

*United States - Anti-dumping Measures on  
Cement from Mexico*

(WT/DS281)

**Response of the United States to Mexico's Answers to the Panel's BCI Questions  
and Mexico's May 19, 2005 Letter Regarding BCI**

**May 25, 2005**

1. The United States appreciates the opportunity to respond to the May 20, 2005 "Answers of Mexico to the Questions by the Panel on BCI Procedures"<sup>1</sup> and Mexico's May 19, 2005 letter in which it sets out its views on "immediate next steps" with respect to BCI. Mexico's responses and its letter serve to highlight the deep flaws and internal inconsistencies in Mexico's arguments with respect to the BCI issue. The United States has already addressed this issue in its communications to the Panel, in its discussions during the first and second Panel meetings, and in its own responses to the Panel's questions.<sup>2</sup> The United States will offer here a few brief – and, hopefully, final – observations with respect to Mexico's arguments regarding (a) the scope of the Panel's March 17, 2005 Request for BCI; (b) access to BCI for counsel to Mexican cement companies (who are not retained by the Government of Mexico); and (c) scheduling of further written submissions and/or hearings regarding the 17 March 2005 BCI.

A. The Scope of the Panel's March 17, 2005 Request for BCI

2. In complete disregard of the events leading up to the Panel's March 17, 2005 request for BCI under Article 13.1 of the DSU, the clear terms of the Panel's request, and the Panel's own re-clarification at the second meeting that it "understood and intended its request for BCI from the United States to relate only to the specific items of information listed by Mexico,"<sup>3</sup> Mexico continues to assert that the Panel requested "all" information on the confidential record of the ITC sunset review and that "the BCI provided by the United States does not comply with the Panel's request."<sup>4</sup> It is astonishing that Mexico not only refuses to acknowledge the facts, but actually contests *the Panel's own understanding* of its DSU Article 13.1 request. The Panel is better situated than Mexico to know what the Panel intended when it issued its March 17, 2005 request and, certainly, the United States has not shared Mexico's apparent confusion regarding

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<sup>1</sup> Hereinafter referred to as "Mexico's Responses to Panel's BCI Questions."

<sup>2</sup> See e.g., Opening Statement of the United States at the First Meeting of the Panel With the Parties at paras. 75-78 (February 17, 2005); Answers of the United States to the First Set of Questions of the Panel in Connection with the First Substantive Meeting with the Parties, paras. 15-35; Letter from the United States to the Panel (April 4, 2005); U.S. Second Written Submission, paras. 172-183; Letter from the United States to the Panel (April 26, 2005); Letter from the United States to the Panel (April 28, 2005); Letter from the United States to the Panel (May 9, 2005); Letter from the United States to the Panel (May 12, 2005); Answers of the United States to the First Set of Questions of the Panel in Relation to the Second Substantive Meeting with the Parties, paras. 1-15.

<sup>3</sup> Panel Question 149 presented to parties at the second Panel meeting and issued in writing on May 17, 2005.

<sup>4</sup> See Mexico's Letter to the Panel at 1 (May 19, 2005).

the scope of the request. At the same time, Mexico apparently concedes that its assertions about the Panel's request for information are wrong when Mexico refers to the analysis of its arguments "should the Panel decide not request access to the all the confidential information on the record."<sup>5</sup> This indicates that Mexico apparently does not believe that the Panel *has* already requested access to all the confidential information on the record.

