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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

AB-2001-5

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

Mexico, *Appellant*
United States, *Appellee*

European Communities, *Third Participant*

AB-2001-5

Present:

Feliciano, Presiding Member
Abi-Saab, Member
Ehlermann, Member

I. Introduction

1. Mexico appeals certain issues of law and legal interpretations in the Panel Report, *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* (the "Panel Report").[1] The Panel considered, pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), the complaint brought by the United States with respect to the consistency with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") of a measure taken by Mexico to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – High Fructose Corn Syrup*").[2]

2. In *Mexico – High Fructose Corn Syrup*, the original panel concluded that Mexico's imposition of definitive anti-dumping duties on imports of high fructose corn syrup from the United States was inconsistent with certain of Mexico's obligations under the *Anti-Dumping Agreement*.[3] The original panel report was not appealed to the Appellate Body and, on 24 February 2000, the DSB

[1]WT/DS132/RW, 22 June 2001. In this Report, we refer to the panel that considered the United States' complaint under Article 21.5 of the DSU as the "Panel", and to its report, WT/DS132/RW, as the "Panel Report".

[2]The recommendations and rulings of the DSB resulted from the adoption, by the DSB, of the panel report in *Mexico – High Fructose Corn Syrup*, WT/DS132/R, adopted 24 February 2000 (the "original panel report"). In this Report, we refer to the panel that considered the original complaint brought by the United States as the "original panel".

[3]*Ibid*., para. 8.2.

adopted the original panel report, including its recommendation that Mexico bring its measure into conformity with its obligations under the *Anti-Dumping Agreement*.[4]

3. On 20 September 2000, with a view to complying with the findings and conclusions set forth in the original panel report, Mexico published a final resolution (the "redetermination") which revised the original final resolution imposing definitive anti-dumping duties on imports of high fructose corn syrup from the United States.[5] In the redetermination, Mexico's Secretariat of Commerce and Industrial Development ("SECOFI") "ratified its conclusion that during the period under investigation, there was a threat of injury 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".[6] SECOFI, thus, found "that it is appropriate to maintain the final offsetting duties established during the [original] anti-dumping investigation".[7] The factual aspects of this dispute are set out in greater detail in the Panel Report.[8]

4. The United States considered that the redetermination was not consistent with Mexico's obligations under the *Anti-Dumping Agreement* and, therefore, requested that the matter be referred to the original panel pursuant to Article 21.5 of the DSU.[9] On 23 October 2000, in accordance with Article 21.5 of the DSU, the DSB referred the matter to the original panel.[10] A member of the original panel was unable to participate in the proceeding and the parties therefore agreed on a new panelist on 13 November 2000.[11] The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 22 June 2001.

5. The Panel concluded, *inter alia*, that:

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[4]Panel Report, para. 1.1.

[5]Final resolution revising, on the basis of the findings and recommendations by the Panel of the World Trade Organization's Dispute Settlement Body, the final determination 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 of the General Import Duties Act, originating from the United States of America, irrespective of the country of export; published 20 September 2000 in Mexico's *Diario Oficial de la Federación*; Exhibits MEXICO-1 (Spanish version) and MEXICO-1(a) (English translation provided by Mexico) submitted by Mexico to the Panel. See also Panel Report, para. 1.2.

[6]Redetermination, para. 188.

[7]*Ibid*.

[8]See, in particular, paras. 1.1 – 1.8 of the Panel Report.

[9]WT/DS132/6, 13 October 2000. See also Panel Report, para. 1.3.

[10]Panel Report, para. 1.4.

[11]*Ibid*., para. 1.5.

> … 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.[12]

6. The Panel concluded that, to the extent that Mexico has acted inconsistently with the provisions of the *Anti-Dumping Agreement*, it has nullified or impaired benefits accruing to the United States under that Agreement, and recommended that the DSB request Mexico to bring its measure into conformity with its obligations under the *Anti-Dumping Agreement*.[13]

7. On 24 July 2001, Mexico notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 3 August 2001, Mexico filed its appellant's submission.[14] On 20 August 2001, the United States filed an appellee's submission.[15] On the same day, the European Communities filed a third participant's submission.[16]

8. The oral hearing in this appeal was held on 11 September 2001. The participants and third participant presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participant

A. *Claims of Error by Mexico – Appellant*

1. The Panel's Treatment of Alleged Deficiencies in the Proceedings

9. Mexico argues that the Panel made a "fatal error" because it made no ruling regarding the fact that Mexico and the United States did not engage in consultations before the redetermination was

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[12]Panel Report, para. 7.1.

[13]*Ibid.*, paras. 7.2 and 7.3.

[14]Pursuant to Rule 21(1) of the *Working Procedures*.

[15]Pursuant to Rule 22 of the *Working Procedures*.

[16]Pursuant to Rule 24 of the *Working Procedures*.

referred to the Panel and regarding Article 6.2 of the DSU.[17] Had it done so, the Panel would have been compelled to conclude that it was not properly established. Mexico also challenges the Panel's failure to address Mexico's argument that the United States had acted inconsistently with Article 3.7 of the DSU since, by "hastily" requesting the establishment of the Panel, the United States failed to exercise its judgement as to whether action under the procedures set out in the DSU would be "fruitful".[18] In remaining silent on these issues, the Panel acted inconsistently with the obligations set forth in Articles 3.4, 7.2, 12.7 and 19 of the DSU. Mexico therefore requests the Appellate Body to reverse the substantive findings made by the Panel, in particular in paragraphs 7.1 and 7.2 of the Panel Report.

10. Mexico emphasizes the importance of consultations within the GATT and WTO dispute settlement systems. Consultations must be held, unless there is an express provision to the contrary. This principle is confirmed and strengthened by Article 4.1 of the DSU. The requirement that requests for consultations be notified to the DSB benefits all WTO Members, and not just the parties to the dispute, because the only way for Members to know whether a dispute that is to be the subject of consultations will affect them is if the disputing parties officially notify the DSB of their intent to engage in consultations.

11. Mexico stresses that the rules governing consultations and the establishment of panels do not distinguish between different types of panels. Accordingly, the generally applicable rules must also be observed in proceedings under Article 21.5 of the DSU. For this reason, Mexico interprets the phrase "these dispute settlement procedures" in Article 21.5 to include the consultations procedures provided for in the DSU.

12. In Mexico's view, it is clear from GATT and WTO practice, and from Articles 4.7 and 6.2 of the DSU, that a panel may be requested and established only *after* consultations have been held and have failed to resolve the dispute. Mexico refers, in this regard, to *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy Safeguard*")[19], and *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*European Communities – Bananas*"),[20] to support its view that the Appellate Body attaches great importance to

[17]Translation of Mexico's appellant's submission, p. 3; original Spanish version, p. 2.

[18]This statement appears in the Notice of Appeal and was repeated by Mexico in its statement at the oral hearing. However, Mexico did not elaborate upon this statement either in its appellant's submission or at the oral hearing.

[19]Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000, paras. 120 ff.

[20]Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 142.

the fulfilment of the requirements for establishment of a panel set forth in Article 6.2 of the DSU, including that the request must indicate whether consultations have been held.

13. Mexico recalls that, in its oral statement at the meeting with the Panel, it argued that there had been no consultations regarding the redetermination and that the United States' request for the establishment of a panel failed to mention whether consultations had been held, as required by Article 6.2 of the DSU; and that the United States had acted contrary to Article 3.7 of the DSU by failing to exercise its judgement as to whether action under the procedures in the DSU would be "fruitful". Furthermore, before the Panel, Mexico agreed with the European Communities' criticism of the lack of consultations. Mexico maintains that, in remaining silent despite these arguments, the Panel failed to comply with its obligation, under Article 7.2 of the DSU, to address the relevant provisions in the covered agreements cited by the parties to the dispute. The Panel also failed to comply with the requirement of Article 12.7 of the DSU to set out the findings of fact, applicability of relevant provisions, and the basic rationale behind its findings and recommendations, and thereby effectively diminished Mexico's rights under the DSU, contrary to Articles 3.4 and 19.2 of the DSU.

2. Article 3 of the *Anti-Dumping Agreement*: "Threat of Material Injury"

14. Mexico also requests the Appellate Body to reverse the Panel's finding in paragraph 6.23 of its Report that "SECOFI's conclusion that there was a significant likelihood of increased importation is not consistent with Article 3.7(i) of the Anti-Dumping Agreement". Mexico believes that the Panel wrongly interpreted Article 3.7 of the *Anti-Dumping Agreement* and failed to comply with the standard of review prescribed by paragraphs 5 and 6 of Article 17 of that Agreement.

15. Mexico submits that the findings of the Panel under Article 3.7(i) of the *Anti-Dumping Agreement* are "limited to assertions" regarding an alleged agreement between Mexican sugar millers and soft-drink bottlers to restrain the bottlers' use of HFCS.[21] In examining the redetermination, the Panel made "exactly the same mistake" as the original panel because both considered it necessary for SECOFI to examine the impact of an agreement whose existence had not been proven.[22] This "agreement", therefore, did not constitute a "fact" but rather an "allegation, conjecture, or remote possibility". As a result, Mexico concludes, the Panel misinterpreted Article 3.7(i) of the *Anti-Dumping Agreement.*

16. Mexico submits that, in basing its evaluation on the alleged agreement, the Panel failed to base itself on the "facts made available … to the authorities of the importing Member", as required by

[21]Mexico's appellant's submission, para. 67.

[22]*Ibid.*, para. 66.

Article 17.5 of the *Anti-Dumping Agreement*. The word "facts" must mean the same thing in Articles 3.7, 17.5 and 17.6 of the *Anti-Dumping Agreement*. Panels are empowered to examine *only* those facts that were before an investigating authority, and not things that were merely *alleged* to exist. Since, in this case, the alleged restraint agreement remained merely an "allegation, conjecture or remote possibility", Mexico contends that the Panel acted inconsistently with the standard of review prescribed in Articles 17.5 and 17.6 of the *Anti-Dumping Agreement* by presuming that the alleged restraint agreement was a "fact", when SECOFI had not determined it to be so.

17. Mexico adds that the United States failed to satisfy its burden of proving the existence of the alleged restraint agreement. Notwithstanding such failure, the Panel considered that SECOFI should have evaluated the impact of this alleged agreement. Had it properly applied Article 17.6(ii) of the *Anti-Dumping Agreement*, the Panel could not have reached the conclusion that SECOFI acted inconsistently with Article 3.7(i) of that Agreement because it had never been found that the alleged restraint agreement did in fact exist. Thus, Mexico concludes that the errors made by the Panel with respect to the alleged restraint agreement invalidate its findings regarding Mexico's non-compliance with Article 3.7(i) of the *Anti-Dumping Agreement*.

