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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

Report of the Panel

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

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I. INTRODUCTION AND FACTUAL BACKGROUND

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

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

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

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

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS132/6, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in

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

[2] *Id*. at para. 188.

[3] *Id*.

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

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

Chairman: H.E. Mr. Christer Manhusen

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

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

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

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

II. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

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

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

III. MAIN ARGUMENTS OF THE PARTIES

A. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

3.1 The United States argues that, in its decision of January14, 2000, the Panel concluded that the Government of Mexico's imposition of a definitive anti

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

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

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

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

3.20 The United States recalls that the Panel did not find that this material provided adequate support for SECOFI's original determination that there was a likelihood of increased imports and it should not do so here. The United States asserts that the material does not demonstrate that HFCS users other than soft drink bottlers, which accounted for only 32 per cent of HFCS consumption in 1996, actually **were** substituting HFCS for sugar during SECOFI's period of investigation. It merely 08eptembetypariga

conjecture, made conclusions that have absolutely no basis in the record before it, and failed to address meaningfully the question the Panel deemed pertinent -- whether, notwithstanding the

doubled that year. According to the United States, these positive trends in profitability and prices, combined with the other positive evidence on the record – capacity

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

3.42 Yet, according to the United States, SECOFI consistently failed to explain its use of projections of industry behavior that were either contrary to or unsupported by the observed data during its period of investigation as inputs in these models and forecasts. The examples that the United States cites include its use of a 50 per cent substitution rate of HFCS for sugar, its projection that sugar prices would decline by 9 per cent[5] and its projection that the Mexican sugar industry's sales revenues would decline by 15 per cent.

B. FIRST WRITTEN SUBMISSION OF MEXICO

1. Introduction

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

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

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

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

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

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

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

[6] Notice of Redetermination, MEXICO-1.

recommendation.[7] In particular, given the Panel's findings and conclusions concerning the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.63 Mexico recalls that the Panel concluded that SECOFI's "consideration of the potential effects of the alleged restraint agreement [between the sugar refiners and soft drink bottlers] was inadequate"[9] and therefore determined that SECOFI's conclusion that there was a "likelihood of substantially increased importation" was inconsistent with the requirements of Article 3.7(i) of the AD Agreement[10], recommending that, *inter alia*, in this respect the measure be brought into conformity with the Agreement.[11]

3.64 Mexico argues that in order to comply with the Panel recommendation adopted byc 0jgSB, Tw (11) Tj -141

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

3.78 Similarly, in this context, in considering the consistency of SECOFI's actions with Articles 12.2 and 12.2.2, Mexico argues that the Panel should take particular account of the fact that the revised final resolution, which concludes the procedure followed by SECOFI for the *specific*

C. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

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

(a) SECOFI's redetermination, according to the United States, fails to explain how there is a likelihood of substantially increased imports of high fructose corn syrup ("HFCS") from the United States in light of an agreement between Mexican sugar refiners and soft drink bottlers limiting the bottlers' use of HFCS. Consequently, the redetermination, like the original determination, violates Article 3.7 of the AD Agreement.

(b) The United States further argues that the redetermination fails adequately to address the factors set forth in Article 3.4 of the AD Agreement concerning the likely impact of the imports on the Mexican sugar industry. According to the United States, the redetermination mischaracterizes pertinent information concerning the condition of the Mexican sugar industry and fails to provide a reasoned and fact-supported conclusion why improvements in industry trends during the period of investigation were not probative in ascertaining the future condition of the industry. As a result, the United States claims, the redetermination violates Articles 3.1, 3.4, and 3.7 of the AD Agreement.

(c) Finally the United States asserts that the redetermination is inconsistent with Articles 12.2 and 12.2.2 of the AD Agreement because it relies on analytical models and forecasts without adequate explanation of the inputs used within the models.