3. Mexico also states that "[i]t is unclear to Mexico why the Panel would believe that Mexico intended to limit its request for BCI to the list provided on February 18, given Mexico's consistent position to the contrary."<sup>6</sup> In fact, what is unclear is why Mexico believes that *its* intent is relevant. Mexico has no right to request information under DSU Article 13.1. Under the express terms of that provision, the right to seek information is provided, entirely and exclusively, to the panel examining the matter in dispute. The Panel has been unequivocal as to the BCI it was requesting pursuant to DSU Article 13.1 and this BCI has now been submitted. There is no basis for Mexico to insist that the time and resources of the Panel, the Secretariat and the United States should now be devoted to the issue of what *Mexico* intended in connection with *the Panel's* DSU Article 13.1 request. Similarly, Mexico continues to assume that its request for information should have the same standing as the Panel's request under DSU Article 13, as though it is Mexico that has the authority under the DSU rather than the Panel.<sup>7</sup>

4. Further, should Mexico's arguments be understood as supporting a new request for the Panel to expand its BCI request, the United States notes that Mexico has provided no basis for such an expansion either with respect to the "entire confidential record" or any specific additional BCI items. Indeed, Mexico concedes in its response to the Panel's questions that it cannot identify "any further specific information that the Panel would need to in order to resolve the matters before it in this dispute."<sup>8</sup> Instead, Mexico reiterates that the Panel should seek the entire ITC confidential record, with the now familiar refrain that "having access to the entire

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<sup>5</sup> Mexico's Responses to Panel's BCI Questions, page 9 [sic].

<sup>6</sup> See Mexico's Responses to Panel's BCI Questions, response to Question 149.

<sup>7</sup> See for example the end of footnote 10 to Mexico's Responses to Panel's BCI Questions, where Mexico appears to believe that *Mexico's* request to the Panel would be the controlling request unless the Panel explicitly indicated otherwise.

<sup>8</sup> Mexico's Responses to Panel's BCI Questions, response to Question 150 (stating that the Panel "is correct" in its understanding that Mexico is "unable to identify any further specific information that the Panel would need in order to resolve the matters before it in this dispute"). The Panel can therefore disregard the Annex to Mexico's Responses to the Panel's BCI Questions in which Mexico purports to list confidential documents to which the ITC Report makes reference. The United States notes that many of the documents in this Annex were included on Mexico's February 18, 2005 list as BCI items that the United States allegedly "partly relied" on in its arguments before the Panel. Those documents have already been submitted by the United States. With respect to the remaining documents, Mexico has not even attempted to argue what relevance they have to the issues in dispute, let alone demonstrated that their submission is "necessary" and "appropriate" under DSU Article 13.1. In fact, these are BCI documents that Mexico, by necessary implication, concedes the United States has *not* "refer[red] to" or "partly rel[ied] on" in this dispute and, as Mexico has confirmed in response to the Panel's questions, it has no basis for suggesting this information "might be useful to the Panel's consideration." See Mexico's Responses to Panel's BCI Questions, response to Question 146(b).

confidential record would . . . facilitate the Panel's assessment of the facts."<sup>9</sup> Not only does this appear to be a request for the Panel to conduct an impermissible *de novo* review, but as before, Mexico makes little effort to substantiate this assertion. Mexico cites to *US - Wheat Gluten* and *US - Argentina Sunset*.<sup>10</sup> However, while both of these disputes involved ITC proceedings with both confidential and non-confidential records, *in neither dispute did the panel request the entire confidential record of the underlying ITC proceeding*. In fact, the panel in *US - Argentina Sunset* did not request *a single piece* of BCI from the confidential record of the underlying ITC sunset review even though the review was the subject of many of the same claims as those made by Mexico in this dispute.

5. Mexico also alleges that the United States "continues to rely on undisclosed confidential information to support its positions."<sup>11</sup> However, as the United States has demonstrated in numerous communications to the Panel – and, most recently, at the second meeting with the Panel – Mexico is simply wrong. Recall that Mexico had complained in the second Panel meeting that the United States had cited to confidential information in Table III-10A of the ITC Report in the U.S. second submission.<sup>12</sup> The United States demonstrated that, in fact, the only information cited by the United States in that table was non-confidential and had been reproduced *in toto* in the U.S. submission.<sup>13</sup> Mexico has since retracted that false assertion but continues to argue that "even in its Oral Statement last week, the United States referred the Panel to the export capability of Apasco, which is confidential."<sup>14</sup> This assertion too is false. The United States stated in its opening statement that Apasco "had imported during the original investigation and, . . . according to its parent firm, would have resumed importing if the order were revoked."<sup>15</sup> Again, the information to which the United States referred is in the non-confidential record.<sup>16</sup>

6. In addition, Mexico refers to the concurrent NAFTA dispute settlement process to make

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<sup>9</sup> Mexico's Responses to Panel's BCI Questions, response to Question 146(a).

