

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

Recourse to Article 21.5 of the DSU by the United States

Report of the Panel

The report of the Panel on *Mexico – Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States* is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 22 June 2001 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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

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I. INTRODUCTION AND FACTUAL BACKGROUND

1.1 On 24 February 2000, the Dispute Settlement Body ("the DSB") adopted the report and recommendations of the Panel in *Mexico - Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* (WT/DS132/R). In that report, the Panel concluded that Mexico's imposition of the definitive anti-dumping duties on imports of high fructose corn syrup, grades 42 and 55, from the United States was inconsistent with the requirements of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement). The panel and the DSB accordingly recommended that Mexico bring its measure into conformity with its obligations under the AD Agreement.

1.2 On 20 September 2000, the Government of Mexico published a final resolution in which it stated that it had revised the original final resolution imposing definitive anti-dumping duties on imports of high fructose corn syrup, grades 42 and 55, from the United States to comply with the Panel report's conclusions and recommendations.¹ Mexico determined to repay provisional duties on entries and guarantees granted for the payment of provisional anti-dumping duties, with interest, for the period 26 June 1997 to 23 January 1998. Mexico also "ratified its conclusion that during the period under investigation, there was a threat of harm to the domestic sugar industry as a consequence of imports of high fructose corn syrup under price discriminatory conditions originating from the United States of America".² The revised final resolution confirmed "the final offsetting duties established during the antidumping investigation".³

1.3 On 12 October, the United States submitted a communication seeking recourse to Article 21.5 of the DSU (WT/DS132/6). In that communication, the United States indicated its view that the measures taken by Mexico to comply with the recommendations and rulings of the DSB were not consistent with the AD Agreement. In particular, in the view of the United States, Mexico's redetermination of a threat of material injury, including its consideration of the impact of dumped imports on the Mexican sugar industry, its consideration of the potential effect of the alleged restraint agreement in its determination of a likelihood of substantially increased importation, and its explanation of the findings and conclusions it reached on all material issues of fact and law, failed to comply with the recommendations and rulings of the DSB and was inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 12.2, and 12.2.2 of the AD Agreement. The United States further stated that because there was "a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB" between the United States and Mexico, within the terms of Article 21.5 of the DSU, the United States sought recourse to Article 21.5 in the matter and requested that the DSB refer the disagreement to the original panel, if possible, pursuant to Article 21.5 of the DSU.

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

"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

¹ Final resolution revising, on the basis of the conclusion and recommendation of the Panel of the World Trade Organization's Dispute Settlement Body, the final resolution of the anti-dumping investigation into imports of high fructose corn syrup, merchandise classified in tariff headings 1702.40.99 and 1702.60.01 of the General Import Tariff, originating in the United States of America, irrespective of the country of provenance, 20 September 2000, MEXICO-1 (hereinafter "Notice of Redetermination"). MEXICO-1 is the official Spanish version of the text, MEXICO 1(a) is the English translation provided by Mexico in this proceeding.

² *Id.* at para. 188.

³ *Id.*

making the recommendations or in giving the rulings provided for in those agreements.”

1.5 A member of the original Panel was unable to participate in this proceeding. The parties agreed on a new panellist on 13 November 2000. As a result, the Panel is composed as follows:

Chairman: H.E. Mr. Christer Manhusen

Members: Mr. Gerald Salembier
Mr. Paul O'Connor

1.6 The European Communities (EC), Mauritius and Jamaica reserved their rights to participate in the Panel proceedings as third parties to the dispute.

1.7 The Panel met with the parties on 20-21 February 2001, and with the third parties on 21 February 2000.

1.8 The Panel submitted its interim report to the parties on 11 May 2001.

II. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

2.1 The **United States** requests the Panel to “review Mexico's redetermination and conclude that Mexico has failed to comply with the conclusions and recommendations of the DSB and Mexico's obligations under the AD Agreement”.

2.2 **Mexico** requests the Panel to “find that the measures adopted by Mexico to comply with the recommendations and rulings of the DSB are consistent with the AD Agreement”.

III. MAIN ARGUMENTS OF THE PARTIES

A. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

3.1 The United States argues that, in its decision of January 14, 2000, the Panel concluded that the Government of Mexico's imposition of a definitive anti-dumping measure on imports of high fructose corn syrup (“HFCS”) from the United States was inconsistent with the requirements of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the “AD Agreement”). In particular, the Panel concluded that in making a threat of material injury determination, Mexico inadequately considered (a) the potential effect of a restraint agreement between Mexican sugar refiners and soft drink bottlers, and (b) the impact of HFCS imports on the domestic sugar industry. The Panel recommended that the Dispute Settlement Body (“DSB”) request Mexico to bring its measure into conformity with its obligations under the AD Agreement.

3.2 In the view of the United States, Mexico has failed to do so. Instead, Mexico has issued a new determination that, while purporting to comply with the Panel's conclusions and recommendations, is essentially a restatement of its original determination. The United States asserts that the new gloss that Mexico has put on its original determination cannot hide the fact that Mexico's threat of material injury determination continues to be based on “conjecture” and “remote possibility,” is contradicted by fundamental facts in the record, and is inadequately explained. Mexico's new determination, therefore, fails to meet the standards required by the Panel and the AD Agreement.

3.3 Specifically, the United States argues, Mexico's redetermination falls far short of what the Panel Report and the AD Agreement require in three important respects.

3.4 First, there is still no basis for the Mexican authority's conclusion that there is a likelihood of substantially increased imports of HFCS from the United States. The United States recalls that the Panel Report concluded that the original determination's finding in this respect violated Article 3.7(i) of the AD Agreement because the Mexican authority gave inadequate consideration to an agreement between Mexican sugar refiners and soft drink bottlers to restrain the soft drink bottlers' use of HFCS. Moreover, argues the United States, the redetermination largely repeats the same information that was previously submitted and again fails to explain how a substantial increase in imports is likely given the fact of the restraint agreement. Consequently, the United States maintains that redetermination suffers from the same defects the Panel identified in its review of the original determination, making the redetermination inconsistent with Article 3.7 of the AD Agreement.

3.5 Second, the redetermination still fails adequately to address the factors set forth in Article 3.4 of the AD Agreement. The Panel Report found that the Mexican authority's original determination violated Articles 3.1, 3.4, and 3.7 of the AD Agreement because it failed meaningfully to analyze both several individual Article 3.4 factors and the overall condition of the Mexican sugar industry. According to the United States, the redetermination merely presents more data concerning the individual Article 3.4 factors without providing the necessary analysis and explanation of these factors. Moreover, argues the United States, the redetermination mischaracterizes pertinent information concerning the condition of the Mexican sugar industry and fails to provide a reasoned and fact-supported explanation concerning why improvements in important industry trends during the period of investigation were not probative in ascertaining the likely future condition of the industry. Consequently, in the view of the United States, the redetermination fails to conform to the requirements of Articles 3.1, 3.4, and 3.7 of the AD Agreement.

3.6 Third, the redetermination is inconsistent with Articles 12.2 and 12.2.2 of the AD Agreement because it relies on analytical models and forecasts without adequate explanation of the inputs on which those methodologies were based.

3.7 The United States recalls that Mexico has had two opportunities to make a threat of material injury determination that is consistent with its obligations under the AD Agreement. The United States asserts that Mexico has done so on neither occasion. Indeed, according to the United States, the facts found by the Mexican authority sufficiently contradict its conclusions on redetermination so as to suggest that it cannot on its record provide a basis for finding threat of material injury. Accordingly, the United States respectfully requests that this Panel review Mexico's redetermination and conclude that Mexico has failed to comply with the conclusions and recommendations of the DSB and Mexico's obligations under the AD Agreement.

1. SECOFI Disregarded The Panel's Conclusion That It Made An Insufficient Finding Of The Likelihood Of Increased Imports

3.8 In its report, the United States notes, the Panel found that SECOFI's conclusion that there was a "likelihood of substantially increased importation" was inconsistent with the requirements of Article 3.7(i) of the AD Agreement.

3.9 In particular, the United States argues, the Panel agreed with the argument of the United States that SECOFI did not adequately consider an agreement between Mexican sugar refiners and soft drink bottlers to restrain the soft drink bottlers' use of HFCS. The United States recalls that it demonstrated to the Panel that the US exporters participating in the investigation informed SECOFI during the pendency of its investigation as to the existence of this agreement, which was publicly revealed by SECOFI Secretary Herminio Blanco Mendoza to the Mexican Senate in September 1997.

3.10 The United States further recalls that the Panel stated that "[t]he question before us is whether SECOFI's analysis provides a reasoned explanation for its conclusion that, assuming [the restraint] agreement existed, there was nonetheless a likelihood of substantially increased importation. "

According to the United States, the Panel provided several grounds for answering this question in the negative.

3.11 One ground was that SECOFI improperly premised its analysis on alleged increases in import levels from 1996, the time of the conclusion of its period of investigation, rather than from the third quarter of 1997, the latest period for which its record contained data on the volume of imports from the United States. The United States notes that the Panel concluded that “[t]he question for purposes of analysis of threat of material injury is not the level of imports already reached, but the likelihood of **increased** imports.” The United States further notes that the Panel criticized SECOFI for “conclud[ing] that such imports would have continued increasing by inertia.”

3.12 An additional ground was SECOFI’s finding that the restraint agreement does not “rule out the possibility” that soft drink bottlers and other users would continue their purchases of imported HFCS. The United States recalls that the Panel concluded that “not ruling out the possibility that imports would continue does not support the finding that there is a **‘likelihood** of substantially **increased** importation’ (emphasis added), as provided for in Article 3.7(i).”

3.13 The United States points out that the Panel also found that SECOFI’s determination did not provide any discussion to support a conclusion that there was a likelihood that users other than soft drink bottlers would increase their importation of HFCS. The Panel found this omission to be critical in light of information in the record indicating that the restraint agreement affected purchasers accounting for 68 per cent of imports and that most other purchasers’ ability to substitute HFCS for sugar was limited.

3.14 Consequently, according to the United States, SECOFI could not implement the Panel’s findings merely by reiterating on redetermination the same arguments and information that Mexico presented to the Panel. Instead, the United States argues, for SECOFI again to conclude that there was a likelihood of increased imports notwithstanding the restraint agreement, it was obliged either to furnish additional explanation or to generate additional data that would support such a conclusion.

3.15 In the view of the United States, SECOFI failed to do so in its redetermination. Instead, it merely repeated the same information and recitation of conclusions that Mexico had previously presented to the Panel.

3.16 In particular, according to the United States, SECOFI made findings in its redetermination that the restraint agreement “does not mean that in periods subsequent to the one under investigation [non-soft drink bottlers’] share in the consumption of high fructose corn syrup would not increase” and that “[b]oth the beverage industry and other industries could acquire the imported product at low prices.” Such findings, the United States asserts, are indistinguishable from the ones in the original SECOFI determination that the Panel rejected. As the United States previously noted, the Panel clearly concluded that findings based on “possible” propensity to increase purchases of imports do not satisfy the requirement of Article 3.7(i) of the AD Agreement that there be a “likelihood of substantially increased importation.” Indeed, the United States argues that Article 3.7 requires that “a determination of threat shall be based on facts and not merely on allegation, conjecture, or remote possibility.” Yet, according to the United States, SECOFI’s continued emphasis on what purchasers other than soft drink bottlers **could** do is clearly based on conjecture and does not provide an adequate basis for the required fact-supported determination on their **likely** behavior.

3.17 In the view of the United States, SECOFI’s redetermination is not flawed merely because it fails to frame its conclusions in the proper language. To the contrary, SECOFI’s redetermination record provides no more support than its original record for any finding that HFCS purchasers other than soft drink bottlers would be likely to increase purchases of HFCS and that these increased purchases would result in substantially increased importations. The redetermination does make two findings that the United States anticipates, based on its arguments to the original Panel, Mexico will

argue support such a conclusion. However, according to the United States, neither finding actually provides such support.

3.18 First, SECOFI postulated that increased imports are likely because imports from the United States increased between the time SECOFI's period of investigation concluded in 1996 and the latest period for which SECOFI had import data, January-September 1997. However, continues the United States, this finding is **precisely** the same finding from the original determination that the Panel specifically rejected in paragraph 7.176 of its Report as inconsistent with Article 3.7(i). In the view of the United States, the finding is equally invalid in the redetermination. Moreover, the United States claims, SECOFI did not relate the 1997 increases to purchasers that were not subject to the restraint agreement.

3.19 Second, SECOFI concluded that HFCS is theoretically substitutable for sugar in a variety of products. The United States believes, however, that this finding is based on the same data that SECOFI submitted to the Panel.

3.20 The United States recalls that the Panel did not find that this material provided adequate support for SECOFI's original determination that there was a likelihood of increased imports and it should not do so here. The United States asserts that the material does not demonstrate that HFCS users other than soft drink bottlers, which accounted for only 32 per cent of HFCS consumption in 1996, actually **were** substituting HFCS for sugar during SECOFI's period of investigation. It merely indicates that these users were theoretically capable of doing so in varying degrees depending on the type of product. The United States further asserts that finding that HFCS users **were likely to** substitute HFCS for sugar merely because they **could** do so as a theoretical matter is sheer conjecture as is SECOFI's unsupported and unexplained assumption of a 50 per cent substitution rate for all HFCS users other than soft drink bottlers. Under Article 3.7, the United States recalls, a threat determination may not be premised on such conjectural assumptions.

3.21 The United States argues that the conjectural basis of this finding is underscored by the magnitude of the substitution into HFCS from sugar that SECOFI projected users other than soft drink bottlers would make. The United States notes that SECOFI projected that HFCS imports from the United States would increase to 350,000 tons in 1998. The United States also notes that SECOFI projected that none of these imports would be by soft drink bottlers, which SECOFI assumed would obtain from Mexican sources whatever HFCS that they were permitted to consume under the restraint agreement.

3.22 Finally the United States recalls that SECOFI reported that HFCS imports from the United States in 1996, the final year of its period of investigation, were 192,906 tons. Based on SECOFI's own data, the amount of these imports attributable to users other than soft drink bottlers was 61,729 tons.

3.23 Consequently, according to the United States, SECOFI in effect projected that imports of HFCS from the United States by purchasers other than soft drink bottlers would increase by **467** per cent in just two years. The United States maintains that SECOFI's redetermination provides absolutely no information on the actual purchasing patterns of HFCS users other than soft drink bottlers that would support the conclusion that they were likely to increase their imports at such an astonishing rate. Moreover, according to the United States, the rate at which SECOFI projected these users would increase their purchases from 1996 to 1998 is not supported by the relevant facts of record. The projected rate of increase is far greater than the rate by which total HFCS imports from the United States -- including those purchased by soft drink bottlers -- actually increased from 1994 to 1996.

3.24 In the view of the United States, SECOFI thus disregarded the Panel's rulings concerning an appropriate analysis of the restraint agreement. The United States asserts that it engaged in

conjecture, made conclusions that have absolutely no basis in the record before it, and failed to address meaningfully the question the Panel deemed pertinent -- whether, notwithstanding the restraint agreement, imports of HFCS from the United States were likely to increase substantially from the levels prevailing at the time SECOFI made its original determination. Accordingly, the United States maintains that SECOFI's analysis of the restraint agreement in its redetermination suffers from the same flaws the Panel identified in its review of the original SECOFI determination. Because there is still no basis for the conclusion that there is a likelihood of substantially increased imports of HFCS from the United States, SECOFI's redetermination violates Article 3.7 of the AD Agreement.

2. SECOFI Did Not Address The DSB's Rulings Regarding The Analysis Of The Likely Impact Of The Dumped Imports

3.25 The United States recalls that the Panel stated that SECOFI's original determination reflected no meaningful analysis of a number of Article 3.4 factors such as the Mexican sugar industry's profits, output, productivity, utilization of capacity, employment, wages, growth, and ability to raise capital. The United States further recalls that Panel also criticized the determination for providing no analysis of the condition of the Mexican sugar industry during the period of investigation, and no projected analysis of its condition for the near future.

3.26 The United States acknowledges that SECOFI's redetermination, in contrast to its original determination, does provide a recitation of data concerning the Article 3.4 factors discussed by the Panel.

3.27 Nevertheless, according to the United States, the Panel did not indicate that Mexico could satisfy its obligations under the AD Agreement merely by having SECOFI recite data in its record concerning the current condition of the Mexican sugar industry.

3.28 The United States maintains that SECOFI did not perform this analysis in its redetermination. Instead, its analysis (i) repeatedly mischaracterizes pertinent information on the condition of the Mexican sugar industry; (ii) fails to provide a reasoned and fact-supported explanation concerning why improvements in important industry trends during the period of investigation were not probative in ascertaining the likely future condition of the industry; and (iii) makes erroneous or unsupported factual findings and calculations.

3.29 In the United States' view, SECOFI mischaracterized the data before it in several instances. For instance, it found a "decreasing trend in employment," although its data indicated that employment actually increased during each year of its period of investigation. Similarly, it characterized "the use of installed industry capacity" as a negative trend demonstrating the sugar industry's sensitivity to competition from imports. In fact, the United States points out, capacity utilization increased by 16 per cent from 1994 to 1995, and by an additional 3 per cent from 1995 to 1996.

3.30 The United States argues that SECOFI's mischaracterization of positive trends as signs of industry weakness cannot be justified as an unbiased and objective evaluation of the facts and cannot properly serve as the basis for an affirmative threat determination.

3.31 With respect to other factors, SECOFI's redetermination cites facts indicating improved industry performance over the period of investigation. Significantly, according to the United States, the redetermination demonstrates that the domestic sugar industry was profitable in 1996 and that profitability in 1996 increased substantially over 1995 – despite the increase in imports of HFCS from the United States. The United States notes that the determination also indicates that in 1996 the price of domestically-produced sugar in Mexico increased by a much higher percentage than prices for HFCS imported from the United States – notwithstanding that the volume of these imports more than

doubled that year. According to the United States, these positive trends in profitability and prices, combined with the other positive evidence on the record – capacity utilization increasing, employment increasing, productivity increasing, operating costs decreasing, sales costs as a per cent of revenue decreasing, and debt level remaining constant – all weigh against a conclusion that the Mexican sugar industry was threatened with material injury.

3.32 The United States recalls that the Panel specifically stated that “[m]erely that dumped imports will increase, and will have adverse price effects, does not, *ipso facto*, lead to the conclusion that the domestic industry will be injured – if the industry is in very good condition, or other factors are at play, dumped imports may not threaten injury.” In light of data showing that prices were increasing and operating performance was improving during a time when HFCS imports from the United States were increasing, the United States argues that there clearly were “other factors at play” besides the imports in determining the condition of the Mexican sugar industry.

3.33 The United States asserts that SECOFI thus was obliged to provide fact-based analysis sufficient to show why the improving trends relating to Mexican sugar industry performance it observed in 1996 would reverse in the near future or why other considerations would render these rising trends insignificant. According to the United States, it did not do so. Instead of analyzing the historical data concerning the industry’s condition, as the Panel concluded was required by the AD Agreement, the United States asserts that SECOFI relied on a variety of assumptions contrary to the data.

3.34 One such assumption was that the projected increase in HFCS imports would cause a 9 per cent decline in prices for domestically-produced sugar in 1997. According to the United States, SECOFI’s projection appears to be based on its view that “in order to avoid greater displacement in sales, the sugar industry would be required to reduce sugar prices to cut the price differential with respect to high fructose corn syrup.” However, the United States asserts that SECOFI’s assumption was contrary to the observed data during 1996, the final year of its period of investigation, when increased HFCS imports caused neither a decline in the price of sugar nor a decline in the price differential between sugar and HFCS. SECOFI has not shown that domestic sugar prices “had been ‘forced downward’ during the period of investigation” and SECOFI nowhere demonstrates why increased imports in 1997 were likely to cause price declines when increased imports in 1996 had opposite effects. Consequently, in the view of the United States, SECOFI’s assumptions and conclusions regarding likely price declines remain “in the realm of speculation” and must be rejected as the type of allegation or conjecture insufficient to support a threat determination under Article 3.7.

3.35 Similarly, SECOFI assumed that further imports would cause domestic sales revenues to decline in 1997. The United States points out that this was contrary to what occurred during 1996. The United States further notes that SECOFI calculated that this decline would in turn cause the domestic industry to incur an operating loss. Again, according to the United States, this was contrary to the actual experience during 1996, when the industry’s operating margins and profits increased. The United States asserts that SECOFI nowhere explains in its redetermination why it was reasonable to make such assumptions premised on facts contrary to those observed during the period of investigation. Thus, according to the United States, these assumptions as well must be rejected as premised on allegation or conjecture.

3.36 The United States maintains that there are several additional findings in the redetermination relating to Article 3.4 factors that are not adequately explained, or do not reconcile with other factual findings. The United States notes that the 5 per cent decline in “sales” that SECOFI calculates for the **entire** Mexican sugar industry in its redetermination is precisely the same as the decline in the **industrial sector only** that Mexico originally reported to the Panel. In its redetermination, SECOFI attributes this “sales” decline to the imports of HFCS. Because HFCS does not compete with sugar used in the household sector, argues the United States, any **overall** decline in sugar sales quantities

attributable to HFCS imports should have been considerably less for the sugar industry overall than for the industrial sector alone.

3.37 Moreover, the United States notes, SECOFI emphasizes that the share of the Mexican sweetener market held by the Mexican sugar industry declined from 98 per cent in 1994 to 93 per cent in 1996, apparently suggesting to SECOFI that HFCS imports were responsible for the decline. However, the United States further notes that SECOFI also states that the market share held by HFCS imports increased from 1.17 per cent in 1994 to 4 per cent in 1996. Consequently, in 1994, the Mexican sugar industry and imported HFCS combined for a 99.17 per cent share of the sweetener market, whereas in 1996, they combined for only a 97 per cent share. Furthermore, according to the United States, information in the redetermination indicates that Mexican HFCS production accounted for 0.82 per cent of the sweetener market in 1996 and imports from sources other than the United States accounted for less than 0.1 per cent of the sweetener market in 1996. Therefore, the United States asserts, SECOFI's redetermination fails to account for 2.18 per cent of the sweetener market in 1996. Given the small share of the market held by HFCS imports, the United States asserts that this gap indicates that SECOFI did not adequately explain its conclusions regarding market share. Moreover, the United States continues, any effects from this gap should not be attributed to HFCS imports.

3.38 Additionally, the United States notes, the redetermination indicates that between 1995 and 1996, employment increased 1 per cent, productivity rose six per cent, but production fell 2 per cent. The United States argues that the 2 per cent decline in production cannot be reconciled with SECOFI's findings of increasing employment and increasing productivity, given that productivity is calculated by dividing production by employment. In order for productivity to increase while employment is also increasing, the United States continues, production must increase and the increase must be by an amount greater than the increase in employment.

3.39 In the view of the United States, SECOFI's pattern of mischaracterizing data in the record concerning the Mexican sugar industry's condition and failing to explain how its assumptions on the likely condition of the industry may be reconciled with contrary information in the record demonstrates that it did not meaningfully account for all factors that might support a negative determination, as instructed by the Panel and as required by Articles 3.4 and 3.7 of the AD Agreement. Nor, according to the United States, did SECOFI in any way demonstrate why there was a clearly foreseen and imminent change in circumstances that threatened injury to an industry not currently injured, as the Panel ruled was required by Article 3.7.

3. SECOFI Did Not Adequately Explain Its Analysis In Critical Respects

3.40 The United States notes that SECOFI's analysis of the likely impact of HFCS imports on the Mexican sugar industry focuses heavily on economic models and forecasts developed by that agency for use in its proceeding. SECOFI used models and forecasts to calculate likely imports, likely prices, and likely financial results for the Mexican sugar industry. As United States previously argued, the results generated by these methodologies were based on unexplained inputs concerning conditions in the Mexican sugar industry contrary to observed data for 1996 in the record. Hence, argues the United States, the findings SECOFI made based on these models and forecasts must be rejected as conjectural. Additionally, notes the United States, SECOFI failed to provide an adequate explanation of its analysis as required by Articles 12.2 and 12.2.2 of the AD Agreement.

3.41 When an investigating authority chooses to base its determination on the results of an economic model or forecast, argues the United States, information concerning the data used as inputs in the model or forecast is clearly “relevant information” for purposes of the determination.⁴

3.42 Yet, according to the United States, SECOFI consistently failed to explain its use of projections of industry behavior that were either contrary to or unsupported by the observed data during its period of investigation as inputs in these models and forecasts. The examples that the United States cites include its use of a 50 per cent substitution rate of HFCS for sugar, its projection that sugar prices would decline by 9 per cent⁵ and its projection that the Mexican sugar industry’s sales revenues would decline by 15 per cent.

B. FIRST WRITTEN SUBMISSION OF MEXICO

1. Introduction

3.43 Mexico first notes its deep concern regarding the presentation of "US Exhibit 1" which contains an inadequate translation of the revised final resolution, published in the *Diario Oficial de la Federación* (DOF) of 20 September 2000. Mexico points out that as most members of the Panel, like the WTO Secretariat, are English-speaking, it is reasonable to assume that they will regularly consult this United States exhibit during the proceeding.

3.44 Mexico further points out that the above-mentioned translation was made by translators who, to all appearances, are not experts in the field, since the translation contains a series of inaccuracies, omissions and serious mistakes which, at best, tend to create confusion and, at worst, completely reverse the meaning of the revised final resolution. The many translation errors are set forth in detail in the First Written Submission.

3.45 Mexico asserts that on the basis of the findings and conclusions of the Panel in its report, adopted by the DSB on 24 February 2000 (WT/DS132/4 and WT/DS132/4/Corr.1) and considering that Mexico, during the ordinary DSB meeting of 20 March, indicated its intention to comply with the Panel's recommendations and rulings, and that on 19 April the United States and Mexico, pursuant to Article 21.3(b) of the DSU, notified the Chairman of the DSB that on 22 September 2000 the reasonable period of time for implementation would expire, Mexico decided to revise the original final resolution by initiating a proceeding under a decision published in the DOF on 15 May 2000.

3.46 Mexico recalls that this procedure ended on 20 September 2000 with the publication in the DOF of the *"Final resolution revising, on the basis of the conclusion and recommendation of the Panel of the World Trade Organization's Dispute Settlement Body, the final resolution in the anti-dumping investigation of high fructose corn syrup imports, merchandise classified in tariff headings 1702.40.99 and 1702.60.01 of the Schedule to the General Import Duties Act, originating in the United States of America, irrespective of the country of export"*.⁶

3.47 In the course of this proceeding, Mexico recalls, the investigating authority requested further information from the interested parties for the explicit purpose of implementing the Panel's

⁴ According to the United States, it is not challenging the ability of investigating authorities to use economic models as an aid to their analysis of material injury and threat of material injury. Instead, the United States' argument concerns the data pertaining to a specific investigation that must be inputted into any model to yield a result specific to that investigation

⁵ According to the United States, the projected 9 per cent decline in sugar prices itself appears to be the result of two unexplained models that SECOFI used to analyze pricing behavior. These are the “Granger causality test,” and a “system of simultaneous equations.” By failing to explain these models, argues the United States, SECOFI failed to provide relevant information on how it derived its predicted price decline data.

⁶ Notice of Redetermination, MEXICO-1.

recommendation.⁷ In particular, given the Panel's findings and conclusions concerning the inadequacies of the analysis of the impact of imports on the domestic industry, Mexico notes that the investigating authority considered it appropriate to obtain additional information on this particular aspect in order to bring the measure into conformity with the AD Agreement. Mexico points out that several of the parties responded to these requests and the information they provided is set out in the revised final resolution.⁸

3.48 Mexico notes that, with regard to the alleged restraint agreement which, according to the Panel's findings and conclusions, Mexico did not take adequately into account in its determination of the likelihood of substantially increased importation, SECOFI considered it appropriate, in order to comply with the Panel's recommendation in this respect, legally to incorporate in the record of the proceedings (it was already physically present) the information from the *Corn Refiners Association* which had previously been rejected and legally dismissed by the investigating authority for having been submitted too late (on 22 January 1998, one day before the publication of the original final resolution).

3.49 Mexico argues that its revised final resolution complies with the Panel's recommendation insofar as it brings the definitive measure into conformity with Mexico's obligations under the AD Agreement in each and all of the instances in which it was found by the Panel to be inconsistent with that Agreement:

(a) By making good the inadequacies of SECOFI's threat of injury analysis, in accordance with the Panel's findings, to bring it into conformity with Article 3 of the AD Agreement in respect of the following:

- (i) Consideration of the impact of the dumped imports on the domestic industry.
- (ii) Determination of threat of material injury on the basis of the domestic industry as a whole.
- (iii) Adequate consideration of the potential effect of the alleged restraint agreement on the likelihood of substantially increased importation.

(b) By ordering the refunding of the anti-dumping duties levied beyond the period of application of the provisional measure, in the light of the Panel's finding and conclusion with respect to Article 7.4 of the AD Agreement.

(c) By ordering the refunding of the anti-dumping duties levied retroactively for the period of application of the provisional measure, in the light of the Panel's findings and conclusions with respect to Articles 10.2, 10.4, 12.2 and 12.2.2 of the AD Agreement.

3.50 Mexico therefore requests that, in accordance with Article 21.5 of the DSU, the Panel find that the measure adopted by Mexico to comply with the recommendations and rulings of the DSB is consistent with the AD Agreement.

⁷ Ibid. paragraph 11.

⁸ Ibid., paragraphs 13, 14, 15 and 16.

2. Mexico Has Complied With The Recommendations And Rulings Of The Dispute Settlement Body

- (a) SECOFI has examined the probable impact of HFCS imports on the domestic industry and has determined threat of injury on the basis of the industry as a whole

3.51 In order to comply with the Panel's findings, Mexico argues that it examined in greater detail the economic factors mentioned in Article 3.4, basing its examination on the domestic industry as a whole. In the revised final resolution, Mexico describes the state of the domestic industry during the investigation period and the two previous years, as well as the impact of dumped imports and the state of the industry in a subsequent period, on the basis of projections.

3.52 In particular, in relation to the performance of the economic indicators, Mexico claims that it analysed the economic variables affecting the state of the domestic industry, both actual (period analysed 1994-1996) and potential (1997), as described in paragraphs 128 to 139 of the revised final resolution.

3.53 According to Mexico, threat of injury was determined for the whole of the domestic standard and refined sugar industry on the basis of reasonable methodologies, using information supplied by the National Chamber of Sugar and Alcohol Industries (hereinafter CNIAA) and working documents in the administrative record of the investigation.