18. Mexico further requests the Appellate Body to reverse the Panel's findings in paragraphs 6.24 to 6.37 of its Report and, in particular, the Panel's finding in paragraph 6.36 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 Anti-Dumping Agreement". Since these findings are based on the Panel's earlier conclusion regarding the likelihood of increased imports, such findings are, in the view of Mexico, also based on an incorrect interpretation of Article 3.7, and constitute an improper application of Articles 17.5 and 17.6 of the *Anti-Dumping Agreement*. Accordingly, Mexico submits that these findings should also be reversed.

3. Article 12.7 of the DSU and Article 17.6 of the *Anti-Dumping Agreement:* "Reasoning of the Panel"

19. Mexico submits that the Panel's findings that Mexico violated Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* should be reversed too, in view of the deficiencies in the reasoning given by the Panel for those findings. The Panel's examination of the impact of imports on the domestic industry is "extraordinarily confused".[23] Mexico argues that the Panel did not comply with its obligations under Articles 3.4, 12.7 and 19 of the DSU because the Panel did not clearly identify the obligations with which Mexico had failed to comply. In one paragraph in its Report, the Panel states that the

[23]Mexico's appellant's submission, para. 111.

redetermination is not consistent with Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*. There is, however, no analysis underpinning these conclusions. It is unclear whether the Panel found that SECOFI's findings on impact were not acceptable because they were not based on facts, because not all the Article 3.4 factors had not been examined, or because there was no *showing* of impact on the domestic industry. Mexico notes that while the Panel might have thought that a violation of Article 3.7 of the *Anti-Dumping Agreement* automatically implies a violation of Articles 3.1 and 3.4 of that Agreement, the Panel did not say so.

20. Mexico further observes that, in paragraph 6.37 of its Report, the Panel acknowledged that in the circumstances of this case it might have been possible to establish a threat of material injury, and that Mexico "apparently" complied with the DSB's recommendations and rulings. Mexico maintains that, in making these statements, the Panel recognized that SECOFI's interpretation of the relevant provisions was "permissible". Therefore, Mexico states, the Panel acted contrary to its obligation under Article 17.6(ii) of the *Anti-Dumping Agreement* by rejecting a "permissible" interpretation of that Agreement.

B. *Arguments of the United States – Appellee*

1. The Panel's Treatment of Alleged Deficiencies in the Proceedings

21. The United States urges the Appellate Body to dismiss Mexico's appeal regarding the absence of consultations. Mexico asserts, for the first time on appeal, that the Panel lacked authority to address this dispute because no formal consultations had been held on the redetermination. Mexico did not raise any such objection at the DSB meeting when the redetermination was referred to the Panel, nor did it object before the Panel itself. Although it made passing reference to the absence of consultations at the meeting with the Panel, Mexico gave no indication that it was seeking a ruling from the Panel on whether the dispute was properly before it. Indeed, Mexico explicitly stated that it was *not* claiming that its rights had been infringed. Furthermore, although the European Communities contended that the dispute was not properly before the Panel because of the absence of consultations, this claim was, correctly, not addressed by the Panel because it was not advanced by either of the parties to the dispute. Accordingly, in the view of the United States, the Panel appropriately did not address these issues in its Report, and in no way infringed or diminished Mexico's rights under the DSU in refraining from doing so.

22. The United States argues that Mexico is precluded from raising these issues for the first time on appeal. The United States refers, in this regard, to the Appellate Body Reports in *United States –*

Tax Treatment for "Foreign Sales Corporations" ("*United States – FSC*")[24] and *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams* ").[25] Since Mexico did not object to the lack of consultations before the Panel, and since Mexico has not attempted to demonstrate that it suffered any prejudice from this lack of consultations, Mexico cannot now assert that the claims of the United States were not properly before the Panel.

23. The United States submits that Mexico's appeal should be dismissed without addressing the merits of its arguments on consultations. Should the Appellate Body reach the issue, however, the United States asks the Appellate Body to rule that formal consultations are not a prerequisite to the establishment of a panel under Article 21.5 of the DSU. While consultations are important, the meaning of Article 21.5, as well as its object and purpose, support the view that consultations are not required in proceedings under Article 21.5 of the DSU. To read a formal consultation requirement into Article 21.5 would undermine prompt compliance with DSB recommendations and rulings and extend the period during which the complaining Member suffers harm.

2. Article 3 of the *Anti-Dumping Agreement*: "Threat of Material Injury"

24. The United States submits that the Panel's finding that SECOFI's redetermination was inconsistent with Article 3.7(i) of the *Anti-Dumping Agreement* should be upheld. As the Panel found, there is no adequate factual basis for SECOFI's findings, in its redetermination, with respect to the likelihood of substantially increased imports. Furthermore, in its appeal, Mexico does not address or challenge the actual reasoning that the Panel articulated to reach this conclusion, and the United States submits that such reasoning is not, therefore, before the Appellate Body.

25. In the view of the United States, Mexico's argument that the Panel committed the same mistakes as the original panel by requiring SECOFI to analyze the effects of the restraint agreement, without at the same time requiring SECOFI to determine that the restraint agreement actually existed, should be dismissed. Since the DSB has adopted the original panel's findings, Mexico cannot now argue that the original panel's analysis was erroneous.

26. The United States maintains that Article 3.7(i) of the *Anti-Dumping Agreement* requires a factual basis for a determination of a likelihood of substantially increased imports. Article 3.7(i) imposes this requirement on investigating authorities, not on panels. In this case, SECOFI purported to find, as a matter of fact that, even if the alleged agreement were in effect, it "would not eliminate

[24]Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000.

[25]Appellate Body Report, WT/DS122/AB/R, adopted 5 April 2001.

the likelihood" that HFCS users other than soft-drink bottlers would substantially increase their consumption of imported HFCS.[26] Both the parties and the Panel understood this "likelihood" of increased consumption of imported HFCS by "other users" to be the factual basis for SECOFI's finding of a likelihood of increased imports. Since SECOFI chose to take this approach, the Panel was entitled to review it under Articles 17.5 and 17.6 of the *Anti-Dumping Agreement*.

27. The United States observes that SECOFI itself elected to facilitate its analysis by assuming that the restraint agreement existed and would be effective. The United States did not challenge, and the Panel did not question, SECOFI's use of this assumption. Accordingly, Mexico's arguments about "burden of proof" are misplaced and irrelevant. On Mexico's logic, investigating authorities would be able to "immunize" or "insulate" their findings from panel review by basing their conclusions on assumptions rather than findings of fact.[27] This cannot be a proper interpretation of Articles 17.5 and 17.6 of the *Anti-Dumping Agreement*. The United States, therefore, urges the Appellate Body to reject Mexico's claims that the Panel misapplied the standard of review and to affirm the finding that Mexico acted inconsistently with Article 3.7(i).

3. Article 12.7 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*: "Reasoning of the Panel"

28. The United States contends that the Panel properly found that SECOFI's analysis of the likely impact of HFCS imports on the Mexican sugar industry was inconsistent with Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*. The Panel was not discussing the requirements of Articles 3.1 and 3.4 "on a blank slate", but rather against the background of the discussion of comparable claims in the original panel report.[28] According to the United States, the Panel Report, whether read in conjunction with the original panel report or alone, makes clear the nature of the obligations under Articles 3.1 and 3.4 that Mexico failed to satisfy.

29. The United States also contends that the Panel provided "compelling" reasons for its conclusions under Articles 3.1 and 3.4 that are not dependent on its findings with respect to Article 3.7.[29] The Panel Report specifically identifies the nature of Mexico's obligations under Articles 3.1 and 3.4 – which were the same obligations articulated in detail in the original panel report – and explains why SECOFI's redetermination failed to satisfy those obligations. Thus, the Panel acted consistently with Article 12.7 of the DSU. In addition, since Mexico submitted no interpretation of Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* during the panel proceedings,

[26]United States' appellee's submission, para. 38.

[27]*Ibid.*, paras. 66 and 67.

[28]*Ibid.*, para. 70.

[29]*Ibid.*, para. 8.

the arguments that it now makes concerning "permissible" interpretations under Article 17.6(ii) of that Agreement are irrelevant.

C. *Arguments of the Third Participant*

1. European Communities

30. The European Communities recalls that, in this case, no request for consultations was provided to the DSB or circulated to Members, and the United States' request for establishment of a panel did not mention whether consultations were held. If no consultations had been requested by the United States, then the Panel should have ruled that the matter was not properly before it. The Panel erred because it neither ascertained whether consultations were held, nor ruled on the consequences of the lack of consultations.

31. According to the European Communities, Article 21.5 requires that the complaining party request consultations under Article 4 of the DSU before requesting an Article 21.5 panel. The phrase "these dispute settlement procedures" in Article 21.5 refers to the panel and Appellate Body procedures laid down in the DSU, including the requirement that consultations be held on a measure before a Member may request the establishment of a panel with respect to that measure. The European Communities refers, in support of this interpretation, to Articles 4.7 and 6.2 of the DSU, and to the Reports of the Appellate Body in *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*")[30] and *United States – Import Measures on Certain Products from the European Communities*.[31]

32. The European Communities submits that parties to an Article 21.5 dispute cannot agree to dispense with the requirement to hold consultations under Article 4 of the DSU. Members cannot deviate from the rules set forth in the DSU unless the DSU expressly authorizes them to do so. Article 4.3 and the second sentence of Article 4.7 of the DSU confirm that consultations are a mandatory prerequisite for requesting establishment of a panel. In addition, it would be inconsistent with the objectives expressed in Articles 3.7 and 4.1, as well as with the duties imposed upon parties under Article 4.5 of the DSU, if parties could agree to dispense with consultations. The European Communities is of the view that any other approach would create uncertainty about procedural guarantees for parties, and would curtail third party rights that are clearly enshrined in the DSU.

33. The European Communities submits that, since consultations are "a fundamental prerequisite for lawful panel proceedings", Article 21.5 panels have a positive duty to ascertain, if necessary on

[30] Appellate Body Report, WT/DS46/AB/R, adopted 20 August 1999, para. 131.