<sup>10</sup> Mexico's Responses to Panel's BCI Questions, response to Question 146(a).

<sup>11</sup> See Answers to Mexico to the Questions by the Panel on BCI Procedures, response to 146(b) (May 12, 2005).

<sup>12</sup> See Answers to Mexico to the Questions by the Panel on BCI Procedures, response to 146(b) (May 12, 2005).

<sup>13</sup> See U.S. Second Written Submission, para. 55.

<sup>14</sup> Answers to Mexico to the Questions by the Panel on BCI Procedures, response to 146(b).

<sup>15</sup> U.S. Opening Statement at the Second Panel Meeting, para. 32 (May 12, 2005).

<sup>16</sup> See ITC Report at 37, n.221 (noting that "[t]he record indicates that Apasco, which could only export to the Florida and Gulf Coast of the United States by sea from its Veracruz terminal on the Gulf Coast of Mexico prior to the order, could now export to California by sea from its new plant in Tecoman and its associated marine terminal at Manzanillo on the Pacific Coast of Mexico") and IV-17 (noting that "[d]uring the original investigation, Apasco exported through the Port of Veracruz and had two plants located in the Gulf coast area"); ITC Report at IV-12, Figure IV-1 (showing Apasco's marine export terminals) and *El Financiero*, Petitioners' Prehearing Brief at Exhibit 70 (Exhibit US-13(d)) (Apasco's parent noting that revocation would be to its benefit because it "would be able to sell much more cement through its subsidiary Apasco").

the new argument that, because the entire administrative record<sup>17</sup> of the sunset review was indexed and made available to a NAFTA panel, the thousands of pages of documents in the confidential record are “pre-packaged”<sup>18</sup> and “available for immediate delivery to this Panel.”<sup>19</sup> This argument is not only factually incorrect – the indexing of documents and submission of them in a different forum has not rendered them “pre-packaged” or “available for immediate delivery” to the Panel – but it ignores important distinctions between the NAFTA and the WTO Agreement. As Mexico is presumably aware as a party to the NAFTA, a NAFTA panel stands in the place of a domestic court when it reviews an investigating agency’s final antidumping or countervailing duty determination.<sup>20</sup> Accordingly, the parties to the NAFTA agreed that an “investigating authority whose final determination is under review shall, within 15 days after the expiration of the time period fixed for filing a Notice of Appearance, file with the responsible Secretariat . . . two copies of the administrative record.”<sup>21</sup>

7. By contrast, WTO panels are asked to examine the narrow question of whether Members’ measures are in compliance with particular WTO obligations. In this context, the parties to the WTO Agreement did not see fit to impose an obligation on Members to file in the dispute settlement process the entire record of the administrative proceeding from which a claim of alleged WTO-inconsistency arose. In light of the particular task of WTO panels, it is difficult to conceive of any situation in which access to the *entire* record of a proceeding – whether public or confidential – would be required in a WTO dispute (indeed, no panel has ever made such a request before). Certainly, Mexico has provided no basis for the entire confidential record to be requested pursuant to DSU Article 13.1 in the instant dispute.

B. Access to BCI By Counsel for Mexican Cement Companies Who Are Not Counsel For Government of Mexico

8. As with the issue of the scope of the Panel’s March 17, 2005 request, the question of whether counsel for Mexican cement companies may have access to the requested BCI is settled. Under the Panel’s procedures, such counsel cannot have access.<sup>22</sup> While Mexico has previously argued that it would be “deprived of its right to counsel” if these counsel do not have access to

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<sup>17</sup> The “administrative record” consists of both the public and the non-confidential records of the underlying proceeding.