3.54 With respect to price analysis, Mexico asserts that it has adequately complied with the Panel's findings in paragraphs 7.141, 7.151, 7.152 and 7.153 of the Panel report. In particular, Mexico points out that in paragraphs 80 to 126 of the revised final resolution the trends in the prices of HFCS imports from the United States and the prices of domestically produced sugar, during the investigation period and the two comparable previous periods, are analysed, together with the projected future trends.

3.55 Mexico explains that the analysis was based on the average selling prices on the domestic sugar market calculated from the sales volumes and values for the domestic industry as a whole. That is to say, sales of standard and refined sugar to both industrial and household sectors were considered. Mexico further explains that fluctuations in the prices of the imports investigated and in domestic prices were also analysed over a three-year period, which included the investigation period.

3.56 In particular, the level and trend of weighted average prices of HFCS-42 and HFCS-55 imports from the United States were examined in relation to the weighted average prices for sales on the domestic standard and refined sugar market in 1994, 1995 and 1996.

3.57 Mexico asserts that actual proof of the adverse impact of the price of the imports investigated on the domestic price during the investigation period was obtained on the basis of a detailed analysis of the month-by-month behaviour of both prices, the calculated margins of undercutting and dumping, statistical evidence of causality and the prevailing economic environment, and account was taken, in particular, of the existence of a "natural difference" between the prices of the two products.

3.58 In addition, Mexico notes that it estimated the prices of both products for 1997, taking into account the analysis made and on the basis of the monthly trend in the price of HFCS imports from the United States and the domestic selling price for sugar for the period 1994 to 1996. Mexico explains that the method of estimation employed relied on a system of simultaneous equations and the result was compared with the observed trend in the values of the variables incorporated (prices and volumes) and checked by considering the consistency of the forecasts with the economic context and conditions in the industry during the period analysed.

3.59 In conducting the financial analysis in its revised final resolution of 20 September 2000, Mexico argues that it took account of the Panel's findings and conclusions, and on the basis of audited financial information for 85 per cent of the Mexican sugar industry and information on debt amortization from that industry, SECOFI examined the financial factors set forth in Article 3.4 of the AD Agreement. Also, according to Mexico, SECOFI made a projection of the financial performance of the sugar industry in 1997 assuming HFCS imports from the United States had continued to increase, varying only the revenue from domestic sales of sugar, and selling costs and operating expenses – in proportion to the predicted volume of domestic sales – in their variable component only.

3.60 On this basis, SECOFI determined that in 1996, the domestic industry would perform positively in terms of profits and profitability owing to an improvement in selling costs and operating expenses. However, continues Mexico, SECOFI considered that owing to the specific characteristics of the industry, profits would be highly sensitive to changes in income, and with a reduction in income predicted for 1997, profits would be affected to a greater extent than income in percentage terms, and that therefore operating profits would be reduced to such an extent that the domestic sugar industry would be running at a loss and the possibility of achieving operational profitability would be wiped out.

3.61 At the same time, SECOFI concluded that in 1996 the sugar making industry had maintained its short-term credit worthiness and had seen an improvement in its accounts payable and receivable indicators. However, according to Mexico, the ratio of total liabilities to net worth of 4.6 had placed the industry in a situation of high levels of debt and saddled it, in 1996, with a high level of risk. Similarly, Mexico continues, SECOFI concluded that based on the debt service as a proportion of projected revenue, if the increasing trend in dumped HFCS imports were to continue, then the domestic industry would be unable to meet its debt servicing obligations, especially if operating losses were predicted for 1997.

3.62 Mexico argues that a joint evaluation of the above considerations led SECOFI to the justified conclusion that dumped HFCS imports from the United States have had a negative impact, as reflected in domestically produced sugar's loss of internal market share, declining sales, falling employment trends, earnings sensitivity, lower profitability, higher levels of debt and reduced ability to raise capital, which indicates that if a definitive anti-dumping measure had not been introduced, given increased importation at dumped prices, the injury to the domestic industry would have manifested itself in the other indicators as well.

(b) SECOFI has analysed the potential effects of the alleged restraint agreement on the likelihood of substantially increased importation in a manner consistent with Article 3.7(I) of the AD Agreement

3.63 Mexico recalls that the Panel concluded that SECOFI's "consideration of the potential effects of the alleged restraint agreement [between the sugar refiners and soft drink bottlers] was inadequate"⁹ and therefore determined that SECOFI's conclusion that there was a "likelihood of substantially increased importation" was inconsistent with the requirements of Article 3.7(i) of the AD Agreement¹⁰, recommending that, *inter alia*, in this respect the measure be brought into conformity with the Agreement.¹¹

3.64 Mexico argues that in order to comply with the Panel recommendation adopted by the DSB, SECOFI considered it appropriate and sufficient to incorporate in the record of the review the information submitted by the *Corn Refiners Association* in the course of the original investigation. On the basis of this information, Mexico asserts, SECOFI found that the alleged restraint agreement

⁹ Ibid., paragraph 7.178.

¹⁰ Idem.

¹¹ Ibid., paragraph 8.4.

would apparently have the potential effect of limiting consumption of HFCS by the soft drink bottlers to 350,000 tons.¹² Mexico further asserts that this information on the terms of the alleged restraint agreement was considered sufficient since, according to paragraph 7.175 of the Panel report, the question was not whether an alleged restraint agreement existed, but whether its potential effects on the likelihood of dumped imports increasing in the near future had been adequately considered in the analysis.

3.65 Thus, in accordance with the Panel's findings, particularly those in paragraphs 7.175 to 7.178, Mexico claims that it carried out a detailed analysis and determined by reasoned explanation the likelihood of substantially increased importation of HFCS from the United States, taking into account the evidence of the effects of the alleged restraint agreement and the arguments relating thereto contained in the file on the anti-dumping investigation.

3.66 In determining the likelihood of substantially increased importation, Mexico argues that it considered, in accordance with subparagraphs (i) and (ii) of Article 3.7 of the AD Agreement, the existence of a significant rate of increase of dumped imports and freely disposable capacity of the HFCS-producing industry in the United States. In that context, Mexico notes that it also explored the effects of the alleged restraint agreement on the basis of the arguments and the information at its disposal. Mexico concluded that the potential effects of the said alleged restraint agreement did not preclude the likelihood of increased importation.

3.67 Mexico asserts that in the revised final resolution, SECOFI did not confine itself to repeating the arguments it made before the Panel, as claimed by the United States. Although it is true that in the new analysis, SECOFI also considered the information previously submitted to the Panel, Mexico claims that this was because this information formed part of the requested explanation of how Mexico had proceeded in its original final resolution. In Mexico's opinion, there is nothing to prevent the use of previously provided information in a subsequent proceeding intended to ensure that a panel's findings and recommendations have been correctly implemented.

3.68 In Mexico's view, the question which had to be settled was whether in the near future relative to the investigation period, even if the bottlers' HFCS consumption were limited, the likelihood of substantially increased importation would persist. On the basis of a comprehensive analysis of the situation which, in accordance with the observations made in the investigation period, would prevail in the near future, Mexico concluded that this likelihood would indeed persist.

3.69 Mexico argues that in an analysis of this kind, special consideration should be given to the fact that the likelihood of substantially increased importation depends not exclusively on a single factor such as the alleged limitation on the consumption of one group of users but also on a concurrence of other factors which must be taken into account in determining probable future import trends. To this end, Mexico claims that it is necessary to introduce into the analysis the trends, observed during the investigation period and comparable previous periods, in prices, volumes, actual and potential consumption, economic context and conditions in the industry and, in the light of these data for the period investigated, to determine whether in the situation envisaged there is still good reason to believe that there will be substantially increased importation in the near future.

3.70 Thus, according to Mexico, in its determination, SECOFI based itself on the figures for the consumption of sugar between 1994 and 1996 by sectors other than the soft drink bottlers and on the actual rates of utilization of HFCS recorded in 1996 by those manufacturers from whom it had requested information on the sweeteners consumed in their production processes. Mexico notes that it also considered the rates of substitution of HFCS for sugar supplied by the main importer for the investigation period, obtained from a recognized firm of economic consultants.

¹² See "Informe Económico del Grupo Financiero Bancomer" of October 1997, MEXICO2.

3.71 Similarly, according to Mexico, SECOFI determined the likelihood of increased importation by considering the effects of the alleged restraint agreement, on the basis of an estimate of the potential HFCS consumption of sectors other than the bottlers in 1997 and 1998, using as input data projections of the total sugar consumption for these years made by experts and applying those sectors' share of total consumption as recorded in 1994, 1995 and 1996.

3.72 Mexico asserts that, in this context, it is reasonable to assume that the demand from the bottlers, allegedly limited to 350,000 tons, would be met from domestically produced HFCS and not imports, due to geographical proximity and lower transport costs, together with other advantages. Mexico further asserts that this would lead to full utilization of the installed capacity of the domestic HFCS producers, so that any additional demand from other users would necessarily have to be met by imports.

3.73 Mexico explains that the underlying economic reasoning is that, in a context in which HFCS prices are depressed relative to sugar prices and in the absence of any distortions of trade flows, such as those caused by anti-dumping investigations, sectors other than the soft drink bottlers would have incentives to substitute imports for the domestically produced product. In the limit, according to Mexico, these sectors would substitute HFCS for all their sugar consumption, even though this process would depend on relative prices and the rate of substitution. Mexico notes that, in 1996, the weighted average rate of utilization in consumer industries other than soft drink bottling was 84 per cent and, on the basis of a conservative assumption, it was determined that if only 50 per cent of potential consumption was substituted and the rate of substitution remained constant, the demand for HFCS thus generated would be equivalent to increased imports as compared with the investigation period.

3.74 Mexico argues that, contrary to the claims of the United States, SECOFI's determination was not based on conjecture or remote possibility but on a forward-looking analysis of the situation observed during the investigation period. Mexico considers that it would not be consistent with Article 3.7 of the AD Agreement to determine the likelihood of increased importation on the basis of a single factor or from trade flows already distorted by the effects of an anti-dumping investigation, or repeatedly to update such a determination in the light of the latest data available to the investigating authority.

3.75 In the light of the above, Mexico respectfully requests the Panel to take into account all the factors analysed and reasons given in the revised final resolution which led the authority to make an affirmative determination of the likelihood of a substantial increase in the imports investigated, since no one of these factors by itself can necessarily give decisive guidance in this respect.

3.76 To recapitulate, in compliance with the findings and conclusions of the Panel report, in its revised final resolution Mexico argues that it has adequately considered the potential effects of an alleged restraint agreement on the likelihood of substantially increased importation, so that its determination is consistent with Article 3.7 (i) of the AD Agreement.

(c) Mexico has complied with the provisions of Articles 12.2 and 12.2.2 of the AD Agreement

3.77 Mexico asserts that SECOFI's revised final resolution¹³ is consistent with the provisions of Articles 12.2 and 12.2.2 of the AD Agreement. Mexico asserts that SECOFI made available in sufficient detail the findings and conclusions reached by the authority on all the issues of fact and law that SECOFI considered material.¹⁴ Moreover, according to Mexico, SECOFI disclosed all relevant

¹³ Notice of Redetermination, MEXICO-1.

¹⁴ Under Article 12.2 of the AD Agreement, final public notices shall "set forth ... in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities."

information on the matters of fact and law and reasons which led it to confirm the imposition of the final anti-dumping measure, while paying due regard to the protection of confidential information.¹⁵

3.78 Similarly, in this context, in considering the consistency of SECOFI's actions with Articles 12.2 and 12.2.2, Mexico argues that the Panel should take particular account of the fact that the revised final resolution, which concludes the procedure followed by SECOFI for the *specific purpose of complying with the recommendation adopted by the DSB*, complements and amends the original final resolution (of 23 January 1998) in all those aspects that were reviewed by the investigating authority after the Panel had found them to be inconsistent with the AD Agreement.

3.79 At the same time, as usual in the anti-dumping practice of Mexico and other countries, Mexico asserts that the authority's relevant findings and conclusions that were included in the final notice of 20 September, like all the relevant information on matters of fact and law and the reasons which led SECOFI to confirm the imposition of the final anti-dumping measure, are based in their turn on more data, information and working documents than, for reasons of confidentiality, scope or relevance, are contained in the administrative record on the investigation, without this creating any inconsistency with the provisions of Articles 12.2 and 12.2.2 of the AD Agreement.

3.80 Thus, in Mexico's view, the Panel should consider that the revised final resolution constitutes a public notice and, in having as its specific purpose the implementation of the DSB's recommendation, complements in various respects the original final resolution, while being based to some extent on more information and documents than contained in the administrative record, without Mexico having thereby breached the provisions of Articles 12.2 and 12.2.2 of the AD Agreement.

3.81 With the specific purpose of complying with the conclusions and recommendation expressed in the Panel report, Mexico claims that SECOFI's revised final resolution:

- (a) Orders the refunding of the anti-dumping duties levied retroactively for the period of application of the provisional measure, in strict compliance with the findings and conclusions of the Panel report (paragraphs 7.194 to 7.198 and 8.2 (e)) in relation, *inter alia*, to Articles 12.2 and 12.2.2 of the AD Agreement;
- (b) Contains, in sufficient detail, explanations of the findings and conclusions on the issues considered material, as well as all relevant information on the matters and reasons which led SECOFI to confirm the imposition of the final measure in accordance with the analysis made by the investigating authority.

3.82 In the light of all the above considerations, Mexico maintains that it has duly complied with the provisions of Articles 12.2 and 12.2.2 of the AD Agreement.

3. Conclusion

3.83 On the grounds set out above, Mexico urges the Panel to declare that its revised final resolution on threat of material injury, including: (i) its examination of the impact of HFCS imports on the Mexican sugar industry as a whole; (ii) its examination of the potential effects of the alleged restraint agreement on the likelihood of substantially increased importation; and (iii) its explanation in the revised final resolution of the findings and conclusions reached by SECOFI with respect to these issues, complies fully with the recommendations and rulings of the DSB and is consistent with Articles 3.1, 3.4, 3.7, 12.2 and 12.2.2 of the AD Agreement.

¹⁵ Likewise, under Article 12.2.2, the final notice shall "contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures ... due regard being paid to the requirement for the protection of confidential information."

C. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

3.84 The United States notes that, in its First Written Submission, it provided three grounds why the redetermination of Mexico's Secretariat of Commerce and Industrial Development ("SECOFI") does not comply with the requirements of either the report of the Panel in this proceeding or the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("the AD Agreement"):

- (a) SECOFI's redetermination, according to the United States, fails to explain how there is a likelihood of substantially increased imports of high fructose corn syrup ("HFCS") from the United States in light of an agreement between Mexican sugar refiners and soft drink bottlers limiting the bottlers' use of HFCS. Consequently, the redetermination, like the original determination, violates Article 3.7 of the AD Agreement.
- (b) The United States further argues that the redetermination fails adequately to address the factors set forth in Article 3.4 of the AD Agreement concerning the likely impact of the imports on the Mexican sugar industry. According to the United States, the redetermination mischaracterizes pertinent information concerning the condition of the Mexican sugar industry and fails to provide a reasoned and fact-supported conclusion why improvements in industry trends during the period of investigation were not probative in ascertaining the future condition of the industry. As a result, the United States claims, the redetermination violates Articles 3.1, 3.4, and 3.7 of the AD Agreement.
- (c) Finally the United States asserts that the redetermination is inconsistent with Articles 12.2 and 12.2.2 of the AD Agreement because it relies on analytical models and forecasts without adequate explanation of the inputs used within the models.

3.85 According to the United States, Mexico's First Written Submission, for the most part, does not directly address the arguments of the United States concerning the specific respects in which SECOFI's redetermination is inconsistent with the conclusions and recommendations of the Dispute Settlement Body ("DSB") and the AD Agreement. Instead, the United States continues, Mexico largely has done no more than summarize the redetermination and contend in a *pro forma* manner that it satisfies the requirements of the DSB and the AD Agreement.

3.86 In the view of the United States, Mexico's arguments only serve to confirm that SECOFI's redetermination is inconsistent with the Panel Report and the AD Agreement. Comparing Mexico's explanations of the redetermination with the redetermination itself demonstrates that SECOFI did not correct the serious deficiencies in explanation and consideration of pertinent factors critical to its determination of threat of material injury that led the Panel to conclude that the original SECOFI determination violated the AD Agreement.

1. SECOFI's Finding Of Likelihood Of Increased Imports Was Based On Conjecture Rather Than Evidence

3.87 The United States notes that in attempting to justify SECOFI's finding that there was a likelihood of increased imports of HFCS notwithstanding the restraint agreement, Mexico asserts that SECOFI based its redetermination "on facts and evidence corresponding to the investigation period and two comparable previous periods, as well as on estimates obtained using objective and reasonable methodologies."

3.88 In fact, according to the United States, this is precisely what SECOFI *failed* to do in its redetermination. The United States argues that SECOFI premised its finding that there is a likelihood

of substantially increased imports not on facts and evidence corresponding to the period of investigation, but on conjecture and on projections that have no factual basis in the record and that are contrary to the facts that are in the record.

3.89 In particular, the United States argues, SECOFI's finding is premised on a projection that imports of HFCS from the United States by purchasers other than soft drink bottlers would increase from 1996 to 1998 by over twice the rate that purchases by all HFCS users increased from 1994 to 1996 (when soft drink bottlers consumed 68 per cent of HFCS imports and all other users consumed only 32 per cent of HFCS imports). The United States points out that although SECOFI's projection deviates markedly from the observed data during the period of investigation, its redetermination provides no basis why such a deviation is likely. Nor, according to the United States, does Mexico's First Written Submission explain how one can discern from the redetermination that SECOFI's projection is based either on "facts or evidence corresponding to the investigation periods" or on "objective and reasonable" methods of calculation.

3.90 Similarly, Mexico's First Written Submission does not explain how the redetermination justifies SECOFI's use of a 50 per cent substitution rate for all HFCS users other than soft drink bottlers.

3.91 According to the United States, the only information in the record pertaining to rate of substitution is information pertaining to the *theoretical* rate at which HFCS could be substituted for sugar in various products. The United States argues that a finding that HFCS users were likely to substitute HFCS for sugar merely because they could do so as a theoretical matter is sheer conjecture.

3.92 Even with respect to theoretical rates of substitution, the 50 per cent and 84 per cent substitution rates referenced by Mexico are not based on evidence in the record. The United States notes that the 84 per cent rate does not appear in the redetermination and Mexico provides no explanation of where the rate originated. Although the 50 per cent rate does appear in the redetermination, the United States asserts that it is not one based on evidence. Instead, asserts the United States, the 50 per cent rate appears to be something selected arbitrarily by SECOFI.

2. SECOFI Did Not Adequately Analyze The Likely Impact Of The Dumped Imports

3.93 The United States does not dispute that SECOFI's redetermination provides a recitation of data concerning the Article 3.4 factors specified by the Panel. However the United States argues that this recitation alone is insufficient to satisfy Mexico's obligations under Article 3. The United States notes that the Panel Report, consistent with the findings of other panels, indicates that the AD Agreement requires an analysis of the pertinent information, not merely a reference to it. According to the United States, in its First Written Submission, Mexico neither challenges the reasoning of the prior panel decisions presented by the United States nor offers any of its own that would indicate that its mere recitation of data was sufficient.

3.94 The United States maintains that Mexico confirms that SECOFI's projections as to the likely levels of prices and profitability in the Mexican sugar industry are central to its analysis of likely impact. According to the United States, SECOFI's projections lead to results that are *directly contrary* to the actual experience of the Mexican sugar industry during SECOFI's period of investigation. SECOFI projected that increased HFCS imports would cause prices for domestically-produced sugar to decline in 1997. However, the United States notes, sugar prices actually increased during 1996 from their levels in 1995, notwithstanding increased imports. The United States points out that SECOFI also projected that the domestic sugar industry would incur an operating loss in 1997 because of the increased HFCS imports. By contrast, in 1996 the Mexican sugar industry was profitable, and profitability increased substantially over 1995. According to the United States, Mexico neither acknowledges nor explains the serious discrepancies between SECOFI's projections for 1997 and the observed data for 1996.

3.95 Mexico also emphasizes its affirmative threat determination is justified by the Mexican sugar industry's need to generate operating profits to allow it to service its high level of indebtedness. In the view of the United States this argument overlooks the fact that SECOFI made several findings in its redetermination that the domestic industry's positive operating results in 1996 improved the sugar industry's cash flow, thus enhancing its ability to obtain short-term financing and permitting it to improve its debt service indices. Thus, by SECOFI's own analysis, asserts the United States, the presence of increased volumes of imported HFCS does not necessarily impair the domestic industry's ability to raise capital and finance debt.

3.96 Consequently, the only support for Mexico's conclusion that SECOFI properly found that "given increased importation at dumped prices, the injury to the domestic industry would have manifested itself in the other indicators as well," is SECOFI's unexplained and seemingly conjectural projections. The projections, continues the United States, simply cannot be reconciled with the actual 1996 data for the Mexican sugar industry showing that indicators of industry performance improved while HFCS imports increased.

3. SECOFI Did Not Adequately Explain Its Analysis In Critical Respects

3.97 In the view of the United States, Mexico's First Written Submission reinforces the problems caused by SECOFI's lack of explanation. For example, Mexico emphasizes that SECOFI's conclusion that an increase in import volume was likely notwithstanding the restraint agreement is premised on a projection which uses as an input a 50 per cent substitution rate of HFCS for sugar by purchasers other than soft drink bottlers. The United States asserts that nothing in SECOFI's redetermination or the administrative record explains how the 50 per cent figure was derived. According to the United States, it appears that SECOFI simply chose this figure arbitrarily. Similarly, Mexico refers to SECOFI's use of "simultaneous equations" for projecting sugar prices. But, according to the United States, Mexico provides no reference to anything in the record that would indicate either what data SECOFI inputted into these "simultaneous equations" or what the equations purport to represent.

3.98 In the view of the United States, Mexico's argument is not advanced by its statement that all material supporting SECOFI's redetermination need not be in the redetermination itself if it is available elsewhere in the administrative record. It is true, notes the United States, that under Article 12.2.2, an investigating authority may choose to make the matters of fact and law supporting the imposition of final measures available through a separate report. But, the United States asserts, Mexico has failed to identify any separate report, or even any portion of the administrative record, that provides the required explanation of the inputs it used for its projections.

D. SECOND WRITTEN SUBMISSION OF MEXICO

1. Introduction

3.99 Mexico recalls that its first written submission in this proceeding set out the facts and arguments which show that Mexico strictly complied with the conclusions and recommendation of the Dispute Settlement Body (DSB) in accordance with the report of the Panel that examined the case concerning *Mexico – High Fructose Corn Syrup (HFCS) from the United States* of 14 January 2000¹⁶ (Panel Report). Accordingly, Mexico responded in general terms to the position taken by the United States in its first written submission.

3.100 However, inasmuch as this second written submission is a rebuttal, Mexico asserts that its fundamental purpose is to provide a more specific reply to the United States arguments by presenting

¹⁶ *Mexico-Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000 (hereinafter "Panel Report, WT/DS132/R").

facts and counter-arguments which will confirm for the Panel that Mexico has strictly complied with the DSB's conclusions and recommendations by:

- (a) Adequately considering the impact of dumped imports on the domestic industry and determining threat of injury to the industry as a whole; and
- (b) adequately analysing the potential effect of the alleged restraint agreement on the likelihood of substantially increased importation, in accordance with Article 3.7(i) of the AD Agreement.

3.101 According to Mexico, it has remedied the deficiencies in SECOFI's threat of injury analysis, bringing it into conformity with the requirements of Article 3 of the AD Agreement, in addition to adequately fulfilling the requirements of Articles 12.2 and 12.2.2 of the AD Agreement.

3.102 Thus, Mexico argues that it has brought its final anti-dumping measure into conformity with the obligations imposed on Mexico by the AD Agreement in respect of each and all of the aspects found to be inconsistent with the Agreement in the Panel Report.

3.103 Moreover, in its first written submission Mexico recalls that it expressed its concern at the inadequate translation into English of the revised final resolution¹⁷, which was submitted by the United States as exhibit "US-1". However, bearing in mind that it is a document of key importance for an understanding of the actions taken by SECOFI, Mexico notes that it has made an effort to revise and submit as an annex to this second submission a more adequate translation of the revised final resolution of 20 September 2000¹⁸, specifically to avoid errors or confusion and to facilitate the work of some English-speaking members of the Panel and of the WTO Secretariat.

2. Mexico Complied With The Conclusions And Recommendation Of The Panel And The Dispute Settlement Body

- (a) SECOFI examined the probable impact of HFCS imports on the domestic industry and has determined threat of injury on the basis of the industry as a whole

3.104 According to Mexico, SECOFI revised and conducted a new review of the resulting impact of HFCS imports on the domestic industry, including an adequate assessment of the economic factors referred to in Articles 3.4 and 3.7 of the AD Agreement and on the basis of a variety of positive evidence and facts, which led to confirmation of the determination of threat of injury.

3.105 Mexico rejects the United States arguments, for the revised final resolution includes all relevant issues and findings of the new SECOFI analysis of trends in economic factors in order to determine the resulting impact of HFCS imports on the domestic industry as a whole, in both real and potential terms and was not confined to reciting data, as suggested by the United States.¹⁹

3.106 In Mexico's view, SECOFI did not mischaracterize the data at its disposal, since the analysis of employment and use of installed capacity was conducted objectively, without hiding or mischaracterizing the increase in those variables. Moreover, the fact that in the period of investigation, the sugar industry's sales declined to the same extent as did sales to the industrial sector is coincidental, since the variations in volume are different.²⁰ Similarly, if the United States cannot

¹⁷ Notice of Redetermination, MEXICO-1.

¹⁸ See MEXICO-1(a).

¹⁹ See Notice of Redetermination, MEXICO-1, *inter alia* paragraphs 128 to 166.

²⁰ See "Table of industrial sector indicators" MEXICO-3, and "Table of total standard and refined sugar sales (household and industrial sector)" MEXICO-4.

reconcile 100 per cent of the sweetener market or the increase in productivity in the industry, it is because it used the wrong data for its calculations.²¹

3.107 Again, Mexico is of the view that no attempts should be made to minimize the analysis of the variables which already showed in the period of investigation the genuinely adverse impact of HFCS imports from the United States, as in the case of sugar sales to the domestic market, the market loss of production oriented to the domestic market and trends in stocks; given the likelihood of increased imports, these factors would be projected as being more seriously affected, to the detriment of the other factors affecting the domestic industry.

3.108 Mexico asserts that it adequately complied with the Panel's findings concerning price analysis, particularly those contained in paragraphs 7.141, 7.151, 7.152 and 7.153 of the Panel Report. According to Mexico, paragraphs 80 to 126 of the revised final resolution contain a review of trends in the prices of HFCS imports from the United States and the prices of domestically produced sugar during the investigation period and the two comparable earlier periods, together with the projected future trends in the price of both products.

3.109 Mexico notes that the United States alleges that SECOFI's projections of future trends in sugar prices for 1997 were based on assumptions contrary to the data observed in 1996 and that SECOFI did not show that sugar prices declined during the investigation period as a result of dumped HFCS imports. In addition, the United States indicates that, although the increased price differentials in the case of very close substitutes might support a finding of injury or threat of injury, but that SECOFI acknowledged that HFCS and sugar are not close substitutes.²²

3.110 In this connection, Mexico asserts that no such acknowledgement exists and that, even though there are differences in the degrees of substitution, both products are substitutes in a range of industrial applications. In Mexico's view, the United States is trying to divert the Panel's attention to a topic which was fully documented in the determination of likeness in the original final resolution and one which – it is important to recall – was not the subject of a challenge by the United States.

3.111 Again, according to Mexico, SECOFI demonstrated to the Panel – and this is fully documented in the administrative record of the anti-dumping investigation - that in the period of investigation, such substitution occurred in the reproduction processes in the baking, beverages (other than soft drinks), dairy and processed food industries, in addition to the soft drink industry. Moreover, asserts Mexico, there is a consensus among experts on the sweetener industry that, precisely because of the existing substitution between sugar and HFCS in the industrial sector, the prices of both goods are linked, and that both the existing differentials between them and the movements in one or other price have proven effects on the conditions of competition in the industry.

3.112 Mexico argues that SECOFI also demonstrated the adverse impact of the prices of the investigated imports on the domestic prices during the investigation period, on the basis of a detailed analysis of month-by-month trends in the prices of sugar and HFCS, the margins of undercutting and dumping calculated for the imports investigated, statistical evidence of causality and the prevailing economic environment, and particularly the "natural difference" between the prices of the two products.²³

²¹ See "Productivity table" MEXICO-5, and "Methodology employed in statistical calculations (analysis of imports and economic indicators)" MEXICO-6, as well as paragraph 26 of Mexico's first written submission.

²² Mexico notes that, according to the United States, Mexico so acknowledged in paragraphs 5.568 and 5.569 in the Panel Report, WT/DS132/R. See footnote 51 to the first written submission of the United States.

²³ See the "Summary tables on annual and monthly margins of undercutting between HFCS and sugar from 1994 to 1996", MEXICO-7, the "Table of HFCS and sugar prices in the United States from 1991 to 1996", MEXICO-8, the translation of the relevant part of the note on "Trade in Sweeteners in the North America

3.113 Mexico points out that the price trends observed in 1996 show that greater import penetration was connected with increased undercutting and declining HFCS prices in relation to sugar. While average prices in 1996 were higher than the year before, according to Mexico, this development is explained by the adverse economic conditions observed in 1995. Consequently, Mexico argues, the basis of comparison highlighted by the United States in its argument fails to note that in 1996, compared with 1994, as well as during the investigation period, sugar prices declined in a context of growing imports, lower prices and an increase in the price differential between the two products.²⁴

3.114 Furthermore, SECOFI estimated the prices of both products for 1997 on the basis of the analysis carried out and the recorded monthly trend from 1994 to 1996 in the prices of HFCS imports from the United States and the domestic selling price for sugar. Mexico claims that the method of estimation employed was a system of simultaneous equations using a vector autoregressive model, and the result was compared with the observed trend in the values of the variables incorporated (prices and volumes), and checked by reference to the consistency of the forecasts with the economic context and the conditions in the industry during the period analysed.²⁵

3.115 In short, according to Mexico, the arguments put forward by the United States concerning SECOFI's price analysis in the revised final resolution are completely unfounded and should be rejected. According to Mexico, it has been shown that Mexico's determination was based, *inter alia*, on positive evidence and an objective examination of past trends and of projections of prices of the investigated imports and their actual and potential impact on the prices of domestically produced sugar, in conformity with the Panel's findings and conclusions in this respect.

