA on March 5, 2001,

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respectively, requesting an Order of the Panel to instruct the SE to revoke the Original Determination and the Revised Determination.

197. On March 26, 2001, the Sugar Chamber filed its memorial in response to the memorials of the Complainants Almex, CRA and Staley in the terms of the Order of the Panel of February 6, 2001.

198. On March 29, 2001, the CRA filed a motion as a complement to its motions filed on February 15, 2001, and March 5, 2001. In the same motion the CRA reiterated its request that this Panel issue an order terminating the application of anti-dumping duties on the HFCS imports from the US, and to immediately terminate the Final Determination and the Revised Determination, based on the failure of the IA to comply with the Order of the Panel of February 6, 2001.

199. On April 6, 2001, the Sugar Chamber filed a motion regarding a document presented by the CRA on March 29, 2001 asking the Panel to instruct the CRA to notify the Sugar Chamber of such a document, as well as to call the attention of the CRA to affirm false information prejudicing the Sugar Chamber and to re-establish the order modified in accordance with Rules 24 and 25.

200. On April 10, 2001, the Panel ordered the IA to submit before the Secretariat, no later than April 17, 2001, two copies of the index and two copies of the documents listed in reference to Record 2

201. On April 17, 2001, the IA, under protest and ad cautelam, and upon the requirement of the Panel delivered two copies of the confidential and non-confidential versions of the "Record 2" formed by the authority in order to comply with the conclusion and the recommendation of the SG-WTO that reviewed the Final Determination of the anti-dumping investigacion regarding imports of HFCS originating from the USA, regardless of the country of origin. In this same document, the IA authorized the representatives that already had access to the proprietary information of the review to have access to the privileged information filed in the confidential version of Record 2.

202. On April 19, 2001, in view that the IA filed Record 2 complying with the Order of the Panel, the Panel issued an Order granting the Complainants an additional opportunity to file memorials by no later than May 10, 2001; and the IA and the Sugar Chamber, no later than May 30, 2001.

203. On April 20, 2001, the Sugar Chamber filed a motion with the purpose of clarifying the Panel Order and the concurring opinion of Panelist Sherman, dated April 10, 2001.

204. On April 24, 2001, the CRA filed a motion requesting that Panel to instruct the IA to comply with Rule 41(4), or else, to instruct the Secretariat to return the IA the privileged information that it filed on April 17, 2001. In this same motion, the CRA asks for an extension of the time established in the April 19, 2001 Panel Order in

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order to file its memorial regarding the amendments made by the IA to the Original Determination in its Revised Determination.

205. On April 30, 2001, Almex filed a motion requesting an extension of time to the term established in the April 19, 2001 Panel Order to file its memorial regarding the amendments made by the IA to the Original Determination in its Revised Determination.

206. On May 2, 2001, the CRA filed a motion regarding the definition of the criterion relative to the response of the SE to the CRA motion filed on April 30, 2001.

207. On May 4, 2001, the IA filed an ad cautelam response to the motion filed by the CRA on April 24; to the CRA´s answer dated May 2, and, to the motion filed by Almex on April 30, asking the Panel to dismiss such motions.

208. On May 7, 2001, the Sugar Chamber filed a motion asking the Panel to dismiss the document entitled motion regarding the definition of criterion relative to the response of the SE to the motion filed by the CRA on May 2, 2001 because it lacked of legal basis.

209. On May 7, 2001, the Panel denied the motions filed by the CRA and Almex on April 24 and April 30, 2001, respectively, in which they requested an extension of time to file their memorials. In this same Order, the Panel denied the motion of the CRA of April 24, 2001, in which it asked the Panel to instruct the IA to comply with Rule 41(4), or else, to order the Secretariat to return the privileged information that was filed by the IA on April 17, 2001.

210. On May 8, 2001, Almex filed a motion requesting an extension to file its memorial.

211. On May 9, 2001, the Panel issued an Order confirming, in every aspects, the Order issued on May 7, 2001 and rejecting, as a consequence, the motion of Almex requesting an extension to file its memorial.

212. On May 10-11, 2001, the CRA filed its memorials, confidential and non-confidential versions, respectively, in response to the Order of the Panel dated April 19, 2001; on May 10, 2001, Staley filed its memorial in response to the same Panel´s Order and Almex filed its memorial adopting by reference CRA´s memorial dated May 10, 2001.

213. On May 11, 2001, the Sugar Chamber filed a request asking the Panel to deal with the motion dated on April 20, 2001.

214. On May 30, 2001, the Sugar Chamber filed its reply memorial to the Complainants memorials, within the terms of the Panel's Order dated April 19, 2001.

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215. On June 1, 2001, the Panel issued an Order rejecting the motion filed by the Sugar Chamber on April 20, 2001.

216. I.3.2.9. Expert Opinion

217. On October 30, 2000, the Sugar Chamber filed a motion requesting the incorporation of a supervening document to the record, which supported the expert opinions related to the like product issue between sugar and HFCS.

218. On November 7, 2000, the CRA opposed the motion of the Sugar Chamber of October 30, 2000.

219. On March 2, 2001, the Panel rejected the Sugar Chamber´s request to include, in the AR, the professional recognition given to its expert.

220. I.3.2.10. Public Hearing of 2001

221. On February 6, 2001, the Panel issued an Order determining that its jurisdiction over the review continues, and called for a second Public Hearing on April 19, 2001.

222. On April 5, 2001, the Panel issued an Order informing the parties that due to reasons that would be explained in a future order, it decided to indefinitely postpone the Public Hearing called for on April 19, 2001.

223. On April 19, 2001, the Panel issued an Order in which it convoked a Public Hearing on June 19, 2001.

224. On June 6, 2001, the CRA filed a motion requesting that the Panel immediately procure the HFCS Article 21.5 final report of the SE and the USTR, and disclose it to the Panel, the legal representatives of the Complainants and of the Sugar Chamber, prior to the Public Hearing of June 19, 2001.

225. On June 11, 2001, the Panel notified the parties of the Agenda, as well as the rules, relating to the Public Hearing to be held on June 19, 2001.

226. On June 13, 2001, the CRA filed a document in which it requested that the Panel take into consideration, in a manner different than programmed, the four items of the Agenda of the Public Hearing.

227. On June 18, 2001, the Sugar Chamber filed a document, ad cautelam and under protest, in terms of section VII of Article 344 of the Federal Code of Civil Procedures containing the "Notes of Allegations" of the Sugar Chamber and asked the Panel to take them into account during the Public Hearing of June 19, 2001.

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228. On June 19, 2001, a Public Hearing was held, in the absence of the IA and the Sugar Chamber, and at the beginning of the hearing the Panel issued an Order rejecting the request of the CRA dated June 6 and 13, 2001 and preserving the items and times assigned as specified in the Order containing the Agenda and granting the participants with access to the confidential information one hour prior to the end of the hearing the opportunity to deal, in camera, with everything related to the confidential information.

229. On June 20, 2001, the Panel issued an Order rejecting the Sugar Chamber's request to take into account the "Notes of Allegations" in issuing its final decision.

230. On June 20, 2001, the CRA filed a copy of the information projected on slides in the Public Hearing on the previous day, which were requested for by the Chairman of the Panel.

231. On June 22, 2001, Staley filed a document containing the oral arguments it made at the Public Hearing on June 19, 2001.

232. On this date, in this Decision, the Panel rejects the documents filed by Staley containing the oral arguments filed in the Public Hearing held on June 19, 2001.

233. II. Standard of Review and Powers of the Panel

234. The standard of review that this Panel must apply and the extent of its powers are of major importance in this review. An adequate understanding of these issues require that the Panel carefully analyze the following questions:

235. 1. Legal nature of the Binational Panel; 2. The Nature of the Review Process before the Federal Fiscal Tribunal and before the Binational Panel; 3. The Standard of Review applicable by the Binational Panel; 4. The Legal Framework applicable by the Binational Panel; 5. The Purpose of the Final Determination of the Process; 6. The Application of the Comity Principle.

236. 11.1. Legal Nature of the Binational Panel

237. The Complainants, in their complaint, do not consider it relevant to discuss the legal nature of the Binational Panel, affirming, however, that what is important is that the panel stand in place of the reviewing tribunal of the importer and must apply the existing law, with, according to the complainants, the power to declare null the impugned determination. The IA affirms that the binational panel is an arbitral body with limited powers, which under no circumstances could annul a determination of the IA.

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238. In this Panel's opinion, a Chapter X1X Binational Panel has the characteristics similar to an ad hoc court, as well as those of an arbitral body.

239. Some of the characteristics which demonstrate the peculiarities of a Binational Panel as an ad hoc court are the following:

240. a.) In the first place, the jurisdictional character of the Binational Panel results from the contracting Parties to the NAFTA, who obligated their respective investigating authorities to submit to the jurisdiction of the panel in cases where one of the Parties or one of the complainants elect the alternative dispute resolution mechanism contained in Chapter X1X of the Agreement. The Complainants have the right to elect this type of review than that which normally follows before the court of the importing Party. NAFTA Article 1904, paragraph 1 and 5 provide:

241. 1. Pursuant to this Article, each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.

242. 5. An involved Party on its own initiative may request review of a final determination and shall, 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, request such review.

243. b) In the procedure followed by a binational panel, as distinct from an ordinary arbitration, the procedural rules that must be applied, were previously established by the NAFTA contracting Parties. Therefore the interested party has no other option than to submit itself to such rules.

244. Paragraph 14 establishes the fundamental elements of the Rules of Procedure that guide the Binational Panels.

245. The rules that guide Binational Panels and the rules that they apply include two levels of regulation: the international, which are comprised of the dispositions of the treaties in which they are found and related to multilateral rules such as the ones alluded to by the GATT-WTO and its Codes of Conduct; and the national, that are comprised of the legal dispositions in the area, whose observance must be followed by Binational Panels in issuing their decisions.

246. c) An additional characteristic of the jurisdiction attributed to Binational Panels and which differentiate them from arbitral bodies are that their decisions have a binding character for the parties and the IA. In effect, Article 1904.9 of NAFTA provides the following:

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247. 9. The decision of a panel under this article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel.

248. The jurisdictional character of the binational panel also includes characteristics of exclusivity and uniqueness . The jurisdiction of a panel is exclusive because once a panel is requested by a person, alternative domestic judicial review procedures of the importing Party are precluded. For example, in the case of Mexico, when a person requests a panel it forgoes the right to the Annulment Procedure before the Federal Fiscal Tribunal (FFT). NAFTA Article 1904, paragraphs 11 and 12 provide for this case:

249. 11. A final determination shall not be reviewed under any judicial review procedures of the importing Party, if an involved Party requests a panel with respect to that determination within the time limits set out in this Article. No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts.

250. 12. This article shall not apply where:

251. a)neither involved Party seeks panel review of a final determination;

252. b) a revised final determination is issued as direct result of judicial review of the original final determination by a court of the importing Party in cases where neither involved Party sought panel review of that original final determination; or

253. c) a final determination is issued as a direct result of judicial review that was commenced in a court of the importing Party before the date of entry into force of this Agreement.

254. The uniqueness of the panel system results from the fact that only a binational panel can review a specific final determination submitted to the procedure under Chapter 19 of NAFTA.

255. Article 1904.6 of the NAFTA states:

256. 6. The Panel shall complete the review pursuant to the procedures established by the Parties pursuant to paragraph 14. When both involved Parties request that a Panel revise a final determination, only one Panel shall review the determination.

257. Despite all of the above, binational panels also share two principle characteristics of arbitral bodies:

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258. First, panelists are not permanent members of the panels but are designated case by case, as in arbitral bodies, and come from different professional fields.

259. Second, panel decisions cannot be invoked as precedent for other panels, but can only serve as guidance to resolve specific questions. This is explicitly established in paragraph 9 of the Article 1904 of the NAFTA.

260. II.2. Nature of the Review Process Before the Federal Fiscal Tribunal and Before the Binational Panel.

261. Another important characteristic of a binational panel is that, compared to the FFT, it possesses different attributes and jurisdiction than that Court. While the jurisdiction and authority of the Federal Fiscal Tribunal are governed completely by the legal provisions of the Federal Fiscal Code (FFC), the jurisdiction and authority of this Panel are ruled by NAFTA in the first place, and secondly by the FFC, but only as circumscribed by the NAFTA. As a consequence, binational panel review differs, in its scope, from that of the FFT.

262. To emphasize the differences in procedures between Binational Panel and those of the FFT, it is important to take into account what is indicated by paragraph 2 of NAFTA Article 1904:

263. An involved Party may request that a panel review, based on the administrative record, a final antidumping 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 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 de amended from time to time, are incorporated into and made a part of this Agreement.

264. The review process before a binational panel consists in determining the legality of the final resolution issued by the IA; and the Panel does so in the same manner as the FFT. This means, the panel reviews the actions of the IA related to the applicable legal provisions, such as: international agreements, the Federal Law on the Administration of Public Bodies (LOAPF), the Internal Regulations of SECOFI (Reglamento Interior de SECOFI) and the Delegatory Agreements (Acuerdos Delegatorios), the Code of Foreign Trade (Ley de Comercio Exterior, herinafter the CFT) and its Regulations (Reglamento de la Ley de Comercio Exterior, hereinafter RCFT), and the FFC. However , the findings of this review does not have the effectiveness that the FFT judgment has. In effect, NAFTA Annex 1911 while specifying the binational panel jurisdiction establishes as standard of review solely

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Article 238 of the FFC. Therefore, the power to annul the administrative act. The binational panel cannot order the IA to annul its own act.

265. The proceeding before the binational panel is a review proceeding of legality. Under no circumstances it is a constitutional review proceeding, as argued by the Complainants in their briefs. The binational panel´s scope is limited by NAFTA Article 1904.8, that establishes the following:

266. 8. The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision. Where the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel's decision. In no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of the filing of a petition, complaint or application) permitted by statute for the competent investigating authority in question to make a final determination in an investigation. If review of the action taken by the competent investigating authority on remand is needed, such review shall be before the same panel, which shall normally issue a final decision within 90 days of the date on which such remand action is submitted to it.

267. Are there circumstances in which the resolution of a binational panel could lead to the cancellation of an anti-dumping investigation? This Panel considers that the answer is yes, but not for the reasons alleged by the Complainants (in the sense that this Panel can annul the IA's act or order it to nullify its resolution), but for example in cases, where the request for the investigation has been filed by a person without legal standing to do so, or if the injury or threat of injury determination carried out by the IA has no support cases in which the IA, subsequent to the remand of the Binational Panel must make its determination compatible with the decision of the Panel or, if not possible , terminate the investigation and return the duties collected. In any case, the remand ordered by the binational panel must permit a new IA determination compatible with the binational panel decision.

268. It is important to mention here that Article 1904.5 of the NAFTA determines the basis of legitimacy to request the establishment of a Binational Panel, which is distinct, in part, from that which operates in cases of internal review of final determinations.

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269. 5. An involved Party on its own initiative may request review of a final determination and shall, 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, request such review.

270. **II.3. Standard of Review applicable by the Binational Panel**

271. Another important element that differentiates a binational panel from the FFT is the standard of review that each body applies. This theme was considered in part in the previous paragraphs. The Panel must apply the standard of review set out in NAFTA Article 1904.3 and Annex 1911.

272. 1904.3. The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a final determination of a competent investigating authority".

273. Annex 1911. Standard of review means the following standards, as may be amended from time to time by the relevant Party:

274. (c) in the case of Mexico, the standard set out in Article 238 of the Codigo Fiscal de la Federacion, or any successor statutes, based solely on the administrative record.

275. This standard of review comprises two parts. The first one is article 238 of the Federal Fiscal Code, which establishes:

276. An administrative determination shall be declared illegal when one of the following grounds is established:

277. I. Lack of jurisdiction of the official who issued, ordered, carried out the proceeding from which the said determination was derived.

278. II. Omission of the formal requirements provided by law, which affects an individual's defenses and goes beyond the result of the challenged determination, including the lack of legal grounding or reasoning, as the case may be.

279. III. Procedural errors which affect an individual's defenses and goes beyond the result of the challenged determination.

280. IV. If the facts, which underlie the determination, do not exist, are different or were erroneously weighed, or if (the determination) was issued in violation of applicable legal provisions or if the correct provisions were not applied.

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281. V. When an administrative determination issued under discretionary powers does not correspond with the purposes for which the law confers those powers.

282. The Federal Fiscal Tribunal may declare sua sponte, because it is a matter of public order, the incompetence of the authority to render the challenged determination and the total absence of grounding or reasoning of this determination".[1]

283. Likewise, based on the second part of the standard of review, the Panel shall apply the general principles of law.

284. An important part of the standard of review is the jurisdiction granted to the reviewing body, which defines the scope of its review. As has been previously stated, a binational panel only has authority to issue resolutions according to NAFTA Article 1904.8.

285. That is to say that the binational panel does not have within its jurisdiction, as has been previously discussed, the authority to annul the acts of the IA or to order this authority to nullify them. Its authority only permits it to confirm or remand the resolution.

286. It is important to emphasize that, according to the Mexican Constitution, the rules that grant jurisdiction to an authority, of whatever nature, are strictly applied. That is to say, they are not subject to broad standards of interpretation such as: analogy, negative implication (contrario sensu) and ad majorem (mayoria de razón)[2]. As a consequence, the NAFTA binational panel has no greater jurisdiction than that which the Treaty grants it. The Complainants claim that through a general principle of law, this Panel not only has the possibility, but in the words of the Complainants, the obligation to assume the authority to nullify the act of the authority or to order it to annul its own act. There is no general principle of law (if the one alleged by the Complainants really exists) that can be above the Constitution, since it is the supreme law, from which all legal provisions originate, including the general principles.

287. The Complainants have argued, however, that this Panel must consider Article 239 of the FFC as an integral part of the standard of review. It is noteworthy that a binational panel in a previous case accepted this standard of review, and four other rejected it[3]. This Panel finds that reasoning concerning the standard of review of the majority of

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[1] This last paragraph of Article 238 was inserted through an amendment published in the *FOG* on December 5, 1995, and entered into force on January 1, 1996.

[2] However this does not mean that when the jurisdictional authority acts, in this case the Panel, it cannot apply by analogy legal norms and precedents, because not doing so would impair its competence.

[3] The Panel that accepted this point of view is the one related with imports of Cut-to-Length Plate Products from the United States of America (MEX-94-1904-2). The other four are the ones related with the Import of Flat Coated Steel Products, in and from the United States of America (MEX-94-1904-01); the imports of Polystyrene and Impact Crystal from the United States of America (MEX-94-1904-03); the imports of Hot-Rolled Steel Originating in or Exported from Canada (MEX-96-1904-03); and the imports of Rolled Steel Plate Originating or Exported from Canada (MEX-96-1904-02).

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the panels shall prevail the inclusion of Article 239 in the standard of review would constitute an undue expansion of it's the Panel's jurisdiction and powers. Further, panels in the United States and Canada do not have the authority to annul a resolution of an IA. This Panel is subject to the jurisdiction and powers established by NAFTA Article 1904.8, which empowers it to affirm SECOFI's final determination, or to remand it for action not inconsistent with its decision, to continue the procedure, but does not confer the power to annul such determination.

288. Had the governments of Mexico, United States and Canada wanted a Chapter XIX binational panel to have the same authority that the FFT pursuant to Article 239, they would had expressly included this Article in the standard of review established in NAFTA Article 1904.8.

289. On the other hand, Article 237 of the FFC includes procedural and jurisdictional rules. The procedural rules are applicable to a binational panel proceedings, in any matter not provided for by the Rules of Procedure negotiated by the Parties. In contrast, the jurisdictional rules are not applicable to the review provided for by the NAFTA nor to the binational panel for the reasons earlier expressed. The article mentioned provides:

290. The judgments of the Fiscal Court shall be grounded in law and shall examine all and each one of the disputed issues of the disputed act and has the power to invoke notorious facts.

291. When different causes of illegality are asserted, the judgment or the resolution of the Chamber must examine first, those causes that can lead it to declare absolute nullity. In the event the judgment declares the nullity of a resolution due to the omission of formal requirements demanded by law, or due to procedural defects, the judgment must establish the manner in which the defenses of the party were affected and go beyond the sense of the resolution.

292. The Chambers may correct the errors observed in the citation of law provisions that are considered violated and shall examine jointly the allegations and causes of illegality, as well as all other reasoning of the parties, in order to solve the issue effectively submitted, but without changing the facts exposed in the petition and in the reply to the petition.

293. In dealing with judgments that solve the matter of the legality of the resolution issued in an administrative remedy, if there are enough elements to do so, the Court shall issue its statement regarding the legality of the challenged resolution in the particular part of the resolution that does not satisfy the legal interest of the Complainant. The acts of the administrative authorities that are not expressly disputed in the petition cannot be annulled or modified.

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294. It is clear then that in determining the legality of the final determination challenged by the Complainants, a binational panel must ground its resolution in law and must examine each and every one of the disputed issues with reference to relevant facts as found in the official record. Likewise, the Panel must examine the legality of the part of the final resolution that violates the legal interests of the Complainants.

295. 11.4 Legal Framework applicable for the Binational Panel

296. The legal provisions that the Panel must apply in order to issue its decision according to the second paragraph of Article 1904 of NAFTA in the matter of anti-dumping and countervailing duties, consist of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents,[4] to the extent that a court of the importing party would rely on such materials in reviewing a Final Determination.

297. As was already pointed out, the Mexican legal system provides two regulatory contexts for these matters: the international, consisting of NAFTA provisions, its Rules, and those contained in other proceedings such as those found in the WTO/GATT and its Codes; and the domestic, which consists of special legal provisions such as the CFT[5] and its Regulation, LOAPF that is related to the issue of jurisdiction of the authorities, as well as the internal regulations of the SE and the delegatory agreements that derive from these regulations.

298. Likewise, the Mexican legal framework must consider also the legislative history contained in the Archives of the Congress of the Union (this is, the reasons for the initiatives and decisions of the Chambers and the Debates of the legislators). In addition, the administrative practices of the Executive branch pursuant to its delegated powers must also be taken into account. These consist of the execution of material acts, or acts that determine the legal situation for individual cases that the State carries out in the exercise of its powers.

299. The judicial precedents that a Panel in Mexico must apply are understood in two ways: those that are non-binding precedents, also known as relevant or isolated

[4] It is evident that article 1904 excludes any direct reference to the Constitution of each country, which in consequence cannot be applied to anti-dumping and countervailing duty matters, since article 1911 contains it in the definition of internal law, but only for the purposes established in article 1905.1, this means it is invoked only for the effects of the safeguard of the review system. So the Constitution should not be a direct source of the grounds that the Panel uses to issue its final decision.