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

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

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

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

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

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

3.89 In particular, the United States argues,

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

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

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

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

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

D. SECOND WRITTEN SUBMISSION OF MEXICO

1. Introduction

3.99 Mexico recalls that its first written submission in this proceeding set out the facts and arguments which show that Mexico strictly complied with the conclusions and recommendation of the Dispute Settlement Body (DSB) in accordance with the report of the Panel that examined the case concerning *Mexico – High Fructose Corn Syrup (HFCS) from the United States* of 14 January 2000[16] (Panel Report). Accordingly, Mexico responded in general terms to the position taken by the United States in its first written submission.

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

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

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

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

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

3.113 Mexico points out that the price trends observed in 1996 show that greater import penetration

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

3.118 In Mexico's view, another matter which conclusively demonstrates the Mexican sugar industry's high sensitivity is the ability to raise capital, since the analysis of the industry's leverage[29] showed an excessively high debt level in 1996, with a ratio of total liability to book capital of 4.6 times, placing the industry in a situation of low net investment and high debt levels exposing it to high financial risk. SECOFI acknowledged that the industry's debt is a structural problem and not a consequence of revenue from dumped imports; in other words, it took account of the prevailing situation of domestic production in 1996 and its sensibility, concluding that with such a debt level the risk to the industry is high and, hence, the financial situation is vulnerable, so that any future change might alter the profits trend of earlier periods by directing more resources to debt servicing.

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

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

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

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

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

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

[29] See MEXICO-13 and MEXICO-16.

3.124 Mexico rejects the United States interpretation that the likelihood of increased imports is determined from the date of publication of the original final resolution. Mexico argues that SECOFI's determination is based not only on the increase in imports already recorded in 1997, as the United States suggests. Mexico adopted the point made by the Panel in paragraph 7.176 of the report so as to determine the existence of such a likelihood on the basis of anticipated import trends in the near future relative to the period investigated, i.e. in 1997, using a forward-looking analysis of a present situation, i.e. the period investigated, 1996.[30] In Mexico's view[31], if such a determination were based on import trends observed during the conduct of the investigation itself, inadequate consideration would be given both to trade flows and to consumption forecasts distorted by the effects of the initiation of the anti-dumping investigation.[32]

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

3.126 Mexico asserts that its determination was based on actual sugar consumption figures from 1994 to 1996 of industrial users other than soft drink bottlers, and on the actual rates of utilisation of HFCS recorded in 1996 by those industrial users, who were requested to provide information on the consumption of sweeteners in their production processes.[35] Mexico also asserts that SECOFI commer7ase in im otao de. the pe the

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Mexico asserts that Article 12.2 does not lay down any precise formulas or specific terms in which an authority is required to express its findings or conclusions in the public notice. On the contrary, it simply states in general terms that these will relate to the issues considered material by the investigating authority. Nor does Article 12.2.2 lay down any specific formulas or terms, and even though it does in fact require the inclusion of all relevant information on the matters of fact and law

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

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

3.140 Mexico also maintains that, in accordance with the findings and conclusions of the Panel Report, particularly those contained in paragraphs 7.176 and 7.177[50], SECOFI took into account additional items of relevant information in order to analyse the potential effects of the alleged restraint agreement and arrive at an adequate determination of the likelihood of a substantial increase in HFCS imports. Thus, from paragraph 55 onwards, the revised final resolution includes a more detailed explanation than that contained in the original final resolution, which sets forth in adequate detail the findings and conclusions which led SECOFI to determine that the potential effects of the alleged restraint agreement did not eliminate the well-founded likelihood of substantially increased HFCS imports. Mexico asserts that that determination is not based on conjecture, allegation or remote possibility, as contended by the United States, but on facts and evidence which support the conclusion of a well-founded likelihood of increased importation despite the existence of the alleged restraint agreement.