3.116 Mexico points out that the United States argues that the positive trends in industry profitability and other factors determined by SECOFI contradict the conclusion that the sugar industry faced a threat of material injury. Mexico rejects the United States arguments because it claims that SECOFI conducted an objective analysis of the probable impact on the industry's profits²⁶ without confining itself merely to including data on that factor, as suggested by the United States. In fact, notes Mexico, SECOFI's analysis recognizes the positive trend in profits, whereas the United States fails to mention that SECOFI carried out a sensitivity analysis of the Mexican sugar industry²⁷, which was done on the basis of established methodologies such as the degree of operational and financial leverage, which are amply explained in the "*Methodological Note on the Financial Report on Injury (HFCS)*".²⁸

3.117 In this regard, it was determined that a 1 per cent change in sales revenue involves a 7 per cent variation in the industry's operating profits, which shows that sensitivity was very high in 1996. Using projections of sugar prices and volumes, SECOFI obtained a projection of domestic sugar industry earnings which showed that sales revenue for 1997 would decline by 15 per cent, and

Region" published in *Sugar and Sweetener Yearbook*, MEXICO-9, and the translation of the relevant parts of the publication *Sugar and Sweeteners* for various dates between 1995 and 1996, MEXICO-10. According to Mexico, these documents, together with other working papers, support SECOFI's conclusion set out in the revised final resolution.

²⁴ In this connection, Mexico claims that SECOFI examined the level and trends in the weighted average prices of HFCS-42 and HFCS-45 imports from the United States in relation to the weighted average prices of standard and refined sugar sold on the domestic market in 1994, 1995 and 1996. Pursuant to the finding contained in paragraph 7.153 of the Panel Report, WT/DS132/R, Mexico asserts that the average sales prices of sugar on the domestic market were calculated on the basis of sales volumes and values for the whole of the domestic industry. In other words, according to Mexico, consideration was given to sales of standard and refined sugar to both the industrial and the household sectors. See the table on sugar sales to the domestic market in MEXICO-11.

²⁵ See "Methodological note on the projection of sugar and HFCS prices for 1997", MEXICO-12.

²⁶ See MEXICO-13.

²⁷ See MEXICO-15.

²⁸ See MEXICO-14.

operating profits by 118 per cent. Similarly, according to Mexico, its calculation of projected profitability for 1997 indicated a 12 percentage points decline in the operating margin compared with the previous period.

3.118 In Mexico's view, another matter which conclusively demonstrates the Mexican sugar industry's high sensitivity is the ability to raise capital, since the analysis of the industry's leverage²⁹ showed an excessively high debt level in 1996, with a ratio of total liability to book capital of 4.6 times, placing the industry in a situation of low net investment and high debt levels exposing it to high financial risk. SECOFI acknowledged that the industry's debt is a structural problem and not a consequence of revenue from dumped imports; in other words, it took account of the prevailing situation of domestic production in 1996 and its sensibility, concluding that with such a debt level the risk to the industry is high and, hence, the financial situation is vulnerable, so that any future change might alter the profits trend of earlier periods by directing more resources to debt servicing.

3.119 On the basis of the matters set out in this section, Mexico emphatically rejects the United States arguments that Mexico did not conduct an analysis in conformity with the provisions of Articles 3.1, 3.4 and 3.7 of the AD Agreement. On the contrary, Mexico reiterates that SECOFI acted in strict compliance with each and every one of the Panel's findings and conclusions so as to bring its measure into conformity, *inter alia*, with those provisions of the AD Agreement.

(b) SECOFI analysed the potential effects of the alleged restraint agreement on the likelihood of substantially increased importation, in a manner consistent with Article 3.7(i) of the AD Agreement

3.120 In accordance with the findings of the Panel Report, particularly those contained in paragraphs 7.176 and 7.177, Mexico maintains that it adequately considered the potential effects of the alleged restraint agreement on the likelihood of substantially increased importation, thereby making its determination consistent with Article 3.7 of the AD Agreement.

3.121 Mexico rejects the United States allegation that SECOFI confined itself to repeating the same information and the same conclusions that it had previously submitted to the Panel. According to Mexico, SECOFI, in this new analysis, considered the information provided previously to the Panel, that it was not the only information considered by the investigating authority. In fact, the Panel's finding obliged Mexico to take more elements into account and to provide an additional explanation to that contained in the original final resolution and not, as the United States suggests, that the explanation or additional data in question should be relative to the information previously submitted to the Panel.

3.122 Mexico argues that, according to the finding contained in paragraph 7.175 of the Panel Report, the question to be resolved by Mexico was whether, in the near future relative to the investigation period, even if the soft drink bottlers' HFCS consumption were limited, the likelihood of substantially increased importation would persist. Mexico considered that determination of the prospects concerning the future behaviour of imports does not depend exclusively on one single factor, such as the alleged restraint on consumption by one group of users, but that it is also necessary to take account of competing factors.

3.123 Therefore, Mexico asserts that SECOFI considered the trends observed during the investigation period and comparable earlier periods in prices, volumes, actual and potential consumption, economic context and conditions in the industry. In the light of these data for the period investigated, Mexico claims that SECOFI found that, in the situation envisaged, there was still good reason to believe that there would be substantially increased importation in the near future.

²⁹ See MEXICO-13 and MEXICO-16.

3.124 Mexico rejects the United States interpretation that the likelihood of increased imports is determined from the date of publication of the original final resolution. Mexico argues that SECOFI's determination is based not only on the increase in imports already recorded in 1997, as the United States suggests. Mexico adopted the point made by the Panel in paragraph 7.176 of the report so as to determine the existence of such a likelihood on the basis of anticipated import trends in the near future relative to the period investigated, i.e. in 1997, using a forward-looking analysis of a present situation, i.e. the period investigated, 1996.³⁰ In Mexico's view³¹, if such a determination were based on import trends observed during the conduct of the investigation itself, inadequate consideration would be given both to trade flows and to consumption forecasts distorted by the effects of the initiation of the anti-dumping investigation.³²

3.125 Mexico claims that it based its case on the actual situation observed among industrial users of HFCS and sugar in 1996 and the result of the review carried out in the original investigation on the commercial interchangeability, uses and functions of both products.³³ Mexico argues that the United States is trying to disregard its own experience in substituting HFCS for sugar in applications other than soft drink bottlers, such as milk, confectionery and bakery products and various beverages and foods.³⁴

3.126 Mexico asserts that its determination was based on actual sugar consumption figures from 1994 to 1996 of industrial users other than soft drink bottlers, and on the actual rates of utilisation of HFCS recorded in 1996 by those industrial users, who were requested to provide information on the consumption of sweeteners in their production processes.³⁵ Mexico also asserts that SECOFI considered rates of HFCS substitution for sugar supplied by the main importer for the period investigated, which were obtained from a recognized economic consultancy firm. Mexico argues that SECOFI determined the likelihood of increased importation by considering the effects of the alleged restraint agreement, on the basis of an estimate of potential HFCS consumption by sectors other than soft drink bottlers in 1997 and 1998, using as an input projections by specialists of total sugar consumption for those years, and applying those sectors' share of total consumption as recorded in 1994, 1995 and 1996.³⁶

³⁰ According to Mexico, it is obvious that, in the circumstances of an anti-dumping investigation, a forward-looking analysis of this nature by the investigating authority with regard to imports beyond or outside the period investigated cannot be extended indefinitely and must have a certain cut-off point, although the AD Agreement lays down no specific requirement in this respect.

³¹ When the analysis of imports within the investigation period and the forward-looking analysis outside the investigation period show not only an increasing trend but substantial increases compared with previous levels (combined with the proven buoyancy of those levels), Mexico asserts that they should be considered for purposes of a determination of the likelihood of substantially increased importation.

³² Mexico notes that the effect of reduced imports as a result of anti-dumping investigations was analysed and documented by *Staiger and Wolak* in the articles mentioned in MEXICO-18.

³³ See paragraphs 400 to 422 of the original final resolution as well as the note on "Substitution of HFCS for sugar in the USA", MEXICO-19.

³⁴ See in MEXICO-19 the note on substitution of HFCS for sugar in the United States. In addition, Mexico claims that the administrative record includes various studies and analyses on development of the HFCS in the United States that fully document the pattern of demand and replacement of sugar by HFCS in industries other than soft drink bottlers.

³⁵ Paragraphs 65 to 93 of the original final resolution refer to the industrial users other than soft drink bottlers who were asked for information on their sugar and HFCS consumption during the period investigated, as well as the replies of those users, on the basis of which the **actual** rates of substitution in 1996 were calculated. See the information and summary tables describing the degrees of substitutability between HFCS and sugar documented by SECOFI in MEXICO-20.

³⁶ Mexico notes that MEXICO-21 contains the projections of total sugar consumption for 1997 and 1998 on which SECOFI based its work and which were obtained from a paper by Peter Bazanall, a recognized expert on sweeteners, and from an estimate contained in a report by the United States Department of Agriculture (USDA).

3.127 According to Mexico, the main aspects of the economic context in which the determination of the likelihood of increased imports was made include: (a) the growth rate of the imports investigated from 1994 to 1996; (b) the export potential of the United States HFCS industry; (c) the price differential recorded during the investigation period between HFCS and sugar, which is an incentive for substitution; (d) the non-existence of trade restrictions on imports and a decline in tariff rates of such imports; and (e) the proven functionality of HFCS as a sugar substitute in a variety of industries in the Mexican market, further supported by the accumulated experience of the development of the United States market.

3.128 Furthermore, contrary to the United States contention, Mexico notes that it did not state that HFCS consumption in 1996 by soft drink bottlers and by other industries was similar, which does not mean that potential consumption by those industries is insignificant. While soft drink bottlers stand out as the main sugar consumers, Mexico points out that the other industries, particularly those which already consumed HFCS in the period of investigation, demand a substantial volume of sugar likely to be displaced by a low-cost substitute product.³⁷ Thus, in a context in which HFCS prices are depressed relative to sugar prices and in the absence of any distortion of trade flows, industrial users other than soft drink bottlers would have economic incentives to substitute dumped-cost HFCS imports for sugar.

3.129 According to Mexico, the United States erroneously alleges that SECOFI did not have at its disposal information to demonstrate that HFCS users other than soft drink bottlers were actually substituting HFCS for sugar during the period of investigation.³⁸ Mexico rejects this argument, because it claims that it did in fact obtain information, directly from industrial users on HFCS consumption in their production processes, and it is attached to this written submission.³⁹

3.130 Mexico recalls that the United States argued that the conjectural basis for the SECOFI determination is reflected in the scale of the estimated substitution and in the assumption that soft drink bottlers would not consume imported HFCS. Mexico categorically rejects the United States interpretation. First of all, according to Mexico, SECOFI's estimate relies on an objective and admissible economic analysis, taking into account the actual conditions prevailing in the Mexican market, which provided reasonable grounds for the likelihood of HFCS being substituted for sugar, as shown, *inter alia*, by the trend observed during the period analysed, 1994-1996. In Mexico's view, under a forward-looking hypothesis for 1997, the restrictive effect of the alleged agreement would not be crucial in curbing the increase in demand for HFCS imports by soft drink bottlers. Furthermore, Mexico claims it has been shown that HFCS demand from other industries would be strengthened and they would increasingly substitute HFCS for their sugar consumption.⁴⁰

3.131 Mexico argues that the elements in support of SECOFI's conclusion are stronger than those that might support a conclusion of the kind the United States is seeking to impose⁴¹, *i.e.*, that, given

³⁷ See in MEXICO-21 the "Table on actual sugar consumption by sector".

³⁸ See paragraph 31 of the first written submission by the United States.

³⁹ See MEXICO-20.

⁴⁰ Taking into account the key characteristics of the foreseeable economic context for 1997 in accordance with the points made in paragraph 51 of the second written submission.

⁴¹ Mexico argues that the United States is attempting to impose a standard of analysis and a conclusion that would absurdly require the authority to obtain information concerning the alleged restraint agreement, which neither Article 3 nor any other provision of the AD Agreement requires for a determination of threat of injury, since this would imply that SECOFI should have precise knowledge and information concerning the validity, compulsory nature and actual application of the alleged agreement. Mexico claims that knowledge of these elements and possession of information based thereon is impossible in both practical and legal terms, given the time-scale of the investigation and the powers of the investigating authority. Hence, according to Mexico, SECOFI could not simply make arbitrary and vague assumptions about them outside the period investigated. In fact, in Mexico's opinion, an analysis of the type suggested as appropriate by the United States

the existence of the alleged agreement and notwithstanding the probable economic framework for substitution, the other sugar-consuming industries would simply abandon the market or, if necessary, revert to their consumption pattern under the conditions existing before the introduction of HFCS in their production processes.

3.132 On the basis of the points made in this section, Mexico maintains before this Panel that SECOFI's review and final conclusion about its analysis of the potential effects of the alleged restraint agreement on the determination of the likelihood of increased importation was based not on conjecture or remote possibility, but on a forward-looking analysis of the situation observed during the period under investigation, following an objective, legitimate and reasonable examination of the information contained in the administrative record.⁴² Accordingly, Mexico contends that its determination is consistent with Article 3.7 of the AD Agreement and that it strictly complies with the findings and recommendation of the Panel Report.

(c) Mexico complied with the provisions of Articles 12.2 and 12.2.2 of the AD Agreement

3.133 Mexico notes that the United States alleges that SECOFI's revised final resolution is inconsistent with the provisions of Articles 12.2 and 12.2.2 of the AD Agreement, based on the erroneous assumption that SECOFI analysed the probable impact of imports on the domestic industry using economic models and projections of industry trends, the results of which were based on unexplained data relating to the state of the industry. In this connection, Mexico firstly rejects the United States argument that SECOFI does not provide adequate information about its analysis and the data on which the methodology employed was based. Similarly it categorically opposes the United States suggestion that SECOFI's findings, based on various economic models and projections should be rejected because of their allegedly "conjectural" nature.⁴³

3.134 In this same context, Mexico totally rejects the interpretation by the United States in paragraph 54 of its first written submission, where, with reference to Articles 12.2 and 12.2.2 of the AD Agreement, it states that "[...] When an investigating authority chooses to base its determination on the results of an economic model or forecast, information concerning the data used as inputs in the model or forecast is clearly 'relevant information' for purposes of determination".⁴⁴

3.135 Mexico maintains that the relevant information referred to in these articles, particularly Article 12.2.2, does not necessarily have to consist of the data used by the investigating authority in the economic models and projections on which its analysis and determination were based. In fact,

would have been possible if it had been shown that authority should arrive at a determination based on conjecture and remote possibility, rather than on facts as required by the AD Agreement.

⁴² Mexico points out that, as it indicated in its first written submission, in order to comply with the Panel recommendation adopted by the DSB, SECOFI considered it appropriate and sufficient to incorporate in the review file the information submitted in the course of the original investigation by the Corn Refiners Association. According to Mexico, despite the fact that the information in question had been submitted too late (one day before publication of the original final resolution) and could not therefore be taken into account in the ordinary investigation, it was appropriate in the circumstances to incorporate it legally in the record of this proceeding so that it could be taken into account and the terms of the alleged restraint agreement could thus somehow be ascertained. On the basis of that information, Mexico asserts that SECOFI observed that the alleged restraint agreement would apparently have the potential effect of limiting HFCS consumption by soft drink bottlers to 350,000 tons (MEXICO-2). Mexico notes that this information on the terms of the alleged restraint agreement was considered adequate, since paragraph 7.175 of the Panel Report, WT/DS132/R, stated that the question was not whether an alleged restraint agreement existed, but whether its potential effects on the likelihood of dumped imports increasing in the near future had been adequately considered in the analysis. Nevertheless, Mexico claims that, from the United States' standpoint, no information that could have been available to any authority under international anti-dumping practice in a case of this kind would have been sufficient for the purposes of the analysis suggested as appropriate by the United States.

⁴³ See paragraphs 6 and 53 of the first written submission of the United States.

⁴⁴ *Ibid.*, paragraph 54.

Mexico asserts that Article 12.2 does not lay down any precise formulas or specific terms in which an authority is required to express its findings or conclusions in the public notice. On the contrary, it simply states in general terms that these will relate to the issues considered material by the investigating authority. Nor does Article 12.2.2 lay down any specific formulas or terms, and even though it does in fact require the inclusion of all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures, it does not specify what that information should be. Rather, according to its own wording, it takes as limiting factors the relevance and confidentiality of the information.

3.136 Mexico argues that it is clear that the United States is once again attempting to base its argument on an excessive and inadmissible interpretation of Articles 12.2 and 12.2.2 of the AD Agreement when it suggests that the notice should include the data that were used by the investigating authority in the economic models and projections on which its analysis and determination were based. In Mexico's opinion, this interpretation and the absurd suggestion by the United States is even contrary to the spirit of the last sentence of Article 12.2.2, which expressly calls for due regard to be paid by the authority to "the protection of confidential information". Mexico maintains that this means that the authority is entitled to consider that certain information should be left out of the notice and be included in the administrative record in such a way as to protect the confidentiality of that information.

3.137 It is therefore clear, according to Mexico, that no valid interpretation of the AD Agreement could warrant the view that the scope of these provisions implies that the final public notice must contain explanations concerning the data on which the methodology used by the authority in its models and projections is based.

3.138 Nor do any of the Panel Report's findings and conclusions contain this implication, argues Mexico. Mexico points out that, despite the fact that the findings and conclusions of the Panel Report in this connection did not deal directly with Article 12, since the United States arguments related not to this provision but to Article 3, the Panel, in finding that Mexico had failed to comply with its obligations under Article 3, also simultaneously concerned itself with establishing what requirements had to be met by a final determination, and it even referred expressly to Article 12.2.2.⁴⁵ However, according to Mexico, none of the relevant findings or conclusions of the Panel is consistent with the United States position and its inadmissible interpretation of Article 12.2.2.

3.139 Mexico maintains that it has complied with the standard established by the Panel, particularly with paragraphs 7.128⁴⁶ and 7.140⁴⁷ as follows:

- SECOFI carried out a review of the impact of HFCS imports on the domestic industry, which, included an adequate evaluation of the economic factors referred to in Articles 3.4 and 3.7 of the AD Agreement. On the basis of a variety of positive evidence and facts – not conjecture as suggested by the United States – that review led it to confirm its determination of a threat of injury to the domestic sugar industry.
- The final notice of 20 September was not confined to reciting data, as asserted by the United States. Paragraphs 128 to 166, *inter alia*⁴⁸, of the revised final resolution

⁴⁵ See footnote 610 of the Panel Report, WT/DS132/R.

⁴⁶ In this connection, in the last part of paragraph 7.128 of the Panel Report, WT/DS132/R, the Panel stated that "[...] the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority" (footnote omitted).

⁴⁷ Apart from what was stated in paragraph 7.140, footnote 610 of the Panel Report, WT/DS132/R, indicated that: "[...] the mere recitation of data does not constitute explanation, or findings and conclusions, sufficient to satisfy the requirements of Article 12.2 of the AD Agreement [...]" and it adds that "[...] unless consideration of a factor is reflected in the final determination, we do not take cognizance of underlying evidence in the record [...]".

provide sufficiently detailed explanations of the findings, conclusions and relevant information contained in the new analysis of trends in economic factors conducted by SECOFI in ascertaining the resulting impact of HFCS imports on the domestic industry as a whole, in both real and potential terms, as well as the reasons which led SECOFI to confirm the final measure, with due regard for the protection of confidential information.

- SECOFI's findings related to the whole of the domestic industry, based on data and information duly documented in the record, as well as on models and projections constituting reasonable methodologies which were also justified in the record by means of methodological notes explaining how SECOFI proceeded in various calculations.⁴⁹

3.140 Mexico also maintains that, in accordance with the findings and conclusions of the Panel Report, particularly those contained in paragraphs 7.176 and 7.177⁵⁰, SECOFI took into account additional items of relevant information in order to analyse the potential effects of the alleged restraint agreement and arrive at an adequate determination of the likelihood of a substantial increase in HFCS imports. Thus, from paragraph 55 onwards, the revised final resolution includes a more detailed explanation than that contained in the original final resolution, which sets forth in adequate detail the findings and conclusions which led SECOFI to determine that the potential effects of the alleged restraint agreement did not eliminate the well-founded likelihood of substantially increased HFCS imports. Mexico asserts that that determination is not based on conjecture, allegation or remote possibility, as contended by the United States, but on facts and evidence which support the conclusion of a well-founded likelihood of increased importation despite the existence of the alleged restraint agreement.

3.141 Mexico also refutes three specific examples mentioned by the United States in an attempt to justify its argument that SECOFI did not adequately explain the use of projections of industry trends.⁵¹

- (a) the United States questions the alleged use by SECOFI of a 50 per cent substitution rate in respect of industrial users other than soft drink bottlers⁵², so as to conclude that there was a likelihood of increased importation. On this point, Mexico claims that the United States confuses the degree of substitution in the various industries with the

⁴⁸ In this connection, Mexico points out once again that the revised final resolution closing the procedure followed by SECOFI for the specific purpose of complying with the recommendation adopted by the DSB complements and amends the original final resolution (of 23 January 1998) in all those aspects reviewed by the investigating authority, because the Panel had considered them to be inconsistent with the AD Agreement.

⁴⁹ See, *inter alia*, exhibits MEXICO-6 "Methodology employed in statistical calculations (analysis of imports and economic indicators)", MEXICO-12 "Methodological note on 1997 price forecasts for sugar and HFCS", MEXICO-14 "Methodological note on the financial report on injury (HFCS)" and MEXICO-21 "Methodological note on analysis of the likelihood of increased importation".

⁵⁰ As mentioned earlier, Mexico asserts that on this point the United States raised no argument concerning the requirements of Article 12 of the AD Agreement. It is for this reason that the conclusions of the Panel Report refer to inconsistency with Article 3.7(i). Nevertheless, on this subject, Mexico also considered that, in order to implement the DSB recommendation, it was essential to bear in mind that, in its findings, the Panel had also dealt with this aspect of the required content of the final determination.

⁵¹ See paragraph 55 and, in part, paragraph 53 of the first written submission of the United States.

⁵² *Ibid.*, second part of paragraph 55.

potential consumption of sugar liable to substitution by HFCS, to which Mexico refers in paragraph 59 of the revised final resolution.⁵³

- (b) the United States suggests that SECOFI did not adequately explain the use of data in pricing models and projections or the methodology used and that SECOFI's sugar price projections for 1997 were based on assumptions contrary to the data observed in 1996.⁵⁴ Mexico contends that, on the basis of the analysis carried out and the recorded monthly trend from 1994 to 1996 in the prices of HFCS imports from the United States and the domestic selling prices for sugar, SECOFI estimated the prices of both products for 1997. The method of estimation employed was a system of simultaneous equations using a vector autoregressive model. The result was compared with the observed trend in the values of the variables incorporated and checked by reference to the consistency of those forecasts with the economic context and conditions in the industry during the period analysed.⁵⁵ Mexico points out that paragraph 98 of the revised final resolution clearly sets out the information used in the projections. The source of the information and the way it was obtained are described in paragraphs 85 and 86 of the resolution.
- (c) Finally, the United States questions SECOFI's use of the projection that industry sales revenue would decline by 15 per cent.⁵⁶ Mexico asserts that the United States is mistaken in stating that the revised final resolution does not provide data on projected sales revenue. In fact, paragraph 152 of the revised final resolution contains a detailed explanation of how the investigating authority calculated projected revenue. The United States assertion is therefore totally false.⁵⁷

3.142 On the basis of all the arguments set forth herein, Mexico rejects the United States position, which Mexico claims is clearly based on an excessive and inadmissible interpretation of Articles 12.2 and 12.2.2 of the AD Agreement, and reiterates to the Panel that Mexico has adequately complied with those provisions.

3. Conclusions

3.143 On the basis of the foregoing, and in accordance with the timetable established for this proceeding, Mexico submits its rebuttal of the arguments put forward by the United States in its first written submission, with the aim of adequately establishing the facts and setting forth the counter-arguments which will confirm to the Panel that Mexico has strictly complied with the conclusions and recommendations of the Panel and the DSB, inasmuch as it has remedied the shortcoming in the threat of injury analysis and brought its final determination into conformity with the requirements of Article 3 of the AD Agreement, while at the same time complying with Articles 12.2 and 12.2.2 of the Agreement.

⁵³ See MEXICO-21 which, according to Mexico, shows that the 1996 substitution rate was applied to the estimated consumption of sugar-consuming industries for 1997 and 1998 so as to calculate each industry's potential consumption, and a 50 per cent reduction rate was applied to the total of such potential consumption in order to obtain an objective yet conservative estimate of potential demand. See also paragraphs 63 and footnote 48 of Mexico's second submission.

⁵⁴ See the second part of paragraph 55 of the first written submission by the United States and footnote 68.

⁵⁵ See "Methodological note on projected sugar and HFCS prices for 1997", MEXICO-12. See also paragraphs 20 to 24 of Mexico's second submission.

⁵⁶ See paragraph 55 and footnote 68 of the first written submission of the United States.

⁵⁷ See paragraphs 36 and 37 of Mexico's second submission, as well as the tables "Projected income for 1997" MEXICO-16, "Calculation of fixed and variable costs in accordance with the degree of operating leverage" MEXICO-17, and "Methodological note on the financial report on injury" MEXICO-14, and paragraphs 153, 154 and 166 of the revised final resolution.

3.144 Mexico also requests the Panel to declare that its revised final determination concerning the threat of material injury to the domestic sugar industry, including (i) its consideration of the impact of HFCS imports on the Mexican sugar industry as a whole; (ii) its consideration of the potential effects of the alleged restraint agreement on the likelihood of substantially increased importation; and (iii) its explanation, in the revised final resolution, of the findings and conclusions reached by SECOFI with regard to those questions, fully complies with the conclusions and recommendations of the Panel and the DSB and is consistent with Articles 3.1, 3.4, 3.7, 12.2 and 12.2.2 of the AD Agreement.

E. ORAL STATEMENT OF THE UNITED STATES

3.145 The United States argues that there are three specific grounds on which SECOFI's redetermination violates the AD Agreement.

1. The Restraint Agreement And Article 3.7(i)

3.146 According to the United States, the redetermination, like the original determination, violates Article 3.7 of the AD Agreement because it provides no basis for the conclusion that there is a likelihood of substantially increased importation of HFCS from the United States.

3.147 In this respect, the United States considers it noteworthy that the redetermination's analysis of the restraint agreement between Mexican soft drink bottlers and sugar refiners contains almost exactly the same flaws as the arguments Mexico presented in the original Panel proceeding.

3.148 Specifically, according to the United States, the Panel rejected SECOFI's original analysis because SECOFI improperly premised its analysis on alleged increases in imports from 1996, the time of the conclusion of its period of investigation, rather than from the third quarter of 1997, the latest period for which its record contained data on the volume of imports from the United States. The United States notes that the Panel concluded that "the question for purposes of analysis of threat of material injury is not the level of imports already reached, but the likelihood of **increased** imports" and criticized SECOFI for "conclud[ing] that such imports would have continued increasing by inertia."

3.149 Yet, the United States argues, SECOFI's redetermination provides the same flawed analysis. The United States notes that SECOFI concluded that increased imports were likely in part because imports from the United States during the first three quarters of 1997 exceeded the levels of the previous year. Moreover, SECOFI did not claim that these increases were attributable to purchasers not subject to the restraint agreement. The restraint agreement was not announced until September 1997. Therefore, increased imports of HFCS by soft drink bottlers between January and September 1997 would not be likely to continue after September 1997 because of the existence of the restraint agreement. Indeed, the United States recalls, SECOFI assumed that after the restraint agreement took effect all of the soft drink bottlers' consumption of HFCS would be supplied from Mexican HFCS production.

3.150 The United States notes that the Panel also found SECOFI's original analysis to be improper because SECOFI found merely that the restraint agreement "does not rule out the possibility" of future imports.

3.151 In paragraph 56 of the redetermination, SECOFI again makes conclusions regarding the possibility of increased imports notwithstanding the restraint agreement.

3.152 The United States points out that the Panel also found SECOFI's analysis to be improper on a third ground. It found that SECOFI's determination did not provide any analysis to support a conclusion that there was a likelihood that users other than soft drink bottlers would increase their importation of HFCS.

3.153 According to the United States, the information on which SECOFI relies in its redetermination is not materially different from the information the Panel previously considered and rejected.

3.154 SECOFI has projected that imports of HFCS by purchasers other than soft drink bottlers would increase by 467 per cent, from approximately 62,000 tons in 1996 to 350,000 tons in 1998. According to the United States, this rate of increase is more than double the rate by which total HFCS imports from the United States – including those by the soft drink bottlers now covered by the restraint agreement – increased during SECOFI's period of investigation. SECOFI provides no information in its redetermination why purchases by these HFCS users, which only accounted for approximately one-third of HFCS consumption in 1996, would be likely to increase at such an astonishing rate.

3.155 SECOFI's estimate of the likely volume of HFCS imports by purchasers other than soft drink bottlers is based on a series of computations. According to the United States, a careful examination of these computations reveals that notwithstanding Mexico's claims to the contrary, they are not based on the actual purchasing patterns of users of HFCS. Instead, the United States asserts, they are based on speculation and conjecture.

3.156 In the view of the United States, there are two fundamental flaws with SECOFI's computations. The first relates to Mexico's claim that: "In 1996, the weighted average rate of utilization in consumer industries other than soft drink bottling was 84 per cent."

3.157 This 84 per cent figure appears nowhere in SECOFI's redetermination. It appears that the 84 per cent figure is a weighted average of theoretical or technical substitution rates of HFCS for sugar for the various types of industries listed in Exhibit Mexico-21.

3.158 It is noteworthy, the United States argues, that the list of purchasing industries and substitution rates in Mexico-21 is not identical to the only listing of substitution rates in the redetermination. That listing appears at paragraph 57 of the redetermination. According to the United States, Mexico claims that this rate reflects data obtained directly from industrial users on HFCS consumption in their purchasing process. The United States further asserts that Mexico apparently would like the Panel to believe that this data reflects the actual rate that these users substituted HFCS for sugar in 1996.