[5] It is important to note that the FFC might eventually become a part of the legislation whose compliance must be safeguarded by the Panel, in the extent that article 85 of the CFT recognizes it's supplementary character in the following terms: *"In the absence of an express provision in this law in what relates to administrative procedures in the matter of unfair international trade practices and safeguard measures, the FFC will be supplementarily applied , in accordance with the nature of this proceeding. This provision will not be applied in what relates to notices and verification visits".*

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thesis, that have not attained the status of jurisprudence and those that are binding, known as jurisprudence.[6]

300. Jurisprudence is a tool to integrate law in Mexico, but only to the extent there is a gap in the law, provided that its invocation is pertinent and applicable a real case. In any other cases its interpretation criteria is relatively binding.[7]

301. Finally, regarding Orders and Final Decisions issued by other Panels, it is unquestionable that, according to NAFTA Article 1904, section 9, they cannot be invoked as binding precedents. However, they can be cited as a guide to solve a specific question.

302. Given that the present Review witnessed peculiar events, such as the IA's questioning of the Panel's jurisdiction to review the Revised Determination, which was issued to comply with the recommendations of the SG-WTO and, on the other hand , the existence of this parallel procedure. This Panel believes it important to thoroughly analyze the legal basis of the jurisdiction to review the Revised Determination of the IA and what type of treatment it needs to give to decisions of dispute resolution bodies, such as the SG-WTO. The Panel will analyze these questions in the following.

303. II.5. Purpose of the Final Determination of the Review Process

304. Since August 22, 2000, the IA, supported by the Sugar Chamber, argued before this Panel that compliance with the Conclusions and Recommendations of the SG-WTO would mean the extinction of the Original Determination issued by the IA and published in the FOG on January 23, 1998 and that, as a consequence, the Panel should terminate its Review. Almost six months had passed[8] so that the IA and the Sugar Chamber concluded that the effect of such compliance could be of such a nature equivalent to a revocation of the Final Determination of January 23, 1998.

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[6] When a jurisprudence is created it becomes a source of Mexican law. Jurisprudence is obligatory to inferior courts. In general terms, jurisprudence is formed when there are five consecutive non-binding precedents in the same sense. The organs that in the Federal Judiciary Branch can issue jurisprudence are: the Supreme Court of Justice or in each of its Chambers) and the Collegiate Circuit Tribunals. Likewise, in federal matters , the Regional and Superior Chambers of the FFT can issue jurisprudence.

[7] It is mandatory for lower courts and for the parties intervening in each one of the cases to form it, however, its binding effect is relative, because a lower court can issue a judgment against the jurisprudence, having the obligation to serve the tribunal that it is contracting with a notice. Jurisprudence must be distinguished from the common law principle of *stare decisis*.

[8] On January 14, 2000 the SG-WTO issued its final report as a result of the WTO dispute settlement proceeding, with regards to the examination of the anti-dumping investigation performed by the Mexican United States on the imports of high fructose corn syrup and the imposition of the final anti-dumping measure. That report was adopted on the meeting of the Dispute Settlement Body of February 24, 2000.

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305. However, there is no immediate or mediate antecedent that could lead to that conclusion.

306. On one hand, the Understanding that governs the dispute settlement proceeding in the WTO does not have as an immediate or general goal the annulment of the measures adopted by one Party, rather it is to place the adopted measures in compliance with the rules that regulate international commerce under the WTO.

307. Indeed, Article 19.1 of the Understanding states:

308. When a special group or the Appellate Body reaches the conclusion that a measure is incompatible with a related agreement, **they will recommend the affected Member to place it into conformity with that agreement**. Besides the formulation of recommendations, the special group or the Appellate Body may suggest the manner in which the affected Member can apply them (Emphasis added)

309. In the case before us, the SG-WTO recommended to the Dispute Resolution Body:

310. …[t]o request of Mexico **to place its measure into conformity with the obligations incumbent on it by virtue of the Antidumping Agreement**. (Emphasis added)

311. On the other hand, that is how the then SECOFI understood and accepted, as stated in the "Determination that revises, based on the conclusion and recommendation of the special group before the DSB of the World Trade Organization, the final determination of the anti-dumping investigation on the imports of high fructose corn syrup, good classified under tariff sections 1702.40.99 and 1702.60.01of the Tariff Code of the General Imports Law, originating in the United States of America, regardless of the country of export", published on May 15, 2000.

312. Indeed, in paragraph 8, under the heading "RECITALS", the IA states:

313. The Ministry, based on this resolution, proceeds to **review** the final determination of the antidumping investigation regarding the imports of high fructose corn syrup, originating in the United States of America, **only as to the conclusions that the Special Group stated as incompatible with the prescriptions of the Agreement relating to the Application of Article VI of the 1994 General Agreement on Tariffs and Trade and which are mentioned in point 5 of this Resolution** [9]. (Emphasis added)

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[9] Point five of the Determination of May 15, 2000 textually reproduces paragraphs 8.1, 8.2, and 8.4 of the SG-WTO Report.

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314. In paragraph 12, under the heading "DETERMINATION", the IA orders:

315. **The initiation of the review is hereby commenced** regarding the final determination of the antidumping investigation of high fructose corn syrup, originating in the United States of America in order to comply with the report of the referred Special Group, **establishing that it will only analyze the aspects stated in point 5 that resulted incompatible with the Agreement related to the Application of Article VI of the 1994 General Agreement on Tariffs and Trade**. (Emphasis added)

316. It is evident that for the IA there is only one anti-dumping investigation regarding the imports of high fructose corn syrup, originating in the United States of America, and only one Final Determination, which it intends to place into conformity with the Anti-dumping Agreement.

317. The Determination of the IA published on May 15, 2000 does not only initiate the review process, but also governs it: it cannot result in a new anti-dumping investigation or a new final determination, much less the revocation of the January 23, 1998 Final Determination due to the express mandate of the IA, which is in its same terms in all of that which is different to the SG-WTO recommendations.

318. In addition to the above is the evidence contained in the same Revised Determination, published in the DOF on September 20, 2000.

319. Over and over, there is reference in the Revised Determination to the integrated AR created by the IA on the anti-dumping investigation and to the final Determination of January 23, 1998, which the IA refers to as the "original final Determination"[10].

320. The IA in its Revised Determination considers that the requested information during the process of review complements the information gathered during the anti-dumping investigation and that the Revised Determination complements the original.

321. Paragraphs 28 and 29 Revised Determination are an example of the previous statement. They read:

322. 28. In the evidence and recommendation of the Special Group, referred to in section 8.2 a) of the Special Group's Report, referred to in section 6 of this Determination[11], the Special Group considered insufficient the examination conducted by the authority to determine the existence of an important threat of injury. This **means that the authority has to perform a complementary evaluation that allows the above-mentioned report to be complied with**. (Emphasis added)

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[10] If the Final Determination of January 23, 1998 is the "original final Determination", which is composed by itself and the September 20, 2000 resolution, it cannot be anything but the "revised final Determination". These same terms were used by the Panel to refer to these determinations in its Order of February 6, 2001.

[11] This point is reproduced on the SG-WTO recommendations.

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323. 29. To comply with the report of the Special Group and based on articles 54 of the Code of Foreign Trade and 6.8 of the Agreement related to the Application of Article VI of the 1994 General Agreement on Tariffs and Trade, the Ministry considered it necessary to make requests of the interested parties, which is also stated in the point 9 of this Determination[12], because it **required complementary elements** to analyze the aspects that section 6 of this Determination refer to. **Moreover, the IA required complementary elements** because in such aspects, the Special Group had a different approach to that of the IA in its **original final determination.** (Emphasis added)

324. There is also, according to the IA, only one AR with two parts, one formed during the anti-dumping investigation, and another complementary part, formed during the review. There is only one final Determination, the original dated January 23, 1998, which is complemented with the final Determination that revises of September 20, 2000.

325. Despite the force of the facts and conclusions above mentioned, this Panel now refers to a detailed analysis of the legislation, the jurisprudence and the general principles of law that the FFT would apply, with regards to the Final Determination under review, by virtue of the request by the IA on August 22, 2000, supported on August 29, 2000 by the Sugar Chamber. This Panel is aware of the seriousness of the request by the IA, the importance of what the IA and the Sugar Chamber want to give to their arguments, and the novelty of a situation like this one prompt us to this analysis.

326. The jurisprudence and the jurisprudential thesis, in particular those of the Judicial branch, do not necessarily refer in an express manner to all and each of the possible matters, notwithstanding they can be applied through analogy. That is stated by the Judicial branch through its jurisprudence:

327. IT IS LEGAL THE ANALOGOUS APPLICATION OF THE JURISPRUDENCE OF THE SUPREME COURT OF THE NATION.[13] It lacks legal support the assertion that the thesis or jurisprudence of the Supreme Court of the Nation or its Chambers, cannot be applied analogously or through comparison, because article 14 of the Constitution only forbids it when in relation with trials of criminal order, but when the court for the solution of a conflict analogously or through comparison applies the legal reasoning contained in a thesis or jurisprudence, it is legal if the legal issue under consideration is exactly the same both in the case before the court and the one contained in the thesis, moreover since the characteristics of the jurisprudence are its generality, abstraction, and impersonality with regards to the legal criteria that it contains

[12] Is the May 15, 2000 Determination.
[13] Ninth Epoch. Instance: Circuit Collegiate Tribunals. Source: Weekly Report of the Judiciary and its Gazette. Volume: VIII.20.J/26. Pg. 837.

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328. This Jurisprudence supports subsequent applications of Jurisprudences and jurisprudential precedents by analogy.

329. Looking at this deeper, first, as regard to the question of whether there are two final Determinations, or better yet, if the final Determination dated September 20, 2000 is autonomous and revoked the final Determination of January 23, 1998.

330. The Federal Fiscal Tribunal has set the standard that the administrative act consists of a proceeding in which a series of formalities and acts are integrated in a unifying manner.

331. **ADMINISTRATIVE PROCEEDING.**[14]- IT'S UNITY FOR THE EFFECT OF LEGAL BASIS AND REASONING OF A RESOLUTION. - The formation of the administrative act requires a series of formalities and acts that prepare it, which constitute the administrative proceeding;**this includes the regulation of the formalities for the formation, execution, and review of the act on the administrative sphere; therefore, the legal basis and reasoning of a resolution must be evaluated taking into consideration** the administrative proceeding **because** it is a unit as the acting of the authority**. (Emphasis added)**

332. That is how the Final Determination of the anti-dumping investigation must be understood, as a proceeding that starts with the initiation of the investigating process (Article 49 CFT) and finishes, when the parties opt for the proceeding of Article 1904 of NAFTA Chapter XIX, with the last review conducted by the IA due to an order of the corresponding binational panel (Article 97, II CFT).

333. As stated by the NAFTA (Article 1904.3 and Annex 1911) a 'final determination' is the one so determined by the applicable law[15]. For Mexico, a final determination is the final determination that imposes a final countervailing duty; revokes the provisional countervailing duty; or finishes the investigation without imposing countervailing duties.

[14] Thesis: II-TASS-8885. R.T.F.F. Yr. VII. No. 74. February 1986. Pg: 1172. Isolated Second Epoch. All members. Matter: ADMINISTRATIVE PROCEEDING (RESOLUTIONS).

[15] When NAFTA was signed, it was still effective the Regulatory Code of Article 131 of the Political Constitution of the Mexican United States in the Matter of Foreign Trade, whose article 13 stated the corresponding "definitive determination" for the case of Mexico. On July 27, 1993, in the FOG, the Code of Foreign Trade was published, substituting the above mentioned Regulatory Code, and which now determines for Mexico what a "definitive determination" is, and it does so in its Article 59, with the denomination of Final Determination.

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334. Article 97, section II, of the CFT complements the above-mentioned disposition by stating:

335. A resolution of the Secretary will only be considered final when issued as a consequence of the determination deriving from the alternative mechanisms.[16]

336. The FFT characterizes the final administrative act this way:

337. FINAL ADMINISTRATIVE ACTS ON THE MATTER OF SOCIAL SECURITY. -THEIR CONCEPT[17]. -The challenge procedure foreseen by article 274 of the Social Security Code is enforceable against final administrative acts. To this matter, the definitiveness of the administrative act consists in that all the stages of the administrative proceeding have been performed… (Emphasis added)

338. This criteria was confirmed by the same tribunal on November, 1994:

339. FINAL DETERMINATION IN THE ADMINISTRATIVE SPHERE.[18]-
The definitiveness on the administrative sphere and the definitiveness for challenging effects are different concepts, because the former implies that the stage of creation of the administrative act is finished, that is, only the act of authority by which the process or phases of the creation of the act is concluded constitutes a final resolution on the administrative sphere, while the definitiveness for challenging effects, according to the content of the last paragraph of article 23 of the Internal Code of this Tribunal, takes place when a resolution does not admit an administrative resource, or when the use of the resource is optional for the affected party. (Emphasis added)

340. In conclusion, the Final Determination of January 23, 1998 is the only one that exists and that is complemented with the Revised Determination of September 20, 2000. The original Final Determination is also complemented with the Remand Report in which the IA shall state, according to Rule 73(1) of the Rules of Procedure, the acts performed as a consequence of the remand ordered by the Panel in this Decision.

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[16] NAFTA Article 1904 states, precisely, the alternative mechanism, by establishing in its section 1 "As provided in this Article, each Party shall replace judicial review of final anti-dumping and countervailing duty determinations with binational panel review"

[17] Thesis: III-PSR-II-66. R.T.F.F. Yr. VII. No. 73. January 1994. Pg. 25. Precedent Third Epoch. Second Regional Metropolitan Chamber. Matter: Social Security.

[18] Thesis: III-PSR-II-70. R.T.F.F. Yr. VII. No. 83. November 1994. Pg. 19. Precedent Third Epoch. Second Regional Metropolitan Chamber. Matter: GENERAL.

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341. The alleged lack of competence and jurisdiction of this Panel could only occur in the case of a change in legal situation. This is how the Judicial branch has considered it:

342. **CHANGE OF THE LEGAL SITUATION RESULTING FROM THE ILLEGALITY OF THE AMPARO SUIT. IT TAKES PLACE IF IN CARS IT APPEARS THAT THE INSURANCE IS ORDERED FROM THE DRIVER WHOSE DISPOSSESSION IS CLAIMED.**[19] According to the content of article 73, section X, of the Amparo Code, the constitutional review is illegal when, after the claim against the act has been raised, a determination to the same proceeding followed by the responsible authority **changes the legal situation that the complainant was into** by virtue of the act that he raised in the amparo, because the tribunal cannot decide on the constitutionality of the act without affecting the new legal situation…(Emphasis Added)

343. The Federal Judicial branch itself determines the general applicable rule to the change of legal situation, in the following terms:

344. **CHANGE OF LEGAL SITUATION. GENERAL RULE.**[20] According to the content of article 73, section X, of the Amparo Code**, the change of legal situation**, as a general rule, takes place when the following hypothesis appear together: a). - When the challenged act in the amparo trial derives from a judicial proceeding, or from an administrative proceeding followed in the form of a trial; b). - When after the filing of the amparo suit a new resolution is issued which changes the legal situation in which the complainant was by virtue of the act challenged in the amparo; c). - When there is impossibility to decide on the constitutionality of the challenge act without affecting the new legal situation, and therefore, when the violations challenged in the amparo trial are to be considered irreparably perpetrated; d). -When there is autonomy or independence between the act challenged in the amparo trial, and the new resolution issued in the related proceeding, in such a way that the latter can subsist, independently that the act of the amparo renders or not unconstitutional.(Emphasis added)

345. In the case before this Panel, the Revised Determination of September 20, 2000, did not modify the legal situation of the Complainants. There is no autonomy or independence between the Revised Determination that revises and the Final Determination of January 23, 1998. The review of the legality of the January 23, 1998, Final Determination does not affect a new legal situation, because there is none. It is derived, consequently, that there is no change in the legal situation.

[19]Ninth Epoch. Instance: Circuit Collegiate Tribunals. Source: Weekly Report of the Judiciary and its Gazette. Volume: IX, April, 1999. Thesis: III.1o.A.64 A. Pg. 502.
[20]Ninth Epoch. Instance: Second Chamber. Source: Weekly Report of the Judiciary and its Gazette. Volume: IV, December, 1996. Thesis: 2a. CXI/96. Pg. 219.

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346. Another argument of the IA[21], supported by the Sugar Chamber, is that there is no subject matter for this Panel to review, because the Final Determination, dated January 23, 1998, ceased to exist as of the Revised Determination of September 20, 2000 was published.

347. It has been demonstrated that the Final Determination, dated January 23, 1998, still exists. On the other hand, it could only cease to exist through an explicit act of revocation, which has not been issued, and which would bring along the revocation of the Revised Determination, dated September 20, 2000, because it complements the prior.

348. An additional question to resolve is whether this Panel, by incorporating to the proceeding the Revisde Determination, dated September 20, 2000, violates the congruency principle, and becomes, as the Sugar Chamber argues,[22] plus petita or ultra petita.

349. The congruency principle is recognized in the Mexican legislation, and has been confirmed by the Judiciary and the FFT.

350. The prevalence of the congruency principle is established in the jurisprudence of the Judiciary:

351. **CONGRUENCY PRINCIPLE. THAT SHALL PREVAIL IN EVERY JUDICIAL RESOLUTION.**[23] In every judicial proceeding attention shall be paid to the compliance with the congruency principle when solving the controversy submitted, which in essence is referred to the fact that the verdict must be congruent not only with itself but also with the controversy, which is reached by solving the controversy taking into consideration the arguments of the parties, without omitting anything or adding issues not presented by the parties, and without including contradictory considerations or contradictory resolutions.

352. The FFT also views the congruency principle as one of the principles that rules the proceeding and adds criteria to determine when there is no compliance with this principle and for the practice of what is known as a supplementation of the claim, that is one of the forms in which the plus or ultra petita can occur:

353. **SUPPLEMENTATION OF A DEFICIENT CLAIM. - IT IS NOT TRIGGERED WHEN THE REQUEST OF THE CLAIMANT IS INFERRED FROM THE**

[21] See Motion Requesting the Termination of the Panel Review of the Final Determination, filed by the IA on August 22, 2000, paragraph 15.
[22] See pages 10 and 11 of the Answer to the Motion of the Complainants Corn Refiners Association and Almidones Mexicanos filed by the Sugar Chamber on February 26, 2001.
[23] Ninth Epoch. Instance: Circuit Collegiate Tribunals. Source: Weekly Report of the Judiciary and its Gazette. Volume: VIII, August 1998. Thesis: I.1o.A. J/9 Page: 764

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INTEGRAL ANALYSIS OF THE ARGUMENTS OF ILLEGALITY.[24] The [court does not] incur on the supplementation of a deficient claim when there is a statement in the concepts of nullity that allows [the court] to infer which was the request of the claimant, being it indispensable to cite all legal rules applicable and to exhaustively state all the arguments that could favor him. Therefore, the Chamber having the matter before it can proceed from the **BASIC** argument presented to amply examine the controversial issue, because doing so it is complying with article 237 of the Federal Fiscal Code, which establishes that the verdicts of the Federal Fiscal Tribunal shall be legally based and shall examine each and all the controversial issues of the challenged act, having also the ability to state notorious facts. This reasoning is further more confirmed if the claimant transcribed the part of the legal rule that it considered as violated, which, harmoniously related to the concept of annulment, allows knowing the request of the complainant. (Emphasis added)

354. **CHALLENGING CONCEPTS. - FOR THEIR STUDY, IT IS ENOUGH THE CLEARNESS OF THE CAUSA PETENDI.**[25] The request for annulment constitutes a whole, and as such it has to be analyzed by the court, because if in one of its parts the causa pretendi is clear, it must be analyzed to comply with the due process, and taking into consideration that article 208, section VI of the Federal Fiscal Code, does not require the concepts of a challenge to fulfill certain requirements. - [For] The above, even when the arguments submitted by the claimant are wrong, the court is obliged to analyze the matters effectively argued and to solve according to the law, following the content of article 237 o the Federal Fiscal Code.

355. The argument of the Sugar Chamber is based on the consideration that the Final Determination that revises, of September 20, 2000, is an autonomous and independent legal act, which substitutes and terminates the existence of the January 23, 1998 original Final Determination. By separating the basis into pieces, the argument falls apart.

356. But there is more, in the complaints and briefs, the Complainants submitted arguments to the Panel that are still effective regarding the Final Determination that revises, of September 20, 2000. It is enough, as the FFT states in the above-mentioned thesis, to have a "basic argument" comprehending, generically, the content of the Final Resolution that revises, of September 20, 2000. The causa petendi is clear and defined, and it embraces, without a doubt, the content of the Final Determination that revises.

357. One of the reasons for it being this way is that the United States government submitted arguments against the January 23, 1998 Final Determination, before the SG-WTO, which, as the IA and the Sugar Chamber recognize, are the same that the Complainants submitted before this Panel. In addition to those arguments advanced

[24]Thesis: III-TASS-234. R.T.F.F. Yr. I. No. 5. May 1988. Pg. 14. Isolated Third Epoch. All Members. Matter: PROCEDURAL (VERDICTS IN THE TRIAL.)
[25]Thesis: IV-TA-2aS-39. R.T.F.F. Yr. II. No. 11. June 1999. Pg. 212. Isolated Forth Epoch. Second Section. Matter: PROCEDURAL.

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by the United States government, the Complainants submitted other issues before this Panel.

358. It is clear then that: if the Final Determination that revises, of September 20, 2000, is not an autonomous and independent act; if the claims of the Complainants are the same that the United States government submitted during the WTO proceeding; if the SG-WTO arrived at its conclusions and formulated its recommendations based on the arguments submitted by the United States; if the Mexican government, through the IA argues that it has complied with the recommendations of the SG-WTO; this Panel cannot violate the congruency principle, nor fall into a plus or ultra petita by incorporating into its review the Final Determination, which results from the compliance by the Mexican government with the recommendations of the SG-WTO.

359. One last question to explain is the reasoning used by the Panel to base its decision to analogously apply Rule 73(2) of the Rules of Procedure.

360. It is convenient, first, to recall that Article 1904.3, when referring to the general principles, and Rule 2 of the Rules of Procedure, in an explicit manner, state the possibility to resort to analogy as to the matters not provided for.

361. The Judiciary, through its jurisprudence, understands the analogous application of the law as follows:

362. **LAW, THE ANALOGOUS APPLICATION**.[26] When a particular case is not expressly foreseen in the law, to figure it out, the court must resort to applicable methods, where the analogy is included, which takes place when there is a relationship between a case expressly provided for in a legal norm and another one that is not included in the same, but because of its similarity with the former, allows the same legal treatment in the benefit of the administration of justice.

363. It is not necessary to insist on that the fact that they have put into a simultaneous way, the mechanisms of NAFTA, Chapter XIX and that of the WTO is something unusual, which, also, is not regulated in an explicit way by Mexican Law, nor has it been solved in any of its jurisdictional instances. The lack of express regulation is evident.

364. It is important now to explain to what extent there is a relationship between the two cases, the one explicitly regulated and the one not, and to what extent there is a similarity that advises the analogous application in benefit of the administration of justice.

365. The relationship between the cases is material; the case presented to the WTO refers to the same anti-dumping investigation submitted before this Panel. There cannot be a closer relationship than this one.

