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

PANEL:
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I. BACKGROUND

1. On August 3, 2001, this Binational Panel issued its Final Decision concerning the proceeding mentioned above. In this Decision, the Panel remanded the case to the Secretary of Economy (SE, Investigating Authority or IA) and ordered that because the IA has failed to prove threat of injury in its Revised Determination of September 20, 2000 (Revised Determination and/or First Revised Determination), the IA must either 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 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.

2. The original schedule to issue a new determination of 90 days, was finally extended to 112 days, that is to November 23, 2001, due to the fact that on October 23, 2001, the Investigating Authority requested from this Panel a time period extension of 22 days to issue its Remand Report and the Panel granted such extension in its Order issued on October 31, 2001.

3. Before and after the issuance of the Remand Report, the Corn Refiners Association (CRA) (November 15 and 21, 2001) and A.E. Staley (November 16 and 26, 2001) filed several motions in which they asked an explanation from the AI concerning the reasons why unauthorized persons from the Sugar Chamber (specifically the Accountant Bernardo Costes Rougon) had had access to confidential information. The Sugar Chamber answered these claims on November 19 and 27, 2001 stating that it had only had access to the confidential information of the Sugar Chamber according to the authorization granted by the IA. The IA did not answer the CRA and A.E. Staley motions.

4. This Panel considers that the prevention of the abuse of unauthorized access to confidential information is an essential part for the effective operation of the process of review established in the binational system of panels of NAFTA Chapter XIX. However, independently of the justification of sanctions against those who may be responsible for the unauthorized access to confidential information, it is a fact that the Claimants have not proven that such access has occurred nor have they proven that such access has caused them any damage or that such information has been misused. Therefore, this Panel considers it justifiable not to make any decision regarding this matter.

5. On November 22 and 27, 2001, CRA and ALMEX filed motions in which they requested the Panel to consider as a supervening precedent the WTO Dispute Resolution Body (DRB) adoption of the WTO Special Group Report Mexico-Antidumping Investigation of High Fructose Corn Syrup from the United States

(WT/DS132/RW), as well as the report of the Appeal Body about Mexico's motion concerning certain legal issues included in the Special Group report that examined the matter Mexico-Antidumping Investigation on High Fructose Corn Syrup from the United States, Article 21(5) United States Resource of the ESD AB-2001-5 (WT/DS132/AB/RW). This Panel accepts the information filed by CRA and ALMEX as supervening information for all legal effects that may be applicable.

6. On November 23, 2001, the SE filed before the Panel and all the interested parties the Remand Report. A.E. Staley (December 13, 2001), CRA (December 14 and 17, 2001) filed in opposition to the Remand Report. On December 17, 2001, ALMEX and ADM filed their Support and Adherence Testimony to the CRA motion mentioned above. The Claimants oppose the Remand Report due to a variety of reasons that are analyzed hereinafter.

7. On January 7, 2002, the SE responded to the motions of the Claimants opposing the Remand Report, and on that same date, the Sugar Chamber filed its answer to the motions against the Remand Report of the IA[1]. On February 25, 2002, the Panel issued an Order in which it postponed its Remand Report Decision in order to have time to translate such decision and other documents into English. This decision is issued according to Rule 73(6) of NAFTA Article 1904 Rules of Procedure.

II. ISSUES BROUGHT BY THE CLAIMANTS

8. In its Final Decision of August 3, 2001, this Panel ordered the IA that because it has failed to prove threat of injury, the IA must either 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 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.

9. The IA alleges that its Remand Report complies with the Panel Order of August 3, 2001 and that it has re-evaluated the basis and justification of the threat of injury finding, and that there are evidences and proofs in the administrative record (Administrative Record and/or AR) that demonstrate threat of injury to the domestic

[1] The Sugar Chamber in its Motion in Response to the objections to the Remand Report as was done in its briefs filed defending the Revised Determination of the IA, once again defends the conclusions of the IA referred to threat of injury based in information not referred to in the AR and that the Panel could not find anywhere in the AR. Because this reason and to other considerations oferred by this Panel in paragraph 765 to 767 of its final decision of August 2001, this Panel cannot assess any of the arguments filed by the Sugar Chamber in its motion.

industry. Therefore, the IA has decided to sustain the countervailing duties imposed on HFCS imports coming from the United States of America[2].

10. The Claimants filed their motions opposing the Remand Report for four essential reasons. First, they allege that the Determination issued by the IA on November 23, 2001 is not a Remand Report in conformity with the instructions of the Panel since the IA must have reviewed the Revised Determination of September 20, 2000 and not only its Original Determination of January 23, 1998 (Original Determination). Second, the Claimants allege that the IA presumes to base its conclusions in the Administrative Record 2 (AR2) that is not before the Panel. Third, the Claimants argue that the SE presumes to base its new determination on documents that do not form part of the AR, specifically references made to record 1912 (Record 1912) contained in paragraphs 31, 53 and 63, among others. Fourth, the Claimants consider that the analysis provided by the IA in the new Determination of November 23, 2001 is only a reiteration and repetition of the arguments used in the two previous Determinations (January 23, 1998 and September 20, 2000) and therefore, the arguments filed by the IA in the Determination of November 23, 2001 do not prove, as the arguments contained at the Revised Determination of September 20, 2000 did not prove, that the threat of injury is a direct consequence of imports. Thus, articles 39 and 42 of the Foreign Trade Code (FTC) are violated.

11. This Panel will examine and answer, under Article 238 of the Federal Fiscal Code (FFC) which is the standard of review that the Panel must apply, each of the issues filed by the Claimants.