3.159 This is not the case, argues the United States. The data in Mexico-20, insofar as used by SECOFI as the basis for the substitution rates used in Mexico-21, pertain merely to purchasers' technical *ability* to substitute HFCS for sugar. Indeed, Mexico-20 describes these substitution rates as the "technical" degrees of substitution. The United States asserts that this information is different from the material that Mexico submitted in the original Panel proceeding only insofar as it came from purchasers. According to the United States, both this material and the material in the original proceeding merely concern whether a purchaser has the theoretical or technical ability to substitute HFCS for sugar. There is a critical distinction, however, between the theoretical or technical ability to substitute and actual substitution. The United States notes that the Panel rejected data on theoretical substitution during the prior proceedings and it argues that the Panel should do so here. According to the United States, SECOFI's redetermination provides no information pertaining to actual substitution rates.

3.160 The United States argues that, to the extent that there is information in Mexico-20 that reflects substitution rates of individual purchasers, SECOFI did not use it in either Mexico-21 or its redetermination. Instead, claims the United States, for purposes of Mexico-21, SECOFI simply selected the highest technical substitution rate reported to it from any source. The United States notes that SECOFI did so despite the fact that several industrial users – such as juice producers and jam makers – reported substitution rates below the maximum.

3.161 The second fundamental flaw in SECOFI's redetermination, the United States argues, relates to SECOFI's assumption that purchasers other than soft drink bottlers would substitute HFCS for 50 per cent of their potential sugar consumption in 1997 and 1998. The 50 per cent assumption is not based on record evidence, alleges the United States. It is a number that SECOFI selected arbitrarily.

3.162 In the view of the United States, it is not surprising, therefore, that neither the redetermination nor Mexico's two submissions to this Panel provides any reasoned explanation of how this 50 per cent figure was derived. According to the United States, careful scrutiny of Exhibit Mexico-21, however, reveals how Mexico used the 50 per cent figure.

3.163 Mexico-21 indicates that SECOFI went through several steps. First, SECOFI calculated the percentage of HFCS that purchasers other than soft drink bottlers could substitute for sugar in their operations. This, claims the United States, was based on theoretical or technical substitution rates. Second, SECOFI estimated the volume of sugar that would be consumed by these industries in 1997 and 1998 by taking an estimate of total Mexican sugar consumption in those years and allocating a share to each industry. The United States claims that these shares were not based on actual consumption patterns but on assigning weights based on the share of the consumer price index allocable to each industry. *See* Mexico-20. Then, SECOFI applied these technical substitution rates to each industry's total estimated consumption of sugar in 1997 and 1998 to derive SECOFI's estimate of the total amount of HFCS that industries other than the soft drink bottling industry could, theoretically, substitute for sugar in 1997 and 1998. Lastly, SECOFI reduced this number by 50 per cent and concluded that this amount represented these users' likely HFCS purchases. In other words, the United States argues, SECOFI assumed that these purchasers *would* substitute 50 per cent of the HFCS that they *could* substitute for sugar.

3.164 In the view of the United States, a careful examination of Mexico-21 confirms that SECOFI's assumption had utterly no basis in reality. The United States further claims that Mexico-21 indicates that, during the 1994-96 period, sugar purchases by industrial users other than soft drink bottlers were generally stable or increasing slightly despite the fact that: (1) these users could theoretically substitute HFCS for sugar to varying degrees and (2) imported HFCS was available from the United States. The United States notes that these purchasing patterns, incidentally, confirm that the substitution rates in Mexico-20 were theoretical, not actual. If the substitution rates were actual, argues the United States, one would have seen significant declines in the amount of sugar these industrial users purchased.

3.165 According to the United States, SECOFI, however, projected that these users would cut their use of sugar by as much as 50 per cent within a two-year period. The United States claims that this projection was not an extrapolation of the historical trends and was not in any way based on these trends. Instead, continues the United States, the projection was totally contrary to the observed data during SECOFI's period of investigation.

3.166 In the view of the United States, this confirms that SECOFI's projections were not, as Mexico claims, obtained using objective and reasonable methodologies. SECOFI's analysis was not premised on the situation observed during its period of investigation, argues the United States, nor was it based on facts. Instead, the United States claims, its conclusion that substantially increased imports were likely notwithstanding the restraint agreement is based on conjecture.

2. Analysis Of Likely Impact And Article 3.4

3.167 According to the United States, SECOFI's redetermination does not provide a reasoned and fact-supported analysis concerning why improvements in important industry trends during its period of investigation were not probative in ascertaining the likely future condition of the industry.

3.168 SECOFI's redetermination indicates that the Mexican sugar industry's performance improved in several critical respects during 1996, a year when imports of HFCS from the United States increased. In particular, the domestic industry was profitable in 1996, and its profitability increased substantially over 1995 levels. Additionally, in 1996 the price of domestically-produced sugar in Mexico increased by a much higher percentage than prices for HFCS imported from the United States. According to the United States, the evidence also shows that, in 1996, the Mexican sugar industry had increasing capacity utilization, rising employment and productivity, declining operating costs, declining sales costs as a percentage of revenue, and stable debt levels.

3.169 In the view of the United States, SECOFI was thus obliged to provide a fact-based analysis demonstrating why such positive trends for the Mexican sugar industry in 1996 would reverse in the near future or why other considerations would make these rising trends insignificant. The United States argues that SECOFI did not do so.

3.170 Indeed, as confirmed by Mexico's written submissions to the Panel, SECOFI relied on its projections of the likely levels of sales, prices and profitability in the Mexican sugar industry in conducting its analysis of likely impact. According to the United States, these projections cannot support SECOFI's determination. They are not fact-based and they yield results that are directly contrary to the experience of the Mexican sugar industry during the period of investigation.

3.171 The United States notes that SECOFI projected a 10 per cent decline in sales volume and a 9 per cent decline in sales prices for the domestic sugar industry in 1997. However, paragraphs 60, 100, 138, 151, and 166 of the redetermination indicate that SECOFI's projections of declines in domestic sales volumes and prices were tied to SECOFI's flawed assumptions regarding likely import volumes. The United States asserts that SECOFI's projections of likely import volumes were based on conjecture contrary to fact. These same defects make SECOFI's projections of likely sales volumes for the Mexican sugar industry invalid. The United States further argues that SECOFI's pricing projections, because they are dependent on the volume projections, also cannot serve as the basis for an affirmative threat determination.

3.172 Moreover, the model used by SECOFI to project sugar prices is a "vector autoregression" analysis. This meant that SECOFI projected future values of variables such as price and volume based on the historical relationship between these variables during its period of investigation. Underlying this type of model are two critical assumptions, notes the United States. One is that the variables historically moved in a consistent manner. The second is that the variables would continue to move in the future in the manner that they had in the past.

3.173 According to the United States, neither of these assumptions was valid with respect to the Mexican sugar industry. First, there was no consistent relationship between import volumes, sales quantities of domestically-produced sugar, and the prices of domestically-produced sugar during SECOFI's period of investigation. The United States notes that import volumes increased throughout the period of investigation. The United States further notes that the quantity of domestic sugar sales declined slightly during the period of investigation. By contrast, sugar prices declined in 1995, but increased sharply in 1996. In particular, the price of refined sugar increased by 48 per cent in 1996, while the price of HFCS-55 increased by only 5 per cent that year. The United States observes that HFCS-55 was the product that constituted the bulk of the imports and that SECOFI asserted competed most directly with refined sugar. In light of this historical experience, and in light of the agreement of industry participants reported in paragraphs 111 and 112 of the redetermination that sugar prices had been "highly unstable" during its period of investigation for reasons having nothing to do with HFCS imports, the United States argues that SECOFI was obliged to explain why it was justified in relying on a model whose assumptions were not based on fact. According to the United States it did not do so.

3.174 With respect to the second assumption, because of the restraint agreement and the other reasons discussed above, the United States maintains that there was no basis to conclude that import volumes would increase in the future in the manner that they did during SECOFI's period of investigation. With respect to this issue as well, the United States asserts that SECOFI did not satisfy its obligation to explain why its reliance on its "vector autoregression" analysis was reasonable.

3.175 Finally, according to the United States, the internal documents from SECOFI's administrative record presented by Mexico to the Panel are inconsistent with the results of SECOFI's pricing projections. Exhibit Mexico-16 contains the projection used in SECOFI's redetermination, namely that sugar prices would decline by 9 per cent from 1996 to 1997. According to the United States, exhibit Mexico-12, in which SECOFI described the basis for its pricing projections, does not support SECOFI's use of the 9 per cent figure. The third page of Mexico-12 contains a chart indicating projected 1997 prices for standard sugar. The chart in Mexico-12 indicates that standard sugar prices would be stable, not declining, in 1997. Indeed, the prices projected for 1997 are at the same levels under which the Mexican sugar industry operated profitably in 1996. SECOFI acknowledges this fact about the standard sugar pricing projections at paragraph 98 of its redetermination. But, the United States argues, SECOFI's projections of stable standard sugar prices and declining overall sugar prices for 1997 are irreconcilable, given that SECOFI's record indicates that: (1) standard and refined sugar shared identical pricing trends for 35 of the 36 months in 1994, 1995, and 1996, and (2) standard sugar accounted for the majority of Mexican sugar volumes. In the view of the United States, SECOFI has failed to explain why it was justified in relying on pricing projections that were both internally inconsistent and irreconcilable with historical data.

3.176 The United States argues that SECOFI's projections of sharp declines in profitability in 1997 are based entirely on its flawed projection of declines in sugar sales volumes and sugar sales prices. Thus, according to the United States, SECOFI's projections of the sugar industry's financial performance are equally invalid. Moreover, the record data contradicts SECOFI's projections. In 1996, sugar industry profits increased substantially despite increasing volumes of imported HFCS. According to the United States, SECOFI has failed to explain why it relied on projections contrary to the facts observed during its period of investigation.

3.177 The United States notes that Mexico contends that SECOFI's conclusions on industry profitability are justified in light of the "financial sensitivity" of the Mexican sugar industry. It asserts that this "financial sensitivity" makes the sugar industry particularly susceptible to losses in revenue. Losses in revenue may be caused either by losses in sales volume or reductions in price. However, according to the United States, SECOFI's record provides no basis -- apart from the results yielded by SECOFI's defective models -- for the conclusion that the Mexican sugar industry was likely to face either lower sales volumes or reduced prices. Consequently, the record also contains no basis for any conclusion that losses in revenue are likely.

3.178 Moreover, the notion that the "financial sensitivity" of the Mexican sugar industry will cause its performance to deteriorate whenever imports increase is contrary to the data in the SECOFI record. According to the United States, SECOFI's own analysis indicates that the presence of increased volumes of imported HFCS does not necessarily impair the Mexican sugar industry's ability to raise capital and finance debt. Indeed, the United States continues, SECOFI found that, notwithstanding increasing HFCS imports in 1996, the sugar industry's cash flow improved, thus enhancing its ability to obtain short-term financing and permitting it to improve its debt service indices.

3.179 In sum, the United States argues that Mexico has not satisfied its obligation to analyze the Article 3.4 factors as to impact. The United States further argues that Mexico has not provided any fact-based analysis; it has merely manipulated data from projections. Finally, the United States argues that the projections cannot serve as a substitute for analysis because they are based on conjecture and yield results contrary to the actual data observed during the course of the investigation.

The United States claims that Mexico has not attempted to explain or reconcile its projections with the contrary data.

3. Notice And Article 12

3.180 In the view of the United States, Mexico violated Articles 12.2 and 12.2.2 of the Agreement because SECOFI consistently failed to explain its use of inputs for its projection of industry behavior that yielded results either contrary to or unsupported by the observed data during its period of investigation.

3.181 The United States argues that SECOFI's failure to explain the inputs that it used in its projections makes it impossible for one reading the determination to ascertain how SECOFI derived its projections of industry behavior. The necessary explanation is not in the determination, nor is it in the type of separate report referenced in Articles 12.2 and 12.2.2. Indeed, Mexico has informed this Panel that SECOFI's analysis of the restraint agreement was premised on substitution rates of HFCS for sugar for various industries. According to the United States, the substitution rates Mexico now states that SECOFI used are different from the substitution rates set forth in paragraph 57 of the redetermination. Moreover, their derivation cannot be traced from anything in the redetermination or any separate report made available to the parties.

F. ORAL STATEMENT OF MEXICO

3.182 Firstly, according to Mexico, it should be stressed that the United States was hasty in resorting to the Dispute Settlement Body without exercising its judgement as to whether action under those procedures would be fruitful, as required by Article 3.7 of the Dispute Settlement Understanding, and without consulting Mexico in respect of the new final resolution.

3.183 Secondly, Mexico recalls that since this procedure concerns the implementation of the AD Agreement, the work of this Panel is governed by the standard of review in Article 17.6 of that Agreement. In other words, given that the dispute between the parties involves detailed discussions concerning the implementation of the various provisions of the AD Agreement, the Panel must bear in mind that Mexico's arguments cannot be disregarded, unless it can be demonstrated that they are based on an inadmissible interpretation of that Agreement.

1. SECOFI Examined The Probable Impact Of Corn Syrup (HFCS) Imports On The Domestic Industry And Determined Threat Of Injury On The Basis Of The Industry As A Whole

3.184 On the basis of the Panel's findings and conclusions, Mexico asserts that SECOFI undertook a fresh examination of the impact of HFCS imports on the domestic industry as a whole, including an adequate actual and potential evaluation of the economic factors and indicators mentioned in Article 3.4 of the AD Agreement. On the basis of various positive evidence and facts, the investigating authority confirmed its determination of threat of injury to the whole domestic sugar industry.

3.185 With respect to price analysis, Mexico claims that it adequately complied with the Panel's findings. The revised final resolution fully sets out the trends in the prices of HFCS imports from the United States and the prices of domestically produced sugar during the investigation period and the two comparable earlier periods, together with the projected trends for the near future.

3.186 The fundamental argument of the United States is that SECOFI's determination is not supported by "factual materials" and that the results of the projections are *directly contrary* to the actual experience of the Mexican sugar industry during the investigation period. According to Mexico, that argument is based on a partial examination of isolated aspects of the revised final

resolution. Mexico further claims that the United States has not examined all the information which was available to SECOFI when it made its determination.

3.187 In Mexico's view, actual proof of the adverse impact of the price of the investigated imports on the domestic price during the investigation period was obtained on the basis of a detailed analysis of the month-by-month trends in both prices, the calculated margins of undercutting and dumping, statistical evidence of causality and the prevailing economic environment, with special emphasis on the "natural difference" between the prices of the two products.

3.188 Mexico asserts that the price trends observed in 1996 showed that greater import penetration was connected with increased undercutting and declining HFCS prices in relation to sugar. In other words, given the process of substitution between the two products, an increase in the price differential stimulates demand for the alternative product at a lower price. In the circumstances, the sugar industry adjustment mechanism, given the conditions of competition imposed by imports and the structural restraints in the industry, is geared to preventing greater market displacement, by containing or reducing domestic prices.

3.189 On the basis of the monthly trends for 1994 to 1996 observed in the price of HFCS imports and the domestic selling price for sugar, Mexico notes that SECOFI estimated the prices of both products for 1997. Mexico also notes that the method of estimation employed was a system of simultaneous equations using a vector autoregressive model. The result was compared with the observed trend in prices and volumes and checked by reference to the consistency of the forecasts with the economic context and conditions in the industry during the period analysed.

3.190 According to Mexico, the reasoning behind the SECOFI determination was consistent with observed price trends during 1996. Indeed, average prices in that year were higher than the year before, even allowing for HFCS imports. This development is explained by the adverse conditions observed in 1995, which unduly depressed both the consumption and the prices of practically all goods on the domestic market.

3.191 Mexico argues that the United States' argument concerning price trends ignores the fact that sugar prices declined from 1994 to 1996, as well as during the January-December 1996 investigation period, which was characterized by growth in dumped imports at lower prices with higher undercutting margins.

3.192 Mexico points out that it determined from the original final resolution that, although sugar and HFCS are not perfect substitutes, since they are not identical products, in no way can it be inferred that they are not close substitutes. According to Mexico, this aspect is fully documented in the administrative record. Experts on the sweeteners industry agree that, precisely because of the existing substitution between HFCS and sugar in the industrial sector, the prices of the two goods are related, and both the existing differentials between them and the movements of one price or the other have a proven impact on the industry's competitiveness.

3.193 Mexico considers that its determination should not be evaluated in isolation, for in order to arrive at a determination of threat of injury all elements must be considered together, because they are interrelated. In addition, Mexico claims that even though not all the factors supported the determination of threat of injury, the negative effects already observed in the period analysed made for a positive determination in this respect.

3.194 SECOFI determined that the high rate of growth in HFCS imports at significantly low prices caused a reduction in sugar sales on the Mexican market of 2.5 and 5 per cent in 1996 compared with 1994 and 1995 respectively, given the substitution of HFCS for sugar in a wide variety of industrial products. This drop in sales, according to Mexico, resulted in the fact that in 1996 production for the domestic sugar market recorded a 4.2 percentage points reduction in its share of domestic

consumption compared with 1994, while the share of HFCS imports from the United States increased by 2.76 percentage points. In Mexico's view, this shows an important link between the share lost by the sugar industry in the domestic market and the proportionately greater share gained by HFCS imports, for in the investigation period alone 60 per cent of the domestic sugar industry's loss of market share was absorbed by HFCS from the United States.

3.195 Mexico claims that the industry's 16 per cent increase in the use of installed capacity and 2 per cent increase in productivity in 1995 compared with 1994, as well as the corresponding 3 and 6 per cent increases for 1996 compared with 1995, are explained by the rising levels of domestic production, because although the installed capacity and the number of employees rose from 1994 to 1996, domestic sugar production recorded greater increases as a result of having to increase the cultivated surface area, yields per hectare and factory efficiency. Mexico further claims that the trends in employment, wages and stocks described in the revised final resolution are explained by the labour and production conditions of the Mexican sugar industry.

3.196 Moreover, the investigating authority determined that during the investigation period the sugar industry's profits and profitability indicators had shown a positive trend attributable to improved selling and operating costs. However, Mexico notes that owing to the specific characteristics of the Mexican sugar industry, operating profits and net profits remain highly sensitive to changes in sales revenue, as reflected in the fact that a decline in sales revenue would result in a disproportionately sharp fall in operating profits and net profits.

3.197 Mexico does not deny that in the period analysed, 1994-1996, the sugar industry faced structural problems. However, dumped HFCS imports from the United States did not allow the sugar industry to recover in the investigation period, in view of the fact that in 1996, compared with 1994, the drop in domestic market sales prices, the fall in domestic market sales, the loss of market share for domestic production in apparent domestic consumption and the increase in stocks indicated that, should the increasing trend in HFCS imports continue, economic factors would be affected in accordance with projections.

3.198 In accordance with those projections, SECOFI determined that, if imports continued, domestic market sales prices would fall by 9 per cent, while sugar sales on the Mexican market would drop by 10 per cent compared with those recorded in the investigation period, and this would result in a 4 point loss of share in apparent domestic consumption. A projection of the domestic sugar industry's earnings was also obtained in which sales revenue in 1997 would fall by 15 per cent and operating profits by 118 per cent, with an operational profitability indicating an operating margin of 12 percentage points with respect to 1996.

3.199 In Mexico's view, the conclusions concerning the significant rate of growth recorded in imports at prices significantly lower than those of the domestic sugar industry during the period analysed, the sufficient freely available capacity, the high export potential of the United States HFCS industry and the joint evaluation of economic factors led SECOFI to the determination that, if the final anti-dumping measure had not been adopted, the domestic industry would have suffered injury.

3.200 On the basis of the points set out above and the contents of the first submission and the rebuttal, Mexico maintains that it has complied with the Panel's findings and conclusions and with its obligations under the AD Agreement, since the revised final resolution fully considered all the facts concerning the prevailing state of the domestic industry based on the information in the administrative record of the investigation.

2. Effects Of The Restraint Agreement On The Likelihood Of Substantially Increased Importation

3.201 Mexico claims that its findings in its revised final resolution support the fact that the potential effects of an alleged restraint agreement on the likelihood of substantially increased importation were sufficiently examined. Therefore, the determination on this matter meets the requirements of paragraphs 7.176 and 7.177 of the Panel Report and is consistent with Article 3.7 of the AD Agreement.

3.202 In its determination, Mexico asserts that it took into account, in addition to the effects of the alleged restraint agreement, competition from other factors such as observed trends during the 1994-1996 investigation period in prices, volumes, actual and potential consumption, the economic context and conditions in the industry. Similarly, the revised final resolution was based on all the information at the investigating authority's disposal when the authority made its determination.

3.203 In Mexico's view, the United States has not considered the entire basis of the authority's determination in making its argument; it simply pinpoints aspects which it evaluates outside the context of the anti-dumping investigation, without relating them to various items of information at the authority's disposal. According to Mexico, the United States arguments are not based on an examination of all the information at the disposal of the investigating authority and are founded on an incorrect reading of the revised final resolution, and consequently do not demonstrate that Mexico acted inconsistently with the AD Agreement.

3.204 In its first written submission, the United States argued that the findings used by Mexico in the revised final resolution do not support its conclusion and it questions the estimates of the likely increase in imports, asserting as well that those estimates were based on the same information and were made in the same way as in the original final resolution.

3.205 In this respect, Mexico reiterates that its determination considered, but was not based on, import trends observed subsequent to the period investigated, i.e. imports effected during the course of the investigation itself, since consideration would then be given to both trade flows and consumption forecasts distorted by the effects of initiating the investigation. In most cases, this would be tantamount to concluding that there was no likelihood of increased importation, since imports tend to decrease substantially as a result of the investigation effect.

3.206 In addition, Mexico notes, the analysis was not restricted to a single factor but considered observed trends in the period under investigation and comparable earlier periods, in prices, volumes, actual and potential consumption, the economic context and the conditions of the industry. SECOFI evaluated the effects of the alleged restraint agreement on the basis of estimates of potential HFCS consumption in 1997 and 1998, for sectors other than the soft drink bottlers, taking as an input projections of total sugar consumption for those years undertaken by specialists, and applying the share of those sectors in total consumption in accordance with figures recorded in 1994, 1995 and 1996.

3.207 According to Mexico, the determination of the likelihood of increased imports was made by taking into account the following context: (a) the growth rate of the imports investigated from 1994 to 1996, (b) the export potential of the United States HFCS industry, (c) the price differential recorded during the investigation period between HFCS and sugar, which is an incentive for substitution, (d) the non-existence of trade restrictions on imports and a decline in tariff rates for such imports, and (e) the proven functionality of HFCS as a sugar substitute in a variety of industries in the Mexican market, further supported by the accumulated experience of development of the United States market.

3.208 Mexico claims that the United States fails to take into account the whole of Mexico's findings, so it does not consider the facts as a whole but simply isolated aspects that do not reflect the general

picture considered by the investigating authority when it made its determination of the likelihood of increased importation.

3.209 On all the above grounds, Mexico maintains that the analysis of the potential effects of the alleged restraint agreement on the likelihood of increased imports made in the revised final resolution complied with the Panel's findings and conclusions and was consistent with the AD Agreement.

3. Mexico Complied With The Provisions Of Articles 12.2 And 12.2.2 Of The AD Agreement

3.210 Throughout the proceeding, Mexico maintained - and reiterates once again - that SECOFI acted in a manner that was fully consistent with Articles 12.2 and 12.2.2 of the AD Agreement.

3.211 Similarly, Mexico argues, the final notice of 20 September did not confine itself simply to presenting more data concerning the factors specified in Article 3.4 "without providing the necessary analysis and explanation of these factors", as claimed by the United States.⁵⁸ On the contrary, the notice included all the relevant findings, conclusions and information which show clearly that SECOFI's analysis significantly evaluated all the economic factors listed in Article 3.4 of the AD Agreement which influenced both the state of the sugar industry during the investigation period and the situation in the near future according to projections, in order to determine the resulting impact of imports on the domestic industry as a whole.

3.212 Mexico asserts that SECOFI also took into account more elements of relevant information in order to analyse the potential effects of the alleged restraint agreement and arrived in an appropriate manner at its determination of the likelihood of a substantial increase in HFCS imports.

3.213 According to Mexico, no admissible interpretation of Articles 12.2 and 12.2.2 implies that "relevant information" must necessarily consist of data used by the investigating authority in the economic models and projections on which its analysis and determination were based. Nor do any of the findings and conclusions of the Panel Report contain this implication.

3.214 Similarly, Mexico continues, Article 12.2 does not lay down precise formulas or specific terms in which an authority is required to express its findings or conclusions in the public notice. It only states in general terms that these will relate to the issues considered material by the investigating authorities. Again, Article 12.2.2 also lays down no specific formulas or terms. Even though it does in fact require the inclusion of all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures, it does not specify what that information must be but rather takes as limiting factors the relevance and confidentiality of the information.

3.215 Accordingly, Mexico argues that SECOFI's findings related to the whole of the domestic industry, based on data and information duly documented in the administrative record, as well as on models and projections constituting reasonable methodologies which were also justified in the record by means of methodological notes explaining how SECOFI proceeded.

3.216 On the other hand, Mexico is not unaware of the findings and conclusions of the Panel which examined the *Thailand – Angles* case. Indeed, despite the fact that no specific allegation of a breach of Article 12 had been made either, the latter Panel, like the one concerned with *Mexico – HFCS*, concerned itself with emphasizing the connection of Article 12 with the context of Article 3 (paragraph 7.151 of the *Thailand – Angles* Panel Report).

3.217 However, according to Mexico it should be made clear that the circumstances of that investigation differed from the circumstances in this case. Among other things, unlike the *Thailand –*

⁵⁸ Essentially in paragraph 5 of its first written submission.

Angles case, which examined an ordinary anti-dumping investigation, the case before the Panel now concerns a review procedure for complying with a DSB recommendation, where the interested parties had the opportunity during the proceeding, at the time of and subsequent to the revised final determination, to obtain access to both the public and the confidential version of the record, by means of the appropriate procedures.

3.218 Mexico also points out that, so far, no representative of the United States has asked for access to the administrative record, either to the public or the confidential version. As regards the interested parties, they had access to the public version of the record on various occasions during the proceeding and only one of the interested parties, via its legal representative, asked for access to the confidential version of the administrative record, and this was granted in accordance with established procedures for access to confidential information.

3.219 Thus, having set out its arguments on this subject, Mexico rejects once again the stance of the United States and reiterates before the Panel that Mexico has duly complied with the requirements of Articles 12.2 and 12.2.2 of the AD Agreement.

4. Conclusion

3.220 On the basis of all the arguments set forth throughout its written submissions and which have been expressed this morning, Mexico reiterates its respectful request to the Panel to declare that SECOFI's actions, including:

- (a) its consideration of the impact of HFCS imports on the Mexican sugar industry as a whole;
- (b) its consideration of the potential effects of the alleged restraint agreement on the likelihood of substantially increased importation, and;
- (c) the revised final resolution of 20 September;

fully comply with the Panel's findings and conclusions and are sufficient to bring Mexico's final anti-dumping measure into conformity with, *inter alia*, Articles 3.1, 3.4, 3.7, 12.2 and 12.2.2 of the AD Agreement, as recommended by the DSB in its ruling of 24 February 2000.

IV. ARGUMENTS OF THE THIRD PARTIES

A. ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

4.1 The European Communities (the "EC") notes with considerable concern that, contrary to the requirement contained in Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), the request for the establishment of a panel in the present proceedings does not mention whether consultations were held between Mexico and the United States before the disagreement on the compatibility of the Mexican measures with a covered agreement was referred to the Panel⁵⁹.

4.2 Furthermore, the notice concerning the request for consultations foreseen in Article 4.4 of the DSU was not provided to the Dispute Settlement Body ("DSB") and was not circulated to the WTO Members. The EC asserts that there is thus no indication whether such consultations were held in the present case.

⁵⁹ Cf. Doc. WT/DS132/6.

4.3 The EC notes in this context that an inconsistent and contradictory practice has developed in a number of cases in which parties had recourse to procedures pursuant to Article 21.5 of the DSU with regard to the requirement of first entering into consultations under Article 4 of the DSU before filing a request for the establishment of a panel.

4.4 In the context of the *Bananas* dispute, the EC recalls that it has made it clear⁶⁰ that it considers consultations pursuant to Article 4 of the DSU to be necessary before the establishment of a panel can be requested pursuant to Article 21.5 of the DSU. The reason, according to the EC, is the reference contained in Article 21.5 that any dispute on implementation “shall be decided through recourse to these dispute settlement procedures”. In the view of the EC, “these dispute settlement procedures” include consultations and a right to an appeal. This is so for reasons related to the multilateral character of the procedures, which include procedural rights of other WTO Members, particularly potential third parties, and a standardised dispute settlement procedure the basic features of which may not be amended simply because that pleases the parties in an individual case.

4.5 In the view of the EC, if the parties to a dispute were entirely free to develop procedures of their own choice (*quod non*), this would jeopardise third party rights enshrined in the DSU (particularly in Articles 4.11 and 10). Nothing would stop the parties from agreeing bilaterally not only to jump the procedural step of consultations, but also to jump other procedural steps such as the panel stage and to submit their dispute to the Appellate Body straight away (e.g. in order to “gain time” and to exclude third parties who cannot participate in Appellate Body procedures if they did not reserve their right to participate in the preceding panel procedure). It would also mean that the parties would be free to agree among themselves that a panel report pursuant to Article 21.5 of the DSU is not binding and that it may be subjected to some kind of review by another international body outside the WTO.

4.6 The EC believes that these scenarios are not compatible with the multilateral nature of the procedures under the DSU, the procedural rights of third parties and indeed the general matrix of procedural checks and balances built into the dispute settlement system. The DSU contains sufficient flexibility to adapt the basic procedural requirements to the needs of the parties in individual disputes. As an example, Article 4.7 (second sentence) of the DSU allows the parties to shorten the 60-day period on the basis of a bilateral agreement. If the parties to the dispute agree, the EC argues, a panel under Article 21.5 of the DSU may be established at the first meeting where the request is considered by the DSB (Article 6.1 of the DSU). Panels may propose special working procedures after consultations with the parties (Article 12.1 of the DSU). The EC asserts that all these provisions indicate that there is some flexibility in the procedures, which is largely dependent on the agreement of the parties to the dispute. None of these provisions, however, allows the parties to the dispute to simply omit one of the essential procedural steps before requesting the next one.