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[26]Ninth Epoch. Instance: Circuit Collegiate Tribunals. Source: Weekly Report of the Judiciary and its Gazette. Volume: VII, April, 1998. Thesis: III.T. J/20 Pg. 649

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366. With regards to the similarity, the report of the SG-WTO revises the consistency of the measure imposed with the Anti-dumping Agreement and its recommendations have the purpose that the Member that imposed the measure put it in conformity with the Anti-dumping Agreement.

367. The Binational Panel reviews the conformity of the final determination with the legal norms related to anti-dumping duties (NAFTA Art. 1904.1), which in the case of Mexico include the Anti-dumping Agreement, and the Panel can return the final determination so the measures non incompatible with its decision can be adopted (NAFTA Art. 1904.1).

368. The similarity is evident. The Mexican legislation does not foresee how the IA is to proceed in order to comply with the recommendation of the SG-WTO. The IA based its revision, among others, on articles 49, second paragraph, and 97, section II, of the CFT, and it is clear that neither of those rules directly applies to the proceeding followed by the IA, but they are applicable by analogy, although the IA did not express it in that way.

369. The Revised Determination of September 20, 2000 is equivalent to the Remand Report that the IA renders in case of a remand by the panel.

370. In conclusion, all the requirements were fulfilled for the analogous application of the norms contained in the Rules of Procedure and to consider the Revised Determination, of September 20, 2000, as part of the proceeding of the anti-dumping investigation, and complementary to the January 23, 1998 Original Final Determination.

371. From all of the above it is clear that it was complied with Article 237 of the Federal Fiscal Code, Rule 7 of the Rules of Procedure, the Congruency principle and the Standard of Review established for this Panel by NAFTA Chapter XIX.

372. **II.6. Application of the Comity Principle.**

373. In the present case, two tribunals with concurrent jurisdiction act simultaneously to solve the same dispute. When there is not a central tribunal or legislative body that coordinates the efforts of these two tribunals, each one has to perform autonomously. The law applied by the FFT and its decisions does not offer any guidance. In situations like this one, the courts have developed throughout the centuries the doctrine of courtesy, or mutual courtesy, in which a tribunal exercises deference towards another and adopts their determinations and conclusions, to avoid, insofar as possible, conflict or duplication of efforts. The doctrine is flexible and voluntary and does not apply when the differences in the nature of the tribunals, on the facts submitted to them, on the applicable law, or on the parties that contend before them, make that application inadmissible.

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374. In the present case, the SG-WTO issued its decision considering that some parts of the 1998, Final Determination of the IA (the initiation of the anti-dumping investigation) were compatible with the AA; that other parts (the extension of the period of application of the provisional measure and the retroactive collection of anti-dumping duties for the period of application of the provisional measure) were incompatible with the AA; and still, that others (insufficient consideration of elements for the determination of the threat of injury) lacked enough basis and therefore they were remanded to the IA so it would conduct additional proceedings. After deliberating, this Panel decided to proceed with the application of the comity principle, such that the use of this principle cannot be understood in any manner as a form of abdication of the Panel's responsibilities. Each application of the comity principle, in consequence, must be legal. Some aspects of this test must be examined in the context of specific determinations; however, the following aspects are relevant to all the determinations of the SG-WTO.

375. Regarding the tribunal: the international ad hoc panel summoned by the WTO, according to Article 6 of Annex 2 of the Agreement that establishes the World Trade Organization is very similar in its criteria as to those of the binational panel constituted according to NAFTA Chapter XIX.

376. Regarding the facts: the AR before both tribunals is identical, except for the documents referred to as "MEXICO 13" presented before the SG-WTO (see section I.3.2.2).

377. Regarding the regulations; both panels apply the AA, that is part of Mexican Law, and many other common principles; but it is necessary for this Panel to determine the regulations of Mexican Domestic Law that, being presumably consistent with the latter, could differ with WTO Law.

378. Regarding the parties: on the Mexican side of both proceedings it could be argued with difficulty that the Mexican Government and the SE, that is a part of the Government, have different interests. On the American side, the question is more complex, as the interests before the SG-WTO were represented by the United States Government; while before this Panel the interests are represented by an association of producers and by individual companies. Nevertheless, it is usual for the States to defend on international controversies the rights of their nationals and for those nationals to be so obligated, which does not imply at all that they are the same party and consequently the principle of res judicata can be applied. Although various differences could be established in typical international litigation and in the present case, this Panel considers that the principle can be applied by analogy without meaning unfair disadvantages to the American parties.

379. Although it is true that neither the FFC nor the CFT have an explicit rule that solves the question, it is also true that the Federal Code of Civil Procedure (FCCP), which is the suppletory norm established by the FFC, regulates the question of jurisdiction of a foreign jurisdictional body and the questions of efficiency and recognition of foreign

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jurisdictional resolutions. These norms contemplate the general principles that otherwise the FFT would apply, in its case, and that illuminate the approach adopted by this Panel and the application that it makes of the comity principle.

380. Mexico is part of the international treaties and agreements that the WTO established and it subscribed to its annexes, especially Annex 2 through which it is adopted the dispute resolution system based on that which the SG-WTO was formed. This means that the jurisdiction of this tribunal is incorporated into Mexican International Law.

381. For this Panel, it is not only recognizable that this jurisdiction the stated reasons, but also for what is directed by articles 564, 566 y 569 of the FCCP, regulations that the FFT would directly apply.

382. Article 564. In Mexico, the jurisdiction assumed by a foreign court for the effects of the execution of verdicts will be recognized when such jurisdiction has been assumed by reasons that are compatible or similar to the domestic law, unless the jurisdiction is exclusive of the Mexican courts.

383. Article 566. The jurisdiction assumed by foreign jurisdictional body, appointed through an agreement of the parties before the trial, will also be recognized if, under the circumstances and relationship of the same, such election does not imply a de facto impediment or the denial of access to justice.

384. Article 569. The verdicts, the decisions of arbitrators of a non commercial character, and all other foreign jurisdictional decisions will be valid and recognized in the Republic in all of that which is not contrary to the domestic public interest, in the terms of this Code and all other applicable laws, save that contained in the treaties and agreements of which Mexico is a party…(Emphasis added)

385. In addition to the above-mentioned basis for its jurisdiction, this Panel considers that article 565 of the FCCP adds a basis for its jurisdiction to review the Revised Determination (which the IA pretends to present as a new determination, independent and autonomous from the anti-dumping proceeding before this Panel.) This logic supports the reasons expressed by the Panel in its Order of February 6, 2001. This article reads:

386. Article 565. Notwithstanding the content of the previous article, the national court will recognize the jurisdiction assumed by the foreign court if, in its own judgment, it had assumed such jurisdiction to avoid a denial of justice, for the lack of a competent jurisdictional body. The Mexican court can assume the jurisdiction in analogous cases. (Emphasis added.)

387. The fact is that, on one hand, not all the claims that were placed before this Panel were presented to the SG-WTO; and on the other, the Revised Resolution of the IA, which resulted from the decision adopted by the SG-WTO, and is a part of the same anti-dumping investigation, affects the Complainants in several ways, with regards to

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which they would be denied access to justice in case this Panel decided not to assume the jurisdiction over the Revised Resolution.

388. In conclusion, it is reasonable to apply the comity principle regarding the conclusions reached by the SG-WTO, related with the AA, and it is on this panel's jurisdiction to review the IA's Resolution (the Original Determination as well as its modification, the Revised Determination) regarding Mexican Domestic Law, as well as to AA with the exception of what does not apply according to the comity principle. This Panel is convinced that these legal dispositions and the general principles of Law would make the FFT to act in the same way in a similar case.

389. Concluding, this is the legal frame that, according to paragraph 2 of NAFTA Article 1904, the binational panel is obliged to apply to the extent that a tribunal of the importing Party wold do, to review whether the determination of the IA was issued according to the legal norms related to anti-dumping and countervailing duties.

390. **III. COMPETENCE OF THE INVESTIGATING AUTHORITY**

391. The Complainants request the Panel to declare the Final Determination illegal, as established in article 238, section I of the FFC, since numerous acts executed during the course of the proceeding, were ordered, carried out and resolved by an incompetent authority.

392. The arguments of the complainants can be summarized as follows:

393. *The legality principle incorporated in article 16 of the Constitution is fulfilled through a written order by competent authority, legally based and applied to the facts.

394. *The alleged "Director General Adjunto de Técnica Jurídica" (DGATJ) of the "International Unfair Trade Practice Unit" (hereinafter UPCI by its Mexican acronym) of SECOFI is an unqualified authority, which executed several "injurious acts" which affected the Complainant's rights.

395. *A Delegatory Agreement cannot create and give competence, this can only be done by law or regulation.

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396. *The delegation of powers is legally ineffective, since the DGATJ was not created by the SECOFI's Internal Regulations, therefore it is invalid for the Minister of SECOFI to delegate responsibilities intended for him and for the UPCI Unit to an authority which was not created by the President of Mexico.

397. *The DGATJ participated in all of the stages of the Investigating Procedure, affecting the rights of the interested parties.

398. *The DGATJ signed all the official letters and orders, specifying that he was doing it by resolution or under the instructions of the head of the UPCI. Nonetheless, the administrative file contains none of such resolutions mentioned by the DGATJ.

399. On the other hand, SECOFI argues that:

400. * SECOFI is the competent authority to deal with and solve investigations relating to unfair practices in international trade.

401. *SECOFI is in charge of dealing with and solving the Investigations relating to Unfair Practices in International Trade, and its Minister is assisted when dealing with the matters under his competence, by the officers mentioned in art. 14 of the LOAPF, the Internal Regulations and other legal regulations.

402. *UPCI is the administrative unit in charge of assisting the Ministry of SECOFI in administering the law on unfair practices in international trade, and its functions may be delegated to officers of the same unit.

403. *The UPCI is a governmental body duly recognized in article 14 of the LOAPF, which establishes the administrative units that are part of the different State Ministries and provides that they are created through the corresponding internal regulations Code and other legal regulations. UPCI is created by article 2 of the Internal Regulations and its functions are established in article 38 of the same regulation, among which are to handle the Investigating Procedure.

404. *The DGATJ is competent to know, deal with and solve the unfair practices in International Trade investigations.

405. *The UPCI has a previously defined organizational structure which contains the DGATJ. This is an authority that exists in accordance with Mexican law, following article 8 of the Internal Regulation Code and 14 of the LOAPF.

406. *Article 16 of the LOAPF grants the Head of a Ministry the faculty to delegate, with the exception of those faculties that are non-delegable as established in the Internal Regulation.

407. *The delegation of faculties of SECOFI to the DGATJ was made through a Delegatory Agreement published in the Official Federal Gazette on January 24, 1996,

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specifically through article 19. In addition, article 31 of this same agreement establishes the faculty of the adjunct general director to sign diverse official writings by resolution of a superior authority.

408. *The Complainants failed to point out the alleged injurious acts produced by the actions of the IA.

409. *The Complainants, when appearing before the SECOFI fully admitted the acts they claim as illegal and submitted themselves to the competence and jurisdiction of SECOFI, through the UPCI.

410. The question before this Panel is whether the DGATJ as an internal unit of UPCI had the legal authority or competency to carry out the acts challenged by the complainants. Five Chapter XIX panels, the FFT in two decisions, and two Mexican federal judges have addressed the same basic question of Mexican law presented to this Panel, notwithstanding a variety of regulatory frameworks, timing, and specific forms of delegation.

411. Four of the panels, a federal judge and the Supreme Court (in reviewing the District Judge's decision) found the DGATJ competent in its conduct of the anti-dumping investigations.[27] One panel, the FFT and one Collegiate Tribunal (in reviewing the District Judge´s decision) came to the opposite conclusion.[28]

412. While this Panel, after reviewing these decisions[29] and the relevant Mexican statutes, regulations and precedents, believes that the DGATJ was competent[30], the Panel does not have to reach this issue because it finds that there is an even more persuasive reason for rejecting the argument of the complainants. Namely, that the acts carried out by the director of the DGATJ in this anti-dumping investigation, which were

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[27] See Panel decisions in the following cases: MEX-94-1904-01 Covered Flat Rolled Steel; MEX-94-1904-03 Poliestirene Crystal Type and Impact; MEX-96-1904-03 Hot Rolled Steel y MEX-96-1904-02 Steel Plate, and the judgment issued in the Juicio de Amparo 682/97, issued by the Sixth District Court in Administrative Matters in the Distrito Federal of the First Circuit, dated may 28, 1998, that was ratified in terms of the judgment in the Amparo under review A.R.-2067/98 issued by la First Chamber of the Supreme Court of Justice on January 29, 2001.

[28] See Panel decision in the case MEX-96-1904-02 Foiled Steel Plate; and the judgment issued in the Nullity Trial 100(20)9/97/2221/96, Second Section of the Federal Fiscal Tribunal of February 12, 1998, and the Amparo Trial P-52/96 issued by the Fourth District Court in Administrative Matters in the Distrito Federal of the First Circuit, dated March 5, 1998 and the Amparo under Review R.A.. 4841/98 of the First Collegiate Tribunal on Administrative Matters of the First Circuit, dated September 20, 2000.

[29] This Panel is aware that NAFTA binational panel decisions have no binding effect, since it is set forth in the same Agreement, and that in Mexico judicial precedents are not binding except for the case of jurisprudence as was established in the section "Standard of Review and Powers of the Panel" contained in this decision.

[30] We consider this for the following reason: Even though it is questioned that the DGATJ possesses legal existence as an independent entity of the UPCI, it cannot be denied that according to LOAPF articles 14 and 16, articles 8 and 38 of the Internal Regulation of SECOFI dated on October 2, 1995 and in articles 19 and 31 of the Delegatory Agreement of SECOFI dated on July 24, 1996, the director of the DGATJ had competence to carry out the acts disputed by the Complaimants.

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objected to by the Complainants, were not acts that caused them an injury in terms of article 16 of the Constitution, that is, acts that affected their legal rights.[31]

413. This issue is of primary importance, because paragraph one of article 16 of the Constitution only requires the competency of an authority when the legal rights of an individual are disturbed (through privation or injurious acts). In this respect, the following jurisprudence is applicable:

414. **PRIVATIVE ACTS AND INJURIOUS ACTS, ORIGIN AND EFFECTS OF THEIR DISTINCTION**.[32] The second paragraph of Article 14 of the Constitution establishes that, no one shall be deprived of life, liberty or their properties, possessions or rights but through trial before previously established tribunals, in which all essential formalities of the procedure are complied with and in accordance with the laws enacted before the act itself; on the other hand, article 16 of the Constitution determines, in its first paragraph, that no one can be annoyed or bothered in its person, family, domicile, papers or possessions, but through a written mandate of a competent authority which is duly based on law and applied to the facts of the case for establishing the legal grounds for the proceeding. Consequently, the Constitution distinguishes and regulates differently the privative acts from the injurious acts, because the first ones, being those that have the effect of definite diminution, deterioration or suppression of a right of the governed, are authorized only through the compliance with certain requisites established in article 14, such as, the existence of a trial followed before a previously established tribunal, that it complies with the essential formalities of the proceeding and that the laws enacted before the judged act are applied. Instead, the injurious acts that, even though they affect the legal sphere of the governed, don't produce the same effects as the privative acts, since they only provisionally restrict a right with the purpose to protect certain legal rights, the Constitution authorizes them, according to article 16, as long as there is a written mandate of an authority with legal competence to do it, which is duly based on law and applies the facts of the case for establishing the legal grounds of the proceeding. Now, to elucidate the constitutionality or unconstitutionality of an act of authority challenged as privative, it is necessary to precise if it truly is, and therefore requires the fulfillment of the formalities established by article 14, or if is an injurious act and therefore the compliance of the requisites of article 16 suffices. To make that distinction, it must be taken into consideration the purpose aimed with such action, that is, if the inherent purpose or finality of the act sought by the authority is the privation of a material or immaterial good, or if, by its own disposition, it only tends towards a provisional restriction.

[31] This Panel is aware that in the Amparo Trial P-52/96 of the Fourth District Court in Administrative Matters in the Distrito Federal, the Judge concluded that the acts the DGATJ carried out in the investigation were injurious acts. However, this Panel respectfully disagrees with the interpretation of the Judge because he failed to examine each one of the specific acts carried out by the DGATJ to see if they constituted injurious acts, the type of analysis carried out by this Panel.

[32] Ninth Epoch, Weekly Report of the Judiciary and its Gazette, Instance: All Members, Volume: IV, July l996, Thesis: P./J. 40/1996, p. 5 .

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415. In other words, the requirement of competence contained in article 16 of the Constitution cannot be applied indiscriminately to all acts of authority, because the Constitution itself relates the requirement of competence inseparably to the acts of authority that injure the individual. In this regard, it is important to distinguish between the acts of authority that cause an injury to the individual, the acts of authority that imply a benefit to the individual, the inconsequential procedural acts that do not affect the rights of an individual and the internal acts of governmental agencies. With respect to the last one, it is worth making a further distinction: those internal acts that extend beyond the agency and affect the legal rights of the individual, causing an injury, and those that are merely internal and do not extend beyond the agency. The acts of authority that benefit the individual, the inconsequential acts, and the internal acts of the authority that do not affect the legal rights of an individual are not subject to the constitutional requirement of competence, given that they do not infringe the legal interests of the individual. The acts of authority that do infringe on the rights of the individual, including those internal actions of authority, are subject to the requirement of competence established by article 16 of the Constitution.

416. In summary, the requirement of competency is applicable only to injurious acts. Therefore it is important to verify whether the acts contested by the Complainants meet the requirements established in article 16 of the Constitution.

417. In order to respond to this question, it first must be noted that the proceeding as a whole cannot be alleged to be an injurious act. A precise statement of each alleged injurious act must be made as is indicated in the following thesis:

418. **ANNULMENT COMPLAINT.- IT IS CONSIDERED AS NOT SUBMITTED**.[33] If in the initial complaint the acts that originated it are not mentioned, or the injuries caused by the act are not expressly established, or the evidence offered is also not mentioned, all of these requirements enumerated in sections IV, V, Vi and VII of article 208 of the Federal Fiscal Code, the Complaint shall be taken as not submitted according to the last paragraph of the cited article. (VII).

419. Based on this, the Panel can only consider those claims of injurious acts and allegations that were presented in the complaints, as is required in Rule 7 of the Rules. To fully address these claims, the Panel has identified the acts contested by the Complainants and arranged them in the following categories:

[33] Federal Fiscal Tribunal, Second Epoch, First Chamber North East Region. (Monterrey) Year VII. N° 70. October 1985, Thesis II-TASR-IX-692, p. 376.

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420. I.- Notification of the determination to initiate the investigation;

421. II.- Notification of the preliminary determination;

422. III.- Documents granting a time extension;

423. IV.- Requests for additional information; and

424. V.- Notification of verification visits, which the parties refer to as Orders for verification visits.

425. It can be then analyzed in which terms this acts of the director of the DGATJ can be considered injurious acts under article 16 of the Constitution.

426. To this respect it is fundamental to distinguish between the acts of authority that cause an injury to the individual and those that do not, either because they are internal acts that do not extend beyond the agency or because they are acts that instead of causing an injurious act represent a benefit for the individual.

427. Notifications

428. With regards to the notifications, as measured by the standard for injurious acts under article 16 of the Constitution, the Federal Judicial Branch has established the following criteria:

429. **ADMINISTRATIVE NOTIFICATION. IT IS NOT AN INJURIOUS ACT IN TERMS OF ARTICLE 16 OF THE CONSTITUTION**.[34] The administrative doctrine classifies the administrative acts or condition (among which there are the notifications conducted by fiscal authorities), in the following categories according to their content: 1st. Acts directly destined to enlarge the individual's legal sphere. Acts of such nature as are the acts of admission, approval, licenses, permits or authorizations, concessions, and patent privileges. 2nd. Acts directly destined to limit such legal sphere, among which there are orders, expropriations, imposition of tax credits in favor of the government, sanctions and acts of execution or implementation; and 3rd Acts that constitute proof of the existence of a legal or factual status. This last category includes acts of registry, of certification, of authentication, notifications, and publications. From the previous it can follow that the injurious acts, from a constitutional point of view, can only be those categorized under the second classification, that is, those destined directly to limit the individuals' legal sphere, but not the notifications through which it is only made known to a person a certain measure or decision or it is made known certain administrative acts, determining a

[34] Eight Epoch. Weekly Report of the Judiciary and its Gazette. Volume: III Second Part-I June de 1989. p. 481.

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starting point for other acts or recourses that in itself can in fact be considered injurious acts, but not the simple notice of its existence. (Emphasis added)

430. It is clear that the notifications of the resolution to initiate the investigation and the preliminary resolution are not injurious acts, because said notifications do not affect the legal rights of the Complainants, these documents only communicate to the parties the status of the case or a right issued or produced by two authorities, the Minister of Commerce and the UPCI.

431. Extension of time and requests for additional information.

432. It is important to note that both the time extensions and the requests for additional information do not result in injurious acts because they offer a benefit for the Complainants by extending the time deadline for filing documents or providing information useful to promote their interests. The extension of time to file documents or to submit information is evidently a benefit. Less clear perhaps, but even more beneficial is giving them the opportunity to present information that might be useful for promoting their interests. Where a demand for information subject to penalty of law would be an injurious act, a request to voluntarily provide additional information that could enhance their position, as these requests were, is a beneficial act that falls outside the scope of article 16.

433. Verification Orders and Notification.

434. With regard to the verification proceeding, it is important to distinguish between the order of verification, the notification of the order of verification and the carrying out of the verification visit itself.

435. The order of verification is an internal act with external effects. It is by means of this act that an authority orders another hierarchically subordinate authority to carry out the verification visit. The passive subject of the order is precisely the official who must carry out the visit, and not the individual. This internal act has consequences for the legal rights of individuals at the moment that it is executed, that is, when the verification visit takes place; the individual becomes the passive subject of the execution of the verification visit. The order of verification issued to the officials that will carry out the visit is the cause whose effect is the verification visit carried out. In that respect, because the completion of the order becomes an injurious act, which in this case is the verification visit, the requirements of article 16 of the Constitution must be complied with. The validity of the order depends on various requirements: i) that the issuer can issue it, ii) that the receiver can receive it, and iii) that the necessary requirements are fulfilled, such as the competence of the authority.

436. The notification of the order of verification, on the other hand, only informs the individual of the order given by the authority by which a subordinated authority is ordered to conduct the verification visit. In that notice, the content of the order of verification is reproduced to inform the individual of the nature and content of the

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order given to the officials, which will carry out the verification visit. The notification is an inconsequential procedural act, not an injurious act, as is stated in the previous jurisprudence, and as a consequence, it is not necessary that it comply with the requirement of competence established in article 16 of the Constitution. The authority that notifies the person of the verification visit is not the same authority that carries out the verification visit.

437. The carrying out of the verification visit is the effect of the internal act of issuing the order of the visit of verification. In the execution of the order the passive subject is the individual. The verification visit is an injurious act, and therefore it must comply with the constitutional principle of competence.

