

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

(WT/DS281)

**Answers of the United States to the Questions of
the Panel in Relation to the Third Substantive Meeting with the Parties**

August 5, 2005

A. NAFTA PANEL REPORT OF 24 JUNE 2005

Questions to both Parties Issued Prior to the Third Panel Meeting:

Q1. In light of the Panel’s Working Procedures and due process, what (if anything) should the Panel take into account when considering how to treat Exhibit MEX-197, which was submitted at this stage in the Panel proceedings?

1. As noted in the U.S. opening statement in the third Panel meeting, the evidence and argumentation regarding the NAFTA panel decision is tardy under the Panel’s working procedures.¹ Moreover, Mexico has not demonstrated any “good cause” that would allow this material to be accepted by the Panel at this late stage. Therefore, the Panel may properly refuse to accept it. Even leaving this aside, the NAFTA panel decision also has no bearing on the question of the relevance of the 17 March 2005 BCI to the issues in this dispute, which is the question that the parties were to address in their June 21 and July 11 submissions and to discuss at the third Panel meeting. Further, given that the NAFTA panel did not consider the consistency of the ITC’s sunset review determination with U.S. obligations under the AD Agreement, the NAFTA panel decision does not have relevance to the other issues in this dispute. For all these reasons, as well as the fact that the NAFTA panel process is still ongoing at present, the United States respectfully submits that the Panel should decline to take this late-filed evidence and argumentation into account in assessing the issues in dispute.

Q2. What is the legal effect of the NAFTA panel decision (in Exhibit MEX-197) within the US legal and administrative system? Does it, for example, “set aside” or “nullify” the sunset review determination in Exhibit MEX-9? What is the continuing live controversy before this Panel in light of the issuance of this NAFTA panel decision? Does the sunset review determination that is identified in this Panel’s terms of reference continue to be an existing measure that is properly before this Panel?

¹ See Working Procedures for the Panel, para. 14 (October 1, 2004).

2. The NAFTA panel decision is an interim ruling² and, as such, has no legal effect with respect to the antidumping measure under the U.S. legal and administrative system. The ITC is in the process of considering the NAFTA panel’s findings and instructions and will make a remand determination that takes these into account. The remand determination is due to be submitted to the NAFTA panel on September 22, 2005. After the complainants and ITC have an opportunity to submit comments on the remand determination, the NAFTA panel will consider the determination and issue another panel decision. Under the NAFTA, the NAFTA panel can affirm the ITC’s remand determination or remand again to the ITC.³ The original ITC determination (which is in Exhibit MEX-9) remains the legally effective determination under U.S. law throughout this process.⁴ A remand determination only becomes the new legally effective determination after the NAFTA panel has affirmed it and issued a Final Panel Action and, if it is challenged to a NAFTA Extraordinary Challenge Committee (“ECC”), after such a challenge has been completed.

3. As the sunset review determination in Exhibit MEX-9 is encompassed by this Panel’s terms of reference, the Panel may continue to consider Mexico’s claims with respect to that determination.

Q3. How if at all, would this situation be altered once the ITC issues its remand determination in response to this NAFTA panel? For example, would the USITC remand determination “replace” the determination in MEX-9?

4. As discussed above, an ITC remand determination will not replace the determination in Exhibit MEX-9 until it is affirmed by the NAFTA panel, a Final Panel Action is issued and any NAFTA ECC process is completed (in the case of a challenge). Until that point, the original determination is the legally effective determination.

² Contrary to Mexico’s assertion, *see* Preliminary Replies of Mexico to the Questions on the NAFTA Panel – MEX-197 at 1 (July 21, 2005)), NAFTA panel decisions are not judicial decisions. Moreover, NAFTA panel decisions are not precedential authority, even as to other NAFTA panels. NAFTA Article 1904.3 requires NAFTA panels to apply the general legal principles that a U.S. court would apply in reviewing a Commission determination. Accordingly, a NAFTA panel reviews whether an ITC antidumping or countervailing duty determination is in accordance with U.S. law, which consists of “the relevant statutes, legislative history, regulations, administrative practice and *judicial* precedents to the extent that a court of the . . . [United States] would rely on such materials in reviewing a final determination of the . . . [Commission].” NAFTA Article 1904.2 (emphasis added) (available at www.nafta-sec-alena.org).