II.A The Determination issued by the IA on November 23, 2001 is not the Remand Report in conformity with the Instructions of the Panel

12. The Claimants allege that the Determination issued by the IA on November 23, 2001 is not the Remand Report on which the IA must have analyzed the threat of injury in conformity with the Panel Decision of August 3, 2001 as may be demonstrated in the publication that the IA made of such Determination in which it states that a review of the Original Determination of January 23, 1998 is done and not a review of the Revised Determination of September 20, 2000. According to the Claimants the IA must review its Revised Determination and not limit itself to the revision of the Original Determination. Therefore, the IA did not comply with the Panel´s Order and again it opposes the Panel´s authority, as it had been done before, to review the Revised Determination of September 20, 2000.

[2] See paragraphs 186- 189 of the Remand Report.

13. By virtue of the foregoing, the Claimants consider that the Panel is not bound to examine the Remand Report and that the only thing this Panel needs in order to resolve this case is the analysis of the Arbitration Body, the prior writs and motions filed by the Claimants and the motion filed in opposition to the Remand Report.

14. On the other hand, the IA states that the title of the Remand Report comprehends what is set forth in the Notice regarding the first request of review before the Panel in which the only determination that is mentioned is the Final Determination of January 23, 1998. Such title does not imply that the IA did not take into consideration the Revised Determination of September 20, 2000.

15. This Panel considers that the determination of November 23, 2001 has the character of Remand Report as provided in NAFTA Articles 1904.8 and 1904.9 and Rule 73(1) of the Rules of Procedure since it was issued by the Investigating Authority in compliance with the Panel Decision's Order of August 3, 2001.

16. Likewise, this Panel considers that the Investigating Authority has reviewed the Revised Determination of September 20, 2000 since it has included in paragraph 12 of the "Resultandos" of the Remand Report that such Determination was issued in compliance with the final report of the SG-WTO. Further, in paragraph 189 of the Remand Report of November 23, 2001, the IA ratifies the sense of several determinations issued by the IA, and consequently it ratifies the countervailing duties imposed by such determinations, among which the Revised Determination published at the Federal Official Gazette (FOG) of September 20, 2000, is included.

17. By virtue of the foregoing, this Panel considers that the Claimants arguments are unpersuasive and do not prevail, and that they do not sustain the assertion of the Claimants that the IA continues opposing the authority of the Panel to review the Revised Determination of September 20, 2000.

II.B The IA presumes to base its conclusions in Administrative Record 2 that it is not before the Panel

18. The Claimants consider that the SE has not formally filed the AR2 before the responsible Secretariat, nor has it formally recognized that AR2 is part of the Administrative Record under the Remand Report of November 23, 2001, and due to the lack of administrative record the Panel must issue its final decision on behalf of the Claimants.

19. This Panel considers that the argument of the Claimants are not persuasive since as of April 10, 2001, the Panel issued an Order in which the IA must file the AR2 and that such Authority complied with that Order, as was recognized by the Panel in its Order of April 19, 2001, in which the Panel stated that such record has been filed.

Furthermore, it was upon the presentation of such record that the Panel granted the parties an additional opportunity to file briefs and oral arguments regarding the Revised Determination of September 20, 2000.

20. By virtue of the foregoing, this Panel will take into consideration the motions filed by the parties before the Panel during the review proceeding and the documents contained in AR and in AR2 that are before the Panel.

II.C The SE presumes to base its new determination in documents that do not form part of the AR: Specifically references made to Record 1912 contained in paragraphs 31, 53 and 63, among others.

21. The Claimants allege that the IA presumes to incorporate in to the Record documents that do not form part of the AR. Specifically Claimants refer to references made to Record 1912 contained in paragraphs 31, 53 and 63, among others of its new determination, that correspond to work product of the DGADS. This constitutes privileged information that the Panel returned to the IA and regarding which the Panel determined not to include within the AR. By virtue of the foregoing, the Claimants request the Panel to reject any reference made by the IA to such documents.

22. The IA alleges that it is not true that it presumes to incorporate documents that do not form part of the Administrative Record, and that it is valid that the Investigating Authority refers for its analysis to such documents, because such documents are part of the Administrative Record according to the Rules of Procedure. According to the IA, it is a very different situation when the documents are before the Panel and when those documents are not part of the Administrative Record, as the Claimants contend. If the Binational Panel has returned the privileged information that the IA filed, this is unrelated to the fact that such information is part of the Administrative Record, because this information was listed in the administrative record index.

23. This Panel considers important to state that the issue of the inclusion or non inclusion of Record 1912 within the AR was extensively analyzed by this Panel under the provisions of the Rules of Procedure and it decided to reject inclusion of this material in the AR. It is particularly important to point out that this rejection, as demonstrated in paragraphs 108 through 121 of the Final Decision of the Panel of August 3, 2001, was done after the refusal of the IA to renounce the privilege claimed relating to all the parties as set forth in Rule 41(4) of the Rules of Procedure, and that no party requested the disclosure of such privileged information.

24. The IA alleges fundamentally that one thing is that a document is before the Panel and other thing is that such document is not part of the AR and the fact that the Panel had returned the proprietary information does not mean that such information is not part of the AR. This Panel does not agree with this interpretation from the IA because

misconstrue the Administrative Record concept and the meaning of "review on the record" in this proceeding. Review on the record means that the parties and Panel have before them the body of material that provided the basis for the determination of the IA. The role of the Panel is not to make new findings, but to determine if the findings of the IA are supported by the record under the relevant law, and solicit the arguments of all of the parties, grounded in the record, on that question.