438. In contrast to what happens in the unfair international trade practices proceeding, in tax matters, the server (notifier) and the executor of the verification visit are the same person. The moment of notification is also the initiation of the verification visit by the same individual. Even if, the notification and the execution of the visit are technically two different acts, materially, they cannot be separated in tax matters.

439. The Federal Fiscal Tribunal en banc has established the following relevant criterion:

440. **ADMINISTRATIVE ACTS, THEIR FORMAL VALIDITY AT THE MOMENT OF THEIR ISSUANCE IS NOT CONDITIONED TO THEIR NOTIFICATION.**[35] In the administrative phase, it is necessary to distinguish two moments: a) the issuance of an administrative act, b) the notification of such act, since the requisites, conditions and effects are different for each case. As to the first, article 16 of the Constitution establishes that to issue an individual any injurious act, it is indispensable that it is made through a written mandate of the competent authority, which is duly based on the law and applied to the facts of the case for establishing the legal grounds of the proceeding. As for the second moment, that is, the notification, articles 134, 135, 136 and 137 of the Federal Fiscal Code establish the different forms through which the administrative acts can be notified, as well as the requisites that must be met for that effect. It therefore **becomes evident that the requisites that must be met by an administrative act and the notification itself are different**, hence, if an act, at the moment of its issuance, is formulated by the competent authority, such act can not be considered illegal if the legal basis in which the authority based itself to issue it have changed at the moment of notification, since **the validity of a resolution in itself is not conditioned to the validity of its notification**, since the notification will have to meet certain requirements, all of them concentrated towards guaranteeing the principle of legal certainty consistent in that the person towards whom the notification is directed has clear knowledge of the act being notified. (Emphasis added).

[35] Second Epoch, All Members, September, 1984, p. 204.

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441. **ACTS NOT NOTIFIED OR ILEGALLY NOTIFIED, PROCEDURE TO FOLLOW IN TERMS OF ARTICLE 209 BIS OF THE FEDERAL FISCAL CODE.**[36] According to section 1 of article 209 Bis, when the notification of the act in dispute at trial is challenged, if the complainant has knowledge of it, such challenge will proceed in the complaint, and will indicate the date in which he learned of it, and in case the administrative act is also being challenged, it will also include the annulment items. Therefore, the Tribunal will first study the challenges against the notification, and if it determines that it is illegal or that there was no notification, the consequence will be to consider that the party had knowledge of the administrative act on the date indicated in its complaint. Secondly, the Chamber will review the challenges against the administrative act. This review is for the purpose of resolving the substance of the matter, without returning it to the agency for proper notification.

442. Independently of the irrelevancy of the issue of competence for the notification of the order of the verification visit, even if the illegality of the notification of the verification visit could be argued, that fact would be irrelevant regarding the investigation conducted by SECOFI.

443. The parties do not challenge the verification visits themselves, which indicates that they accept the validity of the appointment of the executing authorities of the verification visit, of the authority issuing the order of verification, as well as, the issuance of the order, the reception of the order, and its execution. As a result, The Panel presumes that all of the procedures pertaining to the order of the verification visit and the verification visit itself are accepted by the parties as legal.

444. The act that the parties challenge as performed by an incompetent authority is the preparation and dispatch of the official document that contains the notification of the verification visit. As has been analyzed, because said verification is an inconsequential procedural act it does not affect their legal rights and is not an injurious act subject to the requirements of article 16 of the Constitution. By virtue of that, even assuming that the DGATJ did not have competence to issue the notification, that circumstance would be equally irrelevant because a notification is not an injurious act.

445. For the foregoing reasons, the Complainant's argument relating to the legal existence and competence of the DGATJ and its Director to carry out the specific acts referred to by the Complainants must be rejected.

[36] Federal Fiscal Tribunal, Third Epoch, All Members, October 1993, Thesis III-JSS-A-26, p.8.

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446. **IV. ALLEGED ERRORS COMMITED AT THE INITIATION OF THE INVESTIGATION**[37]

447. The Complainants before this Panel state in their claims a series of issues that are interrelated and that are framed into what generically could be called 'initiation of the investigation'. They have, of course, a potential impact on other issues, particularly on the determination of threat of injury; but only as long as the pretension of the Complainants (related to their claims related to the initiation of the investigation) is successful. Therefore, in this section of its Decision, the Panel deals altogether with the issues stated by the Complainants in their claims: 1) Erroneous determination that the petitioner, the Sugar Chamber, had the legal standing to request the investigation; 2) Erroneous determination that sugar and HFCS are like products; 3) Lack of Representativeness of the Sugar Chamber and of their representatives; 4) The erroneous determination that the request for investigation was submitted on behalf of the domestic producers; 5) Erroneous exclusion of certain domestic producers of HFCS; 6) Error of the IA by ignoring the fact that sugar is not a good produced on the immediate previous stage of the same continuous line of production; 7) Erroneous acceptance of a false declaration of the petitioner that there was no production of HFCS in Mexico during1996; 8) Error of the IA by not examining the correctness and truthfulness of the information and proofs included in the request for investigation; and 9) The violation of the law by the IA by starting the investigation based on a request that lacked certain information required by law.

448. All these issues were considered, directly or indirectly, by the Special Group of the SG-WTO before which the US Government brought the review of the Original Determination issued by the IA on the anti-dumping investigation that this Panel is also reviewing.

449. The SG-WTO analyzed the listed issues with a diverse degree of detail and deepness. Particularly, and in relation with the issue of the 'like product', the SG-WTO did not pronounce itself explicitly, however, it declared as valid the determination of the IA with regards to the exclusion of the domestic producers of HFCS and the standing of the Sugar Chamber to submit before the IA the request for investigation[38], with which it in fact fulfilled the requirements needed according to the AA for that exclusion to take place and to consider legal the request to initiate an investigation of a segment of production different to that of the like product.

450. The SG-WTO concluded in section 8.1 of its Report that the initiation of the investigation conducted by the IA was consistent with the requirements imposed by

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[37] In this section is also resolved the claim under the title "SECOFI DOES NOT NOTIFY THE COMPLAINANTS ABOUT ITS EFFORTS TO AMEND FATAL DEFICIENCIES IN THE APPLICATION" that the Complainants include within the general issue designated "SECOFI DOES NOT FULFIL THE REQUIREMENT TO GIVE FULL OPPORTUNITY OF DEFENSES AND OTHER PROCEEDING REQUIREMENTS", the other issues are solved in section V of this decision.

[38] Sections 7.109 and 7.110 of the SG-WTO report are clear to this respect.

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articles 5.2, 5.3, 5.8, 12.1, and 12.1. (iv) of the AA. This conclusion means that the content of articles 2.6, 4.1, 5.1, and 5.4 of the AA were also fulfilled, because anything on the contrary would mean that the consideration that the decision explicitly expressed by the SG-WTO were fulfilled, would lack a basis.

451. In fact, according to the terms of the AA the standing to request the initiation of the anti-dumping investigation is dependant on the existence or not of the like product in the country to which the imports subject to dumping are made. According to Article 2.6 of the AA, the producers of other products that 'although not equal in all aspects, have very similar characteristics to the product under consideration' have legal standing, when there is not existence of that product, whether it is in absolute terms (because there is no domestic production of the good), or in relative terms (because, according to article 4.1(i) all the domestic producers of the like product are related to the exporters or the importers, or they themselves are importers, and consequently, can be excluded from the segment of the domestic production). It could not even be considered the compliance of the AA Articles 5.2, 5.3, 5.8, 12.1, and 12.1.1(iv) if the request to initiate the investigation would have not been submitted by a party with the legal standing to do so.

452. This Panel, through its Order issued on February 6, 2001, in which it solved the Motion for Termination filed by the IA, decided to apply the Principle of Comity of International Law in deference of the SG-WTO and to assume, in those parts in which it is possible, the determinations of fact and the conclusions of that international body.

453. It is clear that this is a case in which the Principle of Comity is appropriate. Consequently, the arguments and claims of the Complainants with regards to the non-compliance of the IA with articles 2.6, 4.1, 5.1, 5.2, 5.3 y 5.4 of the AA are taken as answered and are dismissed as articles 12.1 and 12.1.1(iv) of the AA is taken as fulfilled.

454. This Panel decided in its February 6, 2000 Order, in which it reviewed the arguments and claims related to the 'initiation of the investigation' that the Complainants present, related to the lack of compliance by the IA with the CFT and its Regulations.

455. **IV.1. - Erroneous determination that the petitioner, the Sugar Chamber, had legal standing to request the investigation.**

456. With regards to this claim, the arguments of the Complainants are, essentially, the following:

457. *SECOFI did not comply with its duty, before the initiation, of investigating the legal standing.

458. *If SECOFI did not investigate the legal standing, it did not provide the required reasonable explanation.

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459. *On the other hand, the IA answered, essentially, the following:

460. *Its obligation to investigate the legal standing, before the initiation of the investigation, was satisfied.

461. *The proofs and information submitted by the Sugar Chamber in its request for initiation were dully examined and considered.

462. *The Determination to Initiate contains a sound reasoning of the legal standing of the Sugar Chamber, on section 99.

463. It is convenient that this Panel addresses the internal regulations of Mexico related to the initiation of the 'Proceeding on Matters of Unfair International Trade Practices', because in the claims an erroneous interpretation of this regulations is proposed. By acting in this manner, this Panel will be answering the pretensions stated to this respect by the Complainants.

464. Articles 40, 49, 50, 52, 54, and 55 of the CFT and articles 37, 60, 61, 62, 63, 75, 77, 78, 80, and 81 of the RCFT, are the regulations of the Mexican domestic law that rule the initiation of the investigation.

465. In Mexico, the first thing to determine whenever there is an issue on the concrete issue of an investigation proceeding on matters of unfair international trade practices, is how to initiate and who has the legal standing to request the initiation of the investigation. Articles 49 and 50 of the CFT answer these two questions.

466. Article 49 of the CFT establishes, in paragraph 1:

467. The investigation proceedings on matters of unfair international trade practices and the measures of protection will be initiated sua sponte or by a request of a party, according with the content of the following article (Emphasis added)

468. When the case is not initiated sua sponte, the legal standing to file the request for investigation of the IA is established, in the first place[39], in both sections of article 50 of the CFT. Each one of those sections refers to different situations.

469. Section I refers to the case in which the imports are made under unfair practices of international foreign trade. The legal standing in this case is granted to the producers of identical or like products.

470. The request of a party could be filed by a person or a corporation producer:

[39]As further analyzed, the legal standing of the petitioner is complemented with the representativeness that article 50 requires and is determined according with article 40 of the CFT.

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471. I. - Of identical or like products to those being imported or likely to be imported under conditions of unfair practices of international trade…

472. It is clear that, in the case of the Mexican domestic Law, there is no preference between identical and like product, as it is the case in the AA. That is, according to domestic regulations, there is no need of existence of the identical product for the producers of a like product to have legal standing to request the initiation of an anti-dumping investigation.

473. This does not mean, however, that in the investigation before us the legal standing of the Sugar Chamber has been considered effective without taking into consideration the existence or legal standing of the national producers of the identical product, because the IA in the process of investigation reviewed the issue and reached the conclusion that the domestic producers indeed existed and should have been excluded.

474. What it means is that the lack of preference between the identical and the like product means is that the Sugar Chamber prima facie, in its role of representative of the Mexican producers of sugar, had legal standing, according to the regulations of the domestic Mexican Law, to submit before the IA the request to initiate the investigation.

475. It is important, however, to stress the fact that the aforementioned preference is not established, because that is a crucial circumstance, as it will be stated latter on the interpretation of article 40 of the CFT and on the determination of the 'domestic production'.

476. Section II, on the other hand, opens the legal standing to the producers of directly competitive products, when related to injury or threat of injury.

477. II. - Of identical, like, or directly competitive products to those being imported under such conditions and volume that seriously harm or threaten to seriously harm the domestic production.

478. Notwithstanding, the content of article 37 of the RCFL has to be taken into consideration, because it specifies what should be understood by identical and like products[40], its text reads:

479. For the effects of this Regulations it will be understood:

480. I. - By identical products, the products which are equal in all their aspects to the product under investigation, and

[40] This is a difference, more of a terminological than a substantial character, of the internal Mexican regulations and the AA, because the latter does not distinguish between one concept or the other and encompasses the issue under a same stance: '*like product*'.

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481. II. - By like products, the products that, although not equal in all their aspects, have the like characteristics and composition, which allows them to fulfill the same functions and to be commercially interchangeable with those they are compared to.

482. This means, at the end, that the listing of section II of article 50 of the CFT shall not be understood in a way in which the producer of a directly competitive product that is not a like product has legal standing to request the initiation of an anti-dumping investigation[41], but in a way in which, aside from the likeness of the products, these shall fulfill the same functions and shall be commercially interchangeable. This is the reason why the issue of 'likeness of product' is relevant in this case and by which the Complainants, the IA, and the Sugar Chamber deeply addressed this issue.

483. The difference between those two sections of article 50 may seem to allow the initiation of an investigation without the existence of injury or threat of injury, when there is an unfair practice of international trade; or that an investigation could initiate without the existence of an unfair practice of international trade, when there is injury or threat of injury. However, taking into consideration altogether the CFT and its Regulations (mainly its article 76[42]) and, particularly, incorporating the AA into the analysis the conclusion is that both elements are required: an unfair practice of international trade and injury or threat of injury, with which for practical effects the difference between the content of sections I and II of the CFT vanishes.

484. A first conclusion, then, is that the Sugar Chamber had legal standing to request the initiation of the anti-dumping investigation, as long as it could be assumed that sugar is a like product of HFCS (issue that will be addressed with more detail latter on); that the imports were made under conditions of unfair practices of international trade, and, lastly, that the causation of injury or threat of causing injury to the national production could be assumed. It is clear that neither of these cases has to be fully demonstrated at the moment in which the investigation is initiated, because if that were the case the proceeding would be redundant and unnecessary.

485. As a consequence of the above mentioned, and taking into consideration that the issue of 'like product' will also be analyzed, the arguments and the claim of the Complainants regarding 'the erroneous determination that the Sugar Chamber had legal standing to request the initiation of the investigation' are answered, to that respect, and therefore are dismissed for lacking grounds.

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[41] It is important to point out that, in this particular case, the requirements of the internal Mexican Law for a producer of a non identical product to have legal standing to request the initiation of an anti-dumping investigation are higher than the ones contained in the AA in its article 2.6. AA Article 2.6is limited only to the characteristics of the product, while article 37 of the RCFT also requires the similar composition of products provided that they comply with the same functions and they are interchangeable.

[42] Article 76 of the RCFT states that: *"The Investigation of unfair international trade practices shall deal with the existence of price discrimination or subsidy and the threat caused or likely to be caused to the domestic production. It will encompass a period covering the imports of like or similar products to those of the domestic production that could be affected, which would have been made for a period of at least six months prior to the initiation of the investigation."*

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486. IV.2- Erroneous determination that HFCS and sugar are like products.

487. As it was priory stated, SG-WTO did not expressly decide anything about the similarity between HFCS and sugar, thus this Panel must analyze in detail this issue by applying AA as the rest of the Mexican Law and it is it that, in a detailed way, what is made next. The Complainants allege that the determination of the AI that JMAF and sugar are like products violated the terms of article 2.6 of the AA that requires the term to be interpreted in very narrow fashion. They claim also that the determination of the AI in the investigation that is the object of this revision is incongruous with the approaches that had been used in previous anti-dumping investigations to determine what constitutes like products.

488. The Complainants argue that a correct interpretation of Article 2.6 of the AA should have led the IA to state that HFCS and sugar are not like products. There are more differences between HFCS and sugar than simple variations of presentation since both products are chemically different, with separate and different functional characteristics, production process, final uses, distribution channels and selling points.

489. On the other hand, the IA rejects the interpretation of AA Article 2.6 given by the Complainants. The IA argues that when the Complainants claim that its decision was based only on narrow criterion such as the supposed product interchangeability, this distorts and weakens the conclusions reached by the IA during the investigation regarding the similarity of HFCS and sugar. On the contrary, according to the IA as may be confirmed in paragraphs 329 through 429 of the final resolution, the IA carried out a profound and exhaustive analysis in order to reach its determination.

490. This Panel will make a detailed analysis of the applicable legal provisions and of the arguments stated by the parties. The principal steps of this analysis are to determine the requirements and elements that an evaluation regarding similarity of products must comply in terms of AA Article 2.6 and Article 37 (II) of RCFT.

491. AA Article 2.6 sets forth the following: It shall be understood that: "In all this Code, like product refers to a product that is identical, i.e., alike, in all respects to the product under consideration, or in the absence of such product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." (Emphasis added) On the other hand, as stated in above, Article 37 (II) of the RCFT establishes that it shall be understood as: "For the effects of this regulations, it shall be understood :.. By like products, those products that even though are not alike in all aspects, have similar characteristics that makes them comply with the same functions and are commercially interchangeable with those products they are compared with."

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492. The Complainants and the IA agree that a correct interpretation of AA Article 2.6 and RCFT Article 37 regarding the meaning of like products must be based in an investigation considering the specific characteristics of products in each concrete case. However, both differ in the elements and principles that must be observed to carry out such investigation.

493. The Complainants argue that from history and prior GATT panel reports that have interpreted AA Article 2.6 a fundamental principle has emerged that the IA should have observed while interpreting the term "like product" in the investigation subject to this review. Namely, that the term "like product" must be narrowly interpreted and that physical appearance and similar composition should be given greater weight, rather than direct competitiveness or similar functions.

494. The Complainants argue that this principle is also contained implicitly in RCFT Article 37 (II). This article requires that the first step in the analysis of two products must be to determine if both products are similar in their 'characteristics and composition' and, that the following step consists in determining whether the products serve the same functions and are commercially interchangeable.

495. On the other hand, the IA denies that the history and the interpretation of GATT panel reports regarding AA Article 2.6 provide principles that the IA must observe to issue its resolution of similarity of products. The IA argues that the definition of like product given in AA Article 2.6 does not allow broader or restrictive interpretations as the Complainants claim but requires a grammatical interpretation.

496. The principles that the IA must follow and the tests that a product must go through to consider it alike to a second product are the core of the controversy between the Complainants and the IA. This Panel considers that in order to solve this matter it is important to consider, first, what is the nature of analysis of similarity of products required by AA Article 2.6 and RCFT Article 37 (II). Second, whether the IA comply with those requirements while making its analysis of similarity of products between HFCS and sugar in the investigation that is the subject of this review.

497. First, this Panel recognizes that it cannot be derived from the reading of AA Article 2.6, the characteristics that must be taken into account, the number of characteristics that must be taken into consideration, nor the tests that a product must go through to consider it similar to another product. Therefore, national authorities implement AA provisions in their legal systems by adopting complementary regulatory provisions in order to establish a series of principles that they must follow to comply with AA provisions.

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498. In the US cases, for example, the Department of Commerce must take into account a series of elements to determine the similarity of products such as: a) general physical characteristics; b) the expectations of the ultimate purchasers; c) the channels of trade in which the products is sold; and d) the ultimate use of the merchandise in question.[43]

499. On the other hand, the Canadian government while making its analysis of physical characteristics of the products has added a proof of "functional similarity" which implies that the authority analyses not only physical characteristics of products but also whether products are competitive and how they compete.[44]

500. In Mexico, Article 73 (II) of the RCFT provides that in its analysis of similarity of products, the IA must consider like product those products that, even though they are not equal in all respects have similar characteristics and composition. However, the addition of a subordinating phrase "which allows them to comply with the same functions and to be commercially interchangeable" does not imply, as the Complainants insist, that the IA must give an exclusive prevailing weight to physical characteristics and composition. It means that the composition analysis is limited to the fact that two products can comply with similar functions and can be substituted commercially with those products they are compared with. If two products comply with these conditions, they shall comply with AA Article 2.6 and RCFT Article 37 (II) requirements.

501. By virtue of the foregoing, this Panel does not agree with the Complainants position that the IA must give a narrow interpretation to AA Article 2.6. Independently of history and the interpretation of GATT panel reports regarding Article 2.6 of the AA.

502. As a consequence, this Panel will next consider what the physical characteristics of sugar and HFCS are and whether they are sufficiently alike so as to allow them to serve the same functions and to be commercially interchangeable.

503. To this respect, the IA states that even though sugar and HFCS differ physically in regards to the products they originate from, i.e., corn and sugar cane, and sugar beet, as well as in their processing and in their production technology, both products are finally sweeteners, with similar nutritional properties and similar sweetening power. This allows them to serve the same functions and to be commercially interchangeable. Such physical similarity makes them comply with all the requirements provided in RCFT Article 37 (II). In addition, the IA points out that this basic similarity was never challenged by the Complainants during the anti-dumping investigation and has not been challenged during this review procedure.

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[43] See Abercrombie Baker, Stewart, "like product and Commercial Reality" in Jackson, John and Edwin A. Vermulst (eds), *Antidumping Law and Practice, A comparative Study*, (Ann Arbor, The University of Michigan Press, 1989), p. 288.
[44] Ibid.

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504. .Likewise, they argue that the chemical structure and composition of HFCS and sugar are so different that they possess different functional properties and significant differences in their commercial application.[45] Also, according to the Complainants, the assertions of the SE that both products are sweeteners with similar nutritional properties and a similar sweetening power does not establish the basis to distinguish HFCS and sugar from other sweetening products, which makes this characterization superfluous.

505. This Panel believes that from specialized studies, testimonies and experts technical reports contained in the AR as well as in the briefs and oral presentations at the Public Hearing, it is clear that while sugar and HFCS are not equal products, they are sweeteners of similar physical composition. They are ternary organic compounds of carbon, hydrogen and oxygen with a general composition Cm(H2O)n and both have elemental compounds such as glucose and fructose.[46]

506. It is also clear that sugar and HFCS as sweeteners are like products because they possess a high sweetening power,[47] similar nutritional properties and caloric contribution,[48] an equivalent capacity to sweeten, and give volume, texture and appropriate body for food and beverages. They also have a high and immediate water solubility and a taste that does not cover other flavors. At the same time HFCS and sugar have no toxic effects and are easy to digest.[49]

507. Likewise, this Panel considers that from the studies, expert reports and evidence contained in the AR, there are bases to distinguish HFCS and sugar with other sweetening products. These differences deal with the sweetening, nutritive and taste power of sugar and HFCS, as well as their application in particular industries that do not share other sweetening as glucose, lactose or maltose and other low caloric sweeteners such as aspartame, sucrol or saccharine.

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[45] Among the physical differences that the Complainants point out is that one product is a disaccharide and other product is a mono-saccharide, both possess contrasting molecular weights, one has a liquid presentation and the other has a solid presentation, both possess decomposition temperatures and different fusions, as well as differences in their chemical reduction capacity, solubility, humidity, hygroscopicity and linked properties such as the depression of their freezing point and osmotic pressure. See, Corn Refiners Association Brief, Non Confidential Version, pp. 78 and following pages; equally, pp. 102 and following pages of the Transcription of the Public Audience, Spanish Version.