³ NAFTA Article 1904.8 (available at www.nafta-sec-alena.org).

⁴ *See Co-Steel Raritan v. ITC*, 357 F.3d 1294, 1308 (Fed. Cir. 2004) (“The decision of the court in *Co-Steel I* was not a final decision because, rather than ending the litigation, it remanded the matter to the Commission for further proceedings. *See Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1375 (Fed. Cir. 2003) (stating that ‘the general rule is that decisions by a court remanding a matter to an agency are non-final and not appealable to a reviewing court’))” (Exhibit US-198).

Q4. Should the Panel continue its examination of the sunset review determination in Exhibit MEX-9? If so, on what legal basis?

5. This Panel may continue to consider Mexico's claims with respect to the sunset review determination because that determination is within the Panel's terms of reference.

Question to both Parties Issued Following the Third Panel Meeting:

Q214. Mexico contends, in the first instance, that the NAFTA panel report submitted as Exhibit MEX-197 constitutes persuasive authority and not evidence. In respect of what matters may the NAFTA panel report be considered as persuasive authority?

6. Mexico's contention that the remand decision of the NAFTA panel constitutes "authority" – whether persuasive or otherwise – with respect to this Panel's assessment of the issues in this dispute is simply incorrect.⁵ Contrary to Mexico's contentions, no provision of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") or any other covered agreement permits a remand decision of a binational panel considering an entirely different question, under a different (non-covered) agreement, and subject to different obligations to be "authority" with respect to a WTO panel's assessment of the matter before it. Indeed, as Mexico itself acknowledged in its preliminary answers to the Panel's questions, "the WTO Panel must determine whether the sunset review determination that is identified in the Panel's terms of reference is consistent with the *WTO obligations* of the United States. This matter is not addressed, considered, or resolved by the NAFTA Panel decision."⁶

Q.215 Mexico contends, in the alternative, that the NAFTA panel report submitted as Exhibit MEX-197 constitutes evidence. If so, what facts does the NAFTA

⁵ Specifically, Mexico had argued that "[j]ust as this Panel would wish to consider relevant WTO Panel or Appellate Body decisions that post-dated the First Meeting of the Panel, it can and should *equally consider* NAFTA or other decisions that post-date the First Meeting of the Panel." See Preliminary Replies of Mexico to Questions of the Panel on MEX-197 (emphasis added).

⁶ Preliminary Replies of Mexico to the Questions on the NAFTA Panel – MEX-197 at 3 (July 21, 2005) (emphasis in original). The United States recalls that, at the third Panel meeting, Mexico suggested that in the *Mexico - HFCS* dispute, the United States had argued that a WTO panel *should* take into account findings made by a NAFTA panel regarding the same measure at issue in a WTO dispute settlement proceeding. Mexico's assertion is incorrect and based on a mischaracterization of the U.S. arguments in *Mexico - HFCS*. In fact, the United States was simply pointing out that certain of the arguments made by Mexico in the WTO dispute were inconsistent with arguments on the same issues made by SECOFI, the Mexican investigating authority, in a public brief it had filed in a concurrent NAFTA proceeding. See *US - Mexico HFCS (Panel)*, paras. 5.89-5.136 and 7.31-7.34. Indeed, the United States could not have made arguments about a NAFTA panel decision because the panel in the concurrent NAFTA proceeding had not even held hearings, let alone issued any decision, at the time the parties were making their arguments in *Mexico - HFCS*. See *US - Mexico HFCS (Panel)*, para. 5.95, n. 72.

panel report evidence, and what relevance, if any, do such facts have for this Panel's assessment of the matter before it?