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

(a) the United States questions the alleged use by SECOFI of a 50 per cent substitution rate in respect of industrial users other than soft drink bottlers[52], so as to conclude that there was a likelihood of increased importation. On this point, Mexico claims that the United States confuses the degree of substitution in the various industries with the

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[48] In this connection, Mexico points out once again that the revised final resolution closing the procedure followed by SECOFI for the specific purpose of complying with the recommendation adopted by the DSB complements and amends the original final resolution (of 23 January 1998) in all those aspects reviewed

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

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

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

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

3.157 This 84 per cent figure appears nowhere in

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

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

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

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

3.165 According to the United States, SECOFI, however, projected that these users would cut their ass other Tw (invdustg285 4) Tj 2sd, su TD /F5 11.25 Tf 0 Tc -0.1275 6w ( ) Tj 12 0 TD /F1 11.25 Tf -0.152

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

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

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

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

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

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

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

3. Notice And Article 12

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

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

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

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

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

3.199 In Mexico's view, the conclusions concerning the significant rate of growth recorded in

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

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

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

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

4.4 In the context of the *Bananas* dispute, the EC recalls that it has made it clear[60] that it considers consultations pursuant to Article 4 of the DSU to be necessary before the establishment of a panel can be requested pursuant to Article 21.5 of the DSU. The reason, according to the EC, is the reference contained in Article 21.5 that any dispute on implementation "shall be decided through recourse to these dispute settlement procedures". In the view of the EC, "these dispute settlement procedures" include consultations and a right to an appeal. This is so for reasons related to the multilateral character of the procedures, which include procedural rights of other WTO Members, particularly potential third parties, and a standardised dispute settlement procedure the basic features of which may not be amended simply because that pleases the parties in an individual case.

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

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

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

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

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

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

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

4.11 On the basis of the foregoing considerations, the EC is of the view that the Panel should

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

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

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

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

(a) Raw cane sugar tariff quotas are allocated according to Article XIII of GATT 1994.

(b) Mexico's NAFTA allocations do not count in a country's share allocation in the TRQ (G/AG/N/USA/15 at pp. 22 and G/AG/R/16) and

(c) Mexico does not receive additional access if there are subsequent tariff quota allocations (G/AG/N/USA/13 at pp. 18 of G/AG/R/14).

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

V. INTERIM REVIEW

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

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

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

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

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

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

> " … Moreover, we also deem it possible that imports continuing on an elevated level for a longer period without further increasing at the end of the investigation period may, if unchecked, go on to cause serious injury (i.e. may threaten to cause serious injury). That is, if increased imports at a certain point in time cause *less than*

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

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

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

B. FINDING OF LIKELIHOOD OF INCREASED IMPORTS

6.6 In its original determination, the Panel had concluded that SECOFI failed to adequately address the likelihood of substantially increased imports by failing to properly evaluate the facts concerning, and provide a reasoned explanation of its conclusions regarding, the potential effects of the alleged restraint agreement.[67] Consequently, the Panel found that SECOFI's conclusion that there was a "likelihood of substantially increased importation" was inconsistent with the requirements of Article 3.7(i) of the AD Agreement. In addressing this issue, the Panel noted that the question was not whether such an agreement actually existed, but "whether there was evidence of and arguments

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

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

> "7.177 Mexico's contention that users of imported HFCS other than soft-drink bottlers could have increased their consumption in amounts sufficient to constitute a substantial increase in imports is in our view questionable.[645] However, even assuming this to be the case, there is no discussion in the final determination of the share of imports and domestic production consumed by soft-drink bottlers, other beverage manufacturers, and other industrial users, and the degree of substitutability of HFCS and sugar in their products. Moreover, the alleged restraint agreement affected purchasers accounting for 68 per cent of the imports, suggesting that it would at least slow any further increases in imports. In addition, most other purchasers' ability to substitute HFCS for sugar was limited, suggesting that, if the alleged restraint agreement existed, any further increases in imports would be less than they had been in the past. None of these elements is addressed in

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

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

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[638] *Id*., paras. 449-470.
[639] *Id*., para. 460, *see* import statistics, MEXICO-40.
[640] Final Determination, para. 465."[71]