[46] Experts Report, Chemist Hector García González, of December 8, 1997, Document 1749, Vol. 43 Non Confidential of the AR. The expert states that saccharose (sugar) molecule chemical formula, when the sugar is diluted in water or when it goes through the mouth and stomach, it unfolds in glucose and fructose. See Honig, Pieter, *Sugar Technology Principles* and Brownsell, VL, *C.J. Griffith and E. Jones*, *Science Applied to Food Studies.*

[47] See, study of John E. Long, "High Fructose Corn Syrup".

[48] Experts Report of the third party expert Chemist Héctor García González, op. Cit., "the caloric value of 100 grams dried base for sugar and for HFCS is of 400 calories", p. 3-9.

[49] See experts' reports of the Chemist Héctor García González and Dr. Carlos Lever García point out that saccharose transforms in glucose and fructose (the HFCS components) when is diluted or when it reaches the human organism; the two of them are nutritional sweeteners with the same caloric value and there are no significant flavor differences between them. See also García Chávez, Luis Ramiro, La industria de la fructosa. Su impacto en la agroindustria azucarera mexicana, (Chapingo, México CIESTAAM, 1988).

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508. In sum, this Panel believes that sugar and HFCS share physical similarities that make them alike. The last question that has to be answered is if this likeness allows them to serve with the same functions and to be commercially interchangeable in such a way that they may be considered like products under the requirements of RCFT Article 37 (II).

509. The Complainants assert that differences in the functional properties of the two commodities are so fundamental that in the soft drinks industry in which sugar and HFCS have their principal application, HFCS has replaced sugar. This is a result of both its lower price and its attractive functional characteristics for carbonated beverages, such as its ability to preserve quality and a greater shelf life.[50]

510. Likewise, the Complainants argue that the same can be said about the differences in their commercial applications. Even though, sugar and HFCS have their principal commercial application in the soft drinks industry, there are other commercial applications where sugar continues to be the principal sweetener over HFCS due to its singular functional properties such as its capacity to form bulks (sic), toasted capacity and crystallization. This makes sugar the dominant product in industries such as candies, bakery and cereal products, milk products and institutional food services.

511. Finally, the Complainants argue that even though HFCS and sugar can have the same function as a sweetener for particular industries, -it is important to take into consideration that the purchaser's decision to buy one product over the other, depends of many other factors such as products advantages in the manufacturing process, its price, final use, presentation, distribution channels, environmental impact, etc. If from this perspective, HFCS is a superior article to sugar and makes HFCS different according to Article 73 (II) or the RCFT. In fact, Complainants argue that these other product factors that purchasers take into account-, have been key elements in the IA determination of the similarity of products in prior anti-dumping investigations.[51]

512. The IA argues in response that there is no evidence to sustain the enterprises' claim that HFCS has replaced sugar in the soft drinks industry due to its lower price and attractive functional characteristics for carbonated beverages. On the contrary, technical studies and testimonies of representatives of the industry show that HFCS and sugar are both used interchangeably in the industry without affecting the quality of soft drink products and that sugar has equal or greater shelf life.

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[50] See, Corn Refiners Association Brief, op. cit. pp. 79 and following. Equally, pages 103 and following, from the Transcription of the Public Audience, Spanish Version.

[51] See, pp. 109 through 114 of the Transcription of the Public Hearing, Spanish version. According to the Complainants, among the factors the IA has considered pertinent in the past to determine the similarity of products are the distribution channels, the advantages in the manufacturing process and price points of the products in the market. See Ibid. and also p. 80 of Corn Refiners Association Brief, non confidential version.

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513. The IA also argues that there is no evidence to support the assertion of the Complainants that sugar continues to be the principal sweetener over HFCS in industries such as candies, bakery and cereal products, milk products and institutional food services due to its singular functional properties. On the contrary, according to the IA both sweeteners are used interchangeably in those industries in such a manner that one can argue they are substitute products.

514. In sum, according to the IA, HFCS and sugar while not perfect substitutes possess characteristics and composition sufficiently similar that they serve a great number of similar functions. This allows them to be commercially interchangeable in such a great variety of sub-sectors of the beverages and food sectors.

515. The AI also rebuts the supposed technological superiority of JMAF and asserts that although in previous investigations they would have kept in mind factors like different processes of production of products or different technologies in its analysis of product similarity, there has also been a wide number of resolutions, as the present, in which it has been concluded that said factors do not have significant effects in the similarity of products. The above-mentioned implies, then, according to the AI that the administrative practice that it carries out along with the investigations that recognizes and processes, although its performance is guided in other similar cases, it is not necessarily obligatory.

516. This Panel considers that even though the technical studies filed by the Complainants and the IA offer encountered visions about the functional properties and commercial interchangeability between sugar and HFCS, there are found, however, in the AR specialized studies, technical expertise studies and testimonies about their functional properties and commercial interchangeability of both products.

517. First, even though it is true that HFCS and sugar can present certain advantages and disadvantages in some of the products of the industries in which they are competitive due to their physical presentation or certain technical and economical advantages that each one possess in its applications, the above does not prevent sugar and HFCS from serving similar functions or being commercially interchangeable, when applying them in a liquid state to a variety of uses in the beverages and food sector, including soft drinks, bakery, cookies and jellies, candies and milk products.[52] The proof of the

[52] Independent Expert, Dr. Carlos Lever García establishes that sugar and HFCS can be used indistinctly in a variety of products of the food industry, such as: soft drinks, sauces and dressings, soft caramels, cakes, confectionery, sherbets, ice creams, dairy products, some cereals, marmalades, frozen fruit and some medicaments. See Document 1749, Vol. 43 Non Confidential of the AR. See the expert reports of Héctor García González and Carlos Lever García, p. 3-9, 21, 24, 30 and 31. Dr. Lever also mentions in his report that the shelf life of a soft drink one sweetened with sugar and one sweetened with HFCS is practically equal. Likewise, he mentions in his report that the shelf period of life of two soft drinks, one sweetened with sugar and the other with HFCS, is almost the same. Moreover, the inversion process of the saccharose syrup (diluted sugar), when it takes place in a soft drink does not change the flavor, quality or digestion properties of such soft drink. See Expert report, Document 1749, Vol. 43, Public Record, Non Confidential, pp.18, 28 and 29.

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above is that, in general terms, the ability to use both sweeteners coexist in the national market in same plants, even for the same brands.[53]

518. Second, this Panel considers that the Complainants over-emphasize the supposed technical or economic advantages of HFCS, since experts reports and technical studies that were filed during the investigation, demonstrate that the existence of similar physical properties in HFCS and in sugar regarding sweetening, body, acid balance, viscosity, density and caloric contribution, allow producers and consumers to use the two products interchangeably without sacrifice of the final product quality.[54]

519. In sum, this Panel considers that there is sufficient evidence to sustain the conclusion that both HFCS and sugar are like products according to Article 37, section II of RLCE.

520. Finally, regarding the Complainant's argument that the IA resolution is inconsistent with the criteria it has used in prior anti-dumping investigations to determine like products, this Panel rejects it due to the following reason. Even if it were true that the IA after finding a similarity in physical characteristics and product composition in prior cases, it had analyzed other aspects like manufacturing processes to confirm its position or to deepen in its analysis, that does not mean the authority is obligated to incorporate these aspects in all the investigations or to give them the same weight.

521. By virtue of the previous considerations, the answered the arguments of the relative Complainants to the "erroneous determination that JMAF and sugar are like products" and therefore, they are considered unfounded, confirming the legitimacy of the Sugar Chamber to request the initiation of an anti-dumping investigation which is the reason of the present revision.

522. **IV.3. - Lack of Representativeness of the Sugar Chamber and of its representatives.**

523. Regarding this claim, the essential arguments of the Complainants were as follows:

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[53] The legal representative of the Complainants in the Public Hearing stated that when a plant is designed from the beginning to use HFCS cannot use sugar without having to make large investments in areas of packaging or tanks to dilute the sugar, filters, etc. However, in response to a direct question from the panel, he recognized that there is only one plant in Mexico designed to use only HFCS. The evidence that this Panel found in the AR is that the majority of plants in the soft drinks industry have the capacity to use both sweeteners. See pp 103 and following of the Transcript of the Public Hearing, Spanish version. Inclusively Dr. García Lever states in his study that a soft drinks plant, designed exclusively to use HFCS can use, with the same equipment, sugar syrup or saccharose, i.e., diluted sugar can be used in a facility designed for HFCS. See Carlos Lever *op cit.* pp. 21, 24, 30, and 31.

[54] This Panel considers that one of the main reasons that explain the attractiveness of HFCS is not its alleged technological superiority or its advantages in the manufacturing process but its cost of production. Since in the processing of corn, main input of HFCS, other side products are obtained like oil etc that are sold in the market at good prices, the net cost of corn in producing HFCS is reduced 50% than the raw cost of corn. In sum, it is the price levels of corns and its side products that determine the low cost of HFCS and not its alleged technological superiority or the manufacturing process. See. "U.S. Corn Sweetener Statistical Compendium" in (USDA, Statistical Bulletin. No 863, pp. 1-4) 1993.

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524. * The Sugar Chamber did not prove that it has faculties to represent the sugar mills during the investigation, in violation of CFT articles 50 and 85, 75 of the RCFT and 19 of the FFC. And that, later on, the IA tried to correct such error by unduly applying article 335 of the CFPC.

525. * The Complainants, with the same legal arguments, consider that the IA erroneously recognized the personality of the persons acting as legal representatives of the Sugar Chamber and that, later on; unduly it pretended to correct such error.

526. On the other hand, the IA answered:

527. * That the Sugar Chamber filed probatory documents both of its representativeness and of its legal representatives.

528. This Panel considers that the argument filed by the Complainants regarding the lack of legal standing of the Sugar Chamber and of its legal representatives is not grounded and therefore it does not proceed. Following are exposed the reasons of this determination.

529. The Complainants share a false belief that to prove the representation of the Sugar Chamber in the anti-dumping procedure, the Sugar Chamber should have exhibited "a document of the sugar mills granting representation abilities to the Chamber". This is, the Complainants base their argument in that the representation that article 50 of the CFT requires, refers to that the Sugar Chamber has an express command from the sugar mills that allows it to intervene in the anti-dumping procedure.

530. The above-mentioned is erroneous since the representation of the Sugar Chamber derives from the Code of Business Chambers (Ley de Camaras Empresariales y sus Confederaciones). Indeed, in accordance with article 10 fraction IV, of this code, the those cameras will have as a purpose:

531. …Defend, by specific request, the particular interests of their affiliated business in the terms established by their statutes;...

532. This legal requirement is satisfied by Article 5 of the Statutes of the Sugar Chamber, which authorizes it, among other things, to defend the particular interests of its affiliated partners, with no other limitation that those mentioned in the Code of Business Chambers. Also, to represent in general, all of its associates before local and federal authorities, and to exercise the necessary actions to defend its associate's interests (sections III and VIII).

533. As shown, the powers of representation of the Sugar Chamber derive from a legal provision and therefore, is not required, for its accreditation, a specific power of each of the affiliates to initiate the anti-dumping proceeding. Therefore, the actions of the AI are considered legal.

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534. Consequently, the administration of business does not exist, as argued by the Complainants, which is prohibited by article 19 of the FFC.

535. Article 1896 of the Federal Civil Code provides that the business proxy or representative is "the one that, without any power of representation or obligation, takes the business representation of another person". However, as it was mentioned in the paragraph above, the Sugar Chamber has the legal obligation to represent its associates and to defend their particular interests. The actions of the Sugar Chamber, even if without the express authorization for the case before us, cannot be qualified as business representation without power of representation or obligation.

536. The complainants acknowledge that the Sugar Chamber demonstrated, through proper documentation, Mr. Albino Lara Valerio´s legal representation as General Director and legal representative of the Sugar Chamber.[55]

537. Article 75 of the RCFT establishes the requirements that the petition to initiate an anti-dumping investigation must fulfill; and in section II is states:

538. "trade name or firm name and address of the promoter, and in its case of the representative, along with the documents that demonstrate such representation".

539. SECOFI confirmed that Mr. Albino Lara Valerio submitted the proper documentation and that was acknowledged by the Complainants. Albino Lara Valerio acted as General Director of the Sugar Chamber and, in accordance with the powers granted to him by the Sugar Chamber, he did that throughout the anti-dumping investigation proceeding. Therefore, there is no lack of legal representation, and the IA acted in accordance to law in accepting the petition from Mr. Lara to initiate the investigation.

540. In relation to the power of attorney granted to Rodolfo Cruz Miramontes, Oscar Cruz Barney, and Julio Escandon Palomino, the Complainants argued that such power of attorney does not prove the powers of these representatives due to the fact that it was not ratified by the IA, as it is required by FFC Article 19.

541. The legal purpose of the ratification of signatures is to corroborate the authenticity of all acts that are done outside the public testimony of notaries, judges or administrative officers. In this particular case, the witnesses that appear in the power of attorney are public servants members of the UPCI and thus the granting of power has to be interpreted as being given before the public testimony of the IA.

542. The IA correctly points out this in its memorial when it says: "the ratification of signatures and the granting of power were performed in a single act, since it cannot be denied that the public officers before whom the powers were granted certified the

[55] Brief of the Corn Refiners Association, p. 84.

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identity of the person who granted the power as well as the identity of the persons who received the power."

543. Moreover, the Complainants erroneously point out that the signatures must be "ratified" by the IA. The person who ratifies the signature is the one that grants the power, and it is done in the presence of the authority who certifies the veracity of the granting it, when it is granted in a private document and in a different act, without needing the intervention of the authority before which the grantee will act, and it has as a purpose the certifying by the authority of the the identity of the individuals who granted the authorization as well as the identity of the individuals who accepted the authorization. However, in this case, the granting of the power was made directly before the IA, therefor it is not necessary to ratify it.

544. For the above, the IA's criteria followed to determine that the power of attorney complied with the FFC requirements of ratification is correct and therefore this Panel considers it an adequate proof of the powers of attorney of the legal the representatives since the date of signature of such power of attorney.

545. Finally, the Complainants point out that the IA acted wrongfully when it pretended to correct the lack of legal standing of the Sugar Chamber representatives applying in substitution Article 335 of the Federal Code of Civil Procedures (hereinafter CFPC, using its Mexican acronym) that provides:

546. When a legal exception is grounded in the lack of legal standing or in any other procedural defect that can be corrected, in order to permit the legal continuation of the legal proceedings, the interested party can correct the defect at any stage of the proceeding.

547. During the anti-dumping investigation, the Complainants raised a claim that several individuals lacked legal standing because they had not given adequate proof of being the legal representatives of the Sugar Chamber in accordance with Article 19 of the FFC. It should be highlighted that neither the CFT nor the FFC include the exception of lack of legal standing among the motions that have to be settled before trial can proceed. Thus, the question that arises is: if there is no expressed provision in the FFC nor in the CFT, which legislation can be applied to the legal exception presented by the Complainants?

548. Let us remember that Article 18 of the Civil Code provides:

549. Silence, obscurity and insufficiency of the law do not authorize the judges or tribunals to leave a controversy unsolved.

550. This means that, because the FFC and the CFT do not cover this legal issue, the legislation that should be applied to resolve this exception is the CFPC.

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551. Moreover, FFC Article 5 provides that, unless we are dealing with fiscal provisions of strict application (which is not the case of legal representation) "… if there is an omission in a specific fiscal norm, the common federal law provisions will be applied in substitution". This means the CFPC.

552. In other words, it is this Panel's view that Article 335 of the CFPC can be applied in substitution to the FFC. In the erroneous case that the power of attorney that granted the authorization to Rodolfo Cruz Miramontes, Oscar Cruz Barney and Julio Escandon Palomino would be considered illegal, any legal omission would be repaired by the Extraordinary Assembly Act of December 10, 1997. In it, the totality of the Sugar Chamber affiliates ratified the legality of their legal representatives´ acts in the anti-dumping proceeding as well as their legal powers of attorney.

553. Consequently, the arguments "Lack of Legal Representation of the Sugar Chamber and its representatives" are discarded as unfounded.

554. **IV.4. Erroneous Determination that the Request for Investigation was presented on behalf of the National Production.**

555. The Complainants consider that the IA erroneously considered that the Sugar Chamber represented the national production, because they supposed that only those producing HFCS could be considered as acting legitimated on behalf of national production.

556. As was analyzed before, when dealing with the question of the Sugar Chamber's representativeness, Mexican legislation states that those producing a like product are legitimate to present a request to initiate an anti-dumping investigation.

557. In the previous section, this Panel reached the conclusion that HFCS and sugar are like products, according to legitimation granted by the article 50 of the CFT to those producing a like product as is the case that occupies us in favor of the sugar cane industry (represented by the Sugar Chamber) that can consequently, rightfully present the initiation request for the anti-dumping investigation in the name of the national production.

558. As it will be seen in the following section, when there exists no national production of HFCS different from which the two companies who import the product, in the case that occupies us the national production cannot be any other than that of cane sugar.

559. The second paragraph of the article 50 of the CFT refers to the legitimate applicant who can request the initiation of an investigation and states as it set forth in article 40 of the same law that it is an accessory disposition regarding article 50. Therefore, the exerted representation is that of the Sugar Chamber who in effect, has it because it encompasses almost the entirety of the sugar mills of the country.

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560. In consequence, the arguments of the Complainants regarding the "erroneous determination that the investigation request was presented on behalf of the national production", are answered and they are discarded as unfounded.

561. **IV.5- Erroneous exclusion of certain domestic products of HFCS.**

562. With regards to this claim, the arguments of the Complainants are, essentially, the following:

563. * SECOFI unduly disregarded the domestic producers of HFCS.

564. * SECOFI illegally ignored Almex for being an HFCS importer.

565. * The exclusion of Arancia, basing the exclusion on an incipient production, was incorrect.

566. On another hand, the IA answered, essentially, the following:

567. * SECOFI determined the segment of the domestic production, based on the legal dispositions applicable to the matter. The domestic production of HFCS does not exist, since the domestic producers are also the importers, and because they stated that they would not file an anti-dumping claim.

568. *SECOFI can exclude from the domestic production the producers who are also importers.

569. Before the investigation, SECOFI knew that Almex and Arancia were the major producers and importers; and also, they were excluded form the "segment of the domestic production", according with article 4.1 of the AA.

570. In order to solve this issue, it is important to consider that importers and related producers are excluded in the determination of representativeness. The second paragraph of article 40 of the CFT states:

571. However, when some producers are related to the exporters or the importers or they themselves are the importers of the product under investigation, the term domestic production could be interpreted to include, at least, 25% of the rest of the producers. When the totality of the producers are related to the exporters or the importers or they themselves are the importers of the product under investigation, domestic production could be understood as the producers of the products produced on the immediate previous stage of the same continuous line of production.

572. As with the AA, the determination of the representativeness of the segment of the domestic production is a requirement imposed to the producers of the 'identical or like' products that suffers the injury or the threat of injury, with legal standing to request the initiation of the investigation.

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573. With respect to domestic Mexican Law, legal standing is given to the producers on the immediate previous state of the same continuous line of production, which does not happen in the AA. This means in the case before this Panel, that if the petitioner of the initiation of the anti-dumping investigation were to be determined by an identical product, the producers of the products produced on the immediate previous stage of the same line of production, that is the corn producers, would have legal standing. But in the case the petitioner were to be determined by the like product, as in fact it is the case, the producers of the products produced on the immediate previous stage of the same line of production with legal standing would be the sugar cane producers.

574. If, as the Complainants argue, article 40 of the CFT were not accessory, but had an autonomous life, and if it were considered (which is illegal) that article 50 of the CFT establishes a preference that gives a privilege to the producers of the identical products over the producers of the like products, the conclusion would be that lacking a request for the initiation of investigation filed by the domestic producers of HFCS, the only ones with legal standing to request the initiation of the anti-dumping investigation would be the corn producers. However, this is an erroneous interpretation, for the following reasons:

575. a) As it has been stated, article 40 is accessory to article 50 of the CFT.

576. b) Article 50 of the CFT does not establish a preference in favor of the producers of the identical product, what amounts to state that the request of the initiation of the could either be filed by the domestic producers of HFCS or by the domestic producers of sugar.

577. c) Depending on the product on which the legal standing of the party filing the request for the initiation of the investigation was based, the product produced on the immediate previous stage would be corn, in the case of identical product, or sugar cane, in the case of like product.

578. d) Mixing the AA with the domestic Mexican Law in a biased manner and with the sole purpose of excluding the producers of the like product is invalid. If both legal bodies were combined the result is quite different: no producer on the immediate previous stage would have legal standing to file a request for initiation, neither the corn producers nor the sugar cane producers.

579. Precisely, the fact that the AA does not grant legal standing to the producers on the immediate previous stage and the fact that there is a preference of the identical product over the like product are the reasons why the IA deals with the domestic production of HFCS. Thus, the IA to definitively determine the legal standing of the party that submits the request for the initiation of an investigation makes during the anti-dumping investigation the analysis of the domestic production of HFCS and of the situation of the domestic producers.

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580. According to article 40, second paragraph, of the CFT and article 60 of the RCFT, when the domestic producers of the identical product are related to the foreign producers of the importers, or are they themselves importers of the product they can be excluded form the concept of domestic production for representativeness effects.

581. In this case it was demonstrated that the only two producers of HFCS during the term of the investigation were also at that time the two main importers of the identical product; that is a reason enough to exclude them. By being these the two only producers of the identical product, the legal standing remains absolutely open (not only according to domestic Mexican legislation, which does not establish a preference, but also according to the AA) to the producers of the like product to legally submit the request for the initiation of the investigation, without leaving room to consider that the only party with legal standing are the producers of corn.

582. Consequently, the arguments and the claim of the Complainants of the 'erroneous exclusion of certain domestic producers of HFCS' are answered and are dismissed for lacking grounds.

583. **IV.6. - Erroneous acting of the IA by ignoring the fact that sugar is not a good produced on the previous immediate stage on the same continuous line of production.**[56]

584. Regarding this claim, the argument of the Complainants are, essentially, the following:

585. * SECOFI unduly ignored that sugar is not a good produced on the previous immediate stage on the same line of production.

586. * SECOFI unduly interpreted article 40 of the CFT with regards to the representativeness of the Sugar Chamber as to the producers of the goods produced on the previous immediate stage on the same line of production of HFCS.

587. * According to article 40 of the CFT, when all the producers of the like product are related parties, the domestic industry is defined with regards to the group of producers of the goods produced on the previous immediate stage on the same continuous line of production. Since only Almex was excluded, the criteria does not apply. The previous immediate good is corn or a corn related product.

588. On the other hand, the IA essentially answered the following:

589. * The Mexican legislation allows excluding from the definition of the segment of the domestic production to the producers which are importers of the investigated goods.

[56] The way in which the complainants structured and presented their claims makes this panel to review once and again the same issues. It would be more simple and clear to solve the issue at once, however, because of the standard of review that this Panel has to follow, the Panel has to answer to each one of the claims.

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The administrative investigation did not initiate because of the concept of the good produced on the previous immediate stage, but with regards to the domestic producers of the like product with very similar characteristics.