7. The NAFTA panel report submitted as Exhibit MEX-197 does not constitute “evidence” of any facts that are before this Panel. Rather, the fact of which the NAFTA panel report is “evidence” is that a binational panel, reviewing the ITC’s sunset review determination under U.S. law, affirmed the ITC’s sunset review determination in part and remanded six issues back to the ITC for a determination not inconsistent with the NAFTA panel’s findings and instructions. As this Panel is not tasked with assessing whether the ITC’s sunset review determination is in accordance with U.S. law, this fact does nothing to further the Panel’s assessment of the issues before it. This Panel’s assessment, as Mexico has pointed out, must focus on “whether the sunset review determination that is identified in the Panel’s terms of reference is consistent with the *WTO obligations* of the United States.”⁷

Q.216 In so far as Mexico relies upon the NAFTA panel report for its reasoning rather than its underlying facts, what value, if any, does that have for the Panel's assessment of the matter pursuant to Article 11 of the DSU and Article 17.6(ii) of the Anti-dumping Agreement?

8. The Panel is directed by Article 11 of the DSU to make an “objective assessment” regarding the conformity of the facts of a matter with the relevant provisions of the covered agreements. Article 17.6(ii) of the AD Agreement states that, where a Member’s measure rests on one of a number of permissible interpretations of a provision, the Panel shall find the measure to be in conformity with that agreement. Both provisions confirm that the question for a WTO panel is whether a particular measure is consistent with the *covered* agreements, not whether the measure is in accordance with the domestic law of the defending Member. As the reasoning of the NAFTA panel deals only with the latter question and, as Mexico acknowledges, does not “address, consider, or resolve” any question of WTO-consistency,⁸ that reasoning is of no value for the Panel’s assessment of the matter pursuant to Article 11 of the DSU and Article 17.6(ii) of the AD Agreement.

B. USITC’S DETERMINATION OF LIKELIHOOD OF INJURY

To both Parties:

Q217. Given the USITC's finding that the domestic industry in the Southern Tier was not in a vulnerable position at the time of the sunset review, is there a need, in the light of the analysis and determination required under Article 11.3, to assess whether the non-vulnerability of the industry arose because of

⁷ Preliminary Replies of Mexico to the Questions on the NAFTA Panel – MEX-197 at 3 (emphasis in original).

⁸ Preliminary Replies of Mexico to the Questions on the NAFTA Panel – MEX-197 at 3.

**the protection against dumped imports that was in place at the time or
whether it was the result of some other factor?**

9. The United States notes, at the outset, that different obligations do not apply under Article 11.3 of the AD Agreement when a sunset review proceeding involves a domestic industry that is in a vulnerable position and when it involves an industry that is in a non-vulnerable position at the time of the proceeding. To the contrary, in all sunset proceedings pursuant to Article 11.3, investigating authorities are directed to ask the same question – whether “expiry of the duty would be likely to lead to continuation or recurrence of . . . injury.” Moreover, as the Appellate Body has recognized, Article 11.3 does not prescribe any particular methodological approach that is to be used or particular factors that are to be assessed in answering this question.⁹ Thus, Article 11.3 does not impose any general obligation on investigating authorities to determine whether an industry is “vulnerable” at the time of the sunset review proceeding and, if it is found not to be, to ascertain the reasons it is not vulnerable before making a determination as to the likelihood of injury in the event of revocation.

10. Indeed, as the nature of the inquiry under Article 11.3 is forward-looking and counterfactual in nature, consideration of the extent to which the *present* state of the industry is attributable to protection against dumped imports (a backward-looking inquiry) is not directly relevant to the Article 11.3 inquiry. It is relevant only to the extent that it sheds light on the chief question of whether “expiry of the duty would be likely to lead to continuation or recurrence of . . . injury.” The U.S. statute recognizes this and requires the ITC to “take into account . . . whether any improvement in the state of the industry is related to the [antidumping duty] order or the suspension agreement.”¹⁰ This is simply one consideration, however, in the overall assessment of likelihood and is not central to the ITC’s analysis.

11. Consistent with the U.S. statute, in the sunset review at issue, the ITC found, based on comparisons of the industry’s condition before and after the imposition of the order, that “[t]he order appears to have had a beneficial effect on the regional industry’s performance.”¹¹ The record evidence demonstrated, however, that, without the restraining effect of the antidumping order, the regional industry would be likely to face a significant increase in subject imports with accompanying negative price effects, and that this would be likely to have an adverse impact on

⁹ Specifically, the Appellate Body observed in *US - Argentina Sunset* that “Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination.” *US - Argentina Sunset (AB)*, para. 281 (quoting Appellate Body’s report in *US - Japan Sunset*, para. 123 and noting that “[a]lthough the Appellate Body made this statement in the context of a likelihood-of-dumping determination, it applies equally with respect to a likelihood-of-injury determination.”)