<sup>18</sup> Mexico’s Responses to Panel’s BCI Questions, response to Question 146(a).

<sup>19</sup> See Mexico’s Letter to the Panel at 1 (May 19, 2005).

<sup>20</sup> See NAFTA Articles 1904.1 (“each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review”), 1904.2 (a panel “determine[s] whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.”) and 1904.3 (“The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply in a review of a determination of the competent investigating authority.”).

<sup>21</sup> See Rule 41(c) of the NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews.

<sup>22</sup> See paragraph 12 of the Panel’s Additional BCI Procedures.

the BCI at issue, Mexico now confirms that the counsel at issue, in fact, “have not been retained by the Government of Mexico.”<sup>23</sup> As such, and for the reasons set out in the U.S. letter of May 12, 2005 and the U.S. responses to the Panel’s BCI questions, Mexico’s assertions regarding its asserted “right to counsel” are without merit.<sup>24</sup>

9. There is similarly no merit to Mexico’s argument that “[i]n case of a breach of the confidentiality rules of this Panel, . . . [the counsel to Mexican cement producers] are subject to sanctions under local Bar rules, the existing NAFTA Administrative Protective Order, and the inherent power of the Panel under the DSU.”<sup>25</sup> As the United States has explained in its responses to the Panel’s BCI questions, Mexico’s assertions about the “local Bar rules” are both irrelevant and unsubstantiated.<sup>26</sup> Indeed, as Mexico concedes, neither the District of Columbia Rules of Professional Conduct or the Rules of Professional Conduct of the Law Society of Upper Canada have ever been interpreted to permit the sanctioning of lawyers for a breach of the rules of a supranational body such as the WTO.<sup>27</sup> In addition, contrary to Mexico’s assertions, sanctions under the NAFTA APO procedures are not available for breaches of *WTO confidentiality rules*. Further, as is evident from the *Thailand - H-Beams* dispute, a panel has no “inherent power” under the DSU to impose sanctions if a party, or individual associated with a party, breaches the confidentiality provisions of the DSU or a panel’s working procedures.

10. In short, Mexico is demanding access to highly sensitive company-specific BCI for counsel for the chief competitors of the submitting companies – who have not even been retained by the Government of Mexico<sup>28</sup> – in disregard of the Panel’s Additional BCI Procedures. Moreover, it is doing so in a forum in which none of the safeguards that are available in U.S. domestic or NAFTA proceedings – where such access is permitted only on condition that unauthorized disclosure will be subject to the strictest sanctions – exist. For these reasons, the

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<sup>23</sup> Mexico’s Letter to the Panel at 2 (May 19, 2005).

<sup>24</sup> The United States would also note that Mexico’s response to Question 148 only confirms that Mexico’s assertion of prejudice would apply to *any* individuals named by Mexico, even though Mexico has previously accepted that there are limits on who it could name.

<sup>25</sup> Mexico’s Letter to the Panel at 2 (May 19, 2005).

<sup>26</sup> See U.S. Responses to Panel’s BCI Questions, response to Question 142.

<sup>27</sup> See Mexico’s Responses to Panel’s BCI Questions, response to Question 151. Mexico’s citation to various U.S. cases for the proposition that “state rules and policies on professional conduct apply in the context of international litigation” is entirely misplaced. None of the cited cases support that proposition. For example, in *In re Greenwald*, the D.C. Court of Appeals Committee on the Unauthorized Practice of Law (“CUPL”) confirmed that a lawyer who had been practicing in D.C. law firms for many years without applying for admission to the D.C. bar had engaged in the unauthorized practice of law, even though he claimed to have, for the most part, represented parties before foreign tribunals because “anyone who gives legal advice of any kind within the District of Columbia must comply with Rule 49 [prohibiting the unauthorized practice of law].” The question at issue thus was whether the lawyer had practiced law in the District of Columbia, not whether the D.C. bar ethics rules applied in the context of litigation or dispute settlement before international bodies such as the WTO. 808 A.2d 1231 (D.C. 2002).