590. They should be had here had reproduced all the considerations made by this Panel in the previous section and that they refer to the interpretation and application of the article 40 of the CFT. They will only be expressed additional considerations.

591. Being the fact that the domestic producers of HFCS have the character of importers enough to eliminate the concept of domestic production, articles 61 and 62 of the RCFT, related to the relation between domestic producers of HFCS and the foreign exporters or the importers of HFCS, become irrelevant.

592. The domestic producers of HFCS, whether related or not to the foreign producers or the importers, can be excluded from the domestic production because they are importers.

593. Consequently, the arguments and claims of the Complainants of the 'error of the IA by ignoring the fact that sugar is not a product produced on the immediate previous stage of the same continuous line of production' are answered and dismissed for lack of grounds.

594. **IV.7. - Erroneous acceptance of a false declaration of the petitioner that there was no production of HFCS in Mexico during 1996; and IV.8. Error of the IA by no examining the correctness and precision of the information and the proofs presented in the request for investigation.**

595. Regarding these claims, the arguments of the Complainants are substantially that SECOFI simply based itself on the statement of the Sugar Chamber that there was no national production of HFCS and that the investigation application had inconsistent information regarding the national production of HFCS. The Complainants allege the violation of diverse dispositions of the AA and they make reference to articles 63, 75, 77, 78, 80 and 81 of the RCFT.

596. On the other hand, the IA, in essence, responded that before the initiation of the investigation, it knew that Almexand Arancia were the main producers and importers of HFCS; that the Sugar Chamber presented all the documents within its reach and that it analyzed the accuracy of the tests to determine that there were enough reasons to presume or to suppose the existence of unfair practice.

597. This Panel considers that there does not exist in internal Mexican legislation an equivalent disposition to the article 5.3 of the AA that states:

598. The authorities will examine the accuracy and relevancies of the tests presented with the request to determine if enough tests exist to justify the initiation of an investigation.

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599. Indeed, the norms of the internal Mexican Law that directly regulate the initiation of the investigation are articles 52 of the LCE and 80 and 81 of the RCFT and in none of them is it imposed on the IA the examination of the tests presented.

600. On the other hand, article 63 of the RCFT is only applicable in case the applicants do not represent the entirety of the national production, in consequence it is inapplicable. And articles 75, 76 and 78 of the same RegulationS are irrelevant for the question that is analyzed here.

601. Therefore, since the SG-WTO considered that at the initiation of the investigation, the IA complied with article 5.3 of the AA and by virtue of the Principle of Comity, this Panel has decided to apply by relation to the determinations and conclusions fromSG-WTO relative to the initiation of the anti-dumping investigation and that there does not exist in the internal Mexican Law an equivalent disposition, they are responded and are discarded for unfounded arguments and the claims consistent in "the erroneous acceptance of the applicant's false declaration in the sense that production of HFCS did not exist in Mexico during 1996" and for "error by the IA when not examining the accuracy and truthfulness of the information and tests contributed in the claims of investigation."

602. **IV.9. - Violation of the law by the Investigating Authority by initiating the investigation based on a request that lacked certain information required by the legislation.**

603. Regarding this compliant, the arguments of the Complainants are, in the substantial form, as follows:

604. * SECOFI began the investigation with base in a request that lacked the tests required by the law.

605. * The request did not fulfill the applicable legal requirements.

606. On the other hand the IA in essence responded as follows:

607. * The request reasonably fulfilled the information that the Sugar Chamber at its disposal.

608. * The request contained information regarding discrimination of prices, threats of damage and causal relationship.

609. After carefully studying the arguments of the parties, this Panel considers the arguments of the Complainants unfounded by virtue of the following considerations:

610. Article 75 of the RCFT determines the content of the form that the IA files and by whom presents the requests for the beginning of the investigation together with the request.

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611. It is within the discretion of the IA, as clearly set forth in articles 52 section II, 54 and 55 of the CFT and 76, 77 and 78 of the RCFT, to consider the sufficiency or inadequacy of the information presented by the applicant, in function of the determination of the following elements:

612. a) that the petitioner is a producer of the identical or like products, according to the case, which presumably is being imported under unfair practices of international trade.

613. b) that the petitioner is representative of the segment of the domestic production to which it belongs (of the identical or like product, according to the case).

614. c) that, if the case is related to a like product, the product is effectively a like product, it fulfills the same functions and is commercially interchangeable regarding that which is presumably being imported under conditions of unfair practices of international trade.

615. d) that the products presumably imported under conditions of unfair practices of international trade, could be causing injury or threaten to cause injury to the identical or like products, according to the case.

616. Consequently, it is irrelevant which information, specifically, was included on the initiation request, but rather that the IA considered that it was sufficient to arrive to the above-mentioned determinations.

617. The SG-WTO considered that the IA at the initiation of the investigation complied with article 5.2 of the AA and did under the same argument of discretion and deference in favor of the IA. This Panel does not find within the regulations of the internal Mexican Law any reason to arrive to a different conclusion.

618. Consequently, the arguments and the claim of the Complainants of the ‘violation of the law by the IA by initiating the investigation based on a request that lacked certain information that the legislation requires’ are considered answered and are dismissed for lacking grounds.

619. **V. - ARGUMENTS THAT SECOFI DID NOT COMPLY WITH THE REQUIREMENT OF GIVING FULL OPPORTUNITY OF DEFENSES AND OTHER PROCEEDING REQUIREMENTS.**

620. **V.1. The IA did not provide an exact summary of the technical information meeting with the CRA**

621. The CRA presents this Panel, as a part of a general argument of “an insufficient due process of law in the defense of the Complainants interests”, the specific claim that SECOFI refused to provide a comprehensive and accurate report of the technical information meeting held with the Complainant on July 4, 1997”. CRA argues that

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SECOFI's refusal constitutes a violation of Articles 14 and 16 of the Constitution, 6.2 and 6.6 of the AA, 53, 80 and 82 of the CFT, and 69 and 85 of the RCFT.

622. The first conclusion of this Panel, after analyzing the CRA's claims and briefs, as well as the IA's brief in rebuttal, is that there is insufficient evidence to support the CRA allegations and that this aspect of the issue is, finally, a situation in which there are two contradictory statements, that of the Complainant and that of the IA.

623. The communications the Complainant attached to its written arguments lend no more support than the statements referred to above.

624. Notwithstanding the Panel's initial conclusion there is an additional question that can be considered that is useful in resolving this issue. That question is the normative context that frames this issue.

625. The IA correctly argues that according to Mexican Law the confession of the authority cannot be accepted as a proof. This fact seriously weakens the CRA argument. That argument was that, because the IA did not respond to the Complainants allegation the Panel must consider the CRA arguments as the truth.

626. As a matter of fact, Article 82, paragraph 1 of the CFT provides:

627. The interested parties may offer all kind of proofs **except the confession of the authority**, or those that are considered contrary to public order or to good customs. (Emphasis added)

628. Articles 84 and 85 of the RCFT directly govern the technical information meeting. Therefore, this Panel will start its analysis with a comprehensive review of these regulations, and will then analyze other legal provisions presented by the CRA to support its argument.

629. Article 84 of the RCFT provides:

630. The Ministry shall carry out technical information meetings with the interested parties. Interested parties shall request the authority hold such meetings within a five-day term counted as of the following date of the publication of preliminary and final resolutions at the Federal Official Gazette.

631. The technical meetings **shall explain** the methodology that is used to determinate price discrimination margins and subventions calculations, as well as injury and threat of injury and causality arguments. (Emphasis added)

632. In such meetings, the interested parties **shall have the right to obtain the calculations sheets and the computer programs** that, in its case, the Ministry had used to issue its resolutions. (Emphasis added)

633. For the purposes of this issue analysis, it is important to clarify of the reasons for the technical information meetings and the legal rights the RCFT grants to the involved parties.

634. The purpose of the technical information meetings is specific: to explain the methodology used in the calculation of margins, injury and threat of injury and the

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causality arguments. Although it is possible that other issues can be discussed during a technical meeting, the objective of the meeting does not change because of this possibility.

635. Article 85 of the RCFT also confers legal rights on the interested parties, in addition to those provided by Article 84 Article 85 states:

636. An information report containing the details of the meetings shall be raised at such meetings. The autographic signature of the attendants **must be** placed at such report. The interested parties **may raise** the necessary questions **provided that they are related to the information that is revealed** and shall comply with confidentiality rules set forth at the Law and its Regulation. The report must be included in the administrative file of the case under consideration. (Emphasis added)

637. From the joint analysis of these two Articles it is clear that the limited legal right given to the interested party by Article 85 of the RCFT, the report is constrained to the technical meeting purpose mentioned in article 84.

638. This means that, if the technical meeting has a concrete purpose defined by Article 84, and if the interested party has the right to receive "calculation sheets" and "computer programs", and has the right only to ask questions related to the revealed information (that is, the information related to the methodology used for determining the discriminatory price margins, injury or threat of injury and the causality arguments), the report must include those matters and nothing else. Any other matter included in the report would be superfluous.

639. As the IA argues, CRA seems to suggest that the technical information meeting report can become a confessional piece of evidence against the IA. This is neither the purpose nor the nature of the report. Therefore, this Panel considers that the CRA interpretation of the technical meeting requirement is not valid.

640. The Panel will now consider those regulatory provisions of the AA Articles that the CRA argues were violated by the IA by issuing the technical meeting report.

641. Article 6.2 of the AA provides:

642. Throughout the anti-dumping investigation all the interested parties shall have a full opportunity for the defense of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provisions of such opportunities must take into account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, or justification, to present other information orally.

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643. This AA provision does not refer to the technical information meetings, on the contrary it refers to the conciliation hearings that Article 61 of the CFT and Articles 86, 87 and 88 of the RCFT provide, or to the public hearing that take place during the investigation proceeding carried out by the IA.

644. This means that the IA could not have violated the above provision in any of the acts carried out by it during the technical information meeting. This is sufficient to consider the CRA argument bases of its reclamation inadequate. Also, it is clear than in this case there was no violation against CRA legal rights to have full opportunity to defend its interests. The non-applicability of the provision to the matter in discussion produces by itself the unsuitability of the grounded arguments set forth above.

645. Article 6.6 of the AA provides:

646. Except for circumstances provided for in paragraph 8, the authorities, shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

647. CRA recognizes in its brief that this is a provision "built on to know the accuracy of the information provided by the interested parties". However, it infers form this affirmation a supposed IA obligation regarding "the accurate information release by the IA itself". The CRA pretends with this statement to demonstrate that the IA does not comply with this provision, because it did not include in the technical meeting report what the CRA considers it should be included

648. This Panel emphatically dissents from this juridical interpretation, because it reveals in a real "twisting" of the legal text in order to obtain the desire outcome. One of the general legal principles related to regulation interpretation states that this function has as fundamental limit that the outcome of the interpretation be equivalent, in its meaning, to the meaning of the point of departure. How can be valid an interpretation that, departing from a legal text which establishes a criteria for the information treatment presented by the interested Parties, concludes with an IA assumed obligation to produce by itself this accurate information?

649. Finally, this Panel considers that the provisions pointed out on number 7 of the CRA Reclamation introductory paragraph are not pertinent to all of the specific claims elaborated in the six paragraphs. There are no legal basis issues involved in this matter (Articles 14 and 16 of the Constitution). Articles 53, 80 and 82 of the CFT refer to other issues, as well as Article 69 of the RCFT.

650. For the above reasons, the CRA claim, related to SECOFI's "refusal to provide a comprehensive and accurate report of the technical information meeting held with the Complainant on July 4, 1997" is been reviewed. The Panel considers the Claimant's arguments and support inadequate and it rejects the CRA position.

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651. **V.2. Undue Authorization to the Sugar Chamber for Access to the Confidential Information without notifying the same to the Importers and Exporters.**

652. In their claim, the CRA alleges that the IA allowed an old employee of the SUGAR CHAMBER, Mr. Julio Escandón Palomino, access to the confidential information of the CRA without completing the requirements demanded in article 6.5 of the AA and articles 80 of the CFT and 160 of the RCFT. The CRA recognizes that once the IA had knowledge of the objection it suspended the access to the representative of the SUGAR CHAMBER, but affirms that damage was caused and that sanctions were not imposed.

653. On the other hand, the IA alleges that the access authorization granted Mr. Julio Escandón Palomino is not matter of process and does not affect neither the Preliminary nor the Final Resolution.

654. The IA recognizes that access was granted to the confidential information on July 4, 1997, but asserts that the same was removed before the objection of the CRA.

655. The IA also points out that Mr. Julio's Escandón Palomino supposed relationship with the Sugar Chamber was not demonstrated and that neither the access to the information to him would have caused any damage to the CRA, nor that he would have made a wrong use of the same.

656. This Panel considers that prevention of the abuse of an undue access to confidential information is a vital part for the effective operation of the established revision process in the bi-national system of panels of NAFTA Chapter XIX.

657. However, parties must be permitted, through their credited legal representatives, the access to the information in order to be able to present their opposition. This way the balance is achieved among the protection to the confidentiality and the right of answer of the opposing party.

658. The CRA did not check that the IA knew about the supposed connection between Mr. Julio Escandón Palomino and the Sugar Chamber when it granted the access to the information and its authorization to the same was rejected the moment it knew of this relationship.

659. Independently of the source of sanctions against those who were responsible for the undue access to the confidential information, it is a fact that it was not proven that said access would have caused some damage to the CRA; neither that he would have made wrong use of this information, and consequently, this Panel considers unfounded that the whole investigation was contaminated with illegality and it rejects the pretense of the CRA.

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660. **V.3. The Investigating Authority did not give the CRA an Opportunity of presenting Tests on the Supposed Restraint Agreement between the Mexican Sugar Industry and the Bottlers of Soda.**

661. * The Complainants argue that on December 1 and 2, 1997 they presented documents that contained tests concerning the alleged restraint agreement and that the IA discarded them as untimely. Similarly, they allege that during the Public Hearing of December 3, 1997, the IA denied the CRA and Almex the opportunity to interrogate the representatives of the Sugar Chamber regarding the alleged restraint agreement.

662. * That the IA, at a later time, questioned the Sugar Chamber on the mentioned agreement without giving warning to the CRA and without giving them a similar opportunity to present tests on this agreement.

663. * That the IA did not reveal to the CRA the information on the alleged agreement provided by the Sugar Chamber in a timely fashion so that they could have responded before the issuance of the final resolution.

664. On the other hand, the IA alleged the following:

665. * The documents that the Complainants make reference regarding the alleged restraint agreement were presented outside of the period to offer proofs; this is, outside of the thirty days after the publication ofthe Final Desolution. Also, they did not present documents that proved the existence of the agreement.

666. * The Public Hearing only deals with the information that had been presented by the parties in the course of the investigation and that, therefore, which is in the AR of the case.

667. * The IA, in exercising the authority that the CFT grants it, requested the Sugar Chamber for information regarding the alleged restraint agreement; but it is not at any time obliged to notify the request to the other involved parties, neither it is regarding the content of the answers received. On the other hand, it points out that the public version of the AR is at the parties' disposition.

668. This Panel considers that it is important to keep in mind that the SG-WTO in paragraph 8.2(a) of its Conclusions and Recommendations, determined:

669. [that there was]... insufficient consideration to the potential effects of the alleged restraint agreement in their determination about the probability of a substantial increase of the imports... [HFCS].

670. Also, the IA in its Revised Determination sought to take into account the effects of the alleged restraint agreement without seemingly knowing the precise terms or not even the existence of the restraint agreement, to which it continued referring to as the alleged agreement.

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671. In other words, as this Panel affirmed in its Order of February 6, 2001, all the matters linked with the presentation of supposed proofs on the alleged restraint agreement are already inoperative, by way that the IA has published a new resolution in which it alleges to have considered the possible effect of such an agreement.

672. In sum, it is pending to be solved before this Panel if indeed that consideration made by the IA was adequate.

673. **V.4. The Investigating Authority did not notify to the United States of America Government before proceeding to initiate the Investigation.**

674. The CRA alleges that the obligation of the IA to give prior notice to the US government was not made until the night before the day of the publication of the commencement of the investigation in the FOG.

675. The IA on the other hand responded that the lack of notification to the government from US could only be alleged by them, that it was made on time, and that it does not affect the sense of the resolution.

676. This Panel considers that without a doubt the US government had wide opportunity to outline this question before the SG-WTO and before the Mexican government. It is also undeniable that any tendency does not exist to the interests of the Complainants, consequently this Panel discards this claim for unfounded.

677. **VI. Arguments that SECOFI failed in Its duty to Verify The Sugar Mills**

678. The Complainants allege:

679. * That the IA erred in verifying the accuracy of the information provided by the Sugar Chamber and their associates when they completed the verification in the office of the Sugar Chamber and when not verifying in situ the sugar mills.

680. * That the IA did not have unrestrictive discretion to carry out the verification in any way.

681. * That non-conventional verification methods were used.

682. The IA, on the other hand, alleges that the verification visits to the Sugar Chamber was made in conformity with the applicable legislation and that this legislation does not establish the obligation of carrying out verification visits, because the visits are optional and not mandatory.

683. This Panel considers that, indeed, article 83 of the CFT grants the IA a discretionary ability to carry out verification visits and to determine the method that it uses to collect the required information, consequently this Panel discards this claim as unfounded.

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684. **VII. Arguments that SECOFI did not Consider the National Interest**

685. The Complainants point out that the IA did not consider the national interest, in violation of article 88 of the CFT, when not avoiding the negative effects that had the imposition of compensatory quotas in other productive processes and in the public consumer in general.

686. The Complainants point out that Almex demonstrated through a study elaborated by the Group of Economists and Associates (hereinafter GEA), the inflationary impact that would cause the compensatory quotas on the imports of HFCS.

687. On the other hand, the IA alleges that the arguments and tests presented by Almex and the industrial users were contradictory and that they were based on foundless allegations and conjectures.

688. The IA alleges that the establishment of compensatory quotas was consistent with that set forth in article 88 of the CFT.

689. The IA alleges that they did not have the obligation of avoiding the negative effects in other productive processes.

690. This Panel considers that article 88 of the CFT clearly establishes that one of the main purposes of the establishment of compensatory quotas is the opportune defense of established national production; in this case that is the production of cane sugar.

691. On the other hand the Panel considers that in accordance with this article that the IA did not have an obligation, like the Complainants argue, of avoiding negative repercussions in other productive processes, since in the terms of the proper article this should be avoided "as much as possible".

692. Consequently this Panel discards this complaint as unfounded

693. **VIII. THREAT OF INJURY**

694. **VIII.1. Determination of Threat of Injury in the Original Determination and in the Revised Determination**

695. In its Original Determination, the IA determined the existence of a threat of injury to the domestic sugar industry, basing its conclusions on the following reasons:

696. a) during the period under investigation the imports of HFCS showed a significant growth rate which, added to other factors –such as the low prices, increasing substitution, freely available and growing capacity in the United States- indicated the probability that in the future there would be a substantial increase of those imports to Mexico, given the importance of Mexico as a destination for American exports;

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697. b) the pertinent information of 1996, and January through September of 1997 had shown that HFCS imports increased by 75 per cent compared to the same period of 1996, which demonstrated that a substantial increase of the HFCS imports was probable;

698. c) although the complainants had argued the existence of a restraint agreement for the imports of HFCS between the domestic sugar industry and the soda bottlers, the IA considered that there were other industries besides that of the beverages, which used the imported HFCS in their activities that would not be subject to restriction of the alleged restraint agreement. Given that those industries represented approximately 46 per cent of the total sugar consumption of the industry, the alleged agreement did not eliminate the threat of injury.[57]

699. In their initial Complaint before this Panel, the Complainants outlined their arguments in opposition to the IA's threat of injury determination.

700. In response to the Revised Determination and this Panel's Orders, the Complainants detailed their arguments related to the Revised Determination in their memorials dated March 5 and May 10 and 11, 2001.

701. Based on the claim that the US government submitted before the WTO for the alleged violations of the AA by the Mexican government, in its Original Determination of January 23, 1998 the SG-WTO, constituted to review the claim with regards to the threat of injury, arrived at the following conclusions and recommendations:

702. "...Mexico's imposition the definitive anti-dumping on imports HFCS from the United States on the basis of the SECOFI redetermination is inconsistent with the requirements of the AA in the following respects:

703. a) the inadequate consideration by Mexico of the impact of dumped imports on the domestic industry, and its adequate 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, 3.4, 3.7 and 3.7 (i) of the Antidumping Agreement."

704. Based on the above considerations, the SG-WTO recommended and the DSB agreed that Mexican government revise its determination to make it compatible with the AA, which, the Mexican government announced it would do by issuance of a revised determination that was published on September 20, 2000.

[57] During the anti-dumping investigation, the CRA submitted a writ on January 21, 1998, which mentioned that restraint agreement. However, SECOFI rejected it because it was submitted too late.

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705. In that Revised Determination, the IA analyzes several indications of the threat of injury and causality under the following headings: a) imports subject to price discrimination; b) export capacity; c) analysis of prices; d) effects on the domestic production; e) inventories of the product under investigation; f) other factors of the threat of injury; and g) additional elements, arriving at the following conclusions:

706. 187. Based on the results of the analysis of the arguments and proofs submitted by the parties, as well as on the information obtained by the ministry to comply with the recommendation of the Special Group, it is determined that:

707. a) The continuance of the price discrimination practice observed from January to December 1996, allowing the consumer to acquire a product similar to sugar for significantly lower prices, would amount to an increase in the near future of the demand for those products, as well as to negative effects on the economic indexes and factors of the domestic productive segment. The above, taking into consideration that during that period a significant growth was registered in the imports under price discrimination conditions.

708. b) There is a well based probability that the high fructose corn syrup imports, originating from the United States of America, will increase in the immediate future.

709. c) There is enough capacity freely available, and a high export potential, of the high fructose corn syrup industry in the United States of America to supply the Mexican United States.

710. d) The Mexican market is relevant as a real destination for high fructose corn syrup exports, originating from the United States of America.

711. 188. For all the above reasons, the Ministry ratifies its conclusion that in the period under investigation a threat of injury existed to the domestic sugar industry as a consequence of the high fructose corn syrup imports under price discrimination conditions, originating from the United States of America. Thus, based on the content of point 183 of this resolution, the Ministry considers it legal to maintain the definitive antidumping duties imposed on the antidumping investigation that point number 1 of this determination refers to.

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712. **VIII.2. Arguments of the Complainants**[58]

713. Due to this Revised Determination, and the orders issued by the Panel on February 6 and April 19, 2001, the complainants filed on March 5 and on May 10 and 11, 2001 their memorials in which, following the Panel's instructions, they argued that the Revised Determination was illegal for the reasons specified below, under the following headings:

714. **VIII.2.1 The Growth Rate of the Imports is Erroneous, and the Substitution Coeficients from which the IA Determined Such Rate are Based on Theoretical and not Real Substitution Coeficients**

715. The significant growth rate of the HFCS imports discovered by the IA in its Revised Determination, arguably taking into account the alleged restraint agreement, is erroneous because it totally lacks a basis in the AR, the original as well as the supplemental record compiled by SECOFI for the formulation of the Revised Determination. The IA based its determination of substitution coefficients from four different sources, and none of them contained real rather theoretical substitution coefficients. In other words, according to the Complainants, the substitution analysis and the volume of imports derived from that analysis is not based on a real consumption and usage model. Also, SECOFI extrapolated to the Mexican case, without a basis, the phenomenon of the substitution of sugar by HFCS that occurred in the USA.