25. The IA made a strategic or policy decision at the outset of this proceeding to attempt to bring before the Panel information that the IA would not make available to the Claimants. This Panel rejected that effort as indicated above (paragraph 23). This rejection means the material, for purposes of this review, legally does not exist. This review, therefore, can only be of material that is legally recognized as part of the record and available to all of the parties, regardless of its actual existence in the confidential files of the IA.

26. Therefore and by virtue of the foregoing, this Panel does not accept nor will it take into consideration any reference that the IA has made in its Remand Report to such Record 1912 as the ones found in paragraphs 31, 37, 53 and 63 as well as in paragraphs 32, 33 and 64 which relate respectively to the sources of information contained in paragraphs 31 and 63 of the same Remand Report, i.e, among others, to Record 1912. In other words, all the issues supported by such information will be considered as non demonstrable.

II.D The analysis provided by the IA in the new Determination of November 23, 2001 is a reiteration and repetition of the arguments used in the two previous Determinations (January 23, 1998 and September 20, 2000) and, therefore, the arguments filed by the IA in the Determination of November 23, 2001 do not prove, as the arguments contained in the Revised Determination of September 20, 2000 did not prove, that the threat of injury is a direct result of imports. Thus articles 39 and 42 of the FTC were violated

27. The Claimants allege that a careful comparison of the First and Second Revised Determinations reveals that the latter is not a new analysis about the legal grounds and reasoning for its decision concluding that there exists a threat of injury to the domestic production caused by HFCS imports according to the Panel's instructions. According to the Claimants, the IA in its Second Revised Determination only includes a section of additional background in paragraphs 1-28 and some new paragraphs, i.e., paragraphs 55-57 and 163-165, that have repeated textually and with some changes in the edits, the First Revised Determination in paragraphs 29-54, 58-162 and 166-188,inclusive. According to the Claimants, the new paragraphs 55-57 and 163-165 simply repeat information and analysis that has been included in the First Revised Determination.

28. According to the Claimants, the similarities between the text of the Remand Report and the First Revised Determination clearly demonstrate that the IA continues violating the AA (Antidumping Agreement), FTC, Foreign Trade Code Regulation (FTCR) and Federal Fiscal Code (FFC) and as a consequence, the IA has newly determined a threat of injury with legal grounds and facts, conclusions and analysis that this Panel and the SG-WTO and its Appellation Body have determined constitute a violation of the international obligations of Mexico, and that this Panel in particular has found constitute a violation of its domestic legislation.

29. The IA considers that the threat of injury to domestic production was duly proven in the Remand Report of November 23, 2001, which is demonstrated by the information that forms part of this review, and that the IA timely complied with one of the two options given by the Panel in its Final Decision.

30. In order to decide the question whether the Remand Report is merely a reiteration of the arguments given by the IA in its Original and Revised Determinations and that it does not offer a new analysis, it is important to remember the insufficiencies found by this Panel in the Revised Determination, that lead the Panel to resolve that the IA had not demonstrated the threat of injury in such determination.

31. The insufficiencies that the Panel found in the Revised Determination were analyzed in detail in five sections of its Decision named:

- Imports Subject to Price Discrimination and Export Capacity, paragraphs 755-781;
- Price Analysis, paragraphs 782-794;
- Impact on the Domestic Industry, paragraphs 795-802;
- Compliance with the Antidumping Agreement, paragraphs 805-817, and
- Compliance with Mexican Law, paragraphs 818-828.

32. Following, the Panel summarizes the main deficiencies that it found in the Revised Determination in each of the following issues:

II.D.A Imports Subject to Price Discrimination and Export Capacity

33. As it was noted by this Panel in its Final Decision, paragraphs 762 and 763, the IA, in its Revised Determination, reasoned as follows in approaching the subject of future imports 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:

- The alleged Restraint Agreement would permit the soda bottlers to use 350,000 tons of HFCS[3];

[3] See paragraph 58 of the Revised Determination.

- This HFCS amount would be purchased entirely from the domestic producers[4], and
- Imported (i.e. dumped) HFCS would be purchased entirely by Mexican industries other than by the soda bottlers[5].

34. This Panel found that each one of these assumptions was unsustainable by virtue of the following considerations:

35. First, the Panel found that the IA's assumption that the alleged restraint agreement would permit the soda bottlers to increase their consumption of HFCS to 350,000 tons was not sustainable[6]. The IA did not state in the Revised Determination where it derived the figure of 350,000 tons of HFCS that allegedly the soda bottlers would utilize[7]. The Panel found that total HFCS consumption in 1996 was 192,906 tons[8] 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 was directly contrary to the intent of the alleged restraint agreement, because that would allow the displacement of an additional 157,904 tons of sugar in 1997.

36. Likewise, the Panel considered that it was not reasonable for the IA to assume without further inquiry what the terms of the alleged restraint agreement were 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.

37. About the assumption that the 350,000 tons HFCS would be bought directly from domestic producers. This Panel found it unsustainable for the following reasons:

38. The Panel considered that 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 was hard to believe. There was no basis for the IA to support what it called a "conservative scenario". Furthermore, the Panel reasoned that the purpose of the alleged restraint agreement must be understood to be protection of the sugar industry, not promotion of the domestic HFCS industry.

39. But not only that, the Panel considered that there was no reason to assume the soda bottlers could buy the amount of 350,000 tons of HFCS from domestic producers.

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[4] See paragraph 58 of the Revised Determination.

