

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

## 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.<sup>1</sup> 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".<sup>2</sup> The revised final resolution confirmed "the final offsetting duties established during the antidumping investigation".<sup>3</sup>

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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<sup>1</sup> 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.

<sup>2</sup> *Id.* at para. 188.

<sup>3</sup> *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”.

**[Parties' arguments in Sections III and IV deleted from this version]**

## 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 precise aspects of the interim report. Neither party requested a further meeting with the Panel. Therefore, in accordance with the working procedures adopted by the Panel, the parties were given the opportunity to file further written comments, which they did on 1 June 2001.

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

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

5.4 Mexico notes that in this dispute, it stressed that the quantitative scenario regarding demand for HFCS by industries other than soft drink bottlers was not the only basis for its conclusion with respect to the likelihood of increased imports. Mexico reiterates that SECOFI's determination of the likelihood of increased imports was based on a comprehensive analysis of concurrent factors, including, *inter alia*, the increase in imports during the investigation period and the most recent period for which data was available, the freely disposable capacity of the United States industry, the trend in and level of import prices, and the foreseeable economic context, together with the existence of the alleged restraint agreement. Mexico maintains that SECOFI's conclusion of a likelihood of increased imports is supported by the analysis of the mentioned factors. In Mexico's view, our decision was based only on consideration of the calculation of projected demand for HFCS.

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

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

5.6 We considered carefully Mexico's comments on the interim report, but did not make any changes to the report in connection with the points made by Mexico on interim review. These arguments were fully expressed during the course of the proceedings, and considered in making our decision. We recognized, in paragraph 6.9 of our findings, that there was evidence concerning the rate of increase in imports during the period of investigation, as well as the available capacity in the United States and the existence of other markets, which was considered by SECOFI in making its determination of likelihood of increased imports. However, whether this evidence indicated a likelihood that imports would continue was not the issue with which we were concerned. Our concern was with SECOFI's analysis of the effects of the alleged restraint agreement on the likelihood of

increased imports, which had been faulted by the original panel in its Report. It is in that connection that we considered the projected demand for HFCS by users other than the soft-drink bottlers affected by the alleged restraint agreement, and concluded that an unbiased and objective investigating authority could not have reached the conclusions reached by SECOFI. In our view, it is clear that SECOFI's finding of threat of material injury rested on the determination that imports would increase significantly despite the alleged restraint agreement, and that this conclusion rested on the projected levels of HFCS demanded by users other than soft-drink bottlers.

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

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

5.9 Mexico argues that our finding in paragraph 6.31 does not refer to changes in factors such as sugar prices, sales, domestic market share and inventories between 1994 and 1996, and requests that we include a statement to the effect that the increase in dumped HFCS imports from the United States meant that the industry could not recover during the investigation period, since 1996, as compared to 1994, saw a decrease in domestic sugar prices, a fall in domestic sales, a loss of market share and an increase in inventories. Mexico maintains that the evaluation of these factors made it possible for SECOFI to project an adverse effect on the industry.

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

## **VI. FINDINGS**

### **A. INTRODUCTION**

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

accordingly recommended that Mexico bring its measure into conformity with its obligations under the AD Agreement.

6.2 The United States and Mexico having agreed on a reasonable period for implementation, Mexico decided to revise the original final determination underlying the imposition of anti-dumping duties following a newly initiated proceeding. On 20 September 2000, the Government of Mexico published the final resolution in that proceeding. In that resolution, SECOFI stated that it had revised the original final resolution imposing definitive anti-dumping duties on imports of HFCS from the United States to comply with the Panel report's conclusions and recommendations.<sup>61</sup> 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.<sup>62</sup> 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".<sup>63</sup> The revised final resolution confirmed "the final offsetting duties established during the antidumping investigation".<sup>64</sup>

6.3 The United States asks us to determine whether the redetermination by SECOFI in the HFCS anti-dumping case complied with the ruling of the original Panel, and the recommendation of the 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.<sup>65</sup> 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

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

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

<sup>63</sup> Notice of Redetermination, MEXICO-1(a) at para. 188.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at para 11.

measure into conformity.<sup>66</sup> 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.<sup>67</sup> Consequently, the Panel found that SECOFI's conclusion that there was a "likelihood of substantially increased importation" was inconsistent with the requirements of Article 3.7(i) of the AD Agreement. In addressing this issue, the Panel noted that the question was not whether such an agreement actually existed, but "whether there was evidence of and arguments concerning the effect of the alleged restraint agreement, which, if it existed, would be relevant to the analysis of the likelihood of increased dumped imports in the near future."<sup>68</sup> The Panel posed the relevant question as "whether SECOFI's analysis provides a reasoned explanation for its conclusion that, assuming such an agreement existed, there was nonetheless a likelihood of substantially increased importation."<sup>69</sup>

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

7.178 We conclude that SECOFI's consideration of the potential effects of the alleged restraint agreement was inadequate. Therefore, we determine that SECOFI's

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

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

<sup>68</sup> *Id.* at para. 7.174.