4.7 The EC argues that the procedural step of holding consultations is of fundamental importance for the dispute settlement system. Consultations give the parties an opportunity to resolve their differences without an adjudication of the dispute and will, at the very least, allow the parties to clarify on what precise issues their disagreement continues. In this way, consultations contribute to discharging panel proceedings from issues on which there is no real and serious disagreement. In addition, any request for consultations under Article 4 of the DSU must be circulated to the entire WTO membership in order to identify and circumscribe the dispute, thus allowing potential third parties to prepare their request to participate in the procedure. In this regard, the EC recalls that third parties may participate in consultations requested under any of the provisions cited in Article 4.11 and footnote 4 of the DSU. Thus, argues the EC, third party rights are clearly impaired by the omission of the formal consultation stage in a dispute settlement procedure.

⁶⁰ Cf. the statement of the EC representative at the DSB meeting of 22 September 1998, Doc. WT/DSB/M/48, p. 7.

4.8 According to the EC, all these important functions of the consultations are undermined if the parties to the dispute are considered to be free to “jump the gun” and go to a panel procedure without holding formal consultations under Article 4 of the DSU first. Moreover, consultations must anyhow take place in order to agree on the procedure to be followed, and it is obvious that this is also an occasion to consult on substantive issues. Thus, in reality no time is gained in jumping this procedural step, except that third parties are put at a disadvantage and that the panel may have to address issues on which there is no real disagreement.

4.9 In conclusion, the EC is of the view that the existing rules of the DSU do not allow parties to a dispute to bilaterally agree simply to dispense with consultations under Article 4 of the DSU. Any other approach leads to unbearable procedural uncertainty about the limits of the procedural guarantees for both parties and to curtailing third party rights clearly enshrined in the DSU.

4.10 If the parties to the dispute do not respect their obligations under Article 4 of the DSU, argues the EC, the Panel should draw the consequence and make a ruling that the dispute is not properly before it (or inadmissible, to use a term of art), since all the procedural steps that are required before a dispute may be submitted to a panel have not been followed in the present case

4.11 On the basis of the foregoing considerations, the EC is of the view that the Panel should consider that the dispute is not properly before it because no consultations were requested nor held before the request for the establishment of a panel was submitted to the DSB.

B. JOINT STATEMENT OF JAMAICA AND MAURITIUS

4.12 Jamaica and Mauritius as third parties in the original dispute had made a joint oral statement before the panel to highlight the potential impact this dispute could have on the trade in sugar by Jamaica, Mauritius and other suppliers in securing continued, predictable and increased opportunities for access to the United States market in accordance with the provision of Article XIII of GATT 1994.

4.13 Jamaica and Mauritius noted that they were aware at the time that the issue at hand concerned imports of High Fructose Corn Syrup (HFCS) into the Mexican market. They also recognise that since then, the panel has ruled that Mexico’s imposition of the definitive anti-dumping measures on imports of HFCS for the United States is inconsistent with the requirements of the AD Agreement on several scores and that Mexico has been requested by the DSB to bring its measures into conformity. They are aware that the current case must be concerned with whether the new determination made by Mexico does indeed comply with the Panel’s recommendations.

4.14 Jamaica and Mauritius understand that the primary duty of this panel is to assess whether Mexico’s revised final determination is in conformity with the panel’s conclusions and recommendations in respect of Mexico’s obligations under the AD Agreement.

4.15 They nonetheless believe that in making their assessment of the issue at hand the panel should not lose sight of the broader disagreement over sweetener trade between these two countries and the impact that a resolution of this new dispute may have on third parties which are traditional suppliers of sugar to the US market.

4.16 Jamaica and Mauritius note previous statements made by representatives of the Mexican sugar industry in the press and other public fora to the effect that HFCS and sugar disputes are inter-related and that one cannot be resolved without resolving the other.

4.17 They note that this new dispute arises at a crucial time of the NAFTA time table for sugar trade. They recall that prior to the entry into force of the NAFTA Agreement in 1994, Mexico was a net sugar importer. However, under the NAFTA Agreement, Mexico has since seen its initial market

share of 7,258 tonnes per annum for the period 1994 – 1996 increase to 25,000 tonnes for the 2000 – 2001 quota year.

4.18 This amount may after this date increase to as much as 250,000 tonnes per annum until 2008 at which time NAFTA would allow Mexico unlimited access at zero tariff for its sugar exports.

4.19 Jamaica and Mauritius, as traditional suppliers, have already seen their access reduced in the US market as sugar imports have declined since 1985. They are concerned that an increase in Mexico's sugar exports to the United States as a direct or indirect result of the resolution of this new dispute or indeed other proceedings will increasingly exacerbate the existing prejudice to the traditional suppliers to the US market. They wish to recall that the diminution of opportunity for access to the US sugar market will particularly impact on single commodity producers like Jamaica and Mauritius.

4.20 They note in this regard the assurances given by the United States delegation at the WTO Committee on Agriculture in responding to queries that:

- (a) Raw cane sugar tariff quotas are allocated according to Article XIII of GATT 1994.
- (b) Mexico's NAFTA allocations do not count in a country's share allocation in the TRQ (G/AG/N/USA/15 at pp. 22 and G/AG/R/16) and
- (c) Mexico does not receive additional access if there are subsequent tariff quota allocations (G/AG/N/USA/13 at pp. 18 of G/AG/R/14).

4.21 Jamaica and Mauritius remain nonetheless pre-occupied by the possible serious erosion of their share as traditional sugar suppliers as a result of substantial increase of Mexico's access under NAFTA as from the 2000 – 2001 quota year and any other settlement arising from the present dispute and request that any finding of this Panel not impact negatively on the trade of traditional suppliers, particularly single commodity producers like Mauritius and Jamaica.

V. INTERIM REVIEW

5.1 On 11 May 2001, the Panel issued its interim report to the parties. On 18 May 2001, the parties filed written requests regarding review of review precise aspects of the interim report. Neither party requested a further meeting with the Panel. Therefore, in accordance with the working procedures adopted by the Panel, the parties were given the opportunity to file further written comments, which they did on 1 June 2001.

5.2 The original comments of the United States were limited to typographical and stylistic corrections, which we have incorporated in the Report, as appropriate. Mexico's further written comments were limited to certain asserted translation errors, which we took into consideration.

5.3 Mexico's original comments requested review of our consideration of SECOFI's determination of likelihood of increased imports, stating that our analysis is incomplete because it does not take account of various analytical elements of Mexico's arguments. The United States responded to these substantive points in its further written comments.

5.4 Mexico notes that in this dispute, it stressed that the quantitative scenario regarding demand for HFCS by industries other than soft drink bottlers was not the only basis for its conclusion with respect to the likelihood of increased imports. Mexico reiterates that SECOFI's determination of the likelihood of increased imports was based on a comprehensive analysis of concurrent factors, including, *inter alia*, the increase in imports during the investigation period and the most recent period for which data was available, the freely disposable capacity of the United States industry, the

trend in and level of import prices, and the foreseeable economic context, together with the existence of the alleged restraint agreement. Mexico maintains that SECOFI's conclusion of a likelihood of increased imports is supported by the analysis of the mentioned factors. In Mexico's view, our decision was based only on consideration of the calculation of projected demand for HFCS.

5.5 Mexico also asserts that even if the already increased level of imports were merely maintained, the presence of these imports would suffice to cause a threat of material injury to the domestic industry. In this regard, Mexico refers to the findings of the Panel in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* (WT/DS177/R and WT/DS178/R, 21 December 2000) at paragraph 7.187:

" ... Moreover, we also deem it possible that imports continuing on an elevated level for a longer period without further increasing at the end of the investigation period may, if unchecked, go on to cause serious injury (i.e. may threaten to cause serious injury). That is, if increased imports at a certain point in time cause *less than* serious injury, it is not necessarily true that a threat of serious injury can only be caused by a *further* increase, i.e., *additional* increased imports. In our view, in the particular circumstances of a case, a continuation of imports at an already recently increased level may suffice to cause such threat."

5.6 We considered carefully Mexico's comments on the interim report, but did not make any changes to the report in connection with the points made by Mexico on interim review. These arguments were fully expressed during the course of the proceedings, and considered in making our decision. We recognized, in paragraph 6.9 of our findings, that there was evidence concerning the rate of increase in imports during the period of investigation, as well as the available capacity in the United States and the existence of other markets, which was considered by SECOFI in making its determination of likelihood of increased imports. However, whether this evidence indicated a likelihood that imports would continue was not the issue with which we were concerned. Our concern was with SECOFI's analysis of the effects of the alleged restraint agreement on the likelihood of increased imports, which had been faulted by the original panel in its Report. It is in that connection that we considered the projected demand for HFCS by users other than the soft-drink bottlers affected by the alleged restraint agreement, and concluded that an unbiased and objective investigating authority could not have reached the conclusions reached by SECOFI. In our view, it is clear that SECOFI's finding of threat of material injury rested on the determination that imports would increase significantly despite the alleged restraint agreement, and that this conclusion rested on the projected levels of HFCS demanded by users other than soft-drink bottlers.

5.7 We note in addition that, in the redetermination, SECOFI did not conclude that there was a threat of injury to the Mexican sugar industry even if imports did not increase, but merely continued at the levels already reported during the period of investigation. Therefore, we consider Mexico's reliance on the findings of the Panel in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R and WT/DS178/R, adopted as modified in WT/DS177/ABR and WT/DS178/ABR, 16 May 2001 to be inapposite. Since SECOFI's decision was not based on this rationale, it is not appropriate for us to consider whether a decision based on this rationale should be sustained.

5.8 Mexico also requested a change to the text of paragraph 6.21 of the Report. We did not make this change, as Mexico's proposed language did not correctly convey the import of our analysis as reflected in that paragraph.

5.9 Mexico argues that our finding in paragraph 6.31 does not refer to changes in factors such as sugar prices, sales, domestic market share and inventories between 1994 and 1996, and requests that we include a statement to the effect that the increase in dumped HFCS imports from the United States meant that the industry could not recover during the investigation period, since 1996, as compared to

1994, saw a decrease in domestic sugar prices, a fall in domestic sales, a loss of market share and an increase in inventories. Mexico maintains that the evaluation of these factors made it possible for SECOFI to project an adverse effect on the industry.

5.10 Mexico's arguments concerning the condition of the domestic industry regard are reflected in, *inter alia*, paragraphs 3.113 - 3.114 and 3.187 - 3.197 above, and our conclusions in paragraphs 6.26, 6.29, and 6.30 reflect our consideration of those arguments. We recognize that the domestic sugar industry did not, in 1996, show levels of performance equal to those of 1994 in some respects. However, this does not detract from our conclusion that SECOFI's analysis and conclusion failed to explain why, when the condition of the industry improved significantly from 1995 to 1996 despite significantly increased imports, it was threatened with material injury in 1997. We therefore did not make the change requested by Mexico, as paragraph 6.31 accurately reflects our views.

VI. FINDINGS

A. INTRODUCTION

6.1 On 24 February 2000, the Dispute Settlement Body ("the DSB") adopted the report and recommendations of the Panel in *Mexico - Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* (WT/DS132/R). In that report, the Panel concluded that Mexico's imposition of definitive anti-dumping duties on imports of high fructose corn syrup, grades 42 and 55, from the United States was inconsistent with the requirements of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement). The Panel concluded, *inter alia*, that the determination of threat of material injury was inconsistent with the requirements of the AD Agreement in that the Mexican investigating authority, SECOFI, had inadequately considered the potential effect of an alleged agreement between Mexican soft-drink bottlers and sugar producers to limit the amount of HFCS used by the bottlers, and had inadequately considered the impact of HFCS imports on the Mexican sugar industry. The Panel and the DSB accordingly recommended that Mexico bring its measure into conformity with its obligations under the AD Agreement.

6.2 The United States and Mexico having agreed on a reasonable period for implementation, Mexico decided to revise the original final determination underlying the imposition of anti-dumping duties following a newly initiated proceeding. On 20 September 2000, the Government of Mexico published the final resolution in that proceeding. In that resolution, SECOFI stated that it had revised the original final resolution imposing definitive anti-dumping duties on imports of HFCS from the United States to comply with the Panel report's conclusions and recommendations.⁶¹ Mexico determined to repay provisional duties on entries and guarantees granted for the payment of provisional anti-dumping duties, with interest, for the period 26 June 1997 to 23 January 1998.⁶² Mexico also "ratified its conclusion that during the period under investigation, there was a threat of harm to the domestic sugar industry as a consequence of imports of high fructose corn syrup under price discriminatory conditions originating from the United States of America".⁶³ The revised final resolution confirmed "the final offsetting duties established during the antidumping investigation".⁶⁴

6.3 The United States asks us to determine whether the redetermination by SECOFI in the HFCS anti-dumping case complied with the ruling of the original Panel, and the recommendation of the

⁶¹ Final resolution revising, on the basis of the conclusion and recommendation of the Panel of the World Trade Organization's Dispute Settlement Body, the final resolution of the anti-dumping investigation into imports of high fructose corn syrup, merchandise classified in tariff headings 1702.40.99 and 1702.60.01 of the General Import Tariff, originating in the United States of America, irrespective of the country of provenance, 20 September 2000, MEXICO-1(a) (hereinafter "Notice of Redetermination").

⁶² The United States raised no issue concerning this aspect of Mexico's implementation.

⁶³ Notice of Redetermination, MEXICO-1(a) at para. 188.

⁶⁴ *Id.*

Panel and the DSB to "bring the measure into conformity". The United States also asks us to determine whether the redetermination is consistent with the provisions of the AD Agreement, specifically, Articles 3.1, 3.4, 3.7, 12.2 and 12.2.2 thereof. The United States maintains that the answer to both questions is no. In the United States' view, while the redetermination sets out additional evidence and discussion relevant to the findings of likelihood of increased importation and threat of material injury, these merely add a gloss to the original determination without remedying the errors found by the original Panel.

6.4 Mexico argues that SECOFI complied fully with the original Panel's ruling and recommendation in issuing the redetermination underlying this dispute. Mexico further asserts that the redetermination is fully consistent with the specific provisions of the AD Agreement cited by the United States in its claims of error. In Mexico's view, SECOFI in the redetermination provided all the information and analysis necessary to bring the measure into conformity with the AD Agreement with respect to the errors identified by the original Panel in its ruling. Mexico argues that SECOFI requested additional information from interested parties, in particular concerning the impact of imports on the domestic industry.⁶⁵ Mexico further argues that SECOFI carefully analyzed the information before it, and concluded that, first, even assuming the alleged restraint agreement existed, imports would increase significantly, and second, these dumped imports would depress domestic sugar prices, and as a consequence dumped imports threatened material injury to the domestic industry.

6.5 We are thus faced principally with determining whether SECOFI's conclusion in the redetermination, that dumped imports of HFCS from the United States threaten material injury to the Mexican industry producing sugar, is consistent with Articles 3.1, 3.4 and 3.7(i) of the AD Agreement. Were we to find the redetermination consistent with the provisions of the AD Agreement, we would conclude that Mexico complied with the recommendation to bring its measure into conformity.⁶⁶ However, as is discussed in detail below, we conclude that SECOFI's redetermination is not consistent with Articles 3.1, 3.4 and 3.7(i) of the AD Agreement. Therefore, we conclude that Mexico has failed to bring its measure into conformity with the requirements of that Agreement. In addition, we address below the question whether the public notice of the SECOFI redetermination is consistent with the requirements of Articles 12.2 and 12.2.2 of the AD Agreement.

B. FINDING OF LIKELIHOOD OF INCREASED IMPORTS

6.6 In its original determination, the Panel had concluded that SECOFI failed to adequately address the likelihood of substantially increased imports by failing to properly evaluate the facts concerning, and provide a reasoned explanation of its conclusions regarding, the potential effects of the alleged restraint agreement.⁶⁷ Consequently, the Panel found that SECOFI's conclusion that there was a "likelihood of substantially increased importation" was inconsistent with the requirements of Article 3.7(i) of the AD Agreement. In addressing this issue, the Panel noted that the question was not whether such an agreement actually existed, but "whether there was evidence of and arguments concerning the effect of the alleged restraint agreement, which, if it existed, would be relevant to the analysis of the likelihood of increased dumped imports in the near future."⁶⁸ The Panel posed the relevant question as "whether SECOFI's analysis provides a reasoned explanation for its conclusion

⁶⁵ *Id.* at para 11.

⁶⁶ We note that neither party made any arguments concerning the interpretation of the applicable provisions of the AD Agreement. Neither did the United States question that a redetermination of the type undertaken by SECOFI in this case is an appropriate means of implementing the Panel's and the DSB's recommendation. We therefore have not addressed these matters in resolving the issues between the parties in this dispute.

⁶⁷ *Mexico - Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* WT/DS132/R, adopted 24 February 2000, at paras. 7.173-7.178 (hereinafter "Panel Report, WT/DS132/R")

⁶⁸ *Id.* at para. 7.174.

that, assuming such an agreement existed, there was nonetheless a likelihood of substantially increased importation."⁶⁹

6.7 The Panel concluded that Mexico had not provided such an explanation, observing:

"7.177 Mexico's contention that users of imported HFCS other than soft-drink bottlers could have increased their consumption in amounts sufficient to constitute a substantial increase in imports is in our view questionable.⁶⁴⁵ However, even assuming this to be the case, there is no discussion in the final determination of the share of imports and domestic production consumed by soft-drink bottlers, other beverage manufacturers, and other industrial users, and the degree of substitutability of HFCS and sugar in their products. Moreover, the alleged restraint agreement affected purchasers accounting for 68 per cent of the imports, suggesting that it would at least slow any further increases in imports. In addition, most other purchasers' ability to substitute HFCS for sugar was limited, suggesting that, if the alleged restraint agreement existed, any further increases in imports would be less than they had been in the past. None of these elements is addressed in SECOFI's final determination. We note, moreover, that the final determination states that the alleged restraint agreement does not "rule out the possibility" (emphasis added) that bottlers and other users would continue their purchases of imported HFCS. However, not ruling out the possibility that imports would continue does not support the conclusion that there is a "likelihood of substantially increased importation" (emphasis added), as provided for in Article 3.7(i).

7.178 We conclude that SECOFI's consideration of the potential effects of the alleged restraint agreement was inadequate. Therefore, we determine that SECOFI's conclusion that there was a "likelihood of substantially increased importation" is inconsistent with the requirements of Article 3.7(i) of the AD Agreement.

⁶⁴⁵ We note that the distinction between soft-drink bottlers and other beverage producers is not clear from the final determination. However, we have relied on the information Mexico provided from the underlying record in this regard."⁷⁰

6.8 SECOFI's original determination had been that, "even if Mexican soft-drink bottlers limited their consumption of HFCS, threat of injury to the domestic industry still remained." This conclusion was based on the following considerations:

"(a) imports during the period of investigation showed a significant rate of increase, which together with other factors - such as low prices, increasing substitution, freely disposable and increasing capacity in the United States, and the genuine importance of Mexico as a destination for United States' exports - indicated a likelihood that there would be a substantial increase in the future,⁶³⁸

(b) SECOFI's threat of injury determination was based on information for 1996. However, SECOFI also considered import information for the period January to September 1997, which showed that imports of HFCS rose 75 per cent over the same period in 1996,⁶³⁹ further demonstrating a likelihood of a substantial increase in imports,

⁶⁹ *Id.* at para. 7.175.

⁷⁰ *Id.* at paras. 7.177-78.

(c) Other industries, in addition to the soft-drinks industry, use imported HFCS in their activities and they would not be subject to the restrictions in the alleged restraint agreement. These industries accounted for approximately 46 per cent of the industrial sector's total sugar consumption.⁶⁴⁰

(d) Both the soft-drinks industry and the other industries could purchase the imported product at low prices as a result of dumping, thereby causing sugar prices to shift and deteriorate.

⁶³⁸ *Id.*, paras. 449-470.

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

⁶⁴⁰ Final Determination, para. 465.⁷¹

6.9 In the redetermination, SECOFI found that imports had shown "a high rate of growth during the period of investigation, indicating a well-founded likelihood that a significant increase in such imports would occur in the immediate future."⁷² SECOFI then considered the export capacity of the United States, and the existence of alternative markets for US HFCS exports. SECOFI concluded that the available capacity in the United States "indicates a well-founded likelihood of a significant increase in exports to the Mexican market..."⁷³

6.10 SECOFI next considered the effect of the alleged restraint agreement, and determined that:

"even if there was an agreement to restrict the use of high fructose corn syrup on September 1997, between the sugar mills and the soft-drink bottlers, it would not eliminate the threat of injury to the domestic sugar industry. This is because even if Mexican soft-drink bottlers limit their consumption of high fructose corn syrup, it does not eliminate the likelihood that soft-drink bottlers as well as other sectors of the beverage industry and other industries that use high fructose corn syrup in multiple applications will continue to acquire the imported product under conditions of price discrimination..."⁷⁴

6.11 In support of this conclusion, SECOFI noted that users of sugar could use HFCS in varying degrees, and that consumers of HFCS other than soft-drink bottlers accounted for almost one-third of HFCS imports. SECOFI observed that "this does not mean" that users other than soft-drink bottlers would not increase their consumption of HFCS in the future, "given the increase in the value of [dumped] imports". SECOFI also relied on information concerning the substitution of HFCS for sugar by users other than soft-drink bottlers. SECOFI stated that the degree of substitution should not be considered a technical limit, but merely the level reached to date.

6.12 SECOFI concluded that, assuming the restraint agreement existed, soft-drink bottlers would, in 1997, consume the maximum amount of HFCS permitted under the alleged agreement, 350,000 tons, which would equal the entirety of projected domestic production. SECOFI further concluded that users other than soft-drink bottlers would consume 334,000 tons of HFCS in 1997, which would be supplied by imports.⁷⁵ Thus, SECOFI projected that dumped imports would increase from 192,906 tons in 1996 to 334,000 tons in 1997 and projected an additional increase to 350,000 tons in 1998.⁷⁶

⁷¹ *Id.* at para 7.170.

⁷² Notice of Redetermination, MEXICO-1(a), at para. 61.

⁷³ *Id.* at para. 78.

⁷⁴ *Id.* at para. 56.

⁷⁵ Mexico argued before us that it was immaterial whether users other than soft-drink bottlers consumed imports or domestic production. See Answer to Question 5, Mexico's answers to the Panel's

6.13 Mexico contends that, in the redetermination, SECOFI set out additional facts and analysis which provide a reasoned explanation for its conclusion that, assuming that the restraint agreement existed, there was nonetheless a likelihood of substantially increased importation. The United States, on the other hand, argues that Mexico's explanation and analysis are essentially the same as in the original determination, and that the redetermination is based on conjecture and projections that have no basis in the facts that were before SECOFI.⁷⁷

6.14 Our task in this proceeding is to consider the factual determination of likelihood of substantially increased imports made by SECOFI in the redetermination. Pursuant to Article 17.6 (i), in a dispute under the AD Agreement,

"in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned."

Thus, in assessing the redetermination, we must judge whether, in light of the explanations given in the redetermination, an unbiased and objective investigating authority could reach the conclusions reached by SECOFI on the evidence before it. As stated by the Panel in the original dispute, the relevant question is "whether SECOFI's analysis provides a reasoned explanation for its conclusion that, assuming [a restraint] agreement existed, there was nonetheless a likelihood of substantially increased importation."⁷⁸ We note in this regard that Article 3.7 of the AD Agreement specifically provides that:

"A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent." (footnote omitted)

The reasoned explanation required to satisfy us under the standard of review must respect these elements of Article 3.7 as well.

6.15 The logic underlying SECOFI's redetermination is, in our view, the same as that in the original determination. What SECOFI has done is respond to the specific criticisms of the Panel, concerning the lack of discussion of the share of imports consumed by various users of HFCS, the degree of substitutability, and the effects of the restraint agreement. However, while the redetermination discusses these elements, and recites facts concerning them, the basic analysis and conclusion of the redetermination, that there is a likelihood of substantially increased importation despite the potential effects of the alleged restraint agreement because users of HFCS other than soft-drink bottlers would increase their consumption of dumped imports of HFCS, remains the same.

6.16 SECOFI's determination that there was a likelihood of significantly increased imports depends on the conclusion that demand for HFCS by users other than soft-drink bottlers would

Questions, Annex A. Thus, it was apparently the total volume of HFCS consumption by Mexican users projected for 1997, 684,000 tons (based on 334,000 tons of imports and 350,000 tons of domestic production) that was relevant.

⁷⁶ Notice of Redetermination, MEXICO-1(a), at para. 59.

⁷⁷ Mexico did not respond in detail to the arguments in the US first submission until it filed its second submission brief. The United States was thus precluded from responding to the more detailed explanation of the SECOFI redetermination and the underlying evidence provided by Mexico in its second submission in writing, as its own second submission was filed simultaneously with Mexico's. The United States did respond to Mexico's second submission orally at the meeting of the Panel with the parties.

⁷⁸ Panel Report, WT/DS132/R at para. 7.175.

increase by more than 400 per cent in 1997. SECOFI reached this conclusion on the basis of an analysis of projected demand for HFCS by users other than soft-drink bottlers. In its analysis, SECOFI had before it evidence of the utilisation of HFCS and sugar by consuming industries.⁷⁹ This information consisted of three tables, two labelled "Grado de sustituibilidad técnica del azúcar por JMAF", and the third showing "posibilidades de sustitución entre JMAF y azúcar". SECOFI considered that this evidence demonstrated the rate at which users other than soft-drink bottlers could substitute HFCS for sugar in their production operations in 1997. SECOFI then projected the amount of HFCS that users of sugar other than soft-drink bottlers **could** consume in 1997, reduced it by 50 per cent, and determined that the result, 334,000 tons, was the amount of HFCS that users other than soft-drink bottlers **would** consume in 1997.⁸⁰ SECOFI projected that the amount of HFCS soft-drink bottlers could consume under the alleged restraint agreement, 350,000 tons, would be supplied by the domestic industry. Consequently, the entire 334,000 tons of demand projected for producers of products other than soft-drinks would, SECOFI concluded, be supplied by imports, principally dumped imports from the United States. Thus, SECOFI concluded that the alleged restraint agreement "would not eliminate the threat of injury to the domestic sugar industry" because it does not eliminate the likelihood that soft-drink bottlers, as well as industries other than soft-drink bottlers, would continue to acquire dumped imports.⁸¹

6.17 In our view, an objective and unbiased investigating authority could not have reached the conclusion that industries other than soft-drink bottlers would increase their consumption of HFCS to the extent projected by SECOFI on the basis of the evidence that was before SECOFI, in light of the explanations set out in the redetermination. The evidence in the record concerning the use of HFCS and sugar in 1996 does not support SECOFI's conclusion as to the rate at which all producers in industries other than soft-drink bottling **would** consume HFCS in 1997 and 1998. Absent some explanation as to why there would be this sudden and massive increase in HFCS consumption by industries other than soft-drink bottlers, SECOFI's conclusion of a likelihood of significant increase in imports cannot be sustained.

6.18 Mexico relies on Exhibit Mexico-20 to support the analysis of and conclusions regarding projected demand for HFCS by industries other than soft-drink bottling. Exhibit Mexico-20 contains the three tables mentioned above in paragraph 6.16. The rates of substitution set out in the three tables are different and the sources of information for the three tables are different. As we understand it, SECOFI relied principally on the information gathered in a market survey conducted during the course of the original investigation. However, that market survey reports the relative proportions of use of sugar and HFCS by a limited sample of producers in the manufacture of specific products. These companies, which already used both HFCS and sugar in their production operations, simply reported the relative rates of usage of the two sweeteners for 1996 and 1997. SECOFI considered this information to represent the degree to which HFCS could be substituted for sugar by the industries represented by the reporting companies. This information does not, however, address the critical question of the degree to which companies which had not, to date, used HFCS in their production operations **could**, as a technical matter (taking into account production processes and equipment) use HFCS in place of sugar.⁸² Thus, for instance, evidence that some producers of marmalade had used HFCS as a sweetener in 70 per cent of their production in 1996 does not support the conclusion that all producers of marmalade will use HFCS in the same proportion in 1997.

⁷⁹ MEXICO-20.

⁸⁰ MEXICO-21.

⁸¹ Notice of Redetermination, MEXICO-1(a), at para 56.

⁸² Mexico appears to acknowledge the importance of technical limits on the ability to substitute HFCS for sugar, stating:

"The issue of whether the use of HFCS by the new companies entering the market would match the rate at which other companies use HFCS basically depends on the specific production operations and products concerned. Conditions can vary substantially from one sector or one product to another within a given industry".

Answer to Question 8, Mexico's answers to the Panel's Questions, Annex A.

6.19 SECOFI did not rely exclusively on the survey information, but also relied on the information in the other two tables in Exhibit Mexico-20.⁸³ SECOFI appears to have selectively relied on the available information in using the higher figures in most cases. Thus, while two of the tables report a degree of substitutability of HFCS for sugar in marmalade production of 33 per cent, SECOFI's calculation of projected demand for HFCS by all marmalade producers for 1997 rested on a substitution rate of 70 per cent, which is in fact information reported by one company in the SECOFI market survey.⁸⁴ Mexico provided no reasoned explanation, and in some cases, no explanation at all, of why one source was used in projecting demand for HFCS in some cases, and another in others.⁸⁵

6.20 Mexico asserts that SECOFI discounted by 50 per cent the projected volume of demand in order not to overestimate the likelihood of increased imports. The 50 per cent "discount" factor was calculated by taking a simple average of the rates of utilisation for each product group of users providing information in the market survey, and calculating an overall average, 52.31 per cent, which SECOFI rounded to 50 per cent.⁸⁶ While this had the effect of reducing the figure projected for HFCS use by industries other than soft-drink bottlers in 1997, it is not relevant to the important question of the degree to which these industries were capable, as a technical matter, of making the change to HFCS use between 1996 and 1997. Assuming that the rates of utilisation for each product group represented the rate of substitutability, an average of those figures would be an average rate of substitutability. We cannot see how an average rate of substitutability or an "average rate of utilisation" can meaningfully operate as a factor to discount the projected demand for HFCS in the manner described by Mexico.