[5] See paragraphs 56, 58, 59 and 60 of the Revised Determination.

[6] See paragraphs 769, 770, 772 and 773 of the Final Decision of the Panel of August 3, 2001.

[7] See paragraph 58 of the Revised Determination.

[8] See paragraph 38 of the Revised Determination.

There was no basis to conclude that the HFCS domestic producers could produce the 350,000 tons the IA projected since domestic production of HFCS in 1996 was less than 50,000 tons, and the IA did not specify any element of the AR that allowed it to arrive at the conclusion that the production would jump seven-fold in one year[9].

40. Regarding the IA's assumption that other Mexican industries, other than the soda bottlers, would buy all the HFCS imports (dumped), this Panel also considered it unsustainable because of the following reasons:

41. This Panel observed that once again without explanation and without a legal basis, the IA had assumed 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[10], but the IA had concluded that in 1997-1998 they would consume the entire volume of imported HFCS, which the IA projected to be 334,000-350,000 tons[11]. The Panel considered that the above estimate not only would 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[12]. 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, was found hard to believe.

42. The Panel also considered that the IA did not explain anywhere in its Revised Determination why these other industries would suddenly turn to HFCS in such large quantities and concluded that the absence of an explanation, of references to the AR, or even a statement of the supporting facts was not merely logically unacceptable but constituted by itself a violation of the AA's requirement of transparency in decisions. It is to be mentioned that this Panel recognized that the IA in its Revised Determination had referred to a survey it had conducted, but it was of a non-representative sample and dealt only with the maximum potential HFCS consumption, with no indication of intention to convert away from sugar. According to this Panel, 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 furnished no factual basis.[13]

II.D.B Price Analysis

[9] See paragraphs 775-777 of the Final Decision of the Panel of August 3, 2001.

[10] See table 1 of paragraphs 758 and 759 of the Final Decision of the Panel of August 3, 2001.

[11] Ibid.

[12] See paragraph 779 ibid.

[13] See paragraphs 779 and following paragraphs of the final decision of the Panel of August 3, 2001.

43. Regarding the impact that the volume of imports at the supposed dumped prices would have over the sugar prices, the IA's finding was derived from the assumption that the projected imports of dumped HFCS would adversely affect sugar prices.

44. During the period of investigation, 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 could not be assumed that even a major increase in HFCS imports would necessarily depress sugar prices. Without a doubt, the Panel found that it would be surprising if a 4% factor on the market could drive the price of the remaining 96%.

45. The Panel also noted that the IA cited several tests to support its conclusion that sugar prices could be expected to decline by 9% in 1997. The "Granger causality proof" was never satisfactorily explained, nor was the data tested identified. Likewise, the IA referred to its use of simultaneous equations for a price estimate, but never explained those equations or exactly what they demonstrated.

46. Likewise, the Panel found deficiencies in the IA arguments of undervaluation and a "natural gap" between prices of sugar and HFCS and emphasized that the Mexican price data cited were admittedly "merely illustrative" and other data was 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 conveyed no clear message. Particularly disturbing, from the Panel's viewpoint, was the fact that the IA never made it clear how it arrived at its projected 9% decline in sugar prices for 1997.

47. Finally, the Panel again reiterated the inadmissibility of the import volume projections. In particular, this Panel indicated that the IA assumption 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, was not explained in the Revised Determination and seemed not to be supported in the AR.

II.D.C Impact on the Domestic Industry

48. The Panel in this section analyzed the arguments of the IA contained in the Revised Determination that lead the IA to conclude that there existed a threat of injury to domestic industry and found them insufficient due to the following reasons:

49. The Panel found that the analysis of the IA that had identified the threat of injury to domestic industry was not acceptable because in such analysis the IA had clearly demonstrated 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. The IA, without taking into consideration such improvement and without an adequate explanation, determined that the projected increase on HFCS imports in dumped conditions could cause a material injury to domestic industry.

50. Likewise, the Panel pointed out the lack of an adequate explanation by the IA regarding why increased imports in 1997 would cause injury to the domestic industry health when the existing increases in the previous year, in 1996, in fact did not cause such injury. Furthermore, the Panel rejected the causal link between HFCS imports and the sugar industry conditions concluding that there were financial problems of the domestic industry not generated by import competition.

II.D.D Compliance with the Antidumping Agreement

51. In this section the Panel pointed out the requirements of the Antidumping Agreement especially in Articles 3.1, 3.4 and 3.7 of the AA and the elements that the IA must have taken into consideration to determine the impact on domestic production of dumped imports. This Panel found that the IA had not considered those elements in its Revised Determination due to the following reasons:

52. The Panel considered that even though the Revised Determination looked at more information with respect to the condition of the domestic industry as instructed by the SG-WTO, the IA's analysis remained 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 did not provide an adequate explanation as to why this would then negatively impact the domestic industry. The fact that there was an increase in imports, even in the face of declining domestic market prices, did not in and of itself necessarily lead to a clearly foreseeable imminent threat to the domestic industry, as required by Article 3.7 of the AA.

II.D.E Compliance with Mexican Law

53. In this section the Panel pointed out the requirements of the Mexican Laws for the IA to determine a threat of injury, in particular Articles 39 and 42 of the FTC and Article 68 of the FTCR. After reviewing the requirements that the IA must have complied with, the Panel concluded that the IA had not met such requirements due to the following reasons:

54. After recognizing that in the Revised Determination, the IA had taken into account other elements of Article 42 of the FTC, the Panel concluded that the projection of the supposed sudden and massive HFCS imports in 1997 was not based on facts, but

was instead based on allegations, conjectures and remote possibilities. It also concluded that the AR did not support a finding that the threat of injury was a direct result of the imports.