<sup>69</sup> *Id.* at para. 7.175.

conclusion that there was a "likelihood of substantially increased importation" is inconsistent with the requirements of Article 3.7(i) of the AD Agreement.

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

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

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

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

(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.<sup>640</sup>

(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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<sup>638</sup> *Id.*, paras. 449-470.

<sup>639</sup> *Id.*, para. 460, *see* import statistics, MEXICO-40.

<sup>640</sup> Final Determination, para. 465."<sup>71</sup>

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."<sup>72</sup> 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..."<sup>73</sup>

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

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<sup>70</sup> *Id.* at paras. 7.177-78.

<sup>71</sup> *Id.* at para 7.170.

<sup>72</sup> Notice of Redetermination, MEXICO-1(a), at para. 61.

<sup>73</sup> *Id.* at para. 78.

"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..."<sup>74</sup>

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.<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup>

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."

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<sup>74</sup> *Id.* at para. 56.

<sup>75</sup> 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 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.

<sup>76</sup> Notice of Redetermination, MEXICO-1(a), at para. 59.

<sup>77</sup> 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.

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."<sup>78</sup> 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 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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup>

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

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

<sup>79</sup> MEXICO-20.

<sup>80</sup> MEXICO-21.

<sup>81</sup> Notice of Redetermination, MEXICO-1(a), at para 56.

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.<sup>82</sup> 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.

6.19 SECOFI did not rely exclusively on the survey information, but also relied on the information in the other two tables in Exhibit Mexico-20.<sup>83</sup> SECOFI appears to have selectively relied on the available information in using the higher figures in most cases. Thus, while two of the tables report a degree of substitutability of HFCS for sugar in marmalade production of 33 per cent, SECOFI's calculation of projected demand for HFCS by all marmalade producers for 1997 rested on a substitution rate of 70 per cent, which is in fact information reported by one company in the SECOFI market survey.<sup>84</sup> Mexico provided no reasoned explanation, and in some cases, no explanation at all, of why one source was used in projecting demand for HFCS in some cases, and another in others.<sup>85</sup>

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

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<sup>82</sup> 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.

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

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

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

utilisation" can meaningfully operate as a factor to discount the projected demand for HFCS in the manner described by Mexico.

6.21 We see nothing in SECOFI's redetermination, or even in the explanations provided by Mexico in this proceeding, which would support the conclusion that industries other than soft-drink bottlers **would** switch to HFCS use in 1997 to the extent projected by SECOFI, even assuming the technical capability to do so.<sup>87</sup> Mexico argues that the lower price of HFCS, as compared with sugar prices, supports the conclusion that producers of products other than soft-drinks would switch to HFCS use as overall demand for their products increased. However, during the period of investigation, despite a similar difference in HFCS and sugar prices, nothing like this projected increase was observed, in any of the industrial sectors using both sugar and HFCS. Indeed, while the price of HFCS was lower than the price of sugar in 1996, those margins of underselling were projected by SECOFI to decrease slightly in 1997.<sup>88</sup> HFCS use by producers other than soft-drink bottlers had not in the past shown increases of the magnitude predicted by SECOFI for 1997, even in periods of **increasing** margins of underselling. SECOFI's determination provides no explanation for the conclusion that, despite the projection of no significant change in relative prices for 1997, use of HFCS by industries other than soft-drink bottlers would increase by over 400 per cent, when there had not been increases of this magnitude in the past.

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.<sup>89</sup> As in the original Panel's report, we do not consider that this in itself supports the conclusion that there is a likelihood of substantially increased importation, as provided for in Article 3.7(i) of the AD Agreement. A conclusion that the likelihood of further dumped imports **is not eliminated** does not demonstrate that there is a likelihood of substantially increased importation and consequent threat of material injury.

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

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

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

<sup>89</sup> Notice of Redetermination, MEXICO-1(a), at para. 56.

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

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

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

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

"no analysis of the condition of the Mexican sugar industry during the period of investigation, or projected for the near future. It is therefore not possible, by reading the final determination, to understand the overall condition of the domestic industry with respect to the Article 3.4 factors. Yet without an understanding of the condition of the industry, it is not possible, in our view, for SECOFI to have come to a reasoned conclusion, based on an objective evaluation of the facts, concerning the likely impact of dumped imports. Such a conclusion must, in our view, reflect the projected impact of further imports on the particular domestic industry, in light of its condition. In order to conclude that there is a threat of material injury to a domestic industry that is apparently not currently injured, despite the effects of dumped imports during the period of investigation, it is necessary to have an understanding of the current condition of the industry as a background."<sup>91</sup>

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

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

<sup>91</sup> *Id.* at para. 7.140.