¹⁰ 19 U.S.C. § 1675a(a)(1)(B) (Exhibit MEX-5).

¹¹ ITC Report at 40 (Exhibit MEX-9).

the regional industry.¹² Based on this, the ITC properly determined that revocation of the antidumping order would be likely to lead to recurrence of injury.

Q218. Each of the parties refers to the likelihood that CEMEX would, in the absence of the anti-dumping duty order, substitute imports of cement from non-subject products with imports of cement from Mexico. Each of the parties contends that the likelihood of this substitution advances its case. Can the arguments of each of the parties be reconciled or is the acceptance of one necessarily destructive of the other?

12. There is an important distinction between the U.S. and Mexican arguments regarding the likelihood of substitution of subject imports for non-subject imports. The U.S. arguments recognize that dumped Mexican imports of cement are the focus of a likelihood of injury determination and that fairly-traded non-subject imports are not. Mexico's arguments do not recognize this. Nonetheless, the arguments are somewhat reconcilable in that Mexico's argument is consistent with the ITC's finding that *subject imports* would be likely to increase significantly if the order were revoked,¹³ as were the statements regarding substitution made by Mexican respondents at the ITC hearing.¹⁴ Indeed, Mexico itself confirmed to the Panel that "CEMEX alone accounted for almost three million tons of non-subject imports."¹⁵

13. Moreover, contrary to Mexico's suggestion, the ITC did not limit its likely volume of subject imports finding to the likelihood of CEMEX's substitution of dumped Mexican imports for non-subject imports. The ITC's findings were also based on substantial record evidence including, *inter alia*, (a) statements by a CEMEX official to the Mexican business press, which were confirmed in an affidavit to the ITC, that "if the antidumping duty order was revoked, imports of cement to the United States could reach four million tons per year," thereby tripling the level of subject imports from Mexico; (b) evidence that Mexican respondents had substantial excess production capacity with which to supply the intended substantial increases in subject imports; and (c) the fact that Mexican imports had increased even with the order in place.¹⁶

Q219. The USITC states that the Mexican respondents had both the "ability and incentive" to increase exports to the Southern Tier in the absence of the anti-dumping duty order.

¹² U.S. First Written Submission, paras. 158-246; U.S. Opening Statement at First Panel Meeting, paras. 18-32; U.S. Second Written Submission, paras. 28-69; U.S. Opening Statement at Second Panel Meeting, paras. 12-33.

¹³ ITC Report at 36-38 and 42 (Exhibit MEX-9).

¹⁴ Hearing Transcript at 160-161 (Exhibit US-127).

¹⁵ Mexico Opening Statement at First Panel Meeting, para. 81. CEMEX's actual non-subject import volume is confidential but was listed in note 64 of the ITC's confidential staff report at page I-49; this page and note were provided to the Panel on May 12, 2005 and identified as "Referenced in Mexican Items 1 and 3."

¹⁶ *See, e.g.*, U.S. First Written Submission, paras. 163-198; U.S. Second Written Submission, para. 31-40.

(a) To what extent and how (through which specific facts) did the USITC examine whether the factors that they considered relevant to the question of "ability and incentive" meet the standards of likelihood of injury in Article 11.3?

14. It is helpful, at the outset, to place the ITC's statement referenced above in its proper context. The ITC's statement that "[t]he evidence shows that Mexican producers have the ability and incentive to increase exports to the Southern Tier region, notwithstanding their regional operations,"¹⁷ was made in the context of the ITC's analysis of the likely volume effects of subject imports in the event of revocation, which itself was part of the ITC's larger assessment of whether revocation of the antidumping order would be likely to lead to continuation or recurrence of injury. Therefore, the ITC was not, in making the referenced statement about the "ability and incentive" of the Mexican producers, making a separate inquiry or applying a different standard other than the likelihood of injury set out in Article 11.3. Rather, the ITC's consideration of the abilities and incentives of the Mexican producers was part of its overall analysis of likely volume effects and, therefore, the likelihood of injury.