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

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

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

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

6.12 SECOFI concluded that, assuming the restraint agreement existed, soft-drink bottlers would, in 1997, consume the maximum amount of HFCS permitted under the alleged agreement, 350,000 tons, which would equal the entirety of projected domestic production. SECOFI further concluded that users other than soft-drink bottlers would consume 334,000 tons of HFCS in 1997, which would be supplied by imports.[75] Thus, SECOFI projected that dumped imports would increase from 192,906 tons in 1996 to 334,000 tons in 1997 and projected an additional increase to 350,000 tons in 1998.[76]

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[71] *Id*. at para 7.170.
[72] Notice of Redetermination, MEXICO-1(a), at para. 61.
[73] *Id*. at para. 78.
[74] *Id*. at para. 56.
[75] Mexico argued before us that it was immaterial whether users other than soft-drink bottlers consumed imports or domestic production. See Answer to Question 5, Mexico's answers to the Panel's

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

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

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

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

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

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

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

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

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

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

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

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

increase by more than 400 per cent in 1997. SECOFI reached this conclusion on the basis of an analysis of projected demand for HFCS by users other than soft-drink bottlers. In its analysis, SECOFI had before it evidence of the utilisation of HFCS and sugar by consuming industries.[79] This information consisted of three tables, two labelled "Grado de sustituibilidad técnica del azúcar por JMAF", and the third showing "posibilidades de sustitución entre JMAF y azúcar". SECOFI considered that this evidence demonstrated the rate at which users other than soft-drink bottlers could substitute HFCS for sugar in their production operations in 1997. SECOFI then projected the amount of HFCS that users of sugar other than soft-drink bottlers **could** consume in 1997, reduced it by 50 per cent, and determined that the result, 334,000 tons, was the amount of HFCS that users other than soft-drink bottlers **would** consume in 1997.[80] SECOFI projected that the amount of HFCS soft-drink bottlers could consume under the alleged restraint agreement, 350,000 tons, would be supplied by the domestic industry. Consequently, the entire 334,000 tons of demand projected for producers of products other than soft-drinks would, SECOFI concluded, be supplied by imports, principally dumped imports from the United States. Thus, SECOFI concluded that the alleged restraint agreement "would not eliminate the threat of injury to the domestic sugar industry" because it does not eliminate the likelihood that soft-drink bottlers, as well as industries other than soft-drink bottlers, would continue to acquire dumped imports.[81]

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

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

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[79] MEXICO-20.

[80] MEXICO-21.

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

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

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

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

6.22 Finally, we note that the redetermination states that the alleged restraint agreement "would not eliminate the threat of injury to the domestic sugar industry" because it does not eliminate the likelihood that both soft-drink bottlers and other users would continue to acquire dumped imports.[89]

conclusion, based on an objective evaluation of the facts, concerning the likely impact of dumped imports. Such a conclusion must, in our view, reflect the projected impact of further imports on the particular domestic industry, in light of its condition. In order to conclude that there is a threat of material injury to a domestic industry that

"Merely that dumped imports will increase, and will have adverse price effects, does not, *ipso facto*, lead to the conclusion that the domestic industry will be injured – if the industry is in very good condition, or if there are other factors at play, dumped

SECOFI also calculated that, despite an increase in demand for sweeteners, domestic industry sales would decline 10 per cent in 1997.[107]

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

6.34 As with the redetermination of likelihood of increased imports, while SECOFI has cited more information concerning the condition of the domestic industry, the underlying rationale is the same as in the original determination. SECOFI's conclusion that the industry is threatened with material injury depends on a projected decline in industry revenues in 1997 based on declining prices for sugar caused by increased dumped imports of HFCS. As discussed above, in our view, SECOFI's

D. ADEQUACY OF NOTICE OF REDETERMINATION

6.38 The United States argues that Mexico's notice of redetermination does not satisfy the requirements of Articles 12.2 and 12.2.2.[108] Mexico, on the other hand, argues that SECOFI's notice fully explains the decision on redetermination, and is backed by additional information in the record of the investigation which is referred to or underlies the analysis and conclusions set out in the notice. Essentially, p in the note

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