716. The method used by SECOFI to determine the import volumes of HFCS is inconsistent and it uses theoretical and arbitrary figures. Thus, the reduction of a 50 percent of the arbitrarily estimated numbers is not justified on the AR; neither is the fact that the bottlers, under the Restraint Agreement, increase the use of HFCS by more than 120 per cent, covering that demand only with the domestic production.

717. The figures of the domestic sugar consumption for the calculation of the substitution are inconsistent, and there is no explanation of why the Sugar Chamber, Peter Buzzanel, and the United States Department of Agriculture's (USDA) figures were used, instead of using those of the National Statistics, Geography, and Information Institute (INEGI, using its Mexican acronym) or those of the Committee of the Sugar Industry (Comite de la Agroindustria Azucarera.)

718. SECOFI did not consider the differences between HFCS-42 and HFCS-55. Moreover, it did not use the actual figures for the first nine months of 1997, which were available to it, to estimate the volume of sales, and prices.

[58] During the August, 2000 Public Hearing, the Complainants argued that they were denied a due process with the decisions adopted by the IA in 1997 and 1998, by which they were prevented to submit evidence related to the restraint agreement. The claims of the Complainants are inoperative because the IA decided to include the evidence submitted by the Complainants in the Record 2, with the alleged purpose of complying with the SG-WTO recommendation related to the impact of the alleged restraint agreement on the domestic industry.

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719. **VIII.2.2. The HFCS Imports are not the Cause of the Decrease of the Sugar Prices**

720. The prices of both standard and refined sugar increased and decreased during that period, and SECOFI was not able to demonstrate any causal relationship deriving from the HFCS prices.

721. The data used by SECOFI for the price analysis is only illustrative, since the invoices that it was taken from did not represent a significant volume of the sugar sales to the industry or of the HFCS imports. Also, SECOFI accepts the absence of a correlation between the HFCS imports and the sugar prices determined by the GEA in its study.

722. There is no indication in the AR of the data used for the calculation on the causality test of Granger. On the other hand, SECOFI compared the HFCS prices on a humid basis, which artificially increases the prices.

723. In the AR there is a chart showing horizontal and stable prices for HFCS as well as for standard sugar for 1997, which contradicts the estimations of SECOFI of a ___% decrease on the sugar prices.

724. In application of the simultaneous equations system, SECOFI predetermined one of the variables, which makes the equations system to report trustless results. On the other hand, on the application of that system, the calculation is based on the sugar sales of the industrial segment and not on the market as a whole, as ordered by the SG-WTO. In conclusion, the equations are based on hypothesis contrary to the evidence included in the AR, which demonstrates that there was no consistent relationship between the HFCS volumes and prices and the sugar sales and prices.

725. **VIII.2.3. Evaluation of the Domestic Industry**

726. The Revised Determination does not contain a forceful explanation of why and how SECOFI found a threat of injury, regardless of the positive indicators of the sugar industry.

727. SECOFI's predictions of threat to the sugar industry are based on erroneous data and methodologies: substitution rate, import volumes, sugar prices and sales derived from the substitution rate. With regards to the sensitivity rate, there is no evidence on the AR supporting SECOFI's determinations.

728. The analysis of SECOFI is based on erroneous calculations.

729. **VIII.3. Investigating Authority**

730. The IA opted not to comply with the Orders issued by this Panel, and, consequently, did not submit memorials answering those memorials of the Complainants. Neither did the IA express in any manner its position towards the arguments of the

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Complainants, because it chose not to attend the Public Hearing before this Panel on June 19, 2001.

731. **VIII.4. Arguments of the Sugar Chamber**

732. On the other hand, the Sugar Chamber, in its memorials of March 26 and May 30, 2001 submitted to this Panel the arguments below, under the following headings:

733. **VIII.4.1 Growth of the HFCS Imports; Restraint Agreement, and Substitution Rate Coeficients**

734. The Panel shall reject all the arguments and allegations of the Complainants related to the alleged restraint agreement, because it is not included in the AR, and its existence has not been proved.

735. The HFCS-55 and HFCS-42 imports increased during 1996, more than three times the implicated amount and over 30% respectively, with regards to the previous year. For the determination of the increasing trend estimation it was used an exponential type equation, which indicated that the HFCS-55 imports would double yearly on the following two years and those of HFCS-42 would double in less than five years, which corroborated the results obtained by the SE.

736. The substitution coefficients found by the SE are in conformity with the reality as it is shown by the historical evidence (the manner in which the same companies parties to this case substituted sugar with HFCS in the US as to different usage and beverages.) This evidence confirms that the marketing of HFCS focuses on the same current and potential industrial consumers of the domestic products, thus it is justified to segregate the market to demonstrate the magnitude of the real threat, as well as the immediate and imminent threat of injury to the domestic industry.

737. The HFCS price is considerably lower than that of sugar in the domestic market, and even more when it is compared to the theoretical price, which is that level of price that sugar can aim for without motivating the sugar imports, and that is why it is integrated by the addition of the current sugar import duties and the international price quoted in contract number 5 of London and contract number 11 of New York for refined and standard sugar, respectively. This price level is the one that would be used to quote sugar without the depressing effects of the price discrimination practice of the HFCS imports.

738. **VIII.4.2. The HFCS Imports Prevent the Reasonable Increase of the Sugar Prices**

739. There is a high rate of correlation between the HFCS imports and the sugar price depression, of 0.93% and 0.81% regarding to the HFCS-42 with regards to standard sugar and of HFCS-55 with regards to refined sugar, respectively.

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740. Although the sugar prices increased nominally in 1996, that increase did not even correspond to a one third of the inflation of Mexico for that year, which prevented the prices to be constant on real terms.

741. The evaluation of threat over the sales to the domestic market can be observed because the sugar industry stopped receiving over 16 thousand million pesos when selling to the domestic market in lower volumes and at depressed prices due to the uncommon growth of the HFCS imports under price discrimination, depressing in a considerable manner the amount of its sales, its revenues, and its investment projects.

742. The evaluation of the threat caused by the export of the sugar substituted by HFCS takes place because, lacking the existence of HFCS imports under dumped prices, a similar amount of sugar to that of the HFCS imports would have been sold in the domestic market at the theoretical price levels, which brought as a consequence a market loss of over 500 thousand metric tons during 1994, 1995, and 1996.

743. The SE elaborated its price projections with the sale price information of each operation of the sugar mills, which represent at least 95% of the domestic production.

744. The real HFCS import data of the SHCP for 1997 conform with the projected import figures of the SE, which were used on the simultaneous equation model, which demonstrates the veracity of the results projected by the IA of the expected standard and refined sugar prices for 1997.

745. The Complainants state that the SE has accepted that there is no correlation between the HFCS import prices and those of sugar. What the SE is actually saying is that it performed the correlation test between the HFCS imports and the real prices of refined sugar, based on the data submitted by Almex, and that it verified that a correlation coefficient of 0.04 is obtained with that information. The fact that it had verified it does not mean that it had accepted it.

746. The SE rejected the GEA conclusion because the GEA based its analysis on already depressed prices that were obtained from biased and unreliable sources. Also, it committed other mistakes and false evaluation.

747. This Panel then reviews the Revised Determination to decide whether it complies with the requirements of the AA, the CFT and its Regulations. This Panel is aware that the SG-WTO has issued a new report with regards to that Revised Determination, which the SG-WTO determined did not comply with the AA. However, this Panel considers that, with regard to that report the comity principle cannot be considered as applicable because it is not yet a final report. This Panel shall also take into consideration that one of the main purposes of the dispute resolution mechanism of NAFTA Chapter 19 is the assurance of a fair, efficient, and expeditious review, therefore it shall comply with this commitment without further delay of this proceeding.

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748. VIII.5. Discussion and Analysis

749. Before beginning this discussion, it is useful to make an important statement regarding the IA's attitude towards this Panel throughout the course of this proceeding, which has subjected our review to certain limitations and peculiarities that would otherwise not have occurred.

750. The IA refused to recognize this Panel's jurisdiction to review either the Revised Determination or considerable parts of the 1998 Original Determination. Accordingly, it did not file a memorial to explain the basis of its Revised Determination when requested to do so in anticipation of this Panel's June 2001 public hearing, although this Panel gave all the participants the opportunity to do so. That memorial would have been the legal basis of the oral arguments, which were to be presented at the second Public Hearing on June 19, 2001.

751. Furthermore, the IA chose not to participate in the June 19, 2001 Public Hearing. The Order of this Panel that convoked that hearing expressly stated:

752. "The primary purpose for the Hearing is to enable the Panel to ask questions in order to clarify matters that are unclear and to seek answers to questions that concern them."

753. The Panel is thus left with the Revised Determination and with the AR (the Original and Record 2) as the sole sources of the IA's final position and reasoning to make its finding on the threat of injury issue, and has had no opportunity to clarify the many obscure and ambiguous aspects of the IA's discussion of threat of injury.

754. The Panel continues now with the analysis of the Revised Determination based on the sections used by the IA in that Determination.

755. **VIII.5.1. Imports Subject to Price Discrimination and Export Capacity**

756. In reaffirming its 1998 finding of threat of injury, in its Revised Determination, the IA observed that there had been sharp increases in the volume of HFCS imports from the United States during 1994 through the first nine months of 1997, and that as of 1996 the US had substantial additional production capacity which enabled it to further increase its exports to Mexico.[59]

[59] See paragraphs 62 and following of the Revised Determination.

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757. The IA's finding of threat of injury was based, in part, on the findings of the IA as to the HFCS import volumes for the years 1994, 1995, 1996, and the first nine months of 1997, and the projections made by the IA regarding import volumes that would exist for the balance of 1997 and 1998, which are set forth in Table number 1. Those projections, important to note, are strongly challenged by the Complainants, as stated below, but the import volume figures corresponding to the period of 1994-1996, which were uncontroverted, constitute the appropriate starting point for an examination of the IA's analysis.

758. Table 1.

Volume of Sweeteners Sold in Mexico (figures in metric tons)				
Product	1994	1995	1996	IA Projections for 1997-98
Sugar (imported and domestic)	___________	___________	___________	
Imported HFCS	60,996	90,824	192,906	334-350,000
Domestic HFCS	0	0	39,510	350,000
Total Sweetener	___________	___________	___________	

759. Sources: Paragraphs 38, 44, 58 and 59 of the Revised Determination; paragraph 459 of the Original Determination; paragraph 10(b): Answers of Mexico, Annex A, Mexico – Anti – dumping Investigation of HFCS from the United States, Recourse to Article 21.5 of the DSU by the United States, Report of the Panel WT/DS/132/RW. Deleted information is confidential. Source: Record 2, ref. 173, confidential version, v.12 pgs. 282-287 and 359.

760. By definition, none of the figures describing what happened during the period 1994-September 1997 could reflect the effects of the alleged restraint agreement on the HFCS imports, which according to press reports, was not entered into until August or September of 1997. The evidence of AR thus leaves unanswered the crucial question of what the impact of this alleged restraint agreement would be on the sweeteners market.

761. It should be noted that the total volume of HFCS imports in 1996 occupied less than 4.5% of the Mexican national sweetener market. Of this, two thirds went to the soda

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bottlers,[60] thus if these bottlers, as the Mexican Minister of Trade and Industrial Development testified before the Mexican Senate, had agreed not to increase their consumption of HFCS, the alleged future threat of material injury to the sugar industry from imports had to come from "clearly foreseen and imminent" growth in a mere 1.5% segment of the sweetener market.

762. Against this background of domestic market of sweeteners, the IA reasoned as follows in approaching the subject of future import volumes, which is central to the question of what if any threat may have been "clearly foreseen and imminent" as of the end of 1997:

763. * The alleged Restraint Agreement would permit the soda bottlers to use 350,000 tons of HFCS;[61]

*This HFCS would be purchased entirely from the domestic producers;[62]
*Imported (i.e., dumped) HFCS would be purchased entirely by Mexican industries other than by the soda bottlers;[63]
*The conclusion of the IA that the dumped HFCS protected imports would adversely affect the sugar prices.[64]

764. Complainants challenged each one of these premises as internally inconsistent and not founded on facts, which is a violation of the applicable legal requirements of set forth by the AA. Some of these contentions the Panel rejects out right as unsound,[65] others as immaterial.[66] But the complainants also challenge the factual premises of each of the four steps in the IA's argument summarized above, and these challenges the Panel finds to have merit for the following reasons.

765. However, before specifying those reasons, it is useful to refer to the Sugar Chamber's memorials. It is important to mention that our review of the Sugar Chamber's arguments is subjected to the limitations and peculiarities similar to the IA arguments.

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[60] See paragraph 56 (iii) of the Revised Determination.
[61] See paragraph 58 of the Revised Determination.
[62] See paragraph 58 of the Revised Determination.
[63] See paragraphs 56, 58, 59, and 60 of the Revised Determination.
[64] See paragraph 100 of the Revised Determination.
[65] E.g., the contention that in some places of the Revised Determination the IA finds that the soda bottlers purchased 81% of the HFCS imported in 1996, while elsewhere in the Revised Determination the IA finds that the figure was 67%. In fact, the former is the IA's figure for all beverage bottlers and the latter figure pertains only to the use by the soda ("refrescos") bottlers, so there is no inconsistency.
[66] E.g., the complainants observe that instead of measuring inventories as of the beginning and end of each year, the IA, contrary to sound accounting practice, uses average figures for the twelve months involved. While correct, this criticism is immaterial.

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Since the Sugar Chamber opted to be absent from the June 19, 2001 Public Hearing, the Panel did not have the opportunity to ask any questions.

766. After reviewing the Sugar Chamber's memorials, this Panel arrived at its conclusion that it is possible to identify grossly contradictory arguments and, in the best of cases, immaterial. Indeed, the Sugar Chamber starts its memorials by presenting objections to making references in the foregoing review of the alleged restraint agreement, because it is not a part of the AR. However, the Sugar Chamber continues to present a vigorous defense of the IA's conclusions regarding the threat of injury, based on sources of information which this Panel could not locate anywhere in the AR, nor find references to in the Revised Determination.[67]

767. The import volume data relied on in the Sugar Chamber's analysis is largely derived from USDA sources regarding prices and quantities in the domestic US market, as well as from the Mexican System of Trade Information (SIC-MEX using its Mexican acronym) and other purported 1997 data of the Mexican market. Not only is this information not referred to in the IA's decision but it is apparently not found in the ARas filed by the IA with this Panel. In addition, it is impossible to disregard the fact that since all this information was brought into the case in a memorial requested by the Panel, the Complainants did not have the opportunity to express their opinion on it. The Panel, therefore, cannot give any value to the arguments submitted by the Sugar Chamber in its memorials.

768. The Panel now will analyze the four premises, in the same order as presented by the IA in its Revised Determination, in which the IA based its projections on the future volume on HFCS imports.

769. *The alleged restraint agreement would permit the soda bottlers to use 350,000 tons of HFCS .

770. The IA does not state in the Revised Determination where it derives the figure of 350,000 tons of HFCS that allegedly the soda bottlers would utilize.[68] Total HFCS consumption in 1996 was 192,906 tons[69] and the alleged restraint agreement was supposed to establish a freeze, regardless of the specific formula, that would prevent further inroads by HFCS into the soda bottling industry. The IA's assumption is directly contrary to the intent of the alleged restraint agreement, because that would allows the displacement of an additional 157,094 tons of sugar in 1997.[70]

[67] This can be easily concluded when reviewing the Sugar Chamber memorial, which nowhere make reference to the AR when citing the sources of information on which it bases its statements.
[68] See paragraph 58 of the Revised Determination.
[69] See paragraph 38 of the Revise Determination.
[70] Among the evidence submitted by the CRA there were press reports that referred to those 350,000 tons, however, the IA in paragraph 58 of its Revised Determination presents it as a "conservative scenario", without specifying the source.

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771. The Sugar Chamber argues that the Complainants bore the burden of proving the terms of the alleged restraint agreement and that they failed to do so.[71] This Panel finds the argument of the Sugar Chamber unpersuasive. The alleged restraint agreement was an agreement between the Sugar Chamber's members and the soda bottlers, and consequently it would not be a document available to the Complainants. The Complainants presented what they had at hand, as the testimony of the Minister of Commerce and Industrial Development before the Mexican Senate, as well as newspaper reports and other indirect references.

772. In the face of this contradicting information, the Sugar Chamber's 1997 letter to the IA,[72] it is not reasonable for the IA to assume without further inquiry what the terms of the alleged restraint agreement are without a clear basis for doing so. Furthermore, by complying with the SG-WTO recommendation, the IA was obliged to inquire further about the existence and the terms of the alleged agreement, because the IA is, after all, an investigating agency. The IA sent out questionnaires to obtain additional facts to give basis to its Revised Determination. They could have inquired further about the restraint agreement but chose not to do so.

773. This first premise, consequently, is not sustained.

774. * The 350,000 tons HFCS would be bought directly from domestic producers.

775. The IA's assumption that the alleged restraint agreement would permit the soda bottlers to increase their consumption of HFCS in one year from 192,906 to 350,000 tons is hard to believe. There is no basis for the IA to support what it calls a "conservative scenario." The purpose of the alleged restraint agreement must be understood to be protection of the sugar industry, not promotion of the domestic HFCS industry.

776. Yet, with no explanation, the IA assumes, in paragraph 58 of its Revised Determination, that the soda bottling industry would buy all of the 350,000 tons of HFCS from domestic producers.

777. There is no reason to assume the soda bottlers would do so. And there is no evidence for believing that domestic HFCS producers could produce the 350,000 tons the IA predicts. Domestic production of HFCS in 1996 was less than 50,000 tons, and the IA does not specify any element of the AR that allows it to arrive to the conclusion that the production would jump seven-fold in one year. This second premise, thus, is not sustained.

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[71] The same position would seem to be implicit in the IA's lack of questioning with regards to the alleged restraint agreement during the process of complying with the SG-WTO recommendations, because it did not ask the Sugar Chamber neither the soda bottlers for new information that could, in a way, ratify or deny the existence and the terms of that alleged agreement.

[72] The letter was signed by counsel, Rodolfo Cruz Miramontes, acting as the legal representative of the Sugar Chamber before SECOFI. In that letter, he states that he presents to the IA the information of the Sugar Chamber, without specifying the source. AR, vol. 44, non-confidential version, pp. 86-88.

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778. *Other Mexican industries, other than the soda bottlers, would buy all the HFCS imports (dumped).

779. Once again without enough explanation and without a legal basis, the IA next assumes that Mexican industries other than the sugar bottlers would substitute imported HFCS for sugar to the maximum extent possible. These industries -- candy, baked goods and others -- consumed only about 77,472 tons of HFCS in 1996[73], but the IA concludes that in 1997-1998 they would consume the entire volume of imported HFCS, which the IA projects to be 334,000-350,000 tons[74]. Not only would this be a startling increase in consumption of HFCS by these other industries, but it would represent a one-year increase of over 80 percent in the volume of HFCS imports – despite the loss, on the IA's assumption, of all sales to the soda bottlers, who in 1996 purchased 67 percent of the HFCS imported into Mexico. The IA's prediction of an 80 percent increase in sales, accompanied in the same year by a loss of 67 percent of the pre-existing market, is hard to believe.

780. The IA does not explain anywhere in its Revised Determination why these other industries would suddenly turn to HFCS in such large quantities. Yet the statutory requirement of the AA is that a finding of threat "shall be based on facts and not merely on allegation, conjecture or remote possibility" and must be "clearly foreseen and imminent" and "shall be considered and decided with special care."[75] Moreover, the published administrative decision must contain "all relevant information on the. . . reasons which have led to the imposition of [dumping duties]."[76] The CFT and its Rules go even further. Thus the absence of an explanation, of references to the AR, or even a statement of the supporting facts, is not merely logically unacceptable but constitutes by itself a violation of the AA's requirement of transparency in decisions.

781. The IA purports to explain how (though not why) this increase of HFCS consumption could come about -- but here again there are major gaps in the analysis. To begin with, the IA estimates the extent to which each industry could substitute sugar with HFCS if it chose to do so. But there are serious cost and technological impediments to the use of HFCS in place of sugar -- short shelf life, conversion of equipment, and so on -- which the IA does not take into account in its analysis. The IA refers to a survey it conducted, but it was of a non-representative sample and dealt only with the

[73] See table 1, Supra.
[74] Ibid.
[75] See AA, Arts. 3.7 and 3.8.
[76] See AA, Art. 12.2.2.

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maximum potential HFCS consumption, with no indication of intention to convert away from sugar. The projected volume of HFCS imports were so exaggerated that the IA itself reduced the figure by an arbitrary 50%, a figure for which it furnishes no factual basis.[77]

782. **VIII.5.2. Price Analysis**

783. *The IA's finding that the projected imports of dumped HFCS would adversely affect sugar prices.

784. The IA's analysis of prospective prices of sugar and HFCS is based, in accordance with AA 3.2, in consideration of the effect of the projected increase in the volume of imports (which are assumed to be dumped.) For the reasons just discussed, the IA's estimate of the 1997 volume of HFCS imports is so unsupported that they cannot serve as a reliable predicate for price analysis. In addition, the IA takes no account of the effect on sugar prices of the roughly 300,000 tons of additional domestic production of HFCS that it projects. Any price impact of the predicted surge in HFCS domestic production, were it to occur, could not be a basis for the imposition of dumping duties on imports.

785. The sugar and HFCS prices starting in 1995 were unpredictable, which makes it particularly difficult to isolate the impact of the HFCS imports on the domestic sugar prices without violating the requirements of the AA.[78]

786. The following data basic to the price analysis appear to be reliable:

787. Table 2

Product	1994	1995	1996
Sugar (raw/refined)	$ _______	$ _______	$ _______
HFCS (Grade 42/55)	$ _______	$ _______	$ _______
Volume of HFCS Imports	_____MT	_____MT	_____MT

[77] See paragraph 59 of the Revised Determination.
[78] See paragraphs 88 and 111 of the Revised Determination and Art. 3.7 of the AA.

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788. (This is confidential information. Source: Record 2, ref. 173, Confidential version, v. 12 pg. 284 and v.13 pg. 24)

789. As it can be derived from the table 2 above, prices declined sharply in 1994/95 and rose in 1995/96.[79] This suggests the impact of the "peso crisis" and the ensuing recovery, a factor noted by the IA.[80] However, it is more interesting to observe that during the period of investigation (calendar 1996), although the volume of HFCS imported increased sharply, the HFCS prices increased at the same time, and sugar prices increased considerably more, both actually and relatively. Thus it cannot be assumed that even a major increase in HFCS imports would necessarily depress sugar prices. Without a doubt, it would be surprising if a 4% factor on the market could drive the price of the remaining 96%.