6.21 We see nothing in SECOFI's redetermination, or even in the explanations provided by Mexico in this proceeding, which would support the conclusion that industries other than soft-drink bottlers **would** switch to HFCS use in 1997 to the extent projected by SECOFI, even assuming the technical capability to do so.⁸⁷ Mexico argues that the lower price of HFCS, as compared with sugar prices, supports the conclusion that producers of products other than soft-drinks would switch to HFCS use as overall demand for their products increased. However, during the period of investigation, despite a similar difference in HFCS and sugar prices, nothing like this projected increase was observed, in any of the industrial sectors using both sugar and HFCS. Indeed, while the price of HFCS was lower than the price of sugar in 1996, those margins of underselling were projected by SECOFI to decrease slightly in 1997.⁸⁸ HFCS use by producers other than soft-drink bottlers had not in the past shown increases of the magnitude predicted by SECOFI for 1997, even in periods of **increasing** margins of underselling. SECOFI's determination provides no explanation for the conclusion that, despite the projection of no significant change in relative prices for 1997, use of HFCS by industries other than soft-drink bottlers would increase by over 400 per cent, when there had not been increases of this magnitude in the past.

⁸³ See answer to Question 7, Mexico's answers to the Panel's Questions, Annex A.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See answer to Question 11, Mexico's answers to the Panel's Questions, Annex A.

⁸⁷ In this regard, we note that the SECOFI market survey on use of HFCS and sugar by some industrial users in MEXICO-20 also reported information for 1997. The 1997 information shows little or no increase in relative usage by the surveyed companies, some of which continued to report proportionate use below the levels relied on by SECOFI in its projection of demand for 1997. That is, even companies that had already demonstrated the ability to use HFCS to some degree did not increase their usage to the proportions relied on by SECOFI to project demand for HFCS by industries other than soft-drink bottlers. This further undermines the conclusion that producers who did not already use HFCS in their production operations would switch to doing so, in the proportions predicted by SECOFI.

⁸⁸ We note that SECOFI's redetermination continues to fail to address adequately the "natural difference" between HFCS and sugar prices. Paragraphs 91 and 92 of the redetermination (MEXICO-1(a)) report that in the US market, while the price difference between sugar and HFCS remained stable from 1991 to 1995, it increased in 1995 and 1996. It is not clear how this relates to the "natural gap" in HFCS and sugar prices in the Mexican market, which bears on the significance of the margins of underselling.

6.22 Finally, we note that the redetermination states that the alleged restraint agreement "would not eliminate the threat of injury to the domestic sugar industry" because it does not eliminate the likelihood that both soft-drink bottlers and other users would continue to acquire dumped imports.⁸⁹ As in the original Panel's report, we do not consider that this in itself supports the conclusion that there is a likelihood of substantially increased importation, as provided for in Article 3.7(i) of the AD Agreement. A conclusion that the likelihood of further dumped imports **is not eliminated** does not demonstrate that there is a likelihood of substantially increased importation and consequent threat of material injury.

6.23 SECOFI's determination that industries other than soft-drink bottlers would undertake a massive shift from sugar use to HFCS use, resulting in total consumption of HFCS beyond the capacity of the domestic industry to supply, and a consequent significant increase in dumped imports, is not, in our view, one that could be reached by an unbiased and objective investigating authority in light of the evidence relied upon and the explanations given in the redetermination. While in its redetermination, SECOFI did set out additional information concerning the points identified by the Panel as problematic in its original report, SECOFI failed to provide a reasoned explanation of how that information supports the conclusion that there was a significant likelihood of increased imports. We therefore determine that SECOFI's conclusion that there was a significant likelihood of increased importation is not consistent with Article 3.7(i) of the AD Agreement.

C. ANALYSIS OF LIKELY IMPACT OF IMPORTS ON THE DOMESTIC INDUSTRY

6.24 The second element of error alleged by the United States is the insufficiency of SECOFI's analysis of the likely impact of imports on the domestic industry. The Panel had originally concluded that, in a case involving threat of material injury, an investigating authority was required to consider, among other relevant factors, all the factors set out in Article 3.4 of the AD Agreement. The Panel observed that:

"With respect to the question of threat of material injury, we believe an investigating authority cannot come to a reasoned conclusion, based on an unbiased and objective evaluation of the facts, without taking into account the Article 3.4 factors relating to the impact of imports on the domestic industry. These factors all relate to an evaluation of the general condition and operations of the domestic industry – sales, profits, output, market share, productivity, return on investments, utilisation of capacity, factors affecting domestic prices, cash flow, inventories, employment, wages, growth, ability to raise capital. Consideration of these factors is, in our view, necessary in order to establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7."⁹⁰

The Panel went on to consider whether SECOFI had provided an analysis of the impact of the dumped imports consistently with this obligation, and found it had not. Specifically, the Panel concluded that the final determination reflected "no meaningful analysis of a number of the Article 3.4 factors". The Panel also concluded that there was

"no analysis of the condition of the Mexican sugar industry during the period of investigation, or projected for the near future. It is therefore not possible, by reading the final determination, to understand the overall condition of the domestic industry with respect to the Article 3.4 factors. Yet without an understanding of the condition of the industry, it is not possible, in our view, for SECOFI to have come to a reasoned

⁸⁹ Notice of Redetermination, MEXICO-1(a), at para. 56.

⁹⁰ Panel Report, WT/DS132/R at para. 7.132.

conclusion, based on an objective evaluation of the facts, concerning the likely impact of dumped imports. Such a conclusion must, in our view, reflect the projected impact of further imports on the particular domestic industry, in light of its condition. In order to conclude that there is a threat of material injury to a domestic industry that is apparently not currently injured, despite the effects of dumped imports during the period of investigation, it is necessary to have an understanding of the current condition of the industry as a background."⁹¹

6.25 The United States acknowledges that the redetermination contains information on the Article 3.4 factors that were not discussed in the original determination. However, in the United States' view, this consists of a mere recitation of facts, and is insufficient to satisfy the obligation to provide a reasoned analysis of the condition of the industry during the period of investigation or projected for the near future. The United States argues that SECOFI's redetermination mischaracterizes information on the condition of the domestic industry, fails to provide a reasoned explanation why improvements in trends reflecting the industry's condition during the period of investigation were not probative of the likely future condition of the industry, and relies on erroneous or unsupported factual findings. The United States points in particular to SECOFI's projections as to likely price levels and profitability of the industry, which the United States argues lead to results contrary to those actually occurring during the period of investigation, without explanation.

6.26 Mexico asserts that SECOFI's conclusions in the redetermination are well-founded, based on the evidence and the application of standard economic tests and projections. Mexico maintains that SECOFI assessed the information concerning the factors set out in Articles 3.4 and 3.7, finding that during the period of investigation, HFCS imports had had an adverse impact on the Mexican sugar industry, as seen in declining market share and increased inventories. Moreover, SECOFI reviewed the trends in prices for sugar and HFCS during the period of investigation, finding that sugar prices declined in 1996 as compared with 1994, in a context of increasing imports, and projecting stable prices for standard sugar and a decline in refined sugar prices for 1997. SECOFI projected the effects of these projected prices on the domestic industry's profits, concluding that, in light of the industry's level of debt, and its high sensitivity to price declines, projected price levels would yield declining revenues and leave the industry unable to service debt. Therefore, SECOFI concluded that there was a threat of material injury to the domestic industry.

6.27 In evaluating the redetermination in this regard, we are again faced with the question of the adequacy of SECOFI's factual redetermination, in light of the standard of review under Article 17.6(i). Thus, in assessing the redetermination, we must judge whether, in light of the explanations given in the notice of redetermination, an unbiased and objective investigating authority could reach the conclusions reached by SECOFI on the evidence before it. We continue to keep in mind the requirements of the first two sentences of Article 3.7 of the AD Agreement, that:

"A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent." (footnote omitted)

As noted above, the reasoned explanation required to satisfy us under the standard of review must respect these elements of Article 3.7 as well.

6.28 In the original report, the Panel observed that

⁹¹ *Id.* at para. 7.140.

"Merely that dumped imports will increase, and will have adverse price effects, does not, *ipso facto*, lead to the conclusion that the domestic industry will be injured – if the industry is in very good condition, or if there are other factors at play, dumped imports may not threaten injury. Such a conclusion thus requires the investigating authority to analyze, based on the information before it, the likely impact of further dumped imports on the domestic industry. SECOFI concluded that imports were likely to increase, based on the increases during the period of investigation, and the available capacity of the exporting producers, but there is no meaningful analysis, based on facts, concerning the likely impact of further dumped imports on the domestic industry in the final determination, e.g., whether such increased imports are likely to account for an increased share of the growing Mexican market, have an effect on production or sales of sugar, or affect the profits of the domestic producers, etc, in such a manner as to constitute material injury. SECOFI also concluded that the dumped imports undersold the domestic product during the period of investigation, and that the dumping margins were responsible for the low prices of the dumped imports. SECOFI therefore concluded that a jump in demand for dumped imports could be expected, forcing sugar prices downward. However, there is no discussion of movements in prices of either Mexican sugar or the dumped imports – that is, there is no discussion of whether sugar prices had been "forced downward" during the period of investigation, which in our view leaves the conclusion that dumped imports in the future would force prices down in the realm of speculation. Merely that imports are likely to continue to be priced below the domestic product does not necessarily lead to the conclusion that there is a threat of injury.⁶¹¹ If the price level of the domestic product generates sufficient revenues and profits, injury may be unlikely."⁹²

⁶¹¹ This is particularly true since it appears that there is a "natural" price difference between sugar and HFCS, with HFCS priced below sugar. Notice of Initiation, US-3, MEXICO-1, para. 79. Although this price difference was mentioned in the preliminary determination, US-2, MEXICO-2, para. 277, there is no mention of it in the final determination. Nor is there any analysis as to the extent of any such "natural" price difference as compared with the observed price undercutting.

6.29 In the redetermination, SECOFI did provide information on the elements that were not addressed in the original determination. Thus, SECOFI discussed indicators of the industry's performance for the period of investigation, 1996, and the previous year, and projects trends for 1997 and in some cases 1998.⁹³ SECOFI noted, *inter alia*, that domestic industry market share declined, domestic sales declined, and exports increased during the period of investigation.⁹⁴ Inventories increased.⁹⁵ Productivity improved.⁹⁶ The number of workers increased 16 per cent from 1994 to 1995, and by 1 percentage point over the 1995 figure to 1996, while salaries (denominated in US dollars) declined from 1994 to 1995.⁹⁷ Capacity utilisation increased 16 per cent from 1994 to 1995, and by 3 per cent from 1995 to 1996.⁹⁸ SECOFI also analyzed the financial indicators of the industry,

⁹² *Id.* at para. 7.141.

⁹³ The United States has made no argument that factors are not addressed *per se*; rather, the United States argues that the conclusions reached are not reasonable in light of the information addressed.

⁹⁴ We note that the notice of redetermination states that the domestic industry "was required to increase its sugar exports at prices lower than those prevailing on the domestic market". Notice of Redetermination, MEXICO-1(a), at para. 130.

⁹⁵ *Id.* at para. 131.

⁹⁶ *Id.*

⁹⁷ *Id.* at para. 132.

⁹⁸ *Id.* at para. 133.

and found that in 1996, operating margins were 9 per cent, an increase from 5 per cent in 1995, due in large part to a decline in operating expenses.⁹⁹ The industry's net margin increased from negative 1 per cent in 1995 to 5 per cent in 1996. Return on investment increased 2 percentage points in 1996, to 5 per cent.¹⁰⁰

6.30 SECOFI also addressed the movements in prices for sugar and HFCS. SECOFI noted that prices of dumped imports of HFCS declined from 1994 to 1995, then increased in 1996, although they remained below the 1994 levels.¹⁰¹ Similarly, domestic sugar prices declined from 1994 to 1995, then increased in 1996, although they remained below the 1994 levels.¹⁰² Margins of underselling for HFCS-42 compared to standard sugar were 39 per cent in 1994, 41 per cent in 1995, and 43 per cent in 1996. Margins of underselling for HFCS-55 compared to refined sugar were 48 per cent in 1994, 37 per cent in 1995, and 55 per cent in 1996.¹⁰³ SECOFI concluded that the declining trend in Mexican sugar prices was explained by competition from dumped imports, whose lower price and dynamic growth pressured the domestic industry to adapt, leading to price depression, especially in sales to the industrial sector. SECOFI concluded that this effect was confirmed by application of the Granger test.¹⁰⁴

6.31 SECOFI's own analysis indicates that despite increasing levels of imports, and increasing margins of underselling by HFCS as compared to sugar prices, the domestic industry's performance improved in 1996 over 1995, with increased operating margins, net margins, and return on investment, as well as increased production and capacity utilisation. Sugar prices increased from 1995 to 1996, reflecting the general improvement in the Mexican economy. Yet despite the observed improvements in the indicators of the industry's performance, SECOFI concluded that imports of HFCS had had "adverse effects" on the domestic industry during the period of investigation. SECOFI further concluded that the projected substantially increased dumped HFCS imports would cause material injury to the domestic industry. We consider that a unbiased and objective investigating authority could not reasonably have reached these conclusions in light of the evidence and explanations in the redetermination.

6.32 In its analysis of the likely impact of dumped imports, SECOFI projected price levels for 1997, concluding that the price of HFCS 42 would increase by 2 per cent, while the price of HFCS 55 would decline by 1 per cent, the price of standard sugar would remain stable, and the price of refined sugar would decline by 10 per cent. SECOFI then projected margins of underselling for 1997, concluding that HFCS 42 would undersell standard sugar by 42 per cent, while HFCS 55 would undersell refined sugar by 52 per cent.¹⁰⁵ SECOFI concluded

"The price adjustment required by domestic industry to address the estimated increase in imports under price discriminatory conditions would consequently be reflected in a decline of 9 per cent in the average selling price of sugar on the domestic market. In other words, both sugar sold to the industrial sector as well as that intended for household consumption, combined with the decline in sales, particularly to the industrial sector, because of direct substitution by high fructose corn syrup, would result in a negative impact on operating profits and margins."¹⁰⁶

⁹⁹ *Id.* at para. 143.

¹⁰⁰ *Id.* at paras. 144-45.

¹⁰¹ *Id.* at paras. 80-81. SECOFI discusses the price changes in percentage terms, rather than actual price levels.

¹⁰² *Id.* at para. 83.

¹⁰³ *Id.* at para. 87.

¹⁰⁴ *Id.* at para. 89. The Granger causality test is a standard test in economics, which measures the correlation between variables on a lagged basis.

¹⁰⁵ *Id.* at paras. 98-99.

¹⁰⁶ *Id.* at para. 100.

SECOFI also calculated that, despite an increase in demand for sweeteners, domestic industry sales would decline 10 per cent in 1997.¹⁰⁷

6.33 SECOFI carried out a sensitivity analysis of the sugar industry's profits to changes in sales revenue. SECOFI found that the industry would suffer an adverse effect of 7 per cent on operating profits in response to a decline of one per cent in total revenue. Combining this with the sensitivity of the industry due to the high degree of financial leveraging, SECOFI calculated that a 1 per cent change in sales revenue would cause a 27 per cent change in net profits. Based on projected sales and prices for 1997, SECOFI projected a decline of 15 per cent in industry revenue, causing operating profits to decline by 118 per cent, which SECOFI concluded would cancel any possibility of operating profits, result in a decline in the operating margin to negative 2 per cent, and leave the industry unable to service its debt or attract capital.

6.34 As with the redetermination of likelihood of increased imports, while SECOFI has cited more information concerning the condition of the domestic industry, the underlying rationale is the same as in the original determination. SECOFI's conclusion that the industry is threatened with material injury depends on a projected decline in industry revenues in 1997 based on declining prices for sugar caused by increased dumped imports of HFCS. As discussed above, in our view, SECOFI's conclusions regarding the projected increase in imports are not supported by the evidence. This undermines the projected decline in revenues for 1997 which is at the core of SECOFI's redetermination.

6.35 Moreover, SECOFI has failed to provide a reasoned explanation for why the performance of the industry will suddenly decline significantly in 1997. SECOFI's projections of price levels and profitability for 1997 are contrary to the trends observed during the period of investigation. Thus, for instance, SECOFI projected that for 1997, prices for refined sugar would decline, while prices for standard sugar would remain the same. Yet in 1996, despite significantly increased imports, sugar prices increased. Similarly, SECOFI projected steep operating losses for the domestic industry, despite the fact that in 1996, the industry's profitability improved at the same time as imports were increasing. The projected reduction in income on which SECOFI relies in making this projection depends on the projected increase in imports, which, as discussed above, is a conclusion we do not consider could be reached by an unbiased and objective investigating authority on the evidence before SECOFI in this case.

6.36 We conclude that SECOFI's redetermination with respect to the likely impact of dumped imports of HFCS from the United States on the domestic industry which underlies the determination of threat of material injury to the Mexican sugar industry is not consistent with Articles 3.1, 3.4, and 3.7 of the AD Agreement.

6.37 We do not mean to suggest that it would not be possible to make a finding of threat of material injury in the circumstances of this case. Such a conclusion would be beyond the scope of our standard of review, as it would involve us in analysing the facts *de novo*. However, we do conclude that an unbiased and objective investigating authority could not reach the conclusion that the domestic sugar industry in Mexico was threatened with material injury on the basis of the evidence and explanations provided by SECOFI in the notice of redetermination. Part of the difficulty with SECOFI's redetermination in this case is that while SECOFI apparently undertook to respond to the specific criticisms set out in the original Panel's report, and has set out additional information relevant to the specific points made by the Panel in that report, there does not appear to have been an overall reconsideration and analysis of the information in light of the requirements of the AD Agreement, as clarified by the original Panel.

¹⁰⁷ *Id.* at para. 138.

D. ADEQUACY OF NOTICE OF REDETERMINATION

6.38 The United States argues that Mexico's notice of redetermination does not satisfy the requirements of Articles 12.2 and 12.2.2.¹⁰⁸ Mexico, on the other hand, argues that SECOFI's notice fully explains the decision on redetermination, and is backed by additional information in the record of the investigation which is referred to or underlies the analysis and conclusions set out in the notice. Essentially, Mexico argues that the United States has misunderstood the notice, or is reading Article 12 too strictly.

6.39 Article 12 of the AD Agreement requires, in pertinent part, that public notice of any final determination shall set forth

"in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. ...sufficiently detailed explanations for the ... determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. ...all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures ... as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers...."

6.40 In this case, we have determined that SECOFI's findings and conclusions in the redetermination were not consistent with Articles 3.1, 3.4, and 3.7 of the AD Agreement. Our conclusion is based not on a failure to explain the redetermination in the notice, but on the fact that, in our view, the findings and conclusions set out in that notice, in light of the evidence in the record brought to our attention and as argued by Mexico in this proceeding, are not such as could reasonably be reached by an unbiased and objective investigating authority on the evidence that was before SECOFI. In light of the substantive violations found, the question of whether the notice of the ultimate determination is "sufficient" under Article 12.2 is immaterial. It is, in our view, meaningless to consider whether the notice of a decision that is substantively inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. We therefore make no findings with respect to the claim of insufficiency of the notice of redetermination.

VII. CONCLUSIONS AND RECOMMENDATION

7.1 In light of the findings above, we conclude that Mexico's imposition of definitive anti-dumping duties on imports of HFCS from the United States on the basis of the SECOFI redetermination is inconsistent with the requirements of the AD Agreement 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 AD Agreement. We therefore consider that Mexico has failed to implement the recommendation of the original Panel and the DSU to bring its measure into conformity with its obligations under the AD Agreement.

7.2 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent Mexico has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to the United States under that Agreement.

¹⁰⁸ These provisions govern the contents of notices of final determinations. Mexico does not dispute that these provisions apply to the notice of redetermination, and therefore we do not address that question.

7.3 We recommend that the Dispute Settlement Body request Mexico to bring its measure into conformity with its obligations under the AD Agreement.

ANNEX A

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ANSWERS OF MEXICO TO QUESTIONS FROM THE PANEL

1. It seems that there are two questions to be answered with respect to the possible changeover from use of sugar to use of HFCS by a particular consuming industry and a particular consuming company. First, whether such a switch is technically possible in the light of the product in question and the manufacturing process, and second, the incentive to do so in the short term and long term. What evidence supports the conclusion that the predicted increase in HFCS use by industries other than soft drink bottlers, over 400 per cent in 1997 over their actual use in 1996, is likely? Is there any information on the rate of increase of HFCS use by these industries during the period of investigation?

The basis of Mexico's determination of the likelihood of increased imports included a prospective analysis backed by the pattern observed in the period under investigation. In addition, this examination included estimates of the potential consumption of sugar likely to be switched as a result of competition from dumped HFCS imports, so as to demonstrate that, even on the assumption that there was indeed an alleged restraint agreement between soft drink bottlers and the sugar industry, the potential demand from other consuming industries pointed to the existence of a likely increase in dumped imports.

As part of its determination and in the context of the analysis of the threat of injury factors listed in Article 3.7 of the WTO Anti-Dumping Agreement, Mexico quantified the probable volume of potential demand for HFCS that industries other than soft drink bottlers might generate, so as to illustrate the convincing reasons for believing that in the immediate future there would be a substantial increase in dumped imports. Nevertheless, the United States of America (USA) boiled down Mexico's entire determination to specifying the figures which, in its opinion, ought to be included in the analysis. In particular, the crucial problem the USA identified in Mexico's determination was the size of the rate of increase, which, according to its own calculations, would be obtained from the estimate.

In its second written submission, Mexico rejected the USA's emphasis in demonstrating that the calculations were incorrect and asserting, from its own interpretation of the SECOFI determination, that the determination was inconsistent with the terms of the Anti-Dumping Agreement. In this regard, Mexico reiterates that the determination of the likelihood of increased dumped imports should not be reduced to the results of a mathematical calculation and above all when the calculation includes an estimate of future events. Since the Anti-Dumping Agreement does not establish quantitative parameters for compliance with the Agreement's provisions regarding a substantial increase in imports or the assumed magnitude of the likelihood of the occurrence of a future event, objecting to an investigating authority's determination on the basis of the validity of one figure goes beyond the provisions of the Agreement itself, and in no sense can obligations that do not stem from the Anti-Dumping Agreement be imposed on Mexico.

Again, as part of the reply, Mexico would point out that the commercial interchangeability and substitution of HFCS and sugar was amply analysed by SECOFI in the course of the anti-dumping investigation. The investigating authority's conclusions and findings, as well as the basis for arriving at the determination, were sufficiently documented in the record and established in the original preliminary and final resolutions.

In particular, the evidence on the functions and applications of HFCS and sugar were analysed in paragraphs 187 to 206 of the preliminary resolution¹ and 400 to 422 of the original final

¹ "Preliminary resolution of the anti-dumping investigation into imports of high fructose corn syrup, merchandise classified in tariff headings 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the General

resolution. The evidence analysed by the investigating authority included more particularly: specialized literature on sweeteners, opinions of technical and industrial experts, promotional catalogues of HFCS producers and information obtained from industrial users in different production sectors.

Similarly, from an analysis of the information provided by importers of HFCS originating in the US on their sales lists, as well as information from industrial users of HFCS and sugar, the investigating authority concluded that the imports under investigation were competing on the Mexican market for the same consumers as those of domestic sugar producers.

Specifically, on the basis of sales of imported HFCS by the three main importing firms, the investigating authority found that they went to the following consumer sectors different from soft drink bottlers: food, juices and concentrates, non-carbonated beverages, wines and spirits, bread-making, biscuits, sweets and pastry, pharmaceuticals and dairy products.

From the analysis of all the information described, the investigating authority determined the commercial interchangeability and substitution of HFCS for sugar in various industrial applications. Such substitution, which obviously varies depending on the product and production process, began when HFCS started to be imported from the USA.

Again, the economic context predicted for 1997 was broadly in favour of increased use of HFCS over both the long and the short term. In the three years from 1994 to 1996, the position of HFCS import prices relative to domestic sugar prices was marked by more and more undercutting. Similarly, the tariff reductions on HFCS imports from the USA as a result of the North American Free Trade Agreement, the absence of non-tariff barriers and the excess production capacity of the industry in the USA made for greater incentives to use an abundant low cost substitute. Obviously, for a producer of goods using nutritional sweeteners, the lower production cost using HFCS compared to sugar was a crucial element in deciding which sweetener to use, since both products were commercially interchangeable in the production process.

The likelihood of increased use of HFCS by industries other than soft drink bottlers is also based on the sales performance of those industries observed in 1996, as can be seen from the information supplied in exhibit MEXICO-39² - summarized in the following table - pertaining to the analysis of sales of HFCS imports on the Mexican market by two of the main importers, Almidones Mexicanos, S.A. de C.V. and Arancia, C.P.C., S.A. de C.V., which together account for 81 per cent of the imports investigated.³

Import Tariff, originating in the United States of America, irrespective of the country of provenance", published in the Official Journal of the Federation, 25 June 1997.

² It should be noted that MEXICO-39 was supplied as an annex in the dispute settlement procedure brought before the previous Panel, and hence the WTO Secretariat has that annex.

³ See paragraph 42 of the revised final resolution.

**High Fructose Corn Syrup (HFCS-42 and HFCS-55)/Wet Base
Import Sales
Market Segment/1996**

Industry	Tons		
	Almex	Arancia, CPC.	Total
Soft drinks	96,093,060	17,173,661	113,266,721
Other industries	18,711,717	37,984,593	56,696,310
Total	114,804,777	55,158,254	169,963,031

Source: Sales by importing firms: written statement by Almidones Mexicanos, S.A. de C.V., sheet 1654 of 28 May 1997 and reply by Arancia CPC, S.A. de C.V., by sheet 2627 of 5 August 1997 to investigating authority request UPCI.310.97.114 of 16 July 1997.

In addition, from information on sales of imported HFCS for 1994 supplied by Arancia Corn Products, S.A. de C.V. (previously Arancia CPC, S.A. de C.V.) and information given in the previous paragraph, it was found that from 1994 to 1996 HFCS sales to industries other than soft drink bottlers showed a significant increase. Also, from January to December 1996, monthly sales of imported HFCS by that enterprise to industries other than soft drink bottlers revealed a rise, particularly in the second half of the year. The sales pattern in the two periods indicated showed increasingly larger substitution and consumption of HFCS in those industries.

**High Fructose Corn Syrup (HFCS-42 and HFCS-55)/Wet Base
Import Sales by Arancia CPC, S.A. de C.V.**

Industry	1994 (kg.)	1996 (kg.)	1996/1994 (%)
Soft drinks	750,660	17,173,661	2,188
Other industries	17,555,457	37,984,593	116
Food	3,855,744	10,045,261	161
Beverages (not soft drinks)	3,561,994	12,611,743	254
Marketing company	560	2,539	353
Pharmaceuticals	91,404	150,070	64
Milk products	1,151,560	4,296,570	273
Bread-making and biscuits	8,894,195	10,878,410	22
Total	18,306,117	55,158,254	201

Source: Reply by Arancia CPC, S.A. de C.V., in sheet 2803 of 15 August 1997 to investigating authority request UPCI.310.97.1325 of 28 July 1997 (includes changes as a result of *in situ* verification of information on 23 to 26 September 1997).

The growing HFCS use and consumption in industries other than soft drink bottlers, as well as the existence of consumption of sugar that could be replaced, revealed that, if the conditions under which HFCS had been imported from 1994 to 1996 continued, an increased displacement of sugar in those industries was imminent. While the pace of such a substitution differed among industrial users, from the outlook at the time of the investigation period there was no obstacle to prevent the situation moving faster in the immediate future.

**High Fructose Corn Syrup (HFCS-42 + HFCS-55)/Wet Base
Import Sales by Type of Activity by Arancia CPC, S.A. de C.V.
First Half of 1996**

Industry	Jan	Feb	Mar	Apr	May	Jun	Jan-Jun
Soft drinks	197,886	253,205	297,640	85,190	189,010	113,045	1,135,976
Other industries	2,084,590	1,667,870	1,574,600	2,398,176	3,786,474	4,091,382	15,603,092
Food	404,140	454,203	576,250	779,099	1,263,684	1,179,876	4,657,252
Beverages (not soft drinks)	862,710	526,347	625,205	702,072	1,022,605	1,571,091	5,310,030
Marketing company	0	0	0	0	0	0	0
Pharmaceuticals	11,075	18,530	13,535	13,705	10,550	4,200	71,595
Milk products	175,735	115,910	25,010	292,165	546,525	470,735	1,626,080
Bread-making and biscuits	630,930	552,880	334,600	611,135	943,110	865,480	3,938,135
Total	2,282,476	1,921,075	1,872,240	2,483,366	3,975,484	4,204,427	16,739,068

Source: Reply by Arancia CPC, S.A. de C.V., in sheet 2803 of 15 August 1997 to investigating authority request UPCI.310.97.1325 of 28 July 1997 (includes changes as a result of *in situ* verification of the information on 23 to 26 September 1997).

**High Fructose Corn Syrup (HFCS-42 + HFCS-55)/Wet Base
Import Sales by Type of Activity by Arancia CPC, S.A. de C.V.
Second Half of 1996**

Industry	Jul	Aug	Sep	Oct	Nov	Dec	Jul-Dec
Soft drinks	836,400	1,490,815	1,993,597	2,512,333	4,461,440	4,743,100	16,037,685
Other industries	3,125,040	2,769,807	3,673,645	4,378,471	4,487,479	3,947,059	22,381,501
Food	1,254,105	728,547	984,840	856,635	834,970	728,912	5,388,009
Beverages (not soft drinks)	1,039,915	1,195,295	965,965	1,460,551	1,739,784	900,203	7,301,713
Marketing company	0	0	0	0	1,120	1,419	2,539
Pharmaceuticals	1,960	14,365	0	32,460	16,350	13,340	78,475
Milk products	398,160	383,500	349,350	441,770	559,805	537,905	2,670,490
Bread-making and biscuits	430,900	448,100	1,373,490	1,587,055	1,335,450	1,765,280	6,940,275
Total	3,961,440	4,260,622	5,667,242	6,890,804	8,948,919	8,690,159	38,419,186

Source: Reply by Arancia CPC, S.A. de C.V., in sheet 2803 of 15 August 1997 to investigating authority request UPCI.310.97.1325 of 28 July 1997 (includes changes as a result of *in situ* verification of the information on 23 to 26 September 1997).

**High Fructose Corn Syrup (HFCS-42 + HFCS-55)/Wet Base
Import Sales by Type of Activity by Arancia CPC, S.A. de C.V.
1996**

Industry	Jan-Jun	Jul-Dec	Jan-Jun/Jul-Dec (%)
Soft Drinks	1,1135,976	16,037,685	1,312
Other Industries	15,603,092	22,381,501	43
Food	4,657,252	5,388,009	16
Beverages (not soft drinks)	5,310,030	7,301,713	38
Marketing company	0	2,539	n/a
Pharmaceuticals	71,595	78,475	10
Milk products	1,626,080	2,670,490	64
Bread-making and biscuits	3,938,135	6,940,275	76
Total	16,739,068	38,419,186	130

Source: Reply by Arancia CPC, S.A. de C.V., in sheet 2803 of 15 August 1997 to investigating authority request UPCI.310.97.1325 of 28 July 1997 (includes changes as a result of *in situ* verification of the information on 23-26 September 1997).