15. The evidence that led the ITC to conclude that Mexican producers had the "ability and incentive" to increase exports to the Southern Tier region was consistent with, and confirmed, other record evidence that also demonstrated that "the volume of subject imports entering the Southern Tier region likely would be significant in the reasonably foreseeable future if the antidumping order is revoked" and formed a part of this finding by the ITC.¹⁸ Specifically, the record of the ITC sunset review contained statements by CEMEX officials that if the order were revoked (a) Mexican imports could reach four million tons, thereby tripling Mexican imports, and (b) CEMEX would substitute its substantial volume of non-subject imports with subject imports.¹⁹ Although statements such as these suggested that the volume of subject imports was likely to increase substantially in the event of revocation, the ITC did not choose to rely on them without examining the evidence to determine whether there was a factual basis for them. In furtherance of this, the ITC asked whether Mexican producers had the ability to supply additional subject imports in the volumes that CEMEX's statements indicated such imports likely would increase and whether they had the incentive to effect such increases in subject imports should the order be revoked.

16. The record evidence demonstrated that Mexican producers had substantial excess production capacity and more export and import infrastructure than during the original investigation so as to supply a substantially increased volume of subject imports.²⁰ For example, the evidence demonstrated that the excess capacity of Mexican producers for cement in 1999 was

¹⁷ ITC Report at 38 (Exhibit MEX-9).

¹⁸ ITC Report at 38 (Exhibit MEX-9).

¹⁹ ITC Report at 36-38. (Exhibit MEX-9). *See, e.g.*, U.S. First Written Submission, paras. 163-169.

²⁰ ITC Report at 36-38 (Exhibit MEX-9). *See, e.g.*, U.S. First Written Submission, paras. 170-198.

at a level equal to almost one-fifth of 1999 regional apparent consumption, and (even if one were to consider only the amounts reported by Mexican respondents as being “exportable” excess capacity) about double the additional 2.8 million short tons that CEMEX indicated could be exported if the order was revoked.²¹ Mexican producers not only had the ability to export in substantially increased volumes, consistent with CEMEX’s statements, but also had the incentive to improve capacity utilization levels by producing more cement. Mexican producers’ excess capacity levels were substantial for this highly capital intensive industry, where high fixed costs necessitate that production facilities operate at high capacity utilization levels in order to maximize return on investment.²² Thus, the ITC found that the Mexican producers had the “ability and incentive” to significantly increase exports to the Southern Tier region. In so doing, it was affirming that the record evidence supported CEMEX’s statements that Mexican producers likely would increase subject imports if the order was revoked.

17. The ITC found that the totality of the facts supported a finding that there would likely be a substantial increase in the volume of subject imports if the order were to be revoked. This included, *inter alia*, (a) the fact that the United States was the main market for Mexican imports; (b) Mexican imports had increased even with the order in place; (c) the statements by CEMEX officials that CEMEX could triple the volume of imports to the United States if the order were revoked (*i.e.* increasing Mexican imports by 2.8 million short tons); (d) the evidence that Mexican respondents had substantial excess production capacity; and (e) the statements by CEMEX officials that CEMEX would likely substitute much of its significant volume of non-subject imports with subject imports in the event of revocation.²³ The ITC’s finding was clearly based on positive evidence²⁴ and involved an objective and unbiased evaluation of properly established facts.²⁵

- (b) To what extent and how (through which specific facts) was the USITC able to satisfy itself that the \$3 per ton savings on transportation costs that would result from the substitution of certain non-subject imports with imports from Mexico would result in CEMEX selling its cement at lower prices rather than taking up that saving as profit?**

18. CEMEX officials testified at the ITC hearing that CEMEX would realize a cost savings of \$3 per ton if it were to replace the cement imports from China that it was selling at that time in the United States with cement from Mexico if the antidumping duty order were removed.²⁶

²¹ See, e.g., U.S. First Written Submission, paras. 170-182

²² ITC Report at 35 (Exhibit MEX-9).

