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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 no525 tgTw (7)nation87rw"rth *Anti-Dumping Agreement*

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… Mexico's imposition of definitive anti-dumping duties on imports of HFCS from the United States

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,

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

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*

Tax Treatment for "Foreign Sales Corporations" ("*United States – FSC*")[24]

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.

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.

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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. Mexico

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.
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> 5. Firstly, it should be stressed that the United xr.t1saias hasty

… *we are not complaining that there were no consultations*, but

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

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.

70. In assessing the importance of the obligation "to indicate whether consultations were held",

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.

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

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> 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]
>
> …
>
> 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

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

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

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

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 domes cE Twy-lmre8rconsis8kAn i0 Tc 0 s Tw (doegar inidDumifasoninnatiif12 ntly with itexicn of thre Tj -

> 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,

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

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*

claim under Art131e .

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

> (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. Page 402 inauthorities hav

> … 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

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