2. There is no reference in paragraph 57 of the redetermination to the degree of technical substitutability of HFCS for sugar in bread-making. Nor is there any information on the proportionate use of HFCS and sugar in bread-making in exhibit MEXICO-20. Bread accounts for 86 per cent of the projected volume of sugar consumption in 1997 that SECOFI concludes could be substituted for by HFCS. Could Mexico point to any evidence in the record on the actual use of HFCS in bread-making in Mexico? Could Mexico indicate specifically where in the redetermination this information, if any, was considered?

First of all it is necessary to point out that exhibit MEXICO-20 does contain information on the use of HFCS and sugar in the bread-making industry. It includes, in particular, the data on the enterprises Marinela de Occidente, S.A. de C.V., Productos Marinela, S.A. de C.V., and Panificación Bimbo, S.A. de C.V. Secondly, as evidence of the actual use of HFCS in the bread-making industry in Mexico, the Panel is referred to the information contained in exhibit MEXICO-39 which shows imported HFCS sales in 1996 by the main importers mentioned in the reply to question 2. The information notes that, in 1996, enterprises in the bread-making industry that consumed HFCS in Mexico were, among others, the following:

**Sales of High Fructose Corn Syrup Originating in
the United States of America
1996**

Name of Client	Sales by Arancia kg.	Sales by Almex kg.
Bimbo de Baja California, S.A. de C.V.	189,420	-
Bimbo de Chihuahua, S.A. de C.V.	47,320	-
Bimbo de Occidente, S.A. de C.V.	78,685	-
Bimbo de Puebla S.A. de C.V.	24,080	-
Bimbo de San Luis Potosi S.A. de C.V.	17,640	-
Bimbo de Yucatan, S.A. de C.V.	92,960	-
Bimbo del Centro S.A. de C.V.	18,200	-
Bimbo del Norte, S.A. de C.V.	98,825	-
Bimbo del Pacifico, S.A. de C.V.	37,520	-
Bimbo del Golfo, S.A. de C.V.	-	41,630
Bimbo del Noroeste, S.A. de C.V.	-	56,500
Continental de Alimentos, S.A.	110,440	-
Complementos Alimenticios, S.A.	-	59,780
Marinela de Baja California S.A. de C.V.	632,320	-
Marinela de Occidente S.A. de C	663,145	190,120
Marinela del Norte, S.A. de C.V.	409,488	220,545
Marinela del Sureste S.A. de C.V.	140,030	41,930
Panificacion Bimbo, S.A. de C.V.	421,480	-
Panificadora el Panque, S.A. de C.V.	1,680	-
Paniplus S.A. de C.V.	445,920	-
Paniplus de Occidente, S.A. de C.V.	-	28,290
Productos Lamar, S.A. de C.V.	-	71,030
Productos Marinela, S.A. de C.V.	2,124,905	223,906
Suandy Mexico, S.A. de C.V.	91,000	-
Tia Rosa, S.A. de C.V.	506,935	78,140
TOTAL	6,151,993	1,011,871

Source: Exhibit MEXICO-39, reply by Arancia CPC, S.A. de C.V., in sheet 2803 of 15 August 1997 to investigating authority request UPCI.310.97.1325 of 28 July 1997 and reply by Almidones Mexicanos, S.A. de C.V., in sheet 2770 of 13 August 1997 to investigating authority request UPCI.310.97.1193 of 16 July 1997.

Again, in relation to the last part of the question, it should be noted that, although paragraph 57 of the revised final resolution failed to mention the degree of substitution of HFCS for sugar in the bread-making industry, the explicit reference to that information is made in paragraphs 122 and 123 of the revised final resolution. It should also be noted that the information on the use of HFCS in the bread-making industry was considered in the analysis described in paragraph 53 of the resolution.

3. Could Mexico clarify what is meant, in paragraph 144 of the redetermination, by the net financial burden as a percentage of overall cost of financing? Specifically, could Mexico explain what elements make up the numerator, what is netted out of the numerator, and what elements make up the denominator.

Mexico wishes to clarify that in paragraph 144 of the revised final resolution SECOFI did not state that the net financial burden corresponds to a percentage of the overall cost of financing, but that the investigating authority said:

"144 What is more ... the industry's net financial burden viewed as a percentage of the overall cost of financing remained unchanged in 1996 compared to 1995"
(Emphasis added)

In this respect it is important to note that, in keeping with Mexican accountancy rules, the overall cost of financing⁴ is defined as the sum of: (1) the interest on an enterprise's loans; (2) the profit or loss from foreign exchange fluctuations⁵; and (3) the result of the monetary position known as *Repomo*.⁶

Since interest, foreign exchange fluctuations and the monetary position have a direct impact on the amounts paid for debt use, it is necessary to add them in accordance with the following formula

$$cif = i \pm gpc \pm repomo$$

Where **cif** is the overall cost of financing, **i** represents the net interest of the period, **gpc** is equal to the period's foreign exchange profits or losses and **repomo** is the difference between monetary assets and monetary liabilities, as multiplied by the period's rate of inflation⁷; as will be seen, the arithmetical sign \pm means in fact that the variables in the equation are net variables.

As for **i**, it is a net variable because it represents the balance of the financial revenue and expenses account⁸; **gpc** is a net variable because it involves the profits or losses from foreign currency operations and **repomo** represents the net inflationary profits or losses due to maintaining monetary positions of credits with creditors and debts with debtors, in Mexican pesos.

Because of this, SECOFI calculated the industry's net financial burden as the sum of the overall cost of financing of 48 sugar mills⁹ and not as a percentage, as can be seen from the following equation:

⁴ Paragraph 116 of Bulletin B-10 of the Generally Accepted Accountancy Principles (GAAP) MEXICO-22.

⁵ For further details see paragraphs 122 to 139 of GAAP Bulletin B-10. MEXICO-22.

⁶ For further details see paragraphs 140 to 155 of GAAP Bulletin B-10. MEXICO-22.

⁷ Monetary assets means cash, customers, accounts payable, amounts realisable, i.e., liquid assets. Monetary liabilities means suppliers, loans, creditors, the circulating part of long-term liabilities and similar accounts of a circulating nature.

⁸ Point 5.1 of the first updated document in GAAP Bulletin B-10. MEXICO-22.

⁹ See MEXICO-14.

$$cfn_{ind} = \sum_{n=1} cfn_n$$

Where cfn_{ind} represents the sugar industry's net financial burden, cfn_n is the overall cost of financing each sugar mill_n, which is shown on the corresponding statement of interest, immediately after the operating profit or EBIT. Hence, the net financial burden is not a quotient or a percentage, for which reason there are no numerators or denominators in the calculations of any of the variables in the above equation.

4. It appears from paragraph 17 of Mexico's second submission that SECOFI chose to exclude production for export markets when considering changes in production volumes. The redetermination refers, at paragraph 129, to the fact that the production volume oriented toward the domestic market declined by 2 per cent in 1996 with respect to 1995, but does not refer to the absolute increase in production. Could Mexico explain why? How can consideration only of production oriented to the domestic market be justified in light of the fact that the productivity of the industry included production for both the domestic and export markets?

Mexico wishes to clarify that in paragraph 129 of the revised final resolution, SECOFI analysed the pattern of domestic sugar production oriented towards the domestic market in terms of volume (percentage variation) and in relation to apparent domestic consumption (ADC). In other words, it is the proportion of the domestic market that corresponded to domestic sugar production and not the part intended for the export market.¹⁰

Where:

The percentage share of domestic production oriented to the domestic market in apparent domestic consumption = [((domestic sugar production – sugar exports) / ADP)* 100]

ADP = (domestic sugar production + domestic HFCS production + sugar imports + HFCS imports – sugar exports)

If the share of domestic sugar production intended for the export market had been included, the factors making up apparent domestic consumption would not total 100 per cent, since sugar exports were deducted in calculating domestic consumption of sweeteners. Furthermore, Mexico considers that when a share of domestic production is intended for the export market, the market performance of the domestic industry will be shown by production oriented to the domestic market.

It is important to mention that SECOFI did not fail to evaluate domestic sugar exports, since the Ministry examined it as another of the factors with an impact on the situation of the domestic industry, so that paragraph 130 of the revised final resolution said that, in view of the loss of domestic sales, the industry was obliged to increase its exports of sugar.

Again, it is important to point out that SECOFI did not deny the increase in total domestic sugar production, nor did it deny the increased employment, resulting in increased productivity in the sugar industry.¹¹ However, the increased productivity is explained by the increase in domestic sugar

¹⁰ See paragraph 129 of the revised final resolution "... the share of apparent domestic consumption declined by 4 percentage points with respect to the level in 1995; this loss of market share for the sugar industry was not limited to the period under investigation, since it changed from a share of apparent domestic consumption of 98 per cent in 1994 to 93 per cent in 1996. In absolute terms as well, the production volume oriented to the domestic market declined by 2 per cent in 1996 with respect to 1995".

¹¹ See paragraphs 131 and 135 of the revised final resolution.

production as a result of dynamic exports, which does not detract from the loss of market share for domestic sugar.

5. Mexico's conclusion that the soft drink industry will supply the entirety of HFCS consumption allowed under the restraint agreement, 350,000 tons, from domestic production implies an increase of 128 per cent in HFCS use by soft drink bottlers. What is the evidence to support this projected level of HFCS use? This increase refers to domestically produced HFCS. Does this not suggest that the problem is not HFCS imports, but simply increasing use of HFCS *per se*?

First, it should be noted that the consideration that all of the consumption permitted under the alleged restraint agreement would be supplied by domestic production was not a conclusion reached by Mexico but a working hypothesis. Under this hypothesis, it could be established that, even if the alleged restraint agreement was not strictly complied with and the consumption level to which bottlers were allegedly confined was not supplied by imports (as had traditionally been the case) but by domestic production, an increase in imports would have proved necessary to satisfy the growing demand by industries other than bottlers.

In fact, as Mexico established in its second written submission with regard to the USA's assertions in its first submission, that hypothesis could be discarded. The information that Mexico considered in respect of the alleged agreement and supplied by the parties did not establish the source of supply nor did it indicate a requirement to comply strictly with the level of consumption or penalties in the event of non-compliance. Nevertheless, Mexico considered as a hypothesis, for the purpose of determining the existence of a likelihood of increased imports, that both conditions might exist, so as not to overestimate the demand for further imports.

Indeed, a consumption level limited to 350,000 tons for soft drink bottlers could be supplied by imports, whereas the demand from other industries would have to be met by domestic production. Actually, the decision as to which HFCS is to supply a particular industry or enterprise would depend on the importer-producer in terms of costs, prices and commercial agreements with his customers. The fact is that, regardless of the decision, domestic production, even if it worked at 100 per cent capacity, would not be enough to supply total demand. As an example, it should be noted that, from January to September 1997, imports stood at nearly 260,000 tons wet base, even though the anti-dumping investigation had been initiated in January 1997 and domestic HFCS production was operating to the full.

Again, with the information available to it, Mexico was able to estimate that annual domestic HFCS production for 1997 had not exceeded 250,000 tons, which in terms of the alleged restraint agreement alone left 100,000 tons to be supplied by imports, plus additional demand by industries other than soft drink bottlers. Nevertheless, Mexico made both of these restrictive assumptions so as not to overestimate the likelihood of increased imports, in other words, that the limit on consumption by bottlers would be strictly complied with and that consumption would be supplied by domestic production.

"131. ... the sugar industry's productivity, measured as the ratio of production to the number of workers employed, improved during the period under investigation by 6 percentage points compared to 1995."

"135. It is also significant that the behaviour of wages, inventory and productivity in the sugar industry can be explained by the condition in which the sugar industry was found during the period under investigation, since it needed to improve its production levels in order to meet internal demand, maintain a stock of inventory so as not to generate charges, and be able to export its surplus."

The increased use of HFCS by soft drink bottlers is to be seen in the growing trend in sales to such users during the period of investigation, namely January–December 1996¹², as well as in the information available in the investigation's administrative record on HFCS consumption forecasts for such users that are based on the estimated performance of soft drinks production and, hence, on demand for sweeteners, particularly HFCS. This is supported by two attached studies (MEXICO-23) by recognized specialists in the sweetener industry on the outlook for HFCS demand in Mexico by the soft drinks industry, and they form part of the administrative record of the anti-dumping investigation.

Mexico rejects the scenario estimated for 1997 which suggests that the problem lies in increased use of HFCS *per se* and not in imports. In fact, Mexico considered in its estimate that part of HFCS consumption would be met by domestic production and not only by imports. This does not imply that the increase in imports stemming from greater use can be qualified as negligible or that its adverse effects on the domestic industry can be minimized. It should be emphasized that greater use of HFCS supplied by domestic production, while it would gradually displace the use of the sugar, the effects would differ from those of dumped imports. Furthermore, domestic HFCS production and sugar would compete on a basis that was not distorted by unfair practices and, therefore, at higher prices, whereas the reason for the increase in imports is attractive dumping prices on the Mexican market, which may have the effect of speeding up substitution and increasing demand for further imports. The momentum of the substitution and the price effects of greater HFCS use differ significantly as between domestically produced HFCS and HFCS obtained from dumped imports.

6. In paragraph 162 of the redetermination, Mexico refers to the 4.6 times ratio of total liabilities to book capital as a negative indication of the condition of the industry. Could Mexico explain what the benchmark is against which it is concluded that this particular ratio is high?

In conducting its financial analysis, SECOFI considered that borrowing capacity relates to the additional debts an enterprise may contract without running the risk of failing to pay off a loan, in other words, lenders can recover their loans only when the borrower's repayment capacity is equivalent to or higher than the sum of repayments of principal and payment of interest.

In view of the above, it is important for every enterprise to maintain a suitable balance between debt and capital in order to ensure that the capital or the viability of the organization are not at risk, i.e. enterprises must make sure that they do not borrow beyond their payment capacity.

Broadly speaking, financial leverage ratios measure the protection of creditors against the probable insolvency of a borrowing enterprise, as well as the enterprise's ability to obtain financing for investment. In fact, leverage ratios show what is the enterprise's capital structure, and therefore allow us to understand the link between that capital structure and the operating risk associated with a leveraged enterprise.

If the leverage is significantly high, this means that to continue financing itself at similar levels, economic viability will depend on stable growth in expected income; otherwise, the enterprise is likely to become insolvent in repaying its commitments to creditors or perhaps it may incur net losses.

This reasoning is fully applicable to the ratio of total liabilities to book capital. However, this ratio reveals a further situation: the autonomy of shareholders over their investment depends on the level of borrowing; in other words, as this ratio rises, the shareholders' net investment value falls proportionately, which gradually leads to lost decision-making ability regarding the financing strategy to be followed.¹³

¹² See MEXICO-39.

¹³ This is because creditors will not want the enterprise to borrow more, for they must protect their interests.

In view of these considerations, in paragraph 162 of its revised final resolution, SECOFI stated that in 1996 the domestic industry showed a ratio of total liabilities to book capital of 4.6 times, in other words, the sugar industry's debt was at least 3.6 times higher than shareholders' investment in the industry. This reveals that shareholders technically lost their investments to creditors and lost autonomous decision-making powers.

In short, Mexico is of the view that the very significance of the leverage ratios obtained gives enough of an idea to appreciate when a debt level is unmistakably high. Mexico recognises that SECOFI did not compare the resulting debt to book capital ratio with the average in other industries. However, a ratio of 4.6 times (460 per cent) for the industry in 1996 showed a debt level that is excessive.

Further considerations

Mexico considers it of the utmost importance to expatiate on the significance, in terms of the present procedure, of the concepts of overall cost of financing and financial leverage, since they involve, on the one hand, net payments by the sugar industry for the use of debts in its operations, and on the other, the industry's capital structure and the risk it runs.

In this respect, it should be borne in mind that the debt level has a direct impact on the amount of the financial burden, for which reason, as already pointed out, the industry must in future be able to generate stable income and operating profits at least for an amount identical to its financing cost, so as not to incur losses. What is more, it must generate profits that can guarantee its economic viability.

In this connection, Mexico recognizes that an enterprise with low debt levels should increase the debt in order to back investment for higher profits. However, this means that it has to cope with greater payments for interest, foreign exchange fluctuations and a better monetary situation, which will increase its overall cost of financing. It can be deduced from this that the outstanding issues for deciding to increase borrowings and the overall cost of financing are: how risky is it to borrow more and how far can it be done?, and how is the risk of insolvency viewed in the light of the decision to change the existing capital structure for one that is more leveraged?¹⁴ From this it can be inferred that the decision to increase the debt is not a straight forward decision and involves a thorough-going analysis to define an enterprise's financial strategy.

7. Can Mexico reconcile the substitution rates provided in the Almex market survey and by the consultants GEA that are set out in exhibit MEXICO-20 with the substitution rates relied on by SECOFI in exhibit MEXICO-21? What is the evidence for the conclusion that manufacturers of products other than soft drinks who had not in the past used HFCS would do so in 1997 in the amounts implied by the figures in exhibit MEXICO-21, i.e., in the case of marmalade, 35 per cent of total predicted 1997 sugar consumption, or 6,900 tons. In particular, why would this occur when the price differential between sugar and HFCS was projected to lessen, slightly, as compared to 1996, a year in which such volumes of HFCS were not consumed by industries other than soft drink bottlers?

The substitution rates set out in exhibit MEXICO-21 derive in part from the substitution rates established in the Almex market survey and in part from the evidence available on the use of HFCS in products included in the sugar consuming sectors, as explained in the following table:

¹⁴ It should be borne in mind that capital structure is defined as a percentage mixture of own capital and total liabilities, because 100 per cent of the investment is accounted for by total assets.

Industry	Degree of substitution mentioned in exhibit MEXICO-21	Degree of substitution mentioned in the Almex survey	Comments
Bread	100%	100%	Nominally, it was decided to use the same percentage substitution for bread-making as indicated by Almex, although effectively a degree of substitution of 50% was relied upon.
Juices and concentrates	100%	100%	The Almex survey concerns non-carbonated beverages – i.e. beverage industries other than the soft drink bottlers.
Marmalades	70%	33%	In this case, the degree of substitution relied upon was the degree to which HFCS had already been used instead of sugar in accordance with the information supplied by the company Mermeladas Mago, S.A. de C.V. Reducing the 70% by half, a degree of substitution of 35% was in fact used, which is lower than the average degree of substitution of other producers of marmalades such as Frexport, S.A. de C.V.
Canned fruit	52%	3%	In this case, the degree of substitution relied upon was the degree to which HFCS had already been used instead of sugar in accordance with the information supplied by the company Confituras La Florida, S.A. de C.V. Reducing the 52% by half, the degree of substitution used in reality was 26%. It should be pointed out that in the case of Almex, it concerns the heading "Canned fruit". The reference in exhibit MEXICO-21, is to "fruit in syrup" from the food segment. This segment also contains products such as orange segments, grapefruit segments, pineapple cubes, papaya cubes, melon cubes and mango slices, which correspond generically to canned fruit, and already showed a rate of substitution of 100% according to the information supplied by the company Industrias Citricolas de Montemorelos, S.A. de C.V.
Milk products	50%	0-50%	In the case of Almex, the milk products heading corresponds to yoghurt. In this case, the degree to which HFCS had already been substituted for sugar in accordance with the information supplied by the companies Chantilly, S.A. de C.V., Helados Bing, S.A. de C.V. and Helados Holanda, S.A. de C.V. was considered to provide evidence to suggest that the rate could average about 25%.

Industry	Degree of substitution mentioned in exhibit MEXICO-21	Degree of substitution mentioned in the Almex survey	Comments
Biscuits	10%	0-10%	The degree of substitution relied upon was the maximum that could be reached according to the Almex survey, since the information supplied by the companies Fabrica de Galletas La Moderna, S.A. de C.V. and Gamesa, S.A. de C.V. confirmed that that degree had already been attained.
Sweets	50%	0-5%	36. With respect to sweets, the information relied upon was that supplied by the company Anderson Clayton & Co., S.A. de C.V., which showed a degree of substitution of 100% for liquid caramel. However, in view of the wide range of products that could be considered in this industry, it was in fact decided to use a degree of substitution of 25%.

The elements supporting Mexico's conclusion that industries other than soft drink bottlers that had not used HFCS would do so in 1997 are as follows:

Imports of HFCS from the United States increased significantly during the second half of 1996 as compared to the first half of the year, spurred on by the growing margin of price undercutting by competitors on the Mexican market with respect to domestically produced sugar.

This increase in sales of imported HFCS took place in an economic context marked by the recovery of domestic demand. In other words, industrial users already using HFCS were taking advantage of the increase in demand by using a substitute supplied at a price significantly lower than that of sugar used by their competitors.

This meant that those already using HFCS benefited from a reduction in the cost of sweetener inputs, ranging from 43 to 56 per cent, on average, with respect to the sugar consumed by the other producers. This cost advantage inevitably meant that they were more competitive with their goods on the market than those that did not use HFCS or, alternatively, that they could increase their profits, or both.

Persistence of these conditions would clearly mean that eventually, the industrial producers that did not consume HFCS would lose their market share, or else suffer a loss of profitability. If dumped HFCS imports were to continue competing on the market, undercutting sugar prices, the expansion of the customer base resulting from the demonstration effect of users already utilizing HFCS would accelerate substitution of HFCS for sugar in production operations, even assuming that the rate of substitution of a given industry constituted a technical limitation.

This is corroborated by the behaviour of industrial users during 1996. Exhibit MEXICO-39 shows that during the second half of 1996, importers considerably expanded their customer base in practically all of the industries other than the soft drink bottling industry.

In other words, many companies which did not consume HFCS during the months from January to June 1996 began to use it in their production operations starting in July of that year. In the specific case of the HFCS import sales of Arancia CPC, S.A. de C.V., the number of industrial users

other than soft drink bottlers that began to use HFCS in the second half of 1996 rose to 48 enterprises. In fact, the increase in imported HFCS sales by that company in the above-mentioned sectors between the first half and the second half of the year was 43 per cent.

These facts, added to what was already said by Mexico in its first and second written submissions concerning the economic context foreseen for 1997, support the determination that the substitution of HFCS for sugar in industries other than the soft drink bottling industry would accelerate if competition from dumped imports continued. The repercussions of this substitution on sugar consumption were assessed by using an estimate, based on an accepted methodology, of what could reasonably be expected in the immediate future if the incentives to use HFCS in the different production operations remained unchanged.

The reason for the conclusion that in 1997 the increase in the use of HFCS would accelerate in this way considering the predicted evolution of prices, in addition to the considerations set forth in the reply to question 1, lies in the fact that for that year the pre-market phase could already be considered to have ended (i.e. a potential demand had already been created and the necessary conditions for market expansion had been met). It should be recalled that an embryonic market had already begun to form before 1994, but the process had been interrupted by the sharp fall in consumption in 1995, and it was only in the second half of 1996 that the market growth recovered its momentum. Thus, by the end of 1996 it was reasonable to expect a significant growth in demand for 1997, especially considering that the economic context was far more favourable for the industry than during the three preceding years.

Thus, in spite of the fact that the price forecasts for HFCS suggested that there would be a slight variation with respect to 1996, the margin of price undercutting by HFCS imports with respect to sugar would continue to be sufficiently high to constitute an economic incentive that would strengthen the increase in consumption by the enterprises using HFCS, and would hence increase the pressure on competitors that continued to consume sugar, obliging them in the short term to adjust to the conditions of competition imposed by their rivals. This in turn, would put pressure on the domestic sugar industry to reduce its prices for those users so as to make them competitive with HFCS prices. However, since the magnitude of the adjustment that would be needed to compete on an equal footing implied a significant decline in sugar prices, the only realistic option would be substitution, and the resulting displacement of sugar from the market.

8. Could Mexico please clarify what is meant by "grados de sustitución" in the table "Consumo real de azúcar por sector" in exhibit MEXICO-21. Do those figures not indicate the proportions in which the surveyed companies actually used HFCS and sugar in their production operations in 1996? If so, on what basis can it be concluded that other companies both can and will, in 1997, switch from using sugar to using sugar and HFCS in the same proportions in their own production operations. It appears that the survey information in exhibit MEXICO-20 is from companies that already use HFCS in their production operations. How can conclusions about the likely rate of use of HFCS by companies that have not in the past used HFCS be justified on the basis of information provided by companies that already use HFCS.

The degrees of substitution (*grados de sustitución*) mentioned in exhibit MEXICO-21 refer, as explained in the reply to question 7, to the extent to which industrial users could substitute HFCS for sugar in their production operations, calculated on the basis of the percentage of substitution already used in certain sectors and the extent to which it was technically feasible to substitute sugar consumption for a given product or in a given sector.

Thus, we are not speaking of volumes of sugar actually displaced, but of potential sugar consumption likely to be substituted for by dumped imports; otherwise the situation of the domestic sugar industry would have been one of injury rather than threat of injury.

The basis for concluding that companies that had not used the imported product would in fact use it in the immediate future is the unquestionable economic benefit they would derive from using an input that was cheaper because it was imported at dumped prices, given that it had already proven to be commercially interchangeable with sugar.

The issue of whether the use of HFCS by the new companies entering the market would match the rate at which other companies use HFCS basically depends on the specific production operations and products concerned. Conditions can vary substantially from one sector or one product to another within a given industry. However, at the level of each consumer industry there are common conditions of competition which would imply that new HFCS users would try at least to equal the average rate of use prevailing in the market in order to maintain their competitive position.

Obviously, not all of the industrial users would substitute HFCS for sugar at the same time, at the same rate, or to the same extent. That is why Mexico estimated that the potential consumption of sugar under threat would amount to 33 per cent of estimated consumption for industries other than soft drink bottlers in 1997 (i.e. the proportion of potential consumption of other industries liable to substitution was 334.2 thousand tons in the subtotal covering other industries in the real sugar consumption table by sector: 1,015.1 thousand tons. However, according to the information in the investigation's administrative record, in 1996 HFCS consumption by industries other than soft drink bottlers (108,523 tons), including domestic production and imports already stood at 11 per cent of sugar consumption in those sectors in 1996 (974.9 thousand tons), so that the additional increase in the estimated share for Mexico for 1997 was 22 per cent.

9. The information in exhibit MEXICO-19 indicates that HFCS-55 is used predominantly in the soft drink bottling industry, while HFCS-42 is used predominantly in other industries, such as baking, beverages other than soft drinks, processed foods, and milk products. According to the data in paragraphs 39 and 44 of the redetermination, imports of HFCS-55 increased far more rapidly from 1995 to 1996 than did imports of HFCS-42 (increase of 179 per cent as compared with 5 per cent), and imports of HFCS-55 accounted for the vast majority of imports in 1996, 81 per cent. Does Mexico's predicted increase in usage by industries other than soft drink bottlers not imply that these trends and levels in the distribution of imports between HFCS-55 and HFCS-42 will be reversed in 1997? What is the evidence to suggest such a reversal is likely? Mexico's oral response to this question seemed to indicate that those companies that already use HFCS-55 to manufacture products other than soft-drinks would increase their purchases of HFCS-55. However, since these producers are only a subset of all manufacturers of products other than soft drinks, this would imply an even larger rate of increase in their purchases than the over 400 per cent calculated as the increase in HFCS consumption by all producers of products other than soft drinks. Could Mexico clarify? In addition, Mexico referred to the information in exhibit MEXICO-20 to support its statement that manufacturers of products other than soft drinks used HFCS-55 in their products. This seems to conflict with the information in exhibit MEXICO-19. Could Mexico reconcile this apparent conflict in the evidence?

The information contained in exhibit MEXICO-19 indicates that in the United States market, although HFCS-42 is used predominantly in industries other than soft drink bottlers, those industries also consume HFCS-55, although to a lesser degree. Similarly, while soft drink bottlers consume mainly HFCS-55, they also use HFCS-42.

This does not contradict the information contained in exhibit MEXICO-20 referred to in the oral reply, in which it was stated that industrial users other than soft drink bottlers also use HFCS-55. The point of what Mexico said in its oral response with respect to the performance of HFCS-42 imports in 1996 as indicated by the Panel was to stress that the predicted increase in HFCS consumption by industries other than bottlers would not be limited exclusively to HFCS-42, but

would also include HFCS-55. Nor does this mean that all of the increase in imports would be attributable to companies from industries other than the soft drink bottlers already using HFCS-55.

Similarly, the figures available to the investigating authority on HFCS consumption in Mexico for 1996 are consistent with the information contained in exhibit MEXICO-19. That exhibit shows that, of total HFCS consumption by industries other than soft drink bottlers, 61 per cent concerned HFCS-42 and 39 per cent concerned HFCS-55, while in the case of soft drink bottlers, 84 per cent of HFCS consumption concerned HFCS-55 and 16 per cent concerned HFCS-42.

At the same time, the slower growth and smaller share of HFCS-42 imports in the 1996 total was explained by the fact that the product was already manufactured domestically. In that year, sales of HFCS-42 produced domestically amounted to 54,207 tons while sales of locally produced HFCS-55 totalled 4,254 tons. This is because practically the only company to manufacture HFCS in Mexico in 1996 was Almex, which did not have the necessary facilities for producing HFCS-55, but only HFCS-42, while Arancia CPC did not begin its production until December of that year.

**Distribution of HFCS Consumption in Mexico by Origin and Grade
1996**

Industry	HFCS-42	HFCS-55	Total	42-Total (%)	55-Total (%)
		Domestic			
Soft drinks	12,200	1,002	13,202	92	8
Other industries	42,007	3,252	45,258	93	7
Total	54,207	3,252	45,258	93	7
		Imported			
Soft drinks	12,073	130,621	142,694	8	92
Other industries	23,995	39,269	63,264	38	62
Total	36,068	169,269	205,958	18	82
		Total			
Soft drinks	24,273	131,623	155,896	16	84
Other industries	66,002	42,521	108,522	61	39
Total	90,275	174,143	264,418	34	66

Source: Replies of Arancia CPC, S.A. de C.V., (in sheet 2627 of 5 August 1997 and sheet 2803 of 15 August 1997) to investigating authority requests UPCI.310.97.1194 and UPCI.310.97.1325 of 16 and 28 July 1997 respectively (with changes resulting from the *in situ* verification as from 23-26 September 1997); and letter from Almidones Mexicanos, S.A. de C.V., (in sheet 1654 of 28 May 1997) and reply of 13 August 1997 (folio 2770) to investigating authority request UPCI.310.97.1193 of 16 July 1997.