55. Finally, the Panel considered that the IA's analysis fell short of providing a meaningful or defensible explanation as to why HFCS imports would injure or threaten to cause injury when they showed at that time an improving domestic industry. Likewise, the Panel determined that the IA had failed to show a domestic industry that was susceptible to injury that may be caused by future HFCS imports.

III. ANALYSIS AND RESOLUTIONS OF THE PANEL ABOUT THE REMAND REPORT

56. As established before, the Claimants argue that the analysis provided by the IA in the new Determination of November 23, 2001 is a reiteration and repetition of the arguments used in the two previous Determinations (January 23, 1998 and September 20, 2000) and, therefore, the arguments filed by the IA in the Determination of November 23, 2001 do not prove, as the arguments contained in the Revised Determination of September 20, 2000 did not prove that the threat of injury is a direct cause of imports, and thus articles 39 and 42 of the FTC were violated

57. The Claimants allege that a careful comparison of the First and Second Revised Determinations reveals that the latter has only included the section of additional background in paragraphs 1-28 and some new paragraphs, i.e., paragraphs 55-57 and 163-165 have repeated textually and with some changes in edits the First Revised Determination in paragraphs 29-54, 58-162 and 166-188. According to the Claimants, the new paragraphs 55-57 and 163-165 simply repeat information and analysis that has been included in the First Revised Determination.

58. The IA considers that the threat of injury to domestic production was duly proven in the Remand Report of November 23, 2001, which is demonstrated with the information that forms part of this review.

59. This Panel wants to point out that in its Final Decision, it clearly established that it granted the IA the option 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. (emphasis added by the Panel)

60. In order to determine in which measure the Remand Report is a new evaluation consistent with the findings of this Panel in its Final Decision, the Panel considers important to analyze how the IA responded in its Remand Report to the principal violations of the AA and the domestic legislation that the Panel identified in the

Revised Determination regarding threat of injury. In this analysis the Panel will decide whether the IA effectively carried out a new analysis and corrected the principal deficiencies discovered by the Panel in its Revised Determination. The Panel will then proceed to make this analysis and determination based on each one of the issues identified in the previous section of this Decision.

III.A Imports Subject to Price Discrimination and Export Capacity

61. A first issue that the Panel considers important to point out is that while making a comparison between paragraphs 29 to 59 of the Remand Report regarding imports subject to price discrimination and the correlative paragraphs 34 to 54 and 58 to 61 of the Revised Determination of September 20, 2000, this Panel corroborates that in effect paragraphs 29 to 59 of the Remand Report have repeated with slight changes the text of paragraphs 34 to 54 and 58 to 61 of the Revised Determination, as argued by the Claimants. Likewise, the Panel found that in the section Imports Subject to Price Discrimination, while making its projection about the future volume on imports, the IA derived its conclusions from the same assumptions it made while preparing the Revised Determination and that this Panel found were not legally grounded.

62. In paragraph 53 of the Remand Report, for instance, the IA newly assumed that the supposed restraint agreement would allow the soft drink bottlers to consume 350,000 tons of HFCS. In effect, paragraph 53 of the DR states:[14]

> "In order to determine the probability of the HFCS increase of imports coming from the United States, supposedly the restraint agreement exists and is strictly complied with by the parties, the Secretary based on the total sugar consumption projections for 1997 and 1998 estimated the industrial sector consumption, different from the soft drink bottlers. Likewise, it considered in its analysis the sugar substitution grades for HFCS determined on the information of the industrial users. The IA observed that in a "conservative scenario" in which HFCS consumption is considered limited to 350,000 annual tons, and it would be furnished by domestic production of HFCS whose installment capacity would be occupied 100%, therefore the consumption of HFCS by other industries would increase imports. See paper work of the Direccion General Adjunta de Daño y Salvaguardas, folio number PTDA.01-97-FIN, January 21, 1998, record 1912 of the administrative record index".

63. The Claimants argue that the IA in this paragraph and in the other paragraphs of the Remand Report simply reiterate the amount of 350,000 tons without explaining where the IA obtained such figure and without offering proofs that it has inquired more

[14] This paragraph is identical to paragraph 58 of the Revised Determination of September 2000.

about the Restraint Agreement. Therefore, this Panel must declare this assumption is equally not legally grounded in the Remand Report.

64. The IA answers that this allegation of the Claimants is inadmissible because paragraph 53 of the Remand Report clearly indicates where the figure of 350,000 tons comes from, i.e., Record 1912 of the administrative record index containing the working papers of the DGADS, within which are included the projections of consumption of total sugar for 1997 and 1998, and so the source of the information where the figure of 350,000 tons has been obtained is specified. The IA also mentioned some newspaper notes filed by the CRA during the investigation and a partial photocopy of an Economic Report prepared by Grupo Financiero Bancomer on October, 1997.

65. In other words, unlike the Revised Determination, the IA in its Remand Report tries to support the validity of its assumption that the supposed restraint agreement would allow the soda bottlers to consume 350,000 tons of HFCS by the fact that in the Remand Report the IA includes concrete references to the AR where according to the IA such figure is found, that is, Record 1912 of the Administrative Record, identified as the working papers of the DGADS.