²³ See, e.g., U.S. First Written Submission, paras. 163-198; U.S. Second Written Submission, para. 31-40.

²⁴ *US-Argentina Sunset (AB)*, para. 321, quoting *US-Japan Sunset (AB)*, para. 114.

²⁵ Article 17.6(i) of the AD Agreement.

²⁶ Hearing Transcript at 172 and 175. (Exhibit US-127). According to CEMEX’s economist “[w]hat you would see is a change in sourcing patterns should the order be removed. It says what, \$3 a ton to bring it from Mexico

CEMEX's economist acknowledged that the \$3 per ton cost savings was "not an insignificant amount."²⁷ Thus, the ITC found that the difference of \$3 per ton was substantial, particularly for a highly-substitutable, price-sensitive product, such as cement.²⁸

19. The ITC recognized that these reduced transportation costs provided CEMEX with the flexibility to lower its price for cement imports from Mexico in the U.S. market without reducing its then existing profit margins. The ITC reasonably concluded that "[s]uch a substitution would allow CEMEX to lower its prices in the Southern Tier region to reflect decreases in transportation costs for Mexican imports compared to those for more distant non-subject sources."²⁹ Moreover, the evidence demonstrated that CEMEX not only had the flexibility to lower prices but likely also would do so rather than keep the cost savings as profit. The record evidence included, *inter alia*, (a) the fact that high fixed costs faced by cement producers provide significant incentive to the Mexican producers to sell their additional excess product even at low prices in order to meet their fixed costs;³⁰ (b) the consideration that, free of the high cash deposit rates to which Mexican imports had been subject under the order, Mexican imports could be priced significantly lower in the United States;³¹ and (c) the evidence that Mexican imports predominantly undersold the domestic product, even with the order in place, in the Arizona markets³² where the Mexican producer supplied imports from a plant with excess capacity and competed with two domestic producers, California Portland and Phoenix Cement. The evidence of predominant underselling during the period of review in the markets supplied by CEMEX's Hermosillo/Campana plant, which a CEMEX official acknowledged had excess capacity at the ITC's hearing,³³ indicated that CEMEX would sell its cement at lower prices rather than take up all of that transportation cost savings as profit.³⁴

rather than from China. That's not an insignificant amount and it rationalizes worldwide capacity." *Id.* at 175.

²⁷ Hearing Transcript at 175. (Exhibit US-127).

²⁸ ITC Report at 39, n.238 (Exhibit MEX-9).

²⁹ ITC Report at 39 (Exhibit MEX-9).

³⁰ ITC Report at 35. (Exhibit MEX-9).

³¹ ITC Report at 39. (Exhibit MEX-9).

³² The evidence showed that subject imports from Mexico predominantly undersold the domestic product in the Phoenix, AZ market (36 of 39 months), with consistent underselling from August 1998 to March 2000, and mixed underselling in the Tucson, AZ market (20 of 39 months). ITC Report at V-5 and Tables V-4, F-16, and F-17 (Exhibit MEX-9).

³³ Hearing Transcript at 177 (Exhibit US-127). CEMEX's Ms. Clyburn stated "[w]e have a 20 percent market share in Arizona today, with cement source from Hermosillo, the Campana plant. We have two, three actually now in the last two years, three terminals that are rail-fed from the Hermosillo plant that cross the border at Nogales and come into Phoenix, Chandler, and Tucson. . . . There is excess capacity in Hermosillo today." *Id.*

³⁴ There also was some evidence, which was provided by domestic producers, that the comparative analysis conducted by CEMEX's economist stipulated that Mexican cement would replace non-subject imports at prices that would be considerably lower than non-subject imports in 2000. See CEMEX's Prehearing Brief, Exhibit 37, Table 2 (Exhibit MEX-119) and Domestic Producers' Posthearing Brief at 18 (Exhibit US-13).

C. MEANING OF ARTICLE 4.1(ii)

To both Parties:

Q221. What, if anything, is the Panel to make of the fact that the second sentence of Article 4.1(ii) appears in the part of the Anti-dumping Agreement setting out the "definition" of a domestic industry?