<sup>28</sup> The United States notes Mexico’s invocation of the Panel’s working procedures at page 18 of Mexico’s Responses to Panel’s BCI Questions. The fact that Mexico has no formal relationship with these individuals also raises the question of how Mexico would exercise its responsibility to “ensure” that they would abide by the requirements of the Panel’s working procedures.

United States reiterates its request that the Panel grant the U.S. objection to the designation of the seven counsel for Mexican cement companies as “approved persons,” pursuant to the Panel’s Additional BCI Procedures.

C. Interpretation of Article 13.1 of the DSU

The United States notes with concern Mexico’s response to Panel Question 152(b), where Mexico says that only the panel has an obligation not to reveal confidential information provided to a panel under DSU Article 13. The Panel’s question specifically asked about any obligation on the parties. Mexico’s response demonstrates that Mexico would feel under no obligation under DSU Article 13 to protect confidential information provided to a panel, whether from another party or from another Member or person in another Member. As the United States explained in its response to this question, the obligation is not limited just to the panel, but applies to anyone receiving the information, including the parties.

D. Scheduling of Written Submissions and Hearing Regarding the March 17, 2005 BCI

11. Finally, in presenting its views on the “immediate next steps” with respect to the BCI, Mexico makes the surprising argument that because “the burden of proof rests upon the party . . . who asserts the affirmative of a particular defence,” the United States should “file first, to explain how the BCI data allegedly rebuts Mexico’s *prima facie* case. Mexico would then file a brief in reply to the United States, which would set out Mexico’s views on why the U.S. defence does not apply.”<sup>29</sup> Mexico’s argument ignores the consistent and longstanding U.S. position regarding the BCI and, in fact, flies in the face of Mexico’s own positions under which it pressed the Panel to gather the 17 March 2005 BCI.

12. First, the United States fails to understand to what “particular defence” Mexico is referring.<sup>30</sup> As in any WTO dispute, the burden rests on the complaining party – in this case, Mexico – to make a *prima facie* case of WTO-inconsistency.<sup>31</sup> For the reasons set out in the U.S. submissions, answers to the Panel’s questions, and discussions during the meetings with the Panel, Mexico has failed to make such a case with respect to its claims regarding the ITC’s sunset review.<sup>32</sup> The United States has not “assert[ed] the affirmative” of any “particular defence.” Rather, it has pointed out the significant and pervasive flaws in Mexico’s arguments that undercut its claims of WTO-inconsistency and prevent Mexico from establishing a *prima facie* case in the first place. Thus, the principle that the party “asserting the affirmative of a particular defence” bears the burden of proof is entirely inapposite under the circumstances.

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<sup>29</sup> Mexico’s Letter to the Panel at 2-3 (May 19, 2005).

<sup>30</sup> Mexico’s Letter to the Panel at 2-3 (May 19, 2005).

<sup>31</sup> See *US - Wool Shirts and Blouses (AB)*, p. 14, *EC - Hormones (AB)*, para. 104, *Canada - Dairy (Article 21.5 - New Zealand and US II) (AB)*, para. 66.

<sup>32</sup> See e.g. U.S. First Written Submission, paras. 78-264, U.S. Second Written Submission, paras. 3-72.