66. It should be also recognized that the IA in its DR also included a paragraph that did not exist in the reviewed resolution in which it presumes to sustain the premise that the soft drink bottlers could consume the 350, 000 tons of HFCS. In effect, paragraph 57 of the DR states the following:

> Furthermore, the growth in the utilization of high fructose corn syrup of the soft drink bottlers is sustained in the growing tendency observed in the sales to such users during the investigating period January-December, 1996, as well as in the information available in the administrative record of the investigation in respect of the predictions of high fructose corn syrup consume of such users, which are based in the estimated dynamism of the soft drinks production, and nowtherfore, in the demand sweetener. Particularly of high fructose corn syrup. In support of the above, in the administrative record were included two studies of recognized specialist in the sweeteners industry about a perspectives of demand of high fructose corn syrup in Mexico by the soft drinks industries. See the Comments, Information and/or Evidences, Technique Industrial Expert Testimony of Gustavo Emilio Basurto and Eduardo Barzana García respectively, folios 9703376and 9703377, both of September 30, 1997, nonproprietary version, volume 37, pages 373 and 471, proprietary version, volume 151, records 1206 and 1208 of the administrative record index.

67. This Panel, however, as it was clearly stated in paragraph 24 of this Decision, does not accept nor take into account any reference made by the IA in its Remand Report to Record 1912, since such record is not before the Panel. In other words, all the

questions related to such information cannot be considered as capable of proof. Regarding the newspaper notes filed by the CRA during the investigation and a partial photocopy of an Economic Report prepared by Grupo Financiero Bancomer on October, 1997, this Panel clarifies that the IA in its response to the motions in opposition to the Remand Report expressly stated that the 350,000 tons figure was obtained from the mentioned Economic Report discussing the restraint agreement whose existence has been denied by the IA. Therefore, this Panel considers that since the existence of such an agreement has not been proven, and has been denied by the IA, the IA cannot take into consideration the figure of 350,000 tons as the limit to the consumption of the soda bottles since it is based on a document whose content the same Authority has denied.

68. Regarding paragraph 57 of the Remand Report the IA only reproduce some asserts that had been pointed out in other sections of the Revised Determination and nonetheless in the Remand Report are references to the technical reports from the experts Gustavo Emilio León Basurto and Eduardo Barzana García, a strict analysis of them shows that this reports were carried out to answer some questions such as products similarity, technical substitutes, and in general price ranges. In opinion of this Panel this reports do not prove that the assumed restriction agreement shall let the soft drinks bottlers purchase 350,000 tons of HFCS.

69. In sum, by virtue of the foregoing and the fact that the IA in its DR once again neither explains nor offers any new evidence that the IA tried to identify or investigate the terms of the restraint agreement, this Panel finds, once again, that this first assumption is unsustainable.

70. As can be derived from paragraph 53 of the Remand Report, the IA again adopted the second assumption that it had accepted in its Revised Determination, that is, that the amount of 350,000 tons would be acquired directly from domestic producers.

71. The Claimants allege that the IA repeats in the Remand Report the same that was said in its Revised Determination but it does not provide new evidence that the national producers of HFCS could produce 350,000 tons. The IA argues that this allegation of the Claimants is also inadmissible because in Record 1912 of the administrative record index in which the working papers of the DGADS are identified, there is evidence of the production increase of HFCS domestic producers and its capacity to produce 350,000 tons. The IA, likewise, mentioned the minutes of the verification visit to Arancia in which the installed capacity of such enterprise was supposedly established.

72. Regarding the possible capacity of domestic producers to produce 350,000 tons and the evidence that supposedly is found in Record 1912, the Panel does not accept and does not take into account such reference, since all the information referred to in such

Record is not before the Panel and therefore, the issues related to such information cannot be proven. About the minutes of the verification visit to Arancia, this Panel does not consider that such minutes constitute enough evidence to support the assumption that the domestic producers may produce 350,000 tons.

73. By virtue of the foregoing, the Panel considers such second assumption as unsustainable.

74. Finally and as set forth in paragraphs 51, 52, 53 and 54 of the Remand Report, the IA also takes into consideration the third assumption contained in the Revised Determination, that is, that imported (i.e., dumped) HFCS would be purchased entirely by Mexican industries different from soft drink bottlers.[15]

75. The Claimants allege that once more the IA simply reiterates its surprising figures for the increased HFCS consumption (334,000-350,000 in 1997-1998) by industries different from soft drink bottlers and that the IA does not provide new information in the Remand Report that may explain this incredible figure and why these other industries may suddenly use HFCS.

76. The IA in its Remand Report, states that the information provided by consumers, different from soft drink bottlers, demonstrate the incorporation of HFCS in their production processes and the degree of substitution of sugar by HFCS.[16] Additionally, the IA alleges that the probability of the increase in use of HFCS by industries different from soft drink bottlers was supported by the observed purchases of such industries during 1996.

77. This Panel, after reviewing the information and supposed evidence cited by the IA in its Remand Report to support its third assumption that imported (i.e., dumped) HFCS would be purchased entirely by Mexican industries different from soft drink bottlers, reaches the same conclusion that it had reached while reviewing this issue in the Revised Determination due to the following reasons.

78. The IA again in its Remand Report assumes that industries such as candy, baked goods and others, which consumed 77,472 tons of HFCS in 1996,[17] would consume the entire volume of imported HFCS, which the IA projected to be 334,000-350,000 tons. The IA tries to support this assumption in the observed sales of Arancia and ALMEX during 1994-1996. However, this Panel considers that the rate of sales of such enterprises cannot justify the assumption that there would be an increase of 80 percent in sales, accompanied in the same year by a 67 percent loss of the pre-

[15] See paragraphs 51, 52, 53 and 54 of the Remand Report.