[31] Appellate Body Report, WT/DS165/AB/R, adopted 10 January 2001, para. 70.

their own motion, whether consultations under Article 4 of the DSU have been requested by the complaining party. Therefore, the Panel should have addressed the issue of the lack of consultations. In support of this view, the European Communities refers to the Appellate Body Report in *United States – Anti-Dumping Act of 1916* ("*United States – 1916 Act*"), and, in particular, to the statement that: "some issues of jurisdiction may be of such nature that they have to be addressed by the Panel at any time".[32]

III. Issues Raised in this Appeal

34. The following issues are raised in this appeal:

(a) whether the Panel erred because it did not address, in its Report: the lack of consultations prior to the DSB's referral of the redetermination to the Panel; the alleged failure of the United States to comply with Article 6.2 of the DSU because its communication seeking recourse to Article 21.5 of the DSU did not indicate whether consultations had been held; and the alleged failure of the United States to exercise its judgement, in accordance with Article 3.7 of the DSU, as to whether action under the DSU would be "fruitful";

(b) whether the Panel erred in its review of SECOFI's determination of a threat of material injury, and in particular whether the Panel erred:

(i) in finding, in paragraph 6.23 of the Panel Report, that SECOFI's conclusion, in the redetermination, that there existed a significant likelihood of increased imports of HFCS, was inconsistent with Mexico's obligations under Article 3.7(i) of the *Anti-Dumping Agreement*; and

(ii) in finding, in paragraph 6.36 of the Panel Report, that SECOFI's conclusion, in the redetermination, regarding the likely impact of imports of HFCS on the domestic industry, was inconsistent with Mexico's obligations under Articles 3.1, 3.4, and 3.7 of the *Anti-Dumping Agreement*;

[32] Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 54.

(c) whether the Panel erred in the reasoning employed to reach its findings, in particular:

(i) by failing, as required under Article 12.7 of the DSU, to set out a "basic rationale behind [its] findings" that SECOFI's analysis and conclusions, in the redetermination, regarding the likely impact of imports of HFCS on the domestic industry, were inconsistent with Mexico's obligations under Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*; and

(ii) by failing to apply the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement* in stating, in paragraph 6.37 of its Report, that SECOFI could have made a valid determination of the existence of a threat of material injury, but in nevertheless finding that Mexico had acted inconsistently with Article 3.7 of the *Anti-Dumping Agreement*.

IV. The Panel's Treatment of Alleged Deficiencies in the Proceedings

35. Mexico asks us to reverse the substantive findings reached by the Panel on the grounds that the Panel failed to address and consider the consequences of certain alleged deficiencies in the process of referring SECOFI's redetermination to the Panel. Mexico's principal contention is that the Panel made a "fatal error"[33] because it said *nothing* in its Report regarding: the lack of consultations between Mexico and the United States before the redetermination was referred to the Panel; the alleged failure of the United States to comply with Article 6.2 of the DSU because its communication seeking recourse to Article 21.5 of the DSU did not indicate whether consultations had been held; and the alleged failure of the United States to exercise its judgement, in accordance with Article 3.7 of the DSU, as to whether recourse to dispute settlement would be "fruitful". Before the Panel, Mexico argued that there had been no consultations, and that the United States had acted contrary to Articles 3.7 and 6.2 of the DSU. Mexico also stated that it agreed with the European Communities, which had vigorously criticized the lack of consultations. Mexico contends that the Panel, by remaining silent on these issues despite the arguments raised by Mexico, acted inconsistently with Articles 7.2 and 12.7, and diminished Mexico's rights under Articles 3.4 and 19 of the DSU.

36. We observe that, because Mexico has formulated its claims of error in terms of a "failure" on the part of the Panel to speak to and resolve, in its Report, the contentions of Mexico referred to above, it is necessary for us to examine whether the Panel was under a duty to address or rule on those contentions. We believe that a panel comes under a duty to address issues in at least two instances. First, as a matter of due process, and the proper exercise of the judicial function, panels are required to

[33]Translation of Mexico's appellant's submission, p. 3; original Spanish version, p. 2.

address issues that are put before them by the parties to a dispute. Second, panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings."[34] For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.

37. We observe that Mexico's appeal *explicitly* asserts only that the Panel failed to fulfill its duty in the first type of situation mentioned above. Nevertheless, the issues that Mexico raises, in particular regarding the relation between consultations and the authority of panels to deal with and dispose of matters, require us to consider also whether the Panel failed to exercise its duty in the second type of situation, namely, to consider, on its own motion, the issues now raised by Mexico on appeal.

A. *Mexico's Conduct Before the Panel and the Consequences*

38. In considering whether the Panel was required, by virtue of Mexico's conduct before the Panel, to address the issues now raised by Mexico on appeal, we begin by setting out the relevant facts.

39. The redetermination was published on 20 September 2000.[35] On 12 October 2000, the United States submitted a communication seeking recourse to Article 21.5 of the DSU with respect to the measure taken by Mexico to comply with the recommendations and rulings of the DSB.[36] The communication submitted by the United States does not refer to any consultations having been held. At the DSB meeting on 23 October 2000, which was the first occasion that the matter was raised before the DSB, the matter was referred to the original panel. Mexico did not object to this decision, but stated at that meeting that it had "decided to exercise its right not to oppose the US request at the present meeting."[37] Mexico added that "parties to the dispute were working together with a view to agreeing on the best way to proceed on the matter".[38] Mexico did not mention at that DSB meeting any of the issues which are before us now on appeal.

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[34]Appellate Body Report, *United States – 1916 Act*, *supra*, footnote 32, para. 54.

[35]Panel Report, para. 1.2.

[36]WT/DS132/6.

[37]WT/DSB/M/91, para. 114.

[38]*Ibid*.

40. Mexico did not mention these procedural issues or raise any objection to the authority of the Panel in either of its two written submissions to the Panel. These submissions were made on 14 December 2000 and on 18 January 2001.

41. Mexico referred to these issues for the first time in its oral statement at the meeting with the Panel on 20 February 2001. In that statement, Mexico said:

> 4. Before turning to substance, we have several *observations of a general nature* that are worth mentioning in order for the Panel to *understand the context* of this matter.
>
> 5. Firstly, 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.
>
> 6. This haste resulted in the presentation of a superficial and deficient case, as is evident as from the request for establishment of a panel. Thus, for example, the request did not indicate whether the parties had engaged in consultations, as required under Article 6.2 of the DSU.[39] (emphasis added)

42. In its first intervention following its oral statement, Mexico returned briefly to these issues, and stated that:

[39]Translation of Mexico's oral statement at the meeting with the Panel (Guión de la exposición oral de México), 20 February 2001, paras. 4-6. The original reads:

> 4. Antes de abordar la sustancia del asunto, tenemos algunas observaciones de carácter general que ameritan ser mencionadas para que el Grupo Especial comprenda el contexto en el que nos encontramos:
>
> 5. En primer lugar, vale la pena destacar que EUA recurrió al Órgano de Solución de Diferencias de manera apresurada, sin reflexionar sobre la utilidad de actuar al amparo de los presentes procedimientos, como lo exige el articulo 3.7 del Entendimiento sobre solución de diferencias, ni consultar con México respecto de la nueva resolución final.
>
> 6. Esta premura los obligó a presentar un caso deficiente y superficial, lo cual es evidente desde su solicitud de establecimiento de este Grupo Especial. Así por ejemplo, dicha solicitud no indica si se habían celebrado consultas, como lo requiere el articulo 6.2 del ESD.

> … *we are not complaining that there were no consultations*, but simply noting the haste with which the United States acted …[40] (emphasis added)

43. The European Communities did not file a written submission as a third party in the Panel proceedings. However, at the 21 February 2001 third party session of the meeting with the Panel, held a day after Mexico had presented its oral statement to the Panel, the European Communities devoted its entire oral statement to the United States' failure to circulate a request for consultations and its failure to mention, in the communication seeking recourse to Article 21.5 of the DSU, whether such consultations had been held. The European Communities stated 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."[41] On the same day, in its concluding remarks, Mexico stated that it agreed with the European Communities.[42]

44. The Panel did not mention any of these issues in its Report[43], and Mexico did not comment on the Panel's failure to do so during the interim review stage of the Panel proceedings.

45. In examining Mexico's conduct, we note that Mexico did not bring up the issues it now relies upon at the DSB meeting on 23 October 2000. Rather, Mexico in effect consented to refer the matter to the Article 21.5 Panel at the first DSB meeting where the matter was raised. We further note that Mexico did not refer to these issues, *at all*, in either of its written submissions to the Panel. Nor did Mexico ask the Panel to make any preliminary ruling on these issues. The alleged deficiencies in the authority of the Panel were mentioned by Mexico *only* at the meeting with the Panel on 20-21 February 2000.

46. Furthermore, at the meeting with the Panel, although Mexico referred to the issues it now relies upon before us, Mexico described these comments simply as "observations of a general nature" that were made "for the Panel to understand the context" of the matter. Mexico did not expressly ask the Panel to examine whether it had the authority to address the matter before it, or to rule on the legal

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[40]This quotation is a translation of the italicised portion of the following statement made by Mexico:

> ... fue muy desafortunado que debido a las prisas del propio Estados Unidos de recurrir al 21.5 sin haber realizado consultas; *y no estamos reclamando que no haya habido consultas, simple y sencillamente, constatando la celeridad con la que se ha trabajado*, impidieron que este tipo de información y de aclaraciones, de carácter técnico se pudieran hacer en su oportunidad.

[41]European Communities' oral statement before the Panel, 21 February 2001, para. 11.

[42]Mexico's final statement at the meeting with the Panel, (Guión para las observaciones finales de México) 21 February 2001, p. 1.

[43]The only reference to these issues is in the summary of the arguments made by the European Communities; Panel Report, paras. 4.1-4.11.

consequences of any deficiencies in the process by which the redetermination was referred to the Panel. To the contrary, Mexico explicitly said, on 20 February 2000, that it was *not* complaining that there were no consultations, but simply "noting" the haste with which the United States acted. Mexico's statement, the following day, that it "agreed" with the presentation that had been made by the European Communities did not, in our view, amount to a request to the Panel to examine whether it had authority to examine the matter before it, or to rule on the legal consequences of any deficiencies in the proceedings. Nor did Mexico's statement suffice to offset Mexico's characterization of these issues as "observations of a general nature", or to negate Mexico's express statement that it was *not* complaining with respect to these issues.

47. In sum, the "observations" raised by Mexico were not expressed in a fashion that indicated that Mexico was raising an objection to the authority of the Panel. The requirements of good faith, due process and orderly procedure dictate that objections, especially those of such potential significance, should be explicitly raised. Only in this way will the panel, the other party to the dispute, and the third parties, understand that a specific objection has been raised, and have an adequate opportunity to address and respond to it. In our view, Mexico's objection was not explicitly raised. Thus, in making its "observations", Mexico did not meet this standard.