20. Article 4 sets out rules for interpreting the term “domestic industry” and also includes certain provisions that apply when “domestic industry” is interpreted to mean the industry in a regional market pursuant to the first sentence of Article 4.1(ii). One of these provisions is the second sentence of Article 4.1(ii), which sets out the conditions under which “injury may be found to exist” where the industry concerned is a regional industry as defined in the first sentence of Article 4.1(ii).³⁵ The fact that this provision appears in an article entitled “Definition of Domestic Industry” does not add anything to the understanding of the nature and scope of that provision, which is established by the text of the provision.

Q222. Please comment on whether or not the second sentence of Article 4.1(ii) applies as part of the definition of a domestic industry for the purpose of Article 5.1 of the Anti-dumping Agreement.

21. The second sentence of Article 4.1(ii) does not apply to Article 5.1 of the AD Agreement as part of any definition of “domestic industry.” As explained above, the second sentence of Article 4.1(ii) sets out conditions under which “injury may be found to exist” *once “domestic industry” has been interpreted to mean a regional industry*. It does not itself govern how the term “domestic industry” is to be interpreted, and is no more a part of a definition of “domestic industry” than are the obligations in Article 4.2 regarding the levying of antidumping duties.

22. Reading the conditions in the second sentence of Article 4.1(ii) into a definition of “domestic industry” for purposes of Article 5.1 would not only be contrary to the text of Article 4.1, but it would render Article 5.1 incoherent. Article 5.1 provides that “[e]xcept as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.” If “domestic industry” in Article 5.1 were somehow to be interpreted with reference to the second sentence of Article 4.1(ii), an investigating authority would, presumably, have to consider whether there is a “concentration of dumped imports” into a regional market and whether “dumped imports are causing injury to the producers of all or almost all of the production within such market” in order to determine whether an application is “by or on behalf of the domestic industry.” An application is submitted, however, for the purpose of *initiating* an investigation to

³⁵ The other provision is Article 4.2, which sets out obligations regarding the levying of antidumping duties under regional market circumstances.

determine whether injurious dumping exists. It would be entirely circular to suggest that an investigating authority must take into account, as part of the decision to initiate an investigation, those things that only the investigation itself will reveal.

23. Nor is it appropriate to carve out the “all or almost all” language from the second sentence of Article 4.1(ii) and read only this into other provisions of the AD Agreement as part of a definition of “domestic industry,” as Mexico has advocated in this dispute. As discussed below in response to Question 228(c), this would be contrary to both the text of the AD Agreement and applicable rules of treaty interpretation. Doing so with respect to Article 5.1 would also undermine Article 5.4 of the AD Agreement. Specifically, Article 5.1 of the AD Agreement permits the initiation of an investigation based on an application made “by or on behalf of the domestic industry.” Under Mexico’s approach, an investigating authority presented with an application by a regional industry could only find that the application had been made “by or on behalf of the domestic industry” if it were made “by or on behalf of” producers accounting for “all or almost all of the production” within the regional market. Article 5.4 expressly states, however, that:

[t]he application [for initiation of an investigation, which is referred to in Article 5.1,] shall be considered to have been made ‘by or on behalf of the domestic industry’ if it is supported by those domestic producers whose collective output constitutes *more than 50 per cent of the total production* of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

There is no exception to the 50 percent standard for applications made by or on behalf of regional industries. Nor is there any suggestion in the text that this rule is rendered inapplicable in regional industry cases by operation of the second sentence of Article 4.1(ii).

24. The fact that Mexico’s approach would undermine Article 5.4 also confirms that neither the second sentence of Article 4.1(ii), nor the “all or almost all” standard therein, applies as part of any definition of “domestic industry” to other provisions of the AD Agreement.

Q223. Can the second sentence of Article 4.1(ii) be characterised as a discretionary power that Members may exercise? If so, what significance does this have as to whether the second sentence forms a part of the definition of a domestic industry?

25. The second sentence of Article 4.1(ii) sets out conditions under which injury may be found to exist where the market has been defined as a regional market pursuant to the first sentence of Article 4.1(ii). Article 4.1(ii) second sentence allows for a finding of injury to be made with reference only to the regional industry if two provisos are satisfied: if the investigating

authority finds that “there is a concentration of dumped imports into” a regional market and “the dumped imports are causing injury to the producers of all or almost all of the production within such market.”