[16] See paragraphs 119-125 of the Motion in response to the Objections to the Remand Report of the claiments filed by the IA on January 7, 2002 confidential version.

[17] See Table 1 of the Final Decision of the Panel of August 2001.

existing market, sales to the soft drink bottlers industry, which in 1996 acquired 67 percent of the volume of HFCS imports to Mexico.

79. Second, the IA in its Remand Report continues to say, without explaining why, that industries different from soft drink bottlers would suddenly consume HFCS in such large quantities. The IA, as it did in its Revised Determination, again points out how, but not why HFCS consumption would increase. In this way, the IA in its Remand Report makes no reference to the questions raised by the Panel about costs and technological impediments to the use of HFCS in place of sugar, short shelf life, conversion of equipment, etc. In the other hand, the IA again makes reference to a survey[18] it conducted which, according to what this Panel stated in its Final Decision, was based on a non-representative sample[19] that never included the question whether there was real interest of other industries to substitute sugar by HFCS.

80. In sum, in view of the fact that the IA once again neither explains nor offers evidence that would answer why industries different from soft drink bottlers would suddenly consume HFCS in such large amounts, this Panel considers this third assumption as unsustainable.

III.B Price Analysis

81. The IA carried out its examination about the behavior of prices of HFCS imports coming from the United States of America and of sugar prices of domestic production in paragraphs 77 through 123 of the Remand Report. According to the IA such prices demonstrated the negative effect of dumped imports during the period of investigation based on a detailed analysis of the month-to-month behavior of sugar prices and HFCS prices, the sub-valuation prices and dumping prices calculated for the investigated imports, a statistical causal nexus proof, the prevailing economic background and, especially, the existence of a natural gap between the two product's prices.

82. On the contrary, the Claimants allege that in the Remand Report the IA simply ignores the observations made by the Panel in its Final Decision over the projections of sugar prices made by the IA for 1997 and adopted the same analysis of the Revised Determination. In this manner, without any explanation or additional analysis, according to the Claimants, the IA in its Remand Report continues predicting a 9% decline of the average prices of sugar in the domestic market. Likewise, the IA does

[18] See paragraph 53 of the Remand Report.

[19] The survey carried out to bread industry, for instance, only was based in three enterprises pertained to the same industrial group and referred to products which does not represent a high proportion of its production. However, bread according to the IA will contribute with the 86% of the estimated consumption of the 334,000 tons of HFCS.

not take into consideration the observations of the Panel regarding the sub-valuation and the natural gap of the two prices.

83. This Panel agrees with the Claimants that the IA in its Remand Report conducted a similar analysis to the one it carried out in its Revised Determination and failed to take into consideration the observations made by the Panel in its Final Decision on the analysis of prices issue.

84. In this regard, nowhere in the Remand Report does the IA explain why it did not take into consideration the observations made by the Panel, such as the ones regarding the effect on sugar prices of the roughly 300,000 tons of additional domestic production of HFCS that it projected in its Revised Determination and that it projected again in its Remand Report. Or the one regarding how it is possible to reconcile its conclusion that HFCS imports would have a negative impact over sugar prices when during the period of investigation (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. In other words, based in what logic is it possible to assume that a great increase in HFCS imports which represent a 4% of the market would necessarily depress sugar prices, this is, the price of the remaining 96% market, when this has not occurred during the period of investigation? These inconsistencies were never resolved by the IA in its Remand Report, notwithstanding the Panel's instructions to the IA that in the event it decided to make a new evaluation, it must address the Panel's determinations.

85. In its decision, this Panel clearly established that there were questions about the IA's analysis that were especially problematic and that there were important omissions in the same analysis, such as the fact that in its Revised Determination the IA never makes it clear how it arrived at its projected 9% decline in sugar prices for 1997. 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. Notwithstanding the above observation made by the Panel, the IA in its Remand Report omits this important consideration in its analysis without any explanation or justification.

86. Likewise, the Panel pointed out that one of the major factors not taken into account by the IA's price analysis was that the Mexican soft drink industry was experiencing trememndous growthduring the period of investigation. Assuming the restraint agreement would freeze these bottlers' consumption of HFCS, there would be room for a major expansion of sugar sales with its consequent effect on prices. Notwithstanding the observation made by the Panel, the IA in its Remand Report omits this important factor in its analysis without any explanation or justification.

87. By virtue of the foregoing considerations, this Panel considers that the assumption of the IA that HFCS imports would have a negative effect in sugar prices is unsustainable.

III.C Impact on Domestic Industry

88. As part of its Remand Report, the IA analyzed the impact of the dumped goods on domestic industry and argues that it carried out a complete analysis of the indices and economic and financial factors of domestic production. It concludes that due to the behavior of profit sensibility, potential effects of benefits, income-yield capacity, level of indebtedness and the ability to raise capital, the sales incomes of industry would decline significantly as a reflex to a reduction in prices and sales volumes of sugar as a consequence of the dumped HFCS imports. Thus, as a result there will be a profit reduction, reduced return on investment and the ability to raise capital, while the t capacity to reduce the indebtedness of the industry will beimpaired.

89. The Claimants argue that again the IA in its Remand Report simply carried out a similar analysis to the one done in its Revised Determination and repeated, for instance, the same positive indicators of the domestic industry status and made the same wrong projections, notwithstanding that this Panel had stated its doubts about the feasibility and transparency of such projections regarding the health of the sugar industry. Likewise, they argue that in the Remand Report, the IA again does not offer enough explanation about why HFCS imports are the cause of the supposed injury to the sugar domestic industry.