48. Mexico's arguments that the Panel failed to address the issues on which Mexico's appeal is now based depend on the premise that Mexico had requested the Panel to do so. As we have found that Mexico did not, in fact, make such a request – that is, it did not raise an "objection" – we need not examine further the possible scope or source of a panel's duty to "address" objections raised by parties.

49. However, had we been satisfied that Mexico did, in fact, explicitly raise its objections before the Panel, then the Panel may well have been required to "address" those objections, whether by virtue of Articles 7.2 and 12.7 of the DSU, or the requirements of due process.[44] In such circumstances, however, the Panel could have satisfied that duty simply by stating in its Report that it declined to examine or rule on Mexico's "objections" due to the *untimely* manner in which they were raised. We

[44]We recall that, in a different context involving judicial economy, we said that:

> … for purposes of transparency and fairness to the parties, a panel should, … in all cases, address expressly [even] those claims which it declines to examine and rule upon … Silence does not suffice for these purposes.

Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 117.

note, in this regard that Mexico was aware of all the facts on which it now relies in arguing that the Panel had no authority to deal with and dispose of the matter as soon as the United States submitted its communication seeking recourse to Article 21.5 of the DSU on 12 October 2000. Yet Mexico mentioned these alleged deficiencies, for the first time, more than four months later, at the meeting with the Panel on 20 February 2000. Mexico did not take advantage of the opportunities it had to raise the issues at the DSB meeting of 23 October 2000, or in either of its written submissions to the Panel.

50. In our view, assuming that Mexico had explicitly raised these issues before the Panel, the Panel could reasonably have concluded that Mexico's "objections" were not raised in a timely manner. When a Member wishes to raise an objection in dispute settlement proceedings, it is always incumbent on that Member to do so promptly.[45] A Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a panel consider such objections.

B. *The Nature of Mexico's "Objections"*

51. Turning to the next step in our analysis, we must consider whether the issues now raised by Mexico in its appeal are of such a nature that the Panel was in any case required to address them on its own motion. To do so, we consider separately each of the three issues now raised by Mexico. We observe, in this regard, that it is unclear whether Mexico contends that the Panel should have ruled on a *single* issue, the lack of consultations, and adduces its additional arguments regarding Articles 3.7 and 6.2 of the DSU in support of its principal position that the lack of consultations deprived the Panel of its authority to deal with and dispose of the matter; or whether Mexico is arguing that the Panel should have ruled on *three* distinct issues: first, the lack of consultations; second, the failure of the United States' communication seeking recourse to Article 21.5 to indicate whether consultations were held; and, third, the alleged failure of the United States to exercise its judgement as to whether recourse to dispute settlement would be "fruitful". For the purposes of our analysis, we will assume that Mexico contends that the Panel should have ruled on three separate issues.

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[45]We have already said that the principles of good faith and due process require:

> … that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes … The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.

Appellate Body Report, *United States – FSC*, *supra*, footnote 24, para. 166. *See also* Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, footnote 19, paras. 127-131; and Appellate Body Report, *United States – 1916 Act*, *supra*, footnote 32, para. 54.

52. Mexico and the European Communities seem to argue that the Panel was required to address the issue of consultations because consultations are an indispensable element of proceedings under Article 21.5 of the DSU. They interpret the phrase "these dispute settlement procedures" in Article 21.5 of the DSU as referring to *all* procedures contained in the DSU, including the provisions concerning consultations under Article 4 of the DSU and the provisions concerning establishment of a panel under Article 6.[46] The United States, on the other hand, believes that the phrase refers to something *less than all* procedures contained in the DSU and, in particular, that the only prerequisite set forth in Article 21.5 is that there exist a disagreement as to whether a Member has implemented the recommendations and rulings of the DSB.[47]

53. We do not consider that we need to examine these differences of interpretation between the participants in order to decide the issues on appeal. As we have said, our task is simply to determine whether the "objections" that Mexico now raises before us are of such a nature that they could have deprived the Panel of its authority to deal with and dispose of the matter. If so, then the Panel was bound to address them on its own motion. To fulfill this task we will assume, *arguendo*, that the same procedures apply in Article 21.5 proceedings as in original panel proceedings. If, even on our *assumption*, we find that the lack of consultations was not a defect of such a nature as to deprive the Panel of its authority to deal with and dispose of the dispute, then we need not consider the participants' arguments on the interpretation of Article 21.5 of the DSU.

54. We note that Mexico emphasizes the importance of consultations within the GATT and WTO dispute settlement systems. We agree with Mexico on the importance of consultations. Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole.

[46]Mexico's appellant's submission, para. 12; European Communities' third participant's submission, para. 16.

[47]United States' appellant's submission, para. 26.

55. The practice of GATT contracting parties in regularly holding consultations is testimony to the important role of consultations in dispute settlement. Article 4.1 of the DSU recognizes this practice and further provides that:

> Members affirm their resolve to *strengthen and improve* the *effectiveness* of the consultation procedures employed by Members. (emphasis added)

56. A number of panel and Appellate Body reports have recognized the value of consultations within the dispute settlement process.[48] The United States too, in this appeal, recognizes the importance of consultations.[49] Nevertheless, we are not persuaded that the undoubted practical importance of consultations to the WTO dispute settlement system is dispositive of the issue before us on appeal. To resolve that issue, we turn now to the relevant texts of the WTO agreements.

57. Article 4 of the DSU sets forth a number of other provisions with respect to consultations. We recall that, in our Report in *Brazil – Aircraft*, we observed that:

> Articles 4 and 6 of the DSU, as well as paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.[50]

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[48]The important role of consultations in both the GATT and the WTO dispute settlement systems has repeatedly been acknowledged, both expressly and implicitly, by panels and by the Appellate Body. See, for example: Panel Report, *Uruguayan Recourse to Article XXIII*, adopted 16 November 1962, BISD 11S/95, para. 10; Panel Report, *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted 27 April 1994, BISD 41S/Vol.I/229, para. 333; Panel Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, as upheld by the Appellate Body Report, WT/DS22/AB/R, DSR 1997:1, 189, para. 287; Panel Report, *European Communities – Bananas*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:III, 1085, paras. 7.17–7.20; Panel Report, *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, para. 10.19; Appellate Body Report, *Brazil – Aircraft*, *supra*, footnote 30, para. 132; Panel Report, *Brazil – Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS46/AB/R, para. 7.10; Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*United States – Lamb Safeguard*"), WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by the Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, para 5.40. See also the discussion of the role of consultations in disputes under the *Agreement on Textiles and Clothing* in Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11, at 23-24.

[49]United States' appellant's submission, para. 32.

[50]Appellate Body Report, *supra*, footnote 30, para. 131.

58. The general process that we described in that case also applies in disputes brought under other covered agreements.[51] Thus, as a general matter, consultations are a prerequisite to panel proceedings. However, this general proposition is subject to certain limitations. For example, Article 4.3 of the DSU provides:

> If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. *If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.* (emphasis added)

59. Article 4.3 of the DSU relates the responding party's conduct towards consultations to the complaining party's right to request the establishment of a panel. When the responding party does not respond to a request for consultations, or declines to enter into consultations, the complaining party may dispense with consultations and proceed to request the establishment of a panel. In such a case, the responding party, by its own conduct, relinquishes the potential benefits that could be derived from those consultations.

60. We also note that Article 4.7 of the DSU provides:

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[51]Pursuant to Article 17.1 of the *Anti-Dumping* Agreement, the provisions of the DSU apply to consultations and dispute settlement under that Agreement "[e]xcept as otherwise provided herein". We note that, in our Report in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, we observed that "the rules and procedures of the DSU apply *together with* the special or additional provisions of [the *Anti-Dumping Agreement*]", and that:

> … it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them.

Appellate Body Report, WT/DS60/AB/R, adopted 25 November 1998, para. 65.

Neither of the parties to this dispute has argued that there is any conflict between the provisions of the DSU relating to consultations and dispute settlement and the "special and additional rules and procedures" contained in the *Anti-Dumping Agreement*.

> If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period *if the consulting parties jointly consider that consultations have failed to settle the dispute.* (emphasis added)

61. Article 4.7 also relates the conduct of the responding party concerning consultations to the complaining party's right to request the establishment of a panel. This provision states that the responding party may agree with the complaining party to forgo the potential benefits that continued pursuit of consultations might bring. Thus, Article 4.7 contemplates that a panel may be validly established notwithstanding the shortened period for consultations, as long as the parties agree. Article 4.7 does not, however, specify any particular form that the agreement between the parties must take.

62. In addition, as we discuss in more detail below[52], pursuant to Article 6.2 of the DSU, one of the requirements for requests for establishment of a panel is that such requests must "indicate whether consultations were held". The phrase "*whether* consultations were held" shows that this requirement in Article 6.2 may be satisfied by an express statement that *no consultations were held*. In other words, Article 6.2 also envisages the possibility that a panel may be validly established without being preceded by consultations.

63. Thus, the DSU explicitly recognizes circumstances where the absence of consultations would *not* deprive the panel of its authority to consider the matter referred to it by the DSB. In our view, it follows that where the responding party does not object, explicitly and in a timely manner, to the failure of the complaining party to request or engage in consultations, the responding party may be deemed to have consented to the lack of consultations and, thereby, to have relinquished whatever right to consult it may have had.

64. As a result, we find that the lack of prior consultations is not a defect that, by its very nature, deprives a panel of its authority to deal with and dispose of a matter, and that, accordingly, such a defect is not one which a panel must examine even if both parties to the dispute remain silent thereon. We recall that, in this case, Mexico neither pursued the potential benefits of consultations nor objected that the United States had deprived it of such benefits.

65. For these reasons, we conclude that *even if* the general obligations in the DSU regarding prior consultations were applicable in proceedings under Article 21.5 of the DSU – a matter which we do not decide – non-compliance with those obligations would not have the effect of depriving a panel

[52] *Infra*, paras. 66-70.

of its authority to deal with and dispose of the matter. It follows that, in this case, the Panel was not required to consider, on its own motion, whether the lack of consultations deprived it of its authority to assess the consistency of the redetermination with the *Anti-Dumping Agreement*.

66. We turn to consider whether the issue raised by Mexico with respect to Article 6.2 of the DSU relates to a defect that would deprive a panel of its authority to deal with and dispose of the matter before it and, therefore, constitutes an issue that the Panel should have addressed on its own motion. In Mexico's view, Article 6.2 of the DSU requires that a communication seeking recourse to Article 21.5 of the DSU "shall indicate whether consultations were held". Since the communication circulated by the United States in this case contained no such indication, Mexico argues that the United States failed to comply with Article 6.2 of the DSU.