In fact, it is important to note that HFCS-42 is used as an input in manufacturing HFCS-55 either by using a chromatographic separation tower to enrich the HFCS-42 until the required grade

has been attained, or by physically mixing HFCS-42 with an enriched form of HFCS, generally HFCS-90, to obtain HFCS-55. In any case, the producer must determine which proportion of HFCS-42 production is intended for the market and which proportion to be consumed in the manufacturing of HFCS-55.

During 1996, 97 per cent of Almix's production of HFCS-42 went to domestic market sales, while 3 per cent was used to manufacture HFCS-55, which was produced only in the month of December of that year using the above-mentioned mixing process. Of its sales of domestically produced HFCS-42, 77 per cent went to other industries, while the remaining 23 per cent went to soft drink bottlers.

Bearing this in mind, the predicted increase in the use of HFCS by industries other than the soft drink bottlers would in fact imply an investment in the distribution of imports in 1997 as compared to 1996, assuming that the source of supply for the allegedly restrained consumption by the bottlers was domestic production, since local producers would not have enough HFCS-42 to meet the demands of the market (other industries and soft drink bottlers) and to produce, in addition, HFCS-55.

Thus, if all of the domestic HFCS production were distributed to the bottlers in the same proportions as the bottlers had consumed HFCS during 1996, 85 per cent of the 350,000 tons of the alleged restraint agreement would be HFCS-55 and 15 per cent would be HFCS-42. Likewise, according to this scenario, the potential sugar consumption liable to substitution with HFCS in 1997 corresponding to industries other than the bottling industry, i.e. 334.2 thousand tons according to exhibit MEXICO-21, would have to be supplied by imports and, if distributed in line with HFCS consumption by those industries in 1996, 39 per cent of the imports would be HFCS-55 and 61 per cent would be HFCS-42.

However, as Mexico stated in its reply to question 5, the hypothesis that the consumption limited by the alleged restraint agreement would be supplied through domestic production alone could be dropped in a less stringent scenario, thereby possibly balancing the distribution of imports as between HFCS-42 and HFCS-55.

10. If one adds together the share of the market accounted for by imports of HFCS from the United States and Mexican production of sugar in 1994 and 1996, the total is not 100 per cent. For 1994, it is 99.7 per cent, while for 1996, it is 98 per cent. Could Mexico answer the following:

- (a) What makes up the remainder of the 100 per cent? Sugar imports? Imports of HFCS from other sources? Domestic production of HFCS? What per cent of the market was accounted for in 1994 and 1996 by each of these elements?**

The market is made up 100 per cent of domestic production for the domestic sugar market, domestic production of HFCS, sugar imports and HFCS imports, based on the calculation of apparent domestic consumption.

$$ADC = (\text{domestic sugar production} + \text{domestic HFCS production} + \text{sugar imports} + \text{HFCS imports} - \text{sugar exports})$$

The percentages of each one of these elements are set forth in the annexed table entitled "Apparent Domestic Consumption" (MEXICO-24), which shows that the different shares add up to 100 per cent of the market.

- (b) **Does the remainder of the 100 per cent consist of the same elements in 1994 as in 1996?**

Apparent domestic consumption was calculated on the basis of the same factors. However, it should be noted that in 1994-1995, no HFCS was produced in Mexico, which is why it does not form part of domestic consumption for those years.

- (c) **If domestic production of HFCS is included in the total market, could Mexico explain why, given that all Mexican producers of HFCS were excluded from the industry as related parties?**

For the purposes of defining the relevant domestic industry, Mexico excluded Arancia and Almidones Mexicanos, since these companies were the main importers of HFCS from the United States and had benefited directly from the dumped HFCS imports. However, since domestic production of HFCS formed part of the demand, SECOFI included it in its calculation of apparent domestic consumption so as not to overestimate the relative shares of imports and of the domestic production of sugar.

- (d) **Regardless of what makes up the remainder of the market, the share of the market attributable to these other elements increased from 1994 to 1996, from 0.3 per cent to 2 per cent, an increase almost equal to the increase in HFCS imports from the United States. Did Mexico take this into account in its analysis?**

The share of the market attributable to the remaining elements making up apparent domestic consumption other than imports of HFCS from the United States and production for the domestic sugar market grew from 0.74 per cent in 1994 to 2.21 per cent in 1996. However, it should be noted that, although the remaining elements (sugar imports, HFCS imports from countries other than the United States and domestic HFCS production) increased their market shares, the share of dumped HFCS imports in domestic consumption increased to a greater extent, rising from 1.68 per cent in 1994 to 4.44 per cent in 1996.¹⁵

Similarly, while the market share of production for the domestic market fell by 4.22 per cent in 1996 as compared with 1994, the share of HFCS imports from the United States increased by 2.76 per cent and the share of the remaining elements gained 1.47 per cent during the same period.

On the basis of the above, the Panel will be able to confirm that Mexico took account of all the factors making up 100 per cent of the market for sweeteners, and that while the market share of the other elements (sugar imports, HFCS imports from sources other than the United States and domestic HFCS production) increased, the increase in the share of HFCS imports from the United States was greater; in other words, the loss in market share suffered by domestically produced sugar is attributable more to the investigated imports than to the other elements making up consumption.

11. Could Mexico please explain how it derived the 50 per cent figure by which it discounted the projected volume of sugar consumption in 1997 and 1998 that could be substituted for by HFCS? A simple average of the substitution rates set out in exhibit MEXICO-20 yields a result of approximately 30. A simple average of the substitution rates used in exhibit MEXICO-21 yields a result of approximately 62. What is the basis for the 50 per cent discount rate?

In estimating the likelihood of an increase in imports considering the effects of the alleged restraint agreement, Mexico took account of the information available in the administrative record of

¹⁵ See MEXICO-24.

the investigation concerning the use of HFCS in various sectors, supplied by the industrial users, as well as the degrees of substitution provided by the main HFCS importer for the period investigated. However, the information supplied both by the users and the importer was either limited to very specific products or, in some cases, covered very broad sectors, so that it was decided to calculate a simple average of the percentage of utilization of the products contained in each group for which data had been provided by the industrial users, and then to calculate an average of the different groups.

The percentage obtained through this procedure was 52.31 per cent, which it was decided to round off to 50 per cent. It was thought that this 50 per cent discounting of the percentages used in the calculation of potential consumption would reflect the variations within each sector and between sectors.

Rate of Utilization of HFCS by industrial users other than soft drink bottlers in 1996

No.	Product	Segment	HFCS (%)	Average
1	<i>Jumex</i> (can)	Juices	63.00	
2	<i>Jumex</i> (bottle)	Juices	56.00	
3	<i>Jumex</i> (minibrik)	Juices	53.00	
4	<i>Jumex</i> (tetrabrik)	Juices	58.00	
5	<i>Ami</i>	Juices	68.00	
6	<i>Sonrisa</i> juice	Juices	100.00	
7	<i>Confruta</i> juice	Juices	100.00	
8	<i>Nectars</i>	Juices	100.00	
9	Uncarbonated beverages	Juices	100.00	77.56%
10	<i>Caribe Cooler</i> (peach)	Wines	50.00	
11	<i>Caribe Cooler</i> (lemon)	Wines	50.00	
12	<i>Caribe Cooler</i> (mandarin)	Wines	50.00	
13	<i>Caribe Cooler</i> (grapefruit)	Wines	50.00	
14	<i>Caribe Cooler</i> (strawberry)	Wines	50.00	
15	<i>Caribe Cooler</i> (tropical)	Wines	50.00	
16	<i>Presidencola</i>	Wines	50.00	
17	<i>Cubaraima</i>	Wines	50.00	
18	<i>Sidra Valle Redondo</i>	Wines	50.00	
19	<i>Sidra Campanario</i>	Wines	50.00	50.00%
20	Uncarbonated beverages	Other beverages	25.00	
21	Pau-pau	Other beverages	64.00	
22	<i>Chupifruit</i>	Other beverages	68.00	
23	<i>Chocoloco</i>	Other beverages	97.00	
24	Natural syrup	Other beverages	50.00	60.80%
25	Marmalades	Food	41.00	
26	Ketchup	Food	96.00	
27	Liquid caramel	Food	100.00	
28	Marmalades	Food	8.03	
29	Fruit jellies	Food	16.10	
30	Canned fruit	Food	52.00	
31	Topping	Food	100.00	
32	Glazes	Food	100.00	
33	<i>Cajeta DIF</i> c/nut	Food	29.75	
34	<i>Babar</i> pastry cream	Food	27.79	
35	Grape jelly 51	Food	44.69	
36	Raspberry marmalade 340	Food	53.26	
37	Blueberry marmalade 340	Food	51.30	

No.	Product	Segment	HFCS (%)	Average
38	Cherry marmalade 340	Food	40.93	
39	Peach marmalade 340	Food	53.30	
40	Peach marmalade 510 gr.	Food	46.99	
41	Raspberry marmalade 142	Food	36.80	
42	Raspberry marmalade 510 gr.	Food	49.05	
43	Strawberry marmalade 340	Food	38.58	
44	Strawberry marmalade 40 gr.	Food	40.67	
45	Blueberry marmalade	Food	35.48	
46	Apricot marmalade 340	Food	46.70	
47	Apricot marmalade 510 gr.	Food	50.27	
48	Peach marmalade 142 gr.	Food	35.07	
49	Strawberry marmalade 440 gr.	Food	14.90	
50	Orange marmalade 142 gr.	Food	39.28	
51	Pineapple marmalade 340 gr.	Food	48.44	
52	Blackberry marmalade 142 gr.	Food	36.46	
53	Strawberry marmalade 142 gr.	Food	26.73	
54	Strawberry marmalade 510	Food	38.33	
55	Orange marmalade 440	Food	27.94	
56	Orange marmalade 510 gr.	Food	50.65	
57	Pineapple marmalade 142	Food	35.38	
58	Blackberry marmalade 510 gr.	Food	48.75	
59	Strawberry pie filling	Food	20.61	
60	Pineapple pie filling	Food	27.83	
61	Nut pie filling	Food	11.02	
62	<i>Multistrawberry</i> filling	Food	20.61	
63	Tamarind for drinks 52 kg.	Food	21.73	
64	Marmalade	Food	43.70	
65	Orange segments	Food	100.00	
66	Grapefruit segments	Food	100.00	
67	Pineapple cubes	Food	100.00	
68	Papaya cubes	Food	100.00	
69	Melon cubes	Food	100.00	
70	Mango slices	Food	100.00	
71	Salads	Food	100.00	
72	Crystallized fruit	Confectionery	9.32	
73	Marmalades	Food	70.00	
74	Glaze	Food	46.00	
75	Sweet syrup	Food	99.00	51.73%
76	<i>Trompadita</i>	Bakery products	1.75	
77	<i>Trompada</i> (long) <i>Marve</i>	Bakery products	2.63	
78	<i>Huesito</i> (vanilla flavour)	Bakery products	2.63	
79	<i>Huesito</i> (special)	Bakery products	10.13	
80	<i>Base betunada</i> (strawberry)	Bakery products	6.86	
81	<i>Base betunada</i> (lemon)	Bakery products	6.86	
82	<i>Base bombom</i>	Bakery products	5.40	
83	<i>Base betunada</i> (export)	Bakery products	6.86	
84	<i>Base chicolina</i>	Bakery products	5.37	
85	<i>Base</i> (chocolate)	Bakery products	5.49	
86	<i>Base deportigrillo</i>	Bakery products	7.14	
87	<i>Base Garrillas</i>	Bakery products	7.03	

No.	Product	Segment	HFCS (%)	Average
88	<i>Base Glorias</i>	Bakery products	7.88	
89	<i>Base Laura Castellanos</i>	Bakery products	5.38	
90	<i>Base Laura</i> (chocolate)	Bakery products	5.39	
91	<i>Base Marcela</i> (chocolate)	Bakery products	6.86	
92	<i>Base Magdalenas</i>	Bakery products	7.87	
93	<i>Base Malvavisco</i>	Bakery products	5.40	
94	<i>Base Rosalia Dif.</i>	Bakery products	5.27	
95	<i>Base Sandwich</i> (lemon)	Bakery products	7.86	
96	<i>Base</i> (vanilla)	Bakery products	7.63	
97	<i>Base Wond</i> (vanilla)	Bakery products	7.63	
98	<i>Base Wond</i> (export)	Bakery products	7.63	
99	<i>Granel Azucena</i>	Bakery products	8.25	
100	<i>Granel Animalitos</i>	Bakery products	5.51	
101	<i>Granel Alejandrinas</i>	Bakery products	4.67	
102	<i>Granel Azucena Lyconsa</i>	Bakery products	8.38	
103	<i>Granel Animalitos</i>	Bakery products	10.12	
104	<i>Granel Barra de Coco</i>	Bakery products	5.64	
105	<i>Granel Bing</i> (chocolate)	Bakery products	5.56	
106	<i>Granel Club Crema</i>	Bakery products	2.51	
107	<i>Granel Esmeraldas</i>	Bakery products	5.60	
108	<i>Granel Grageas</i> (chocolate)	Bakery products	4.94	
109	<i>Granel Grageas</i> (vanilla)	Bakery products	7.89	
110	<i>Granel Jarochas</i>	Bakery products	5.61	
111	<i>Granel María</i>	Bakery products	8.76	
112	<i>Granel Mordisko</i>	Bakery products	2.10	
113	<i>Granel Minigalleta</i> (chocolate)	Bakery products	3.85	
114	<i>Granel Marianitas</i>	Bakery products	5.52	
115	<i>Granel Pescaditos</i>	Bakery products	2.77	
116	<i>Granel Rikis Ajonjolí</i>	Bakery products	5.85	
117	<i>Granel Rikis</i>	Bakery products	2.40	
118	<i>Granel Rikis</i> (butter)	Bakery products	1.99	
119	<i>Granel Tostada</i>	Bakery products	9.29	
120	<i>Marías</i>	Bakery products	8.63	
121	<i>Animalitos</i>	Bakery products	6.31	
122	<i>Sabrosas</i>	Bakery products	2.53	
123	<i>Sw. Emperador ch.</i>	Bakery products	11.03	
124	<i>Sw. Emperador v.</i>	Bakery products	8.15	
125	<i>Sw. Emperador n.</i>	Bakery products	7.47	
126	<i>Populares</i>	Bakery products	10.00	
127	<i>Ricanelas</i>	Bakery products	14.83	
128	<i>Pancrema</i>	Bakery products	3.91	
129	<i>Arco Iris</i>	Bakery products	5.27	
130	<i>Maravillas</i>	Bakery products	3.83	
131	<i>Frutana</i>	Bakery products	10.00	
132	<i>Mamut</i>	Bakery products	6.93	
133	<i>Ovaladas</i>	Bakery products	6.11	
134	<i>Flipy</i>	Bakery products	6.63	
135	<i>Delicias</i>	Bakery products	4.75	
136	<i>Marinas betunadas</i>	Bakery products	4.83	
137	<i>Grageitas</i>	Bakery products	3.89	

No.	Product	Segment	HFCS (%)	Average
138	<i>Barra de coco</i>	Bakery products	9.15	
139	<i>Sw. de merengue</i>	Bakery products	8.39	
140	<i>Roscas de canela</i>	Bakery products	4.52	
141	<i>Chokis</i>	Bakery products	2.45	
142	<i>Hawaiianas</i> (pineapple)	Bakery products	4.09	
143	<i>Dóro</i>	Bakery products	6.08	
144	<i>Chocolatines</i>	Bakery products	9.69	
145	<i>Zoo</i>	Bakery products	14.00	
146	<i>Flups v.</i>	Bakery products	6.44	
147	<i>Flups ch.</i>	Bakery products	6.38	
148	<i>Flor de naranja</i>	Bakery products	7.00	
149	<i>Mariás</i> (chocolate)	Bakery products	8.51	
150	<i>Gansito</i>	Bakery products	22.05	
151	<i>Submarino</i> (strawberry)	Bakery products	52.15	
152	<i>Submarino</i> (vanilla)	Bakery products	52.14	
153	<i>Pingüinos</i>	Bakery products	35.69	
154	<i>Chocorroles</i> (2)	Bakery products	36.56	
155	Strawberry roll	Bakery products	41.23	
156	<i>Napolitano</i>	Bakery products	2.73	
157	<i>Triki trakes</i>	Bakery products	33.96	
158	<i>Plativolos</i>	Bakery products	7.40	
159	<i>Pipucho</i>	Bakery products	6.59	
160	<i>Minipríncipe</i>	Bakery products	6.25	
161	Toffee rolls	Bakery products	13.37	
162	<i>KG</i>	Bakery products	15.20	
163	<i>Polvoron</i> (chocolate)	Bakery products	22.63	
164	<i>Shok</i> (vanilla)	Bakery products	8.80	
165	<i>Shok</i> (chocolate)	Bakery products	6.61	
166	Pancakes with raisins	Bakery products	0.88	
167	Pancakes with nuts	Bakery products	0.91	
168	<i>Mantecadas</i> (4)	Bakery products	0.74	
169	Cinnamon rolls (6)	Bakery products	3.50	
170	<i>Glass rolls</i> (6)	Bakery products	3.27	
171	Cinnamon rolls (2)	Bakery products	3.51	
172	<i>Glass rolls</i> (2)	Bakery products	3.26	
173	<i>Panquecitos</i> (2)	Bakery products	2.29	
174	<i>Triki trakes</i>	Bakery products	16.20	
175	<i>Príncipe</i>	Bakery products	6.30	
176	<i>Plativolos</i>	Bakery products	10.20	
177	<i>Chocorroles</i> (2)	Bakery products	30.30	
178	Strawberry rolls	Bakery products	31.10	
179	Toffee rolls	Bakery products	13.40	
180	<i>KG</i>	Bakery products	14.90	
181	<i>Rocko</i>	Bakery products	5.20	
182	<i>Hit</i>	Bakery products	15.30	
183	<i>Sponch</i>	Bakery products	19.00	
184	<i>Pingüinos</i>	Bakery products	22.10	
185	<i>Submarinos</i>	Bakery products	52.50	
186	<i>Napolitano</i>	Bakery products	1.70	
187	<i>Gansito</i>	Bakery products	11.20	

No.	Product	Segment	HFCS (%)	Average
188	<i>Pipucho</i>	Bakery products	41.50	
189	<i>Dalmata</i>	Bakery products	2.10	
190	Cakes	Bakery products	17.00	
191	Cake "8"	Bakery products	19.15	
192	<i>Rosca de reyes</i>	Bakery products	21.77	10.30%
193	Whipped cream	Milk products	100.00	
194	<i>Media crema</i>	Milk products	100.00	
195	<i>Helado</i>	Milk products	17.90	
196	Yoghurt <i>helado</i>	Milk products	36.00	63.48%
TOTAL				52.31%

12. The information in exhibit MEXICO-20 for 1997 shows almost no increases in the rate of usage of HFCS over that reported by the same companies for 1996. Could Mexico reconcile this with its projection of a significant increase in the use of HFCS in 1997?

Indeed, the information contained in exhibit MEXICO-20 for 1997 as compared to 1996 does not show any increases in the rate of usage of HFCS. This can be explained by the fact that during the period concerned, the anti-dumping investigation initiated in January 1997 was still under way, and this made consumers more cautious and prevented substitution from taking place or at least slowed it down. However, the fact that the rate of usage remained the same does not mean that a greater quantity of HFCS was not being used in absolute terms to the detriment of domestically produced sugar, since imports had already increased.

At the same time, Mexico's estimate as to the probability of an increase in imports was not supported by the real performance of the market in 1997 alone, but also by the fact that based on the information available for the period under analysis it was reasonable to predict that such increase would take place in the near future if the circumstances remained the same. Thus, one cannot compare what actually happened in reality with what was likely to happen, since each situation involved different factors. Obviously, any estimate of what is likely to happen in the future, seen with the benefit of hindsight in the light of what happened in reality, particularly when there are a number of elements which significantly alter the course of events, could turn out to be erroneous and even meaningless.

ANSWERS OF THE UNITED STATES TO QUESTIONS FROM THE PANEL

13. Could the United States please specify the portions of the original panel determination referred to in paragraph 9 of the United States' oral submission?

1. Paragraph 9 of the Oral Statement of the United States was based on paragraphs 24-27 of the First Written Submission of the United States. In that discussion, the United States cited paragraphs 7.177 and 7.178 of the original Panel Report in support of the proposition that the Panel found that SECOFI's original determination did not provide any analysis to support the conclusion that there was a likelihood that users other than soft drink bottlers would substantially increase their importation of HFCS.

14. In paragraph 5 of its oral statement, the United States seems to express concern that SECOFI failed to focus on 1997 data in its analysis. Does the United States contend that SECOFI was obligated to base its determination on 1997 data? If so, on what basis in the AD Agreement does the United States make this contention?

2. The concern that the United States expressed in paragraph 5 of its Oral Statement simply repeats a concern that the Panel expressed in its original report. In its original determination, as in its redetermination, SECOFI relied on the fact that HFCS imports were higher in January-September 1997 than in January-September 1996 in finding that there was a likelihood of increased importation. Because the January-September 1997 data do not reflect the operation of the restraint agreement – which was not announced until September 1997 – the Panel concluded that this data did not support SECOFI's conclusion, under Article 3.7(i) of the AD Agreement, that substantial increases in HFCS imports were likely after September 1997. As the Panel stated in paragraph 7.176 of its original report:

"Mexico's references to the increasing trend of HFCS imports suggest that somehow SECOFI concluded that such imports would have continued increasing by inertia, given the significant increases recorded during the period of investigation and through September 1997, even if they were not demanded in significantly increased quantities by soft-drink bottlers, the leading consumers of imported HFCS. Mexico points out that the alleged restraint agreement was made after the period of investigation, and thus any limitation on imports started from the already significantly increased levels that had been reached. However, the question for purposes of analysis is not the level of imports already reached, but the likelihood of **increased** imports."(Emphasis in original).

3. As the United States indicated in paragraphs 5 and 6 of its Oral Statement and paragraph 29 of its First Written Submission, one reason that the analysis of the restraint agreement in SECOFI's redetermination is inadequate is because it fails to address these concerns of the Panel. As the Panel previously recognized, the fact that imports of HFCS increased prior to September 1997, predominantly because of increased purchases by soft drink bottlers, cannot serve as a basis for finding that purchasers other than soft drink bottlers are likely to substantially increase imports after September 1997.

15. Based on the reported 75 per cent increase of imports in January-September 1997 as compared to the same period in 1996, it might be extrapolated that total imports for 1997 would increase by 75 per cent over total imports for 1996, to a level of 338,000 tons. This is approximately the same level of imports predicted by SECOFI for 1997. Similarly, it appears that under the alleged restraint agreement, soft-drink bottlers could purchase 350,000 tons of HFCS, presumably all from imports, which would again be an increase of about 74 per cent

from 1996 levels. Putting aside the question of who would purchase these imports, does the United States maintain that the level of 1997 imports *per se* would not support a conclusion that there was a likelihood of substantially increased imports? That is, is the United States' objection to SECOFI's conclusion of substantially increased imports based on the projected level of imports or on the methodology used on the projection?

4. The United States has not made any arguments, either in the original Panel proceedings or the current proceedings, that any particular increase in import level or penetration can or cannot be substantial *per se*. The United States argues that SECOFI's methodology is not fact-based and, hence, could not serve as the basis for SECOFI's conclusion that substantially increased imports are likely. As the United States argued in paragraph 7 of its First Written Submission, the facts found by SECOFI sufficiently contradict its conclusions on redetermination so as to suggest that SECOFI cannot on its record provide a basis for finding a threat of material injury.

5. The original Panel decision, as well as Article 3.7(i) of the AD Agreement, obligated SECOFI to examine whether substantial increases in HFCS imports were likely notwithstanding the restraint agreement. SECOFI attempted to satisfy the Panel's concern by focusing on users other than soft drink bottlers. SECOFI projected that soft drink bottlers would obtain from Mexican production all quantities of HFCS that they were permitted to use under the restraint agreement, and that all Mexican HFCS production capacity would be used to supply soft drink bottlers. Redetermination, para. 58.

6. SECOFI projected that imports of HFCS by purchasers other than soft drink bottlers would increase from approximately 62,000 tons in 1996 to 350,000 tons in 1998. As the United States indicated at paragraphs 11 through 24 of its Oral Statement, as well as in responses to questions the Panel asked orally at the Meeting on February 20 and February 21, the methodology that SECOFI used to project this increase must be rejected because it is not based on data reflecting either actual HFCS purchases by users other than soft drink bottlers or the actual rates at which these users substituted HFCS for sugar during SECOFI's period of investigation and because it is not consistent with historical trends.

16. Does the United States consider its arguments under Article 12 to constitute an independent claim of violation of the AD Agreement? In this regard, could the United States please comment on the findings of the Panel in *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, circulated 30 October 2000 (appeal on other issues pending) at paragraphs 6.257 and 6.259.

7. The United States considers its arguments under Article 12 to constitute an independent claim of violation of the AD Agreement. We note that in its original decision, this Panel concluded that Mexico acted inconsistently with the substantive requirements of Article 10.2, when it applied dumping duties retroactively, and with the notice requirements of Articles 12.2 and 12.2.2. See Panel Report, paras. 7.194 - 7.198. Nevertheless, we believe it is within a Panel's discretion to decide, as a matter of judicial economy, not to reach the question of whether there has been an Article 12 violation when it has found a violation of a related substantive obligation. This appears to have been the basis for the *Bed Linen* decision. However, we would disagree with the *Bed Linen* Panel to the extent that it was suggesting that Article 12 is not an independent obligation under the AD Agreement or that there will always be an overlap between a Member's substantive obligations and its obligations under Article 12. The United States considers the transparency obligations created by Article 12 to be critical to the effective operation of the AD Agreement.

**COMMENTS BY THE UNITED STATES ON NEW FACTUAL INFORMATION
SUBMITTED BY MEXICO**

1. Mexico 39

1. At several points in its responses to the Panel's questions, Mexico refers to material from exhibit MEXICO-39 in the original Panel proceedings. Because Mexico had never previously referred to this information during the current proceeding, MEXICO-39 is "new information" for purposes of this Article 21.5 proceeding.

2. The MEXICO-39 material concerns import sales data from Arancia CPC, S.A. de C.V., one of two importers of HFCS from the United States during SECOFI's period of investigation. Mexico contends that this material shows that Arancia's sales of HFCS to users other than soft drink bottlers were increasing throughout SECOFI's period of investigation, particularly during 1996.

3. It is noteworthy that Mexico never referenced the MEXICO-39 material in either of its two written submissions or during the meeting with the Panel. Instead, in all of its previous submissions, Mexico has attempted to demonstrate the accuracy of SECOFI's projections of likely purchases of HFCS by users other than soft drink bottlers. Indeed, SECOFI's redetermination clearly relied on these projections, rather than any material concerning actual purchasing patterns, in finding that the restraint agreement "would not eliminate the likelihood" of further increased imports of HFCS. *See* SECOFI Redetermination, paras. 55-59. Consequently, Mexico's current reliance on MEXICO-39 is another example of Mexico attempting to defend SECOFI's redetermination on the basis of reasoning not discernible from, or even consistent with, the determination itself.

4. In any event, Mexico's characterization of the material from MEXICO-39 is inaccurate.

5. The MEXICO-39 material does not show, as SECOFI contends, that Arancia's sales to purchasers other than soft drink bottlers increased sharply during 1996. The monthly sales data included after paragraph 4(viii) of Mexico's response do not show steadily increasing sales during the course of the year to non-soft drink bottlers. Instead, these data indicate sharp fluctuations in sales volumes from month to month. Thus, Arancia's sales to purchasers other than soft drink bottlers during June 1996 were greater than its monthly sales to such purchasers for four of the six subsequent months.

6. Although MEXICO-39 reflects that Arancia increased its sales to purchasers other than soft drink bottlers from 1994 to 1996, the rate of increase in such sales is far smaller than the 2188 per cent increase in sales to soft drink bottlers during the same period. Additionally, this increase is from a small base: Arancia's 1994 sales to HFCS users other than soft drink bottlers were under 20,000 tons. By contrast, SECOFI projected that these users would purchase 350,000 tons of HFCS in 1998. The 1994 to 1996 increase is also far smaller than the over 400 per cent increase in sales to purchasers other than soft drink bottlers SECOFI projected from 1996 to 1998 in an effort to show that overall imports would increase notwithstanding the restraint agreement.

7. Finally, Arancia was neither the sole nor even the principal importer of HFCS from the United States. The MEXICO-39 material included in Mexico's response indicates that the other importer, Almex, was responsible for 67.5 per cent of all HFCS imports in 1996. Almex's sales were much more heavily oriented to soft drink bottlers than Arancia's. There is consequently no basis for concluding that Arancia's data are representative of all HFCS importers.

2. "Rate Of Utilization" Chart

8. After its response to question 11, Mexico has submitted a chart purporting to demonstrate how it derived the 50 per cent figure by which it discounted the amount of projected sugar consumption in 1997 and 1998 that could be substituted for HFCS. Because Mexico has never previously disclosed this material, this chart is also new factual information.

9. Mexico claims that the chart demonstrates that SECOFI derived the 50 per cent figure by taking a simple (not weighted) average of actual utilization rates in various sectors. Absent data -- which Mexico does not provide -- concerning the volume of HFCS used by the each of the industries listed in the chart, there is no basis for concluding that Mexico's technique of computing a simple average of utilization rates provides reliable information concerning the actual average rate of utilization. In this regard, it is noteworthy that the chart contains no information showing actual HFCS usage in the production of bread, which SECOFI predicts will account for 86 per cent of the consumption of HFCS in the near term.

10. Although Mexico maintains, at least for purposes of its answer to question 11, that the 50 per cent rate reflects the rate that HFCS was actually substituted for sugar, the redetermination and its answer to question 6 suggest that SECOFI viewed the 50 per cent figure differently. The redetermination and Mexico's answer to question 6 suggests that the 50 per cent figure was simply a figure SECOFI arbitrarily chose to reduce theoretical substitution rates that were unrealistically high. We maintain that the redetermination and the answer to question 6, rather than the answer to question 11, indicate the true derivation and purpose of the 50 per cent figure.