790. The IA cites several tests to support its conclusion that sugar prices could be expected to decline by 9% in 1997. The "Granger causality proof", referred to in paragraph 90 of the Revised determination is never satisfactorily explained, nor is the data tested identified. The IA does not even inform the reader what the "test" proved. Likewise, the IA refers to its use of simultaneous equations for a price estimate, but never explains those equations or exactly what they demonstrate.[81] The IA also dismisses the GEA study, produced by economic consultants retained by Almex, saying that it correctly calculated a correlation of only 0.04 between sugar prices and HFCS prices (which is admittedly not statistically significant); but the IA challenged the reliability of the data used by GEA. The Revised Determination does not contain a finding as to the extent of correlation, if any, between the two prices.[82]

791. There is discussion in the Revised Determination of undervaluation and a "natural gap" between prices of sugar and HFCS.[83] But the Mexican price data cited are admittedly "merely illustrative"[84] and the other data is from U.S. markets, where the "natural gap" ranged all the way from 11.6% to 29%, so that even if relevant to the Mexican market they convey no clear message.[85]

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[79] See paragraphs 80 and 81 of the Revised Determination.
[80] See paragraph 82 of the Revised Determination.
[81] See paragraph 98 of the Revised Determination
[82] See Record 2, folio 173, confidential version, v. 13, pp. 14-41.
[83] See paragraphs 91 and 95 of the Revised Determination.
[84] See paragraph 97 of the Revised Determination
[85] The Sugar Chamber memorial, relying on extrinsic evidence, refers to a "theoretical price" which is apparently the world market price, with addition for Mexican customs duties. This appears to confuse cost with price. This price at which sugar can be imported from abroad sets a ceiling on the domestic price of sugar, but not a floor. The IA also speaks of a very high price, which ought to prevail, and against which even the increased price of sugar in 1996 was too low. This is surely mere conjecture and speculation, with no factual basis demonstrated. See paragraphs 92 and 95 of the Revised Determination.

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792. Particularly disturbing, from the Panel's viewpoint, is the fact that the IA never makes it clear how it arrived at its projected 9% decline in sugar prices for 1997.[86] For all that appears, even a large increase in the volume of HFCS might not have a serious adverse effect on sugar prices – as the 1995-1996 experience shows. One of the major factors not taken into account in the IA's price analysis is that the Mexican soft drink industry was in a period of tremendous growth. Assuming the restraint agreement would freeze these bottlers' consumption of HFCS, there would be room for a major expansion of sugar sales. This was the expected benefit to the sugar industry that the alleged restraint agreement was apparently designed to achieve. The Panel cannot accept the IA's assertion because that would amount to canceling this gain by assuming an utterly unrealistic and unexplained seven-fold one-year increase in domestic production of HFCS.

793. The AA expressly provides that "where injury is **threatened** by dumped imports, the application of anti-dumping measures **shall be considered and decided with special care**."(Emphasis added.)[87] This provision reflects the practical wisdom of the AA negotiators, who knew that proving the nexus between dumped imports and actual injury is fraught with great difficulty, and that in a case, such as the present, where the allegation is threat of injury, the difficulty is especially great. For there is often a tendency for domestic interests to anticipate future injury from low price imports and generate hypothetical scenarios to confirm their fears. The problem is all the more acute where there are apparently serious financial problems in the domestic industry, quite apart from any import competition.

794. Following the IA's discourse and assumptions, the result would be different. The alleged restraint agreement would exist to have protected the domestic sugar industry from HFCS import competition into the industrial segment of the soda bottlers, which represents 29% of the Mexican sweeteners market. Two thirds of the total HFCS imports in 1996, which represents less than 4.5% of the domestic sweeteners market, were sold to the soda bottlers representing less than 3% of the domestic sweetener market; the difference, less than 1.5%, went to the rest of the industrial sweeteners market representing 24% of all sweeteners. The IA assumed that all the HFCS imports projected increase would come from that 1.5% of the whole sweeteners market, which would amount to an exponential increase of the imports, which is not explained in the Revised Determination and seems not to be supported in the AR. The fourth premise, consequently, is not sustained.

795. **VIII.5.3. Impact on the Domestic Industry**

796. As part of its Revised Determination, the IA re-analyzed the original Determination in response to the recommendations and conclusions found in the SG-WTO Report and looked at information and factors not originally considered. Specifically, in response to the SG-WTO Report, the IA argues it considered for the first time the

[86] See paragraph 100 of the Revised Determination.
[87] AA, Art. 3.8.

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factors found in Article 3.4 of the AA relating to the status of the industry. The IA argues that it considered the imports which were subject to dumping, the capacity of exporters, price analysis, effects on domestic production, inventories of the subject merchandise, other factors of threat of injury, and additional elements.[88]

797. As indicated above, the IA concluded that, given the significant increase in imports during the period of investigation, the continuation of dumping in the immediate future would increase demand for these products and negatively affect domestic sugar prices.[89] It argues that it considered the impact of these increases on the national industry, and that it looked at the effects on economic indicators, and the effects on financial variables. The IA concluded that economic indicators were negatively affected by imports because the loss of its share on the domestic sweeteners market that the domestic sugar industry suffered, resulted in decreased sales, lost employment, and negative capacity utilization. The IA found this to indicate that continued increases in dumped HFCS imports would injure the domestic sugar producers.[90] With regards to the financial variables of the domestic industry, the IA concluded that the continued increase in those imports would reduce profits, return on investments, and the ability to access capital, while compromising the domestic industry's capacity to pay its debt.[91]

798. Regarding other factors relating to the threat of injury articulated by Article 3.5 of the AA, the IA evaluated the arguments presented by the parties throughout the course of the proceedings. The IA looked at claims which linked the threat of injury to excessive debt load, price wars, lack of modernization and evolution of technology, lack of integration in the field, excessive inventories, and over supply of domestic sugar. The IA rejected these arguments on the basis that none of these factors eliminated or excluded the threat of injury presented to domestic producers by the dumped imports.

799. On the contrary, the IA found that these factors made the domestic industry more susceptible to dumped HFCS imports. With regards to the evolution of technology, the IA found that this factor did not affect the positive finding of threat of injury, because it contributed to the productivity of the industry, which is reflected in the increased production during the period of investigation notwithstanding that on the surface, it remained practically constant.[92] Regarding the over supply of domestic sugar, the IA determined that this situation was the result of increased production arising from the increase in yield per hectare. Moreover, it found that the decrease in

[88] When reviewing the Revised Determination, the SG-WTO considered the analysis of the IA and arrived to a conclusion similar to this Panel's conclusion.
[89] See paragraphs 79-126 of the Revised Determination.
[90] See paragraphs 128-139 of the Revised Determination.
[91] See paragraphs 140-166 of the Revised Determination.
[92] See paragraph 172 of the Revised Determination.

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sugar utilization arose from the economic problems, which occurred after the devaluation of December 1994. The IA found that in the presence of these circumstances, the susceptibility of the domestic industry was heightened. That is, the domestic industry's predisposition to injury or threat of injury was exacerbated as the result of dumped fungible imports and the consequent loss of sales and market share in the industrial sector that caused increases of sugar supply in the domestic market.[93]

800. The Complainants have argued that the IA's analysis of the state of the domestic industry, in the Revised Determination, violates provisions of the AA, as well as the CFT and its regulations. Specifically, they claim that Articles 3.1, 3.4, 3.5 and 3.7 of the AA, as well as Article 39 and 42 of the CFT and Article 68, sub 111 of the RCFT have been violated.[94]

801. The Complainants argue that in order to find a threat of injury, the AA requires the IA to analyze "all relevant economic factors and indices" which impact on the state of the domestic industry.[95] They contend that this analysis must be objective, based on positive facts and evidence, and not merely on allegations, conjecture or remote possibilities.[96] Further, it is argued, the IA must show a causal relationship between the injury factors and imports.[97] They allege that all of these articles have been breached because the IA fails to explain in convincing manner how, in light of all positive pertinent economic factors, they continue to find threat of injury.

802. The Complainants argue that the defective analysis of the state of the domestic industry is also in violation of the CFT and RCFT. They argue that under domestic legislation, the IA can only find threat of injury if they establish that the threat of injury is a direct consequence of the subject matter imports.[98] This must be done with facts, not allegations, conjecture or remote possibilities.

803. **VIII.5.3.1. Analysis and Conclusion**

804. The Panel finds that the analysis of the likely impact of dumped subject matter goods on the domestic industry, which underlies the threat of injury determination, is inconsistent with Articles 3.1, 3.4, and 3.7 of the AA.

805. **VIII.6. Compliance with the Antidumping Agreement**

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[93] See paragraphs 168-173 of the Revised Determination.
[94] See, CRA Brief, March 5, 2001, pp. 34-45.
[95] See, CRA Brief, March 5, 2001, pp. 35-36, referring to AA 3.4 .
[96] See, CRA Brief, March 5, 2001, pp. 35-36, referring to AA 3.1, 3.7.
[97] See, CRA Brief, March 5, 2001, pp. 35-36, referring to AA 3.5.
[98] CFT, Art. 39.

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806. Article 3 of the AA deals with the determination of injury. Injury, unless otherwise specified, means material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.

807. An analysis of threat of injury requires a two-fold test under Article 3.1 of the AA. The first part of this test requires an examination of dumped good volumes and their effects on prices while the second part involves an examination of the consequent impact of these imports on domestic producers. The IA's handling of the first part of this test is referred to elsewhere in this Decision.[99] This part will therefore focus on the second part of the test-namely, the impact on domestic producers.

808. Article 3.4 of the AA establishes the procedures to be followed by the IA when commencing its analysis of the impact of dumped goods on the domestic industry. This section lists the factors, which relate to an evaluation of the general condition and operations of the domestic industry. They include sales, profits, output, market share, productivity, return on investment, utilization capacity, and factors affecting domestic prices, cash flow, inventories, employment, wages, growth, and the ability to raise capital or investments. Consideration of these factors is necessary to establish a background against which the IA can evaluate whether 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. However, it must be noted that this section specifically states that the list, which it articulates, is not exhaustive and that neither one nor several of these factors necessarily give decisive guidance.

809. Initially, the IA, in its Original Determination, did not deal with Article 3.4 of the AA. In argument before the first SG-WTO review, the IA took the position that Article 3.4 factors only dealt with injury, not threat of injury analysis. However, as a result of the SG-WTO Report, the IA retreated from this position and included, in its Revised Determination, a discussion of the condition of the domestic industry.

810. While the Revised Determination includes further information and analysis, it is more in the nature of an augmentation to the Determination than an overall reconsideration of the issues. The Revised Determination did address various factors, not initially addressed in the Determination, including indicators relating to the industry's performance during the period of investigation, 1996, the previous year, and projected trends for 1997 and 1998.[100]

811. In evaluating the relevant factors and indices affecting the state of the industry, the IA noted that the domestic industry's market share declined, domestic sales declined, and exports increased during the period of investigation.[101] However, the IA also noted

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[99] See paragraphs 752-791 of this Decision.
[100] See paragraphs 98-186 of the Revised Determination
[101] See paragraph 130 of the Revised Determination.

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positive indicators of the domestic industry's health. They noted that inventories increased and productivity improved.[102] While salaries may have declined, there was an increase in the number of people employed [103] and capacity utilization increased.[104]

812. The IA also analyzed the financial indicators of the industry and again, found positive indicators. They found that operating margins and net margins increased.[105] They also noted that return on investment increased.[106]

813. The IA followed fructose prices from 1994 to 1996 and found that while they initially dropped, they subsequently increased in 1996, albeit not to the levels of 1994.[107] They went on to conclude that domestic sugar prices followed fructose prices.[108] They analyzed margins of underselling[109] and concluded that declining domestic sugar prices were as the result of dumped imports which forced the domestic industry to maintain low prices, especially in the industrial sector.

814. However, the IA's own analysis showed that notwithstanding increased imports and increased margins of underselling, the domestic industry's overall health improved, in terms of operating margins, net operating margins, return on investment, production, and capacity utilization. Notwithstanding these improvements and without adequate explanation, the IA found that the projected increase of dumped HFCS would cause material injury to the domestic industry. As part of its analysis on the likely impact of dumped imports, the IA projected price levels and margins of underselling for 1997. The IA projected that domestic industry sales would decline in 1997[110] and concluded that the domestic industry would need to lower sugar prices in the domestic market to respond to dumped imports. This, it argued, would lead to a negative impact on operating profits and margins, as well as an inability to service debt or attract capital.[111]

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[102] See paragraph 131 of the Revised Determination.
[103] See paragraph 132 of the Revised Determination.
[104] See paragraph 133 of the Revised Determination.
[105] See paragraphs 143 and 144 of the Revised Determination.
[106] See paragraph 145 of the Revised Determination.
[107] See paragraphs 80 and 81of the Revised Determination.
[108] See paragraph 83 of the Revised Determination.
[109] See paragraph 87 of the Revised Determination.
[110] See paragraph 138 of the Revised Determination.
[111] See paragraphs 89-100 of the Revised Determination.

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815. In sum, while the Revised Determination looks at more information with respect to the condition of the domestic industry, the IA's analysis remains flawed in so far as the original rationale remain unchanged. Assuming, arguendo, that an important increased projection of HFCS imports could be made, the IA does not provide an adequate explanation as to why this would then negatively impact the domestic industry. The fact that there is an increase in imports, even in the face of declining domestic market prices, does not in and of itself necessarily lead into a clearly foreseeable imminent threat to the domestic industry, as required by Article 3.7 of the AA.

816. The IA's own analysis showed that when imports increased in 1996, the health of the domestic industry improved. Against this backdrop, and without sufficient explanation, the IA argues that increased imports in 1997 would lead to clear and imminent injury to the domestic industry. Conspicuous by its absence, is the lack of an adequate explanation by the IA as to why increased imports in 1997 would damage the health of the domestic industry when increases the prior year, in 1996, failed to do so.

817. The IA's analysis of 1996 saw an increase in domestic sugar prices and domestic industry profits, in the face of increasing HFCS imports. However, the IA extrapolated a negative impact on the domestic industry for 1997 under a similar scenario. If their argument was that the negative impact came as a result of even stronger surges in imports, in the context of an even weaker domestic industry, this is an argument that they failed to make persuasively. This outcome is, perhaps, inevitable given that the IA Revised Determination is based more on a response to the missing information outlined by the SG-WTO Report, than rethinking the analysis that supports a threat of injury, in a fashion required by the AA.

818. **VIII.7. Compliance with Mexican Law**

819. The applicable domestic law includes Articles 39 and 42 of the CFT and Article 68 RCFT.

820. Article 39 of the CFT provides, inter alia, "The determination of threat of injury must be based on facts and not simply on allegations, conjecture or remote possibilities."

821. Article 42 of the CFT provides that the Ministry shall take in to account a range of factors in determining the threat of injury to national production, not just the potential impact of the dumped imports. The section expressly directs the Secretary to take into account "the other elements that the Secretariat considers convenient." Article 68 of the RCFT provides details on how the Secretariat shall consider the elements set forth in Article 42 of the CFT.

822. The SG-WTO report resulted in the Revised Determination, thus the IA placed more emphasis in its Revised Determination on the AA than on Mexican regulations. Rather than providing a section-by-section analysis of domestic law, it analyzed the

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factors in its provisions at the same time it analyzed the provisions of the AA. As such, the analysis provided by the IA is more in the nature of recitation and repetition of the legal dispositions (domestic and international), than an analysis of the legal basis for its conclusions and determination. If there is anything in the domestic legislation that is arguably inconsistent with the AA, the Revised Determination does not advert to it. In essence, the IA holds that the threat of injury analysis for the domestic legislation is the same as it is for the AA.

823. The CRA argued that IA's analysis of the state of the national industry violates the CFT and the RCFT.[112] Specifically, they argued that under the Article 39 of the CFT, the IA failed to show that the threat of injury was as a direct consequence of fructose imports. They further argued that the determination of threat of injury was not based on facts, but instead on allegations, conjectures and remote possibilities, contrary to law.

824. Notwithstanding the summary treatment of these arguments by the parties, the Panel finds that the Revised Determination violates Articles 39 and 42 of the CFT, as well as Article 68 of the RCFT.

825. Article 39 of the CFT refers to injury and threat of injury. In essence, this article requires that the treat of injury determination must be based on facts, not simply allegations, conjecture or remote possibilities. It goes on to further limit the IA finding of threat of injury to cases where the dumped imports are a direct cause of the injury. Article 42 then lists the element, which the IA must consider in its analysis. These factors include increases in imports, exporter capacity, export prices, inventories, profitability and other relevant factors. This section concludes by requiring the IA to consider all the factors listed to show that dumped imports are imminent and whether the non-application of duties would lead to an injury in terms of this law.

826. Article 68 of the RCFT then goes on to flesh out the factors that the IA must consider under Article 42 of the CFT. Regarding imports, it states that the IA shall consider whether the increase in imports will cause an imminent increase of imports in the immediate future, whether this would lead to injury to the domestic industry, whether these imports are directed at the markets or actual or potential consumers of domestic producers, and whether they use the same channels of distribution. In regards to disposable capacity of the exporter, the IA is to consider whether present or imminent and substantial increases in exporter capacity would lead to a significant increase in dumped goods considering other export markets. In regards to export prices, the IA will consider whether import prices will cause downward or stagnating price pressure on domestic production and whether such prices would lead to greater demand for the imports. This analysis is to include consideration of the sale terms or conditions resulting from the imports. Regarding the existence of the imports, the IA will look at

[112] See, CRA Brief, March 5, 2001, pp. 43-45.

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the inventories of the subject goods in the domestic market. Regarding profitability, the IA will consider feasible investments, profits dealing with the production line of the subject goods, as well as financial models. The IA is further instructed to consider other economic tendencies showing injury. In determining injury, the IA is instructed to use available and generally accepted techniques.

827. In looking at the IA's analysis, it is clear that the Revised Determination addresses some of the factors listed. However, given that article 42 must be read in light of Article 39, which requires that the threat of injury determination must be based on facts, and that it must be shown that the threat is a direct consequence of the imports, this Panel cannot uphold the IA's analysis. As mentioned earlier, the IA's determination rests on the projection of a sudden and massive import of fructose in 1997. This Panel has found that the record does not support such a determination. This projection is not based on fact, but on allegation, conjecture and remote possibility. Further, the record does not support a finding that the threat is as of a direct result of the imports. As such, this finding violates Article 39 of the CFT.

828. The Revised Determination further contravenes Article 42 of the CFT and Article 68 of the RCFT. While the IA may have looked at some of the factors listed in article 42 of the CFT, it did not meet the threshold level of explanation required by Article 68 of the RCFT. The IA's analysis falls short of providing a meaningful or defensible explanation as to why HFCS imports would injure or threaten to cause injury when they presently show an improving domestic industry. The IA has failed to show a domestic industry that is susceptible to injury that may be caused by future HFCS imports.

829. **IX. Other Claims**

830. This Panel acknowledges that CRA, Almex, Cargill Inc., Cargill Mexico, Cerestar, ADM, and Staley filed additional claims in their writs of complaint which are dealt with in this section. However, upon the failure of the IA to prove the existence of an imminent material threat of injury, enough to justify the application of anti-dumping duties, it makes no sense to analyze those claims and to issue a decision on them, because the findings in the Original and Revised Determinations that they refer to are subject, indeed, to the demonstration of the threat of injury. Shall the IA demonstrate the existence of the threat of injury, in its Report of Remand issued in compliance with this Decision of the Panel, then it would be appropriate to analyze and decide over those additional claims. Thus, they are left unsolved.

831. For all of these reasons, the Panel finds that the IA has not established the existence of an imminent threat of material injury sufficient to justify the imposition of dumping duties and, consequently, issues the following:

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Courtesy Translation

ORDER

Based on Articles 14 and 16 of the Political Constitution of the United Mexican States; Articles 1904 and 1901, and Annex 1911 of the North American Free Trade Agreement; Rules 2, 3, 4, 7, 17, 41, 44, 45, 63, 72, 73 of the North American Free Trade Agreement Article 1904 Rules of Proceeding; Articles 5, 19, 237 (as applicable) and Article 238 of the Federal Fiscal Code; Articles 2, 3, 4, 5, 6, and 12 of the Agreement Related to the Application of Article VI of the 1994 General Agreement on Tariffs and Trade; Articles 39, 40, 42, 49, 50, 51, 52, 53, 54, 55, 59, 61, 80, 82, 85, 88, and 97 of the Code of Foreign Trade; Articles 19, 37, 60, 61, 62, 63, 68, 69, 75, 76, 77, 78, 80, 81, 84, 85, 86, 87, 88 and 160 of the Regulations of the Code of Foreign Trade; Article 18 of the Federal Civil Code; Articles 335, 564, 565, 566, and 569 of the Federal Code of Civil Procedures; Article 14 of the Organizational Law of the Federal Public Administration; the applicable Articles of the Internal Regulations of the Ministry of Commerce and Industrial Development (SECOFI) and its Delegation Agreements; Article 10 of the Law of Chambers; the jurisprudence of the Federal Judiciary and of the Federal Fiscal Tribunal cited in this Decision; and, on the bases contained in same, this Panel issues the following:

ORDER:

Whereas:

1. The anti-dumping duties at issue in this dispute have been in place since January, 1998;

2. The IA has conducted two public inquiries concerning the alleged threat of injury to the domestic sugar industry and issued two essentially identical determinations of threat of injury;

3. Two substantial administrative records have been compiled in these proceeding and have been available for this review;

4. In its Revised Determination, the IA expressly revised its reasoning in response to the finding of an independent review body of the WTO that its Original Determination of threat of injury was not supported by either the record or its analysis;

5. This Panel has found that in the IA´s Revised Determination there was still no support for its conclusion that there existed threat of injury to the domestic sugar industry due to the HFCS imports under conditions of unfair trade; and

6. This Panel has determined that the IA has only two courses of action that are consistent with this determination of the Panel.

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This Panel therefore orders the following:

1. That because the IA has failed to prove threat of injury, the IA promptly terminate the anti-dumping duties imposed to the HFCS imports originating in the United States of America and refund the duties collected since the imposition of those duties; or

2. Should the IA wish to re-evaluate what basis and justification -if any- there is for its finding of threat of injury, consistent with the findings of this Panel, and in light of the multiple proceedings already completed, it proceed accordingly.

3. The IA shall have no more than 90 days to comply with this order and conclude its proceeding in this matter.

Issued on August 3, 2001.

Signature:	Date:
Víctor Blanco Fornieles	August 3, 2001
Víctor Blanco Fornieles	Date
Héctor Cuadra y Moreno	August 3, 2001
Héctor Cuadra y Moreno	Date
Howard N. Fenton	August 3, 2001
Howard N. Fenton	Date
Gustavo Vega Cánovas	August 3, 2001
Gustavo Vega Cánovas (Chairman)	Date

I concur in the result:

Saul L. Sherman	August 3, 2001
Saul L. Sherman	Date

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