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

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

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

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

6.28 In the original report, the Panel observed that

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

price level of the domestic product generates sufficient revenues and profits, injury may be unlikely."<sup>92</sup>

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

6.29 In the redetermination, SECOFI did provide information on the elements that were not addressed in the original determination. Thus, SECOFI discussed indicators of the industry's performance for the period of investigation, 1996, and the previous year, and projects trends for 1997 and in some cases 1998.<sup>93</sup> SECOFI noted, *inter alia*, that domestic industry market share declined, domestic sales declined, and exports increased during the period of investigation.<sup>94</sup> Inventories increased.<sup>95</sup> Productivity improved.<sup>96</sup> The number of workers increased 16 per cent from 1994 to 1995, and by 1 percentage point over the 1995 figure to 1996, while salaries (denominated in US dollars) declined from 1994 to 1995.<sup>97</sup> Capacity utilisation increased 16 per cent from 1994 to 1995, and by 3 per cent from 1995 to 1996.<sup>98</sup> SECOFI also analyzed the financial indicators of the industry, and found that in 1996, operating margins were 9 per cent, an increase from 5 per cent in 1995, due in large part to a decline in operating expenses.<sup>99</sup> The industry's net margin increased from negative 1 per cent in 1995 to 5 per cent in 1996. Return on investment increased 2 percentage points in 1996, to 5 per cent.<sup>100</sup>

6.30 SECOFI also addressed the movements in prices for sugar and HFCS. SECOFI noted that prices of dumped imports of HFCS declined from 1994 to 1995, then increased in 1996, although they remained below the 1994 levels.<sup>101</sup> Similarly, domestic sugar prices declined from 1994 to 1995, then increased in 1996, although they remained below the 1994 levels.<sup>102</sup> Margins of underselling for HFCS-42 compared to standard sugar were 39 per cent in 1994, 41 per cent in 1995, and 43 per cent in 1996. Margins of underselling for HFCS-55 compared to refined sugar were 48 per cent in 1994, 37 per cent in 1995, and 55 per cent in 1996.<sup>103</sup> SECOFI concluded that the declining trend in Mexican sugar prices was explained by competition from dumped imports, whose lower price and dynamic growth pressured the domestic industry to adapt, leading to price depression, especially in

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<sup>92</sup> *Id.* at para. 7.141.

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

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

<sup>95</sup> *Id.* at para. 131.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at para. 132.

<sup>98</sup> *Id.* at para. 133.

<sup>99</sup> *Id.* at para. 143.

<sup>100</sup> *Id.* at paras. 144-45.

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

<sup>102</sup> *Id.* at para. 83.

<sup>103</sup> *Id.* at para. 87.

sales to the industrial sector. SECOFI concluded that this effect was confirmed by application of the Granger test.<sup>104</sup>

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

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

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

SECOFI also calculated that, despite an increase in demand for sweeteners, domestic industry sales would decline 10 per cent in 1997.<sup>107</sup>

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

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

<sup>105</sup> *Id.* at paras. 98-99.

<sup>106</sup> *Id.* at para. 100.

<sup>107</sup> *Id.* at para. 138.

conclusions regarding the projected increase in imports are not supported by the evidence. This undermines the projected decline in revenues for 1997 which is at the core of SECOFI's redetermination.

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

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

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

#### 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.<sup>108</sup> Mexico, on the other hand, argues that SECOFI's notice fully explains the decision on redetermination, and is backed by additional information in the record of the investigation which is referred to or underlies the analysis and conclusions set out in the notice. Essentially, Mexico argues that the United States has misunderstood the notice, or is reading Article 12 too strictly.

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

"in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. ...sufficiently detailed explanations for the ... determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. ...all relevant information on the matters of fact and law and reasons which have led to the

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

imposition of final measures ... as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers...."

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

## VII. CONCLUSIONS AND RECOMMENDATION

7.1 In light of the findings above, we conclude that Mexico's imposition of definitive anti-dumping duties on imports of HFCS from the United States on the basis of the SECOFI redetermination is inconsistent with the requirements of the AD Agreement in that Mexico's inadequate consideration of the impact of dumped imports on the domestic industry, and its inadequate consideration of the potential effect of the alleged restraint agreement in its determination of likelihood of substantially increased importation, are not consistent with the provisions of Articles 3.1, 3.4, 3.7 and 3.7(i) of the AD Agreement. We therefore consider that Mexico has failed to implement the recommendation of the original Panel and the DSU to bring its measure into conformity with its obligations under the AD Agreement.

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

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