67. For purposes of our analysis of this issue we again assume, *arguendo*, that the same procedures apply in Article 21.5 proceedings as in original panel proceedings. If, on this assumption, we find that the failure of the United States' communication to indicate whether consultations were held would not deprive a panel of its authority to deal with and dispose of the matter before it, then we need not inquire further into the procedures that are actually required in proceedings under Article 21.5 of the DSU.

68. Article 6.2 of the DSU, which governs requests for the establishment of a panel, provides:

> The request for the establishment of a panel shall be made in writing. *It shall indicate whether consultations were held*, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference. (emphasis added)

69. We recall that, in previous appeals, we have observed that Article 6.2 imposes four requirements on Members requesting establishment of a panel, one of which obliges Members requesting the establishment of a panel to "indicate", in that request, "whether consultations were held".[53] The issue which we examine here is not whether Members come under such an obligation, for it is clear that they do. Rather, we must consider the nature of that obligation, and the consequences that ensue when a requesting Member does not "indicate whether consultations were held" in its request for establishment of a panel and a responding Member does not object to that omission. We stress that, in so doing, we neither examine nor interpret the other three requirements for requests for establishment of a panel set forth in Article 6.2 of the DSU.

[53] Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, footnote 19, para. 120.

70. In assessing the importance of the obligation "to indicate whether consultations were held", we observe that the requirement will be satisfied by the inclusion, in the request for establishment of a panel, of a statement as to whether consultations occurred *or not.* The purpose of the requirement seems to be primarily informational – to inform the DSB and Members as to whether consultations took place. We also recall that the DSU expressly contemplates that, in certain circumstances, a panel can deal with and dispose of the matter referred to it even if no consultations took place. Similarly, the authority of the panel cannot be invalidated by the absence, in the request for establishment of the panel, of an indication "whether consultations were held". Indeed, it would be curious if the requirement in Article 6.2 to inform the DSB whether consultations were held was accorded more importance in the dispute settlement process than the requirement actually to hold those consultations.

71. Thirdly, Mexico also challenges the silence of the Panel regarding the alleged failure of the United States to satisfy its obligation under the first sentence of Article 3.7 of the DSU to exercise its judgement as to whether dispute settlement proceedings would be "fruitful". Although Mexico has not elaborated its interpretation of the scope of this obligation we, nevertheless, consider whether a failure to comply with the first sentence of Article 3.7 of the DSU would deprive a panel of its authority to deal with and dispose of a matter.

72. The first sentence of Article 3.7 of the DSU provides:

> Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful.

73. In our view, this sentence reflects a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU. We recall that, when we examined the language of Article 3.7 of the DSU in our Report in *European Communities – Bananas*, we stated that:

> … a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be *largely self-regulating* in deciding whether any such action would be "fruitful".[54] (emphasis added)

74. Given the "largely self-regulating" nature of the requirement in the first sentence of Article 3.7, panels and the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly exercised its judgement as to whether recourse to that panel would be "fruitful". Article 3.7 neither requires nor authorizes a

[54]Appellate Body Report, *supra*, footnote 20, para. 135.

panel to look behind that Member's decision and to question its exercise of judgement. Therefore, the Panel was not obliged to consider this issue on its own motion.

75. We have already found that, before the Panel, Mexico did not explicitly raise its "objections" relating to the lack of consultations, the failure of the communication seeking recourse to Article 21.5 of the DSU to indicate whether consultations were held, and the alleged failure of the United States to comply with the requirement in the first sentence of Article 3.7 of the DSU. Having considered the nature of these "objections", we also find that the Panel did not err in refraining from addressing them on its own motion. We, therefore, dismiss Mexico's appeal on these issues.

V. Article 3 of the *Anti-Dumping Agreement*: "Threat of Material Injury"

76. In this appeal, Mexico also asks us to reverse the Panel's findings regarding, first, the likelihood of increased HFCS imports and, second, the likely impact of these imports on the Mexican sugar industry. We will deal with each issue separately.

A. *Likelihood of Increased Imports*

77. Regarding SECOFI's conclusion that there existed a significant likelihood of increased imports, the Panel found:

> 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.[55]

78. We start by making certain preliminary observations on the scope of these Article 21.5 proceedings. Mexico argues that the original panel erred in its treatment of the alleged restraint agreement and that the Panel "made *exactly the same mistake as the original Panel*".[56] (emphasis added) The only difference, Mexico asserts, is that "in this case, the Panel focused on whether or not

[55]Panel Report, para. 6.23.

[56]Mexico's appellant's submission, para. 66.

SECOFI had complied with [the findings and recommendations of the original panel as adopted by the DSB], and compliance with Article 3.7(i) of the Anti-Dumping Agreement became secondary".[57] There appear to us to be two elements to Mexico's assertion. First, Mexico seems to seek to have us revisit the original panel report. Second, Mexico is claiming that the Panel should have analysed the consistency of the new measure with Mexico's obligations under the *Anti-Dumping Agreement* rather than simply verifying whether Mexico had followed the original panel's recommendations as adopted by the DSB.

79. With respect to the first element, we note that the original panel report, regarding the *initial* measure (SECOFI's original determination), has been adopted and that these Article 21.5 proceedings concern a *subsequent* measure (SECOFI's redetermination). We also note that Mexico did not appeal the original panel's report, and that Articles 3.2 and 3.3 of the DSU reflect the importance to the multilateral trading system of security, predictability and the prompt settlement of disputes. We see no basis for us to examine the original panel's treatment of the alleged restraint agreement.

80. With respect to the second element, we note that Mexico argues that the Panel confined itself inappropriately to an examination of whether the new measure complied with the rulings and recommendations of the DSB relating to the original measure. However, we note that at the outset of its reasoning the Panel considered that it was "faced principally with determining whether SECOFI's conclusion in the redetermination … is consistent with Articles 3.1, 3.4 and 3.7(i) of the *Anti-Dumping Agreement*".[58] In our view, making this determination is exactly what the Panel went on to do, as is clear from the rest of its analysis. Similarly, our review of the Panel Report will focus on the Panel's reasons for finding that the redetermination was not consistent with Mexico's obligations under the *Anti-Dumping Agreement*.

81. Returning to the substance of Mexico's appeal, we observe that Mexico asks us to reverse the finding of the Panel regarding the likelihood of increased imports on the grounds that the Panel wrongly interpreted Article 3.7 of the *Anti-Dumping Agreement* and incorrectly applied the standard of review prescribed by Articles 17.5 and 17.6 of that Agreement. In its appellant's submission, Mexico focuses its arguments on errors that it considers the Panel made in its treatment of an alleged restraint agreement between Mexican sugar millers and Mexican soft-drink producers. Article 3.7 provides, among other things, that "a determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility". Mexico maintains that, since SECOFI never determined that this alleged agreement existed as a matter of "fact", it was only "allegation, conjecture or remote possibility". Thus, Mexico asserts that the Panel erred in relying on "allegation,

[57]Mexico's appellant's submission, para. 66.

[58]Panel Report, para. 6.5.

conjecture or remote possibility" to find that the redetermination was inconsistent with Article 3.7(i) of the *Anti-Dumping Agreement.* Mexico also argues that the Panel erred in examining the alleged restraint agreement since Article 17.5 of the *Anti-Dumping Agreement* authorizes panels to examine only the "*facts* made available" (emphasis added) to national investigating authorities.

82. Article 3.7 of the *Anti-Dumping Agreement* provides, in relevant part:

> 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.[10] *In making a determination regarding the existence of a threat of material injury, the authorities should consider, inter alia*, such factors as:
>
> (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation; (emphasis added)

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[10]One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

83. In previous anti-dumping cases, we have emphasized the importance of distinguishing between the different roles of panels and investigating authorities.[59] We note, in this regard, that Article 3.7 of the *Anti-Dumping Agreement* sets forth a number of requirements that must be respected in order to reach a valid determination of a threat of material injury. The third sentence of Article 3.7 explicitly recognizes that it is the *investigating authorities* who make a determination of threat of material injury, and that such determination – by the investigating authorities - "must be based on facts and not merely on allegation, conjecture or remote possibility". Consequently, Article 3.7 is not addressed to panels, but to the national investigating authorities which determine the existence of a threat of material injury.

84. The *Anti-Dumping Agreement* imposes a specific standard of review on *panels*. With respect to facts, Articles 17.5 and 17.6(i) of the *Anti-Dumping Agreement*, together with Article 11 of the DSU[60], set out the standard to be applied by panels when assessing whether a Member's investigating authorities have "established" and "evaluated" the facts consistently with that Member's

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[59]Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*United States – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, para. 55.

[60]Article 11 of the DSU provides in relevant part that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".

obligations under the covered agreements.[61] These provisions do not authorize panels to engage in a new and independent fact-finding exercise. Rather, in assessing the measure, panels must consider, in the light of the claims and arguments of the parties, whether, *inter alia*, the "establishment" of the facts by the investigating authorities was "proper", in accordance with the obligations imposed on such investigating authorities under the *Anti-Dumping Agreement*.[62]

85. In our view, the "establishment" of facts by investigating authorities includes both affirmative findings of events that took place during the period of investigation as well as assumptions relating to such events made by those authorities in the course of their analyses. In determining the existence of a *threat* of material injury, the investigating authorities will necessarily have to make assumptions relating to "the "occurrence of future events" since such *future* events "can never be definitively proven by facts".[63] Notwithstanding this intrinsic uncertainty, a "proper establishment" of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be "clearly foreseen and imminent", in accordance with Article 3.7 of the *Anti-Dumping Agreement*.[64]

86. Bearing in mind the role assigned to panels under Articles 17.5 and 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU, we turn to examine how the Panel dealt with the treatment of the alleged restraint agreement by SECOFI in its redetermination.

87. We recall that the United States asserted, before the original panel that, during the anti-dumping investigation, United States' exporters had learned of the existence of an agreement between Mexican sugar millers and Mexican soft-drink bottlers. Under that alleged agreement, Mexican soft-drink bottlers had undertaken to limit their consumption of HFCS while Mexican sugar millers had, in

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[61]Appellate Body Report, *United States – Hot-Rolled Steel, supra*, footnote 59, paras. 50-62.

[62]*Ibid.*, para. 56.

[63]Appellate Body Report, *United States – Lamb Safeguard*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para 136.