90. This Panel, after reviewing carefully the sections of the Remand Report where the IA analyses the impact on domestic industry of dumped HFCS imports and the evidence referred to in the AR, has reached the conclusion that the IA, on this issue, once again conducted a similar analysis to the one the IA carried out before in its Revised Determination, without taking into consideration the observations made by this Panel in its Final Decision.

91. In effect, an analysis of each and every indices and economic and financial factors of the domestic industry that the IA reviewed in its Remand Report reveals that they are similar to the ones taken into account in its Revised Determination. In this way, the IA finds again, as it found in its Revised Determination, that the domestic industry's market[20] share declined and the domestic sales[21] declined, but at the same time, the IA noted that there were indicators that revealed a health status of domestic industry such as inventory increases and productivity improves[22]. While salaries may have declined,

[20] See paragraphs 126 of the Remand Report and 130 of the Revised Determination.

[21] See paragraphs 127 of the Remand Report and 130 of the Revised Determination.

[22] See paragraphs 128 of the Remand Report and 131 of the Revised Determination.

there was an increase in the number of people employed and capacity utilization increased[23].

92. Likewise, about financial indicators, the IA in its Remand Report found the same positive indicators as it had found in its Revised Determination, such as increases in operating margins and net margins[24] and an increase in return on investment[25]. In other words, the IA found again, in its Remand Report as it did in its Revised Determination, that even though imports increased and the sales in dumped conditions increased, the domestic industry health improved as a whole based on the operating margins, net operating margins, return on investment and capacity utilization.

93. Notwithstanding the foregoing, and the fact that the Panel clearly established in its Final Decision that the analysis which the IA used in its Revised Determination to establish threat of injury on domestic industry was not acceptable, since in the same analysis the IA demonstrated a healthy status of the domestic industry notwithstanding HFCS import increases and the dumped sales conditions, the IA in its Remand Report reaches the same conclusion again, under the same circumstances and without offering new evidence or an adequate explanation.

94. Indeed, the IA in its Remand Report and notwithstanding the improvement of domestic industry, re-determined that the projected increase on dumped HFCS would cause material injury to that domestic industry. As part of its analysis, the IA again projected price levels and domestic industry sales that would decline in 1997[26], 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[27], as well as an inability to service debt or attract capital[28].

95. In sum, this Panel considers that the analysis carried out by the IA in its Remand Report is supported basically by the same rationale as the Revised Determination and that the IA does not provide an adequate explanation as to why the dumped imports would then negatively impact the domestic industry. By virtue of the foregoing, the Panel determines that the analysis of the probable impact of dumped goods on domestic industry offered to sustain the determination of threat of injury is not consistent with Articles 3.1, 3.4 and 3.7 of the Antidumping Agreement, or Articles 39 and 42 of the FTC and Article 68 of the FTCR.

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[23] See paragraphs 129 and 130 of the Remand Report and 132 and 133 of the Revised Determination.

[24] See paragraphs 140 and 143 of the Remand Report and 143 and 144 of the Revised Determination.

[25] See paragraphs 142 of the Remand Report and 145 of the Revised Determination.

[26] See paragraphs 151 of the Remand Report and 138 of the Revised Determination

[27] See paragraphs 151 of the Remand Report and 89 of the Revised Determination

[28] See paragraphs 162 of the Remand Report and 89-100 of the Revised Determination

96. For all the above reasons, this Panel finds that the IA has not demonstrated the existence of a threat of sufficient imminent material injury to justify the imposition of countervailing duties and, as a consequence, it issues the following:

ORDER

Based on Articles 14 and 16 of the Political Constitution of the United Mexican States; Articles 1904 and 1911, 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 Foreign Trade Code; 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 Foreign Trade Code; and all other legal provisions, and on the bases contained in same, issues the following: Order:

Whereas:

1. The IA has had multiple opportunities to both review the material in the administrative record and to expand upon it as a result of the first review by the WTO-DSB; and

2. The IA has twice failed to demonstrate to this Panel that the administrative record supports its conclusion that imports of HFCS from the United States pose a threat of injury to the Mexican sugar market; and

3. Under the terms of NAFTA Chapter 19, panel review of these determinations is to be based exclusively on the administrative record.

4. That there exists no support in the combined record resulting form the original investigation and from the investigation carried out by the IA regarding its Original Decision, for the conclusion of the IA that imports of HFCS from the United States pose a threat of injury to the Mexican sugar industry, rendering the three determinations adopted by the IA inconsistent to international provisions and applicable laws.

5. As a result of this determination, this Panel also finds that the imposition and collection of the antidumping duties posed to HFCS imports coming from the United States of America had been and continue being inconsistent to international provisions and applicable laws, inasmuch as they were the result of the unlawful conclusion of the IA regarding threat of injury also inconsistent to international provisions and applicable laws.

Now, therefore, it orders the following:

This Panel remands this matter to the IA to take action consistent with the Panel's Decision that the duties have been imposed and collected contrary to law, no later than 30 days following the entry of this decision.

Issued on April 15, 2002.

Signature:	**Date:**
Víctor Blanco Fornieles	April 11, 2002.
Víctor Blanco Fornieles	Date
Héctor Cuadra y Moreno	April 11, 2002.
Héctor Cuadra y Moreno	Date
Howard N. Fenton	April 11, 2002.
Howard N. Fenton	Date
Saul L. Sherman	
Saul L. Sherman	Date
Gustavo Vega Cánovas	April 11, 2002.
Gustavo Vega Cánovas (Chairman)	Date