13. Second, Mexico, having consistently charged the United States with “relying on” the 17 March 2005 BCI<sup>33</sup> to rebut Mexico’s arguments (and also having consistently failed to substantiate that assertion), now wants the United States to “explain how the BCI data allegedly rebuts Mexico’s *prima facie* case.”<sup>34</sup> In fact, the U.S. position with respect to the 17 March 2005 BCI is well-known. It has been set out in great detail in numerous communications and submissions to the Panel in which the United States has demonstrated that its arguments do not depend on the BCI and that the Panel can, and should, make its findings on the basis of the information on the public record.<sup>35</sup> There is no reason for the United States to “file first” to explain, again, its position.

14. Third, the United States recalls that it is Mexico that demanded, in the first instance, that the Panel gather the BCI at issue because this would “facilitate the Panel’s assessment of the facts.”<sup>36</sup> Yet, Mexico now requests substantial periods of time – up to *five weeks*<sup>37</sup> – to prepare a submission to substantiate this assertion. Indeed, Mexico’s insistence that it be provided such a lengthy period to address the relevance of the BCI – and that the United States “file first” to express its views as to the relevance of the BCI – only calls into question why Mexico requested the disclosure of the BCI in the first place, and in fact substantiates the U.S. view that there was never any basis for Mexico to request such disclosure in this dispute.

15. In sum, it has been the consistent U.S. view that the issues in this dispute can be resolved on the basis of the public record. It was Mexico who originally requested the BCI, and who alone has argued that disclosure of such BCI will facilitate the Panel’s assessment of the facts in this dispute. Thus, if Mexico insists on maintaining its position, Mexico – and not the United States – should bear the burden of demonstrating the relevance of the BCI to the Panel. Should the Panel ask Mexico to file such an additional submission, the United States respectfully requests that it be provided a meaningful opportunity to respond. The United States notes, in this regard, that Mexico has proposed an entirely one-sided schedule under which the United States

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<sup>33</sup> See e.g. Mexico’s Request for Preliminary Ruling (February 15, 2005) (“The arguments advanced by the United States in its First Submission refer to, and partly rely on, primarily confidential information”); Mexico’s Responses to Panel’s Questions Regarding Preliminary Ruling Requests, para. 72 (“during the First Meeting of the Panel, Mexico submitted a list of confidential information relied upon by the United States in its First Submission to justify its determination.”).

<sup>34</sup> Mexico’s Letter to the Panel at 2-3 (May 19, 2005).

<sup>35</sup> See e.g. U.S. response to Question 20(a) of the Panel, dated March 2, 2005, in which the United States demonstrates that – with respect to each BCI item requested by Mexico – Mexico has not challenged the accuracy or validity of the non-confidential aggregate data that the United States has provided or the ITC’s factual findings to which the confidential data relate; U.S. Letter to the Panel (April 4, 2005); U.S. Second Written Submission, paras. 172-183.

<sup>36</sup> See Mexico’s Responses to Panel’s BCI Questions, response to Question 146(b).

<sup>37</sup> Under Mexico’s proposal it will have five weeks to prepare its submission addressing the BCI if, consistent with the Panel’s Additional BCI Procedures, counsel for Mexican cement producers are barred from accessing the 17 March 2005 BCI. If the counsel are granted access, Mexico requests a period of three weeks for preparation.

may have as little as one week – but Mexico may have over a month (five weeks) – to prepare a submission for the Panel.<sup>38</sup> Mexico's proposal is manifestly unfair and inconsistent with Article 12.4 of the DSU. Mexico has had the BCI since May 12, or almost two weeks. It should now be in a position to provide its arguments as to why the BCI is relevant to these proceedings and how it relates to Mexico's *prima facie* case. If the Panel determines it wishes to receive any further submissions, the United States respectfully requests that the Panel provide Mexico two days to provide its submission, and provide the United States approximately the same time as Mexico has had to prepare its submission - two weeks - to comment on that submission. Further, the United States would propose that the Panel refrain from definitively scheduling any additional meeting until after it receives such submissions. The United States is confident that the Panel will find, after receiving these submissions, that no additional meeting is necessary.

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<sup>38</sup> Mexico's Letter to the Panel at 3 (May 19, 2005).