[64]As we noted in *United States – Hot-Rolled Steel*:

> Article 17.6(i) … defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their "establishment" and "evaluation" of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities'* establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*. (original emphasis)
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> Appellate Body Report, *supra*, footnote 59, para. 56.

turn, agreed to reduce the prices at which sugar was supplied to these bottlers.[65] In its original determination, SECOFI did not determine whether the alleged restraint agreement actually existed, but nevertheless concluded that, "*in any event*, the alleged agreement 'does not eliminate the possibility that bottlers as well as other sectors that use HFCS in multiple applications [will continue to import] it under conditions of price discrimination to replace sugar.'" [66] (emphasis added)

88. We note that, in order to arrive at this conclusion, SECOFI must have considered the potential consequences of the alleged restraint agreement and found that they were not sufficient to eliminate the threat of material injury to the sugar industry. The original panel found that SECOFI had inadequately evaluated the impact of dumped imports on the domestic industry and the potential effects of the alleged restraint agreement and that, by doing so, had acted inconsistently with Articles 3.1, 3.2, 3.4, 3.7 and 3.7(i) of the *Anti-Dumping Agreement.* As we have already observed, this original panel report was not appealed and was subsequently adopted by the DSB.

89. By way of implementation, SECOFI then carried out a new investigation, the results of which are set forth in the redetermination. In the analysis leading to its new conclusion that there existed a "well-founded likelihood that a signficant increase in [imports of HFCS from the United States] would occur in the immediate future"[67], SECOFI explained:

> The Secretariat determined that *even if there was an agreement to restrict the use of high fructose corn syrup in September 1997, between the sugar mills and the soft drink bottlers*, it would not eliminate the threat of injury to the domestic sugar industry. [68]
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> …

[65]On 23 September 1997, Secretary Blanco Mendoza of SECOFI appeared before the Mexican Senate and stated that he had "been informed" of the existence of the alleged restraint agreement, and declared that he took "great satisfaction" in this "private arrangement". However, the text of the alleged agreement was never produced to the original panel and, in response to a written inquiry from SECOFI during the course of the anti-dumping investigation, the Mexican Sugar Chamber (which had filed the application for the anti-dumping investigation and was said to be one of the parties to the alleged agreement) denied the existence of such an agreement. (Original Panel Report, para. 5.529, footnote 425 to para. 5.532 and footnote 433 to para. 5.544)

[66]Original Panel Report, para. 7.173, quoting from para. 547 of SECOFI's original determination.

[67]Redetermination, para. 61.

[68]*Ibid.*, para. 56.

> For purposes of determining the likelihood of an increase in imports of high fructose corn syrup originating from the United States of America, *assuming without admitting that the alleged agreement existed (and in addition that it was strictly honoured by the parties*), the Secretariat based on projections of total sugar consumption for 1997 and 1998, estimated the consumption by industrial sector users other than soft drink bottlers.[69]
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> …
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> This allowed the Secretariat to conclude that, *even if the assumed agreement existed and was complied with*, the demand for imports of high fructose corn syrup based on price levels prevailing in the domestic market would provide an incentive for an increase in its consumption by the consuming industries other than soft drink bottlers. Such an increase would be at such a magnitude as to [be] consider[ed] a significant increase in imports over the levels noted during the period under investigation ...[70] (emphasis added)

90. In stating that "even if the assumed agreement existed and was complied with" the likelihood of the threat of injury to the domestic sugar industry would not be eliminated, SECOFI – *arguendo* – treated the existence of the agreement and its effectiveness *as if they were facts* and concluded that, even if those assumptions were correct, the threat of material injury to the sugar industry remained. We note that SECOFI could have made affirmative factual findings concerning the alleged agreement. However, the above reasoning clearly indicates that SECOFI *chose* to assume the existence and effectiveness of the alleged restraint agreement for purposes of its analysis of the likelihood of increased imports. We further note that none of the parties to this dispute challenged, before the Panel, SECOFI's decision to make such assumptions. In these circumstances, it was logical for the Panel to examine SECOFI's conclusions using the same premises. Indeed, we consider that it would have been improper for the Panel to have sought, on its own initiative, to go behind the assumptions made by SECOFI.[71]

91. In challenging the Panel's finding regarding SECOFI's determination of a significant likelihood of increased imports, Mexico confines its arguments to the Panel's treatment of the alleged restraint agreement. Notably, Mexico's appellant's submission does not allege any legal error in the

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[69]Redetermination, para. 58.

[70]*Ibid*., para. 60.

[71]We note, in this context, that Articles 17.5 and 17.6(i) contemplate precisely that panels will examine antidumping measures on the *same* factual basis as that before the investigating authorities. In *Thailand – H-Beams*, we found that "Articles 17.5 and 17.6 clarify the powers of review of a panel established under the *Anti-Dumping Agreement.* These provisions place limiting obligations on a panel, with respect to the review of the establishment and evaluation of facts by the investigating authority". (Appellate Body Report, *supra*, footnote 25, para 114)

Panel's analysis leading to its conclusions with respect to SECOFI's projections of increased demand for HFCS from users *other* than soft-drink bottlers.

92. Notwithstanding the narrow scope of Mexico's arguments on this issue, we believe that it is useful to observe that the Panel (like the original panel) considered that the relevant question was *not* whether the alleged agreement existed, but "whether SECOFI's analysis provide[d] a reasoned explanation for its conclusion that, assuming [a restraint] agreement existed, there was nonetheless a likelihood of substantially increased importation".[72] In answering this question, the Panel found that SECOFI's projection of increased HFCS imports depended on the finding that *users other than soft-drink bottlers* (i.e., those that purportedly were *not* parties to the alleged restraint agreement) *could and would* replace sugar with HFCS, resulting in an increase in consumption of HFCS by those users of more than 400 per cent in 1997.[73] This projection was based on SECOFI's view of the ability and willingness of that segment of the domestic industry to substitute HFCS for sugar.[74] The Panel observed that SECOFI's projection relied on the supposition that, due to price differentials between domestic sugar and imported HFCS, substitution of HFCS for sugar would take place.[75] The Panel considered that this supposition was not supported by the evidence in the record concerning the use of HFCS and sugar in 1996.[76] The Panel also observed that SECOFI had not addressed the "critical question"[77] of the degree to which companies, which had not used HFCS during the period of investigation (1996), could, as a technical matter (taking into account production processes and equipment), use HFCS in place of sugar in 1997 and 1998. It was these defects underlying SECOFI's projection of increased imports, and *not* any assumption used by the Panel relating to the existence of the alleged restraint agreement, that led the Panel to conclude that SECOFI's determination of the likelihood of increased imports was inconsistent with Article 3.7 (i) of the *Anti-Dumping Agreement*.

93. In conclusion, we find that the Panel did not err in using the same assumption with respect to the alleged restraint agreement that SECOFI used in the redetermination for purposes of the analysis leading to its conclusion that there existed a likelihood of substantially increased imports. We, therefore, uphold the Panel's finding, in paragraph 6.23 of its Report, 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."

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[72]Panel Report, para. 6.14, referring in footnote to para. 7.175 of the Original Panel Report.

[73]*Ibid*., para. 6.16.

[74]*Ibid*.

[75]*Ibid*.

[76]*Ibid*., para. 6.17.

[77]*Ibid*., para. 6.18.

B. *Likely Impact of Imports on the Domestic Industry*

94. Following its examination of SECOFI's analysis of the likely impact of imports on the domestic industry, the Panel concluded:

> … 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.[78]

95. Mexico requests that this finding be reversed on appeal. In Mexico's view, it is clear, in particular from paragraphs 6.34 and 6.35 of the Panel Report, that the Panel's findings regarding the likely impact of imports on the domestic industry depend on its findings on the likelihood of increased imports. Since, as Mexico argued above, the Panel erred in rejecting SECOFI's conclusion regarding the likelihood of an increase in imports, Mexico submits that it follows that the Panel's finding regarding the likely impact of dumped imports on the domestic industry is similarly flawed and must be reversed. This is the sole substantive argument raised in Mexico's appellant's submission relating to the Panel's finding concerning the impact of imports on the domestic industry.

96. In the previous section, we upheld the Panel's finding that SECOFI did not determine the existence of a significant likelihood of increased imports in accordance with Article 3.7(i) of the *Anti-Dumping Agreement.* We agree with Mexico that the Panel's finding on SECOFI's determination of the impact of imports on the domestic industry depends on the Panel's finding on the likelihood of increased imports. We note, however, that despite this logical inter-dependence, the Panel also considered SECOFI's evaluation of a number of economic factors leading to its determination of threat of material injury, and we consider it useful to examine its reasoning in this regard.

97. In reviewing the information included in SECOFI's redetermination, the Panel found that SECOFI's own analysis indicated that, despite increased levels of imports, and despite increased margins of underselling by HFCS relative to sugar, "the domestic sugar 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".[79] The Panel thus concluded that, in the light of the evidence and explanations provided in the redetermination, there was insufficient

[78]Panel Report, para. 6.36.

[79]*Ibid.*, para. 6.31.

justification for SECOFI's conclusion that imports of HFCS had had "adverse effects" on the domestic industry during the period of investigation (1996).[80]

98. With respect to SECOFI's projections concerning the likely condition of the Mexican sugar industry in 1997, the Panel found that these depended on "a projected decline in industry revenues in 1997 based on declining prices for sugar caused by increased dumped imports of HFCS".[81] As we have seen, however, the Panel also found that "SECOFI's conclusions regarding the projected increase in imports [of HFCS] are not supported by the evidence"[82] and that this "undermines the projected decline in [domestic industry] revenues for 1997 which is at the core of SECOFI's redetermination".[83]

99. The Panel further found that "SECOFI has failed to provide a reasoned explanation for why the performance of the industry will suddenly decline significantly in 1997"[84], in particular given that "SECOFI's projections of price levels and profitability for 1997 are contrary to the trends observed during the period of investigation".[85] In sum, the Panel provided a number of reasons in support of its finding that there was insufficient evidence and explanations to justify SECOFI's conclusion that the projected substantial increase in dumped HFCS imports (which, as we have seen, the Panel did not accept) would cause material injury to the domestic sugar industry in 1997.

100. As the Panel observed, several of the relevant economic factors analysed in the redetermination indicate a positive performance by the sugar industry during the period of investigation. We note that Article 3.7 of the *Anti-Dumping Agreement* provides that a determination of a threat of material injury must be based on a change in circumstances that must be "clearly foreseen and imminent". Bearing in mind this high standard set by Article 3.7, and having reviewed the reasoning of the Panel, we see no reason to question the Panel's finding, in paragraph 6.36, that "SECOFI's redetermination with respect to the likely impact of dumped imports of HFCS from the United States on the domestic industry … is not consistent with Articles 3.1, 3.4 and 3.7 of the *Anti-Dumping Agreement*".

101. We, therefore, dismiss this part of Mexico's appeal relating to the Panel's review of SECOFI's analysis of the impact of imports on the domestic industry. We note, however, that Mexico also requests us to reverse the Panel's finding that SECOFI's analysis of the impact of imports on the

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[80]Panel Report, para. 6.31.

[81]*Ibid.*, para. 6.34.

[82]*Ibid.*

[83]*Ibid.*

[84]*Ibid.*, para. 6.35.

[85]*Ibid.*

domestic industry was inconsistent with Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* on other grounds, to which we now turn.

VI. Article 12.7 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*: "Reasoning of the Panel"

102. In its appeal, Mexico also challenges certain aspects of the reasoning used by the Panel in finding that SECOFI's analysis of the likely impact of the dumped imports was inconsistent with Mexico's obligations under the *Anti-Dumping Agreement*. Mexico argues, first, that the Panel failed to set out a "basic rationale", as required by Article 12.7 of the DSU, for its findings that Mexico acted inconsistently with its obligations under Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*. Second, Mexico argues that the Panel erred in its application of Article 17.6(ii) of the *Anti-Dumping Agreement*.

A. *Article 12.7 of the DSU: "Basic Rationale"*

103. In the penultimate paragraph of the section of its Report examining SECOFI's analysis of the likely impact of dumped imports of HFCS on the domestic industry, the Panel reached the following conclusion:

> 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.[86]

104. On appeal, Mexico points out that this is the only paragraph in the relevant part of the Panel Report where the Panel states that the redetermination is inconsistent with Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*. Mexico asserts that this section of the Panel Report lacks *any* analysis revealing how the Panel reached such conclusions, and does not identify the specific obligations that Mexico was found to have violated. Mexico notes that while the Panel may have taken the view that a violation of Article 3.7 of the *Anti-Dumping Agreement* automatically implies a violation of Articles 3.1 and 3.4 of that Agreement, the Panel Report actually contains no such explanation. Mexico argues, therefore, that the Panel failed to set out a "basic rationale" as required under Article 12.7 of the DSU.

105. Article 12.7 of the DSU provides, in relevant part, that:

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[86]Panel Report, para. 6.36. This conclusion is also reflected in paragraph 7.1 of the Panel Report.

> Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, *the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.* … (emphasis added)

106. In considering the scope of the duties imposed on panels under Article 12.7, we turn first to the dictionary meaning of "basic", which includes both "fundamental; essential" and "constituting a minimum … at the lowest acceptable level".[87] "Rationale" means both "a reasoned exposition of principles; an explanation or statement of reasons" and "the fundamental or underlying reason for or basis of a thing; a justification".[88] The "basic rationale" which a panel must provide is directly linked, by the wording of Article 12.7, to the "findings and recommendations" made by a panel. We, therefore, consider that Article 12.7 establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations. Panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations.

107. In our view, the duty of panels under Article 12.7 of the DSU to provide a "basic rationale" reflects and conforms with the principles of fundamental fairness and due process that underlie and inform the provisions of the DSU.[89] In particular, in cases where a Member has been found to have acted inconsistently with its obligations under the covered agreements, that Member is entitled to know the reasons for such finding as a matter of due process. In addition, the requirement to set out a "basic rationale" in the panel report assists such Member to understand the nature of its obligations and to make informed decisions about: (i) what must be done in order to implement the eventual rulings and recommendations made by the DSB; and (ii) whether and what to appeal. Article 12.7 also furthers the objectives, expressed in Article 3.2 of the DSU, of promoting security and predictability in the multilateral trading system and of clarifying the existing provisions of the covered agreements, because the requirement to provide "basic" reasons contributes to other WTO Members' understanding of the nature and scope of the rights and obligations in the covered agreements.

108. We do not believe that it is either possible or desirable to determine, in the abstract, the minimum standard of reasoning that will constitute a "basic rationale" for the findings and

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[87] *The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 188.

[88] *Ibid.*, Vol. II, p. 2482.

[89] We have also examined these principles in other contexts. See, for example, Appellate Body Report, *United States – Hot-Rolled Steel*, *supra*, footnote 59, paras. 101 and 193; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 158; and Appellate Body Report, *United States – FSC*, *supra*, footnote 24, para. 166.

recommendations made by a panel.[90] Whether a panel has articulated adequately the "basic rationale" for its findings and recommendations must be determined on a case-by-case basis, taking into account the facts of the case, the specific legal provisions at issue, and the particular findings and recommendations made by a panel. Panels must identify the relevant facts and the applicable legal norms. In applying those legal norms to the relevant facts, the reasoning of the panel must reveal how and why the law applies to the facts. In this way, panels will, in their reports, disclose the essential or fundamental justification for their findings and recommendations.[91]

109. This does not, however, necessarily imply that Article 12.7 requires panels to expound at length on the reasons for their findings and recommendations. We can, for example, envisage cases in which a panel's "basic rationale" might be found in reasoning that is set out in other documents, such as in previous panel or Appellate Body reports – provided that such reasoning is quoted or, at a minimum, incorporated by reference. Indeed, a panel acting pursuant to Article 21.5 of the DSU would be expected to refer to the initial panel report, particularly in cases where the implementing measure is closely related to the original measure, and where the claims made in the proceeding under Article 21.5 closely resemble the claims made in the initial panel proceedings.

110. Turning to examine whether the Panel in this case satisfied its duty to set forth a "basic rationale" for its findings under Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*, we note that the relevant section of the Panel Report, entitled "Analysis of Likely Impact of Imports on the Domestic Industry", is contained in paragraphs 6.24 to 6.37 of the Panel Report. At the end of this section, the Panel found that Mexico had acted inconsistently with its obligations under Articles 3.1, 3.4 and 3.7. of the *Anti-Dumping Agreement.*

1. The Panel's Finding Concerning Article 3.4 of the *Anti-Dumping Agreement*

111. We first consider Mexico's argument, on appeal, that the Panel failed to set out a "basic rationale", as required by Article 12.7 of the DSU, for its finding that Mexico had acted inconsistently with its obligations under Article 3.4 of the *Anti-Dumping Agreement.*

112. In reviewing SECOFI's analysis of the likely impact of imports on the domestic industry, the Panel began by recalling the original panel's view that, in a case involving a determination of a threat of material injury, investigating authorities must "consider, among other relevant factors, all the

[90]Appellate Body Report, *Korea – Alcoholic Beverages*, WT/DS75/AB/R, WT/DS83/AB/R, adopted 17 February 1999, para. 168.

[91]Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, para. 78.

factors set out in Article 3.4".[92] The Panel then recalled the conclusion of the original panel that SECOFI's initial determination "reflected 'no meaningful analysis of a number of the Article 3.4 factors'".[93] It appears to us that, without expressly saying so, the Panel considered, in assessing the consistency of an injury determination with Article 3.4, that it was necessary to examine, first, whether all listed and other relevant factors were evaluated, and second, whether the evaluation of each factor by the investigating authorities was adequate.

113. The Panel then restated the applicable standard of review, found in Article 17.6(i) of the *Anti-Dumping Agreement*, and observed that the determination of threat of material injury must "as well" satisfy the elements of Article 3.7 of the *Anti-Dumping Agreement*.[94] Having identified the relevant legal standards – Articles 3.4, 3.7 and 17.6(i) – the Panel turned to apply them to the redetermination.

114. In reviewing the evidence that was before SECOFI, the Panel's analysis relating to the claim under Article 3.4 of the *Anti-Dumping Agreement* is intertwined with its analysis relating to the claim under Article 3.7 of that Agreement. For this reason, it is not always easy to ascertain whether the Panel's review of specific facts was undertaken pursuant to Article 3.4, to Article 3.7, or to both provisions. While the Panel did not itself discuss the relationship between those two provisions, it did reproduce three lengthy passages from the original report that reflect the original panel's view of the close relationship between the obligations under Articles 3.4 and 3.7 of the *Anti-Dumping Agreement* in cases involving a determination of a threat of material injury.[95]

115. The United States acknowledged that SECOFI's redetermination contained "information" on factors relevant under Article 3.4[96] and the Panel stated that, "[i]n the redetermination, SECOFI did provide information on the elements that were not addressed in the original determination".[97] Thus, it seems that the Panel found that the redetermination did address all the relevant factors under Article 3.4 of the *Anti-Dumping Agreement*.

116. The Panel then considered the adequacy of SECOFI's analysis of a number of economic factors. Although it did not refer explicitly to Article 3.4, the economic factors analysed by the Panel

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[92]Panel Report, para. 6.24.

[93]*Ibid.*

[94]*Ibid.*, para. 6.27.

[95]Panel Report, paras. 6.24 and 6.28, referring to the Original Panel Report, paras. 7.132, 7.140 and 7.141. We note, also, that the preceding paragraphs of the original panel report set out in detail that panel's view of the relationship between the obligations set forth in Articles 3.4 and 3.7 of the *Anti-Dumping Agreement*. (Original Panel Report, paras. 6.118-6.131)

[96]Panel Report, para. 6.25.

[97]*Ibid.*, para. 6.29.

are among those listed in Article 3.4, including profits, production, capacity utilisation and prices.[98] As we discussed in the previous section of this Report, the Panel found that SECOFI's analysis of these factors was not supported by the evidence that was before SECOFI.[99]

117. It appears to us that, while this part of the Panel Report might not reflect an exemplary degree of clarity in all respects, it can fairly be read as setting out the Panel's "basic" explanations and reasons for considering that SECOFI's evaluation of certain Article 3.4 factors was not adequate. Thus, we find that the Panel satisfied its duty, under Article 12.7 of the DSU, to provide a "basic rationale" for its finding that Mexico acted inconsistently with its obligations under Article 3.4 of the *Anti-Dumping Agreement*.

118. For these reasons, we dismiss Mexico's appeal concerning the Panel's alleged failure to provide a "basic rationale" for its finding concerning Article 3.4 of the *Anti-Dumping Agreement*. We also recall that, in the previous section of this Report, we dismissed Mexico's appeal regarding the substance of that finding.[100] We, therefore, uphold the Panel's finding, in paragraph 6.36 of its Report, that Mexico acted inconsistently with its obligations under Article 3.4 of the *Anti-Dumping Agreement*.

2. The Panel's Finding Concerning Article 3.1 of the *Anti-Dumping Agreement*

119. As regards the Panel's finding that Mexico acted inconsistently with Article 3.1 of the *Anti-Dumping Agreement*, we recall that the Panel found, in paragraph 6.36 of its Report, that the redetermination "is not consistent with Articles 3.1, 3.4, and 3.7 of the AD Agreement".

120. Turning again to the section of the Panel Report reviewing SECOFI's analysis of the likely impact of imports on the domestic industry, we note that it does not contain any quotation or discussion of the text of Article 3.1, or explanation of how Mexico failed to comply with the obligations set out in that provision. Nevertheless, in examining whether the Panel provided a "basic rationale" for its finding with respect to Article 3.1, we believe that we must take account of the circumstances particular to this case.

121. The Panel was charged, under Article 21.5 of the DSU, with assessing the claims made by the United States with respect to the consistency of the redetermination with Mexico's obligations under the *Anti-Dumping Agreement*. In proceeding under Article 21.5 of the DSU, the Panel conducted its

[98]Panel Report, paras. 6.30-6.34.

[99]The Panel found deficiencies, for example, in the conclusions that SECOFI drew in its analysis of the domestic industry's projected revenues, production levels and capacity utilisation, and in SECOFI's analysis of projected domestic prices. (Panel Report, paras. 6.31-6.35)

[100]*Supra*, para. 101.

work against the background of the original proceedings, and with full cognizance of the reasons provided by the original panel. The original determination and original panel proceedings, as well as the redetermination and the panel proceedings under Article 21.5, form part of a continuum of events. We consider that the Panel Report cannot be read in isolation from those events.

122. In addition, in this case, the redetermination was not a stand-alone measure, but rather one that, in the words of Mexico, "complements and amends" the original determination.[101] The United States' claims under Articles 3.1, 3.4 and 3.7 closely resembled the claims that it had made under Articles 3.1, 3.4 and 3.7 with respect to SECOFI's original determination.

123. We recall that, in its Report, the Panel provided reasons in support of its findings that the redetermination was inconsistent with Mexico's obligations under Articles 3.4 and 3.7 of the *Anti-Dumping Agreement*. There is, as we have ourselves observed, a close relationship between the various paragraphs of Article 3 of the *Anti-Dumping Agreement*.[102] In its assessment of SECOFI's original determination, the original panel explained, at length, its views as to the relationship between Articles 3.1, 3.4 and 3.7.[103] Based on its view of the relationship between these three provisions, the original panel found a violation of Article 3.1 as a consequence of having found violations of Articles 3.4 and 3.7.[104]

124. Having regard to these circumstances, we are of the view that the Panel Report, read together with the original panel report, leaves no doubt about the reasons for the Panel's additional finding under Article 3.1 of the *Anti-Dumping Agreement*. We, therefore, find that the Panel did not fail to provide a "basic rationale" for that finding.

125. For these reasons, we dismiss Mexico's appeal concerning the Panel's alleged failure to provide a "basic rationale" for its finding with respect to Article 3.1 of the *Anti-Dumping Agreement*. We recall that, in the previous section of this Report, we dismissed Mexico's appeal regarding the substance of that finding.[105] We, therefore, uphold the Panel's finding, in paragraph 6.36 of its Report, that Mexico acted inconsistently with its obligations under Article 3.1 of the *Anti-Dumping Agreement*.

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[101]Panel Report, para. 3.78.

[102]See, in particular, Appellate Body Report, *Thailand – H-Beams*, *supra*, footnote 25, paras. 106-108; and Appellate Body Report, *United States – Hot-Rolled Steel*, *supra*, footnote 59, paras. 192-197.

[103]Original Panel Report, paras. 7.118-7.131.

[104]We also note that, in their responses to questioning at the oral hearing before us, both Mexico and the United States accepted that a measure that was inconsistent with Article 3.4 of the *Anti-Dumping* Agreement would also be inconsistent with Article 3.1 of that Agreement.

[105]*Supra*, para. 101.

126. We wish to add that for purposes of transparency and fairness to the parties, even a panel proceeding under Article 21.5 of the DSU should strive to present the essential justification for its findings and recommendations in its own report. In this case, in particular, we consider that the Panel's finding under Article 3.1 of the *Anti-Dumping Agreement* would have been better supported by a direct quotation from or, at least, an explicit reference to, the relevant reasoning set out in the original panel report.

B. *Article 17.6(ii) of the Anti-Dumping Agreement: "Permissible Interpretation"*

127. In paragraph 6.37 of its Report, the Panel stated:

> 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. … (underlining added)

128. Mexico argues that this paragraph demonstrates that the Panel in effect recognized that SECOFI's interpretation of the relevant provisions of the *Anti-Dumping Agreement* was or could be "permissible".[106] Since Article 17.6(ii) of the *Anti-Dumping Agreement* requires panels not to disturb "permissible" interpretations by national investigating authorities – even if the panels prefer alternative "permissible" interpretations – Mexico concludes that the Panel erred in nevertheless finding the redetermination to be inconsistent with Mexico's obligations under the *Anti-Dumping Agreement*.

129. We recall that Article 17.6 of the *Anti-Dumping Agreement*, which sets out the standard of review for panels examining claims under that Agreement, contains two separate sub-paragraphs, which read:

> In examining the matter referred to in paragraph 5:
>
> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

[106] Mexico's appellant's submission, para. 127.

> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

130. We recently examined this standard of review in *United States – Hot-Rolled Steel*. In our Report in that case, we observed that, pursuant to Article 17.6(i), "the task of panels is simply to review the investigating authorities' 'establishment' and 'evaluation' of the facts".[107] Under Article 17.6(ii), panels must "determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*."[108] The requirements of the standard of review provided for in Article 17.6(i) and 17.6(ii) are cumulative. In other words, a panel must find a determination made by the investigating authorities to be consistent with relevant provisions of the *Anti-Dumping Agreement* if it finds that those investigating authorities have properly established the facts and evaluated those facts in an unbiased and objective manner, *and* that the determination rests upon a "permissible" interpretation of the relevant provisions.

131. Before considering whether the Panel properly applied the standard of review set forth in Article 17.6(ii) of the *Anti-Dumping Agreement*, we first examine Mexico's characterization of paragraph 6.37 of the Panel Report and, in particular, its contention that the Panel found that SECOFI's interpretation of the relevant provisions of the *Anti-Dumping Agreement* could be "permissible". In the first sentence of paragraph 6.37, the Panel cautioned that it did "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." In our view, the Panel was not suggesting, in this sentence, that SECOFI's interpretation of the applicable legal provisions was "permissible". Rather, the Panel was simply declining to exclude the possibility that, *had certain factual circumstances been sufficiently substantiated and properly evaluated by SECOFI in its redetermination*, SECOFI could have made a determination of threat of material injury that would have been consistent with Mexico's obligations under the *Anti-Dumping Agreement*. However, in the same paragraph, the Panel considered that, on the basis of the evidence and explanations actually provided, it was not possible to make such a finding of threat of material injury:

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[107] Appellate Body Report, *supra*, footnote 59, para. 55.

[108] *Ibid*., para. 60.

> … 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. (emphasis added)

132. We are satisfied that, in paragraph 6.37, the Panel was acting according to the standard of review set forth in Article 17.6(i) of the *Anti-Dumping Agreement*. The Panel reviewed what SECOFI had done and found that SECOFI's *establishment and evaluation of the facts* did not support its determination of a threat of material injury.[109] This finding was sufficient for the Panel to find the redetermination to be inconsistent with Articles 3.1, 3.4 and 3.7 of the *Anti-Dumping Agreement*.

133. We are further satisfied that the Panel was *not*, in this paragraph, dealing with any issue of legal interpretation of the relevant provisions of the *Anti-Dumping Agreement*.[110] The Panel did not consider whether SECOFI's determination of the existence of a threat of material injury rested on a "permissible" legal interpretation of Articles 3.1, 3.4 and 3.7 of the *Anti-Dumping Agreement* because the Panel found that SECOFI's establishment and evaluation of *the facts* did not support that determination. Thus, the Panel did not need to apply the standard of review in Article 17.6(ii).

134. For these reasons, we are unable to accept Mexico's assertion that the reasoning used in paragraph 6.37 indicates that the Panel found that SECOFI's legal interpretation of the relevant provision of the *Anti-Dumping Agreement* could be "permissible". As Mexico's appeal concerning the standard of review in Article 17.6(ii) of the *Anti-Dumping Agreement* depends on this premise, we dismiss this part of Mexico's appeal.

VII. Findings and Conclusions

135. For the reasons set out in this Report, the Appellate Body:

(a) finds that the Panel did not err in refraining from addressing in its Report: the lack of consultations between the United States and Mexico prior to the DSB's referral of the redetermination to the Panel; the alleged failure of the United States to comply with Article 6.2 of the DSU because its communication seeking recourse to Article 21.5 of the DSU did not indicate whether consultations had been held; and the alleged failure

[109]We recall that the findings of the Panel were based on its review of the *factual* basis for SECOFI's projected increases in demand for HFCS from users other than soft-drink bottlers, and on the resulting projected increase in HFCS imports and projected impact on the Mexican sugar industry.

[110]The Panel itself noted that neither Mexico nor the United States "made any arguments concerning the interpretation of the applicable provisions of the AD Agreement." (Panel Report, footnote 66 to para. 6.5)

of the United States to exercise its judgement, in accordance with Article 3.7 of the DSU, as to whether action under the DSU would be "fruitful";

(b) upholds the Panel's finding, in paragraph 6.23 of the Panel Report, that SECOFI's conclusion, in the redetermination, that there existed a significant likelihood of increased imports was inconsistent with Mexico's obligations under Article 3.7(i) of the *Anti-Dumping Agreement*;

(c) upholds the Panel's finding, in paragraph 6.36 of the Panel Report, that SECOFI's conclusion, in the redetermination, with respect to the likely impact of dumped imports of HFCS from the United States on the domestic industry, was inconsistent with Mexico's obligations under Articles 3.1, 3.4, and 3.7 of the *Anti-Dumping Agreement*;

(d) finds that the Panel satisfied its duty, under Article 12.7 of the DSU, to set out a "basic rationale behind [its] findings" with respect to Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*; and

(e) finds that the Panel did not act inconsistently with the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*.

136. The Appellate Body *recommends* that the DSB request that Mexico bring its anti-dumping measure found in this Report, and in the Panel Report as upheld by this Report, to be inconsistent with the *Anti-Dumping Agreement*, into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 5th day of October 2001 by:

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Florentino P. Feliciano
Presiding Member

_____ _____

Georges Abi-Saab
Member

Claus-Dieter Ehlermann
Member