26. The *first* sentence of Article 4.1(ii) may be characterized as discretionary in the sense that Members have a choice in whether to divide their territory into two or more competitive markets – *i.e.* they can choose to do so if they find that the market conditions described in parts (a) and (b) of the first sentence of Article 4.1(ii) exist. However, *if* a Member defines the market as a regional market *and* undertakes to make a determination of injury only with respect to the producers in that regional market, it must find that the two provisos in Article 4.1(ii) second sentence are satisfied in order to find that injury exists.

27. With respect to the Panel’s second question above, as explained in response to Questions 221-222 and 228, neither the second sentence of Article 4.1(ii), nor the “all or almost all” standard therein, is part of any definition of “domestic industry.” The characterization of the provisions in the second sentence of Article 4.1(ii) as “mandatory” or “discretionary” does not alter that conclusion.

Q224. To what extent must the second sentence of Article 4.1(ii) be applied during an original investigation involving a regional industry as defined in the first sentence of Article 4.1(ii)? Can you envisage a situation when the second sentence of Article 4.1(ii) will not apply during an original investigation involving a regional industry as defined in the first sentence of Article 4.1(ii)? Please explain your answer.

28. The second sentence of Article 4.1(ii) is implicated in any circumstance in which “domestic industry” has been interpreted as referring to a regional industry, pursuant to the first sentence of Article 4.1(ii), *and* an investigating authority is making a determination of whether injury exists with respect to that regional industry. Accordingly, in an original investigation involving a regional industry as defined in the first sentence of Article 4.1(ii), a determination of injury can only be made with reference to the regional industry if the two provisos in Article 4.1(ii) second sentence are satisfied.

Q225. What, if anything, does the drafting history reveal about the interpretation of the second sentence of Article 4.1(ii), and how might that assist the Panel in interpreting Article 4.1(ii)?

29. The drafting history confirms what the text of Article 4.1 clearly shows, that the second sentence of Article 4.1(ii) applies only with respect to determinations of *injury*. The text of Article 4.1 of the AD Agreement is nearly identical to Article 4.1 of the Tokyo Round Agreement on Implementation Article VI of the General Agreement on Tariffs and Trade (“AD Code”), with one relevant exception. Whereas Article 4.1 of the AD Code had provided that the rules therein governing interpretation of “domestic industry” applied only “in determining

injury,”³⁶ Article 4.1 of the AD Agreement provides that these rules apply “for purposes of this Agreement.”³⁷ Although this change was effected in the application of the rules governing interpretation of “domestic industry,” no such change was made with respect to the second sentence of Article 4.1(ii). In both the AD Code and the AD Agreement, these sentences are identical. They both set out identical conditions under which “injury may be found to exist” in regional industry cases.

30. Thus, in the AD Code, the entirety of Article 4.1 – both the provisions governing interpretation of “domestic industry” and those setting out the conditions under which injury may be found to exist in regional industry cases – applied only when an investigating authority was making a determination of injury. The drafters of the AD Agreement retained this limitation with respect to the provisions regarding findings of injury in regional industry cases by leaving them exactly as they were. If the drafters had intended to apply the conditions in the second sentence of Article 4.1(ii) to contexts other than injury determinations, they certainly could have done so, but they did not. Mexico cannot now ask the Panel do what the drafters specifically decided not to do.³⁸

Q226. What do the words "in exceptional circumstances" add, if anything, to the requirements set out in parts (a) and (b) of the first sentence of Article 4.1(ii)? Is there some additional content in the words "in exceptional circumstances" that is not already caught in parts (a) and (b) of the first sentence of Article 4.1(ii)? If not, how are the words "in exceptional circumstances" to be read without redundancy, particularly in the light of the prefatory words "except that" used in the chapeau of Article 4.1?

³⁶ Article 4.1 of the AD Code reads, in relevant part, as follows:

In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that . . . (ii) in exceptional circumstances the territory of a Party may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

³⁷ The Carlisle 1 and 2 drafts replaced the phrase “in determining injury” with the phrase “for the purpose[s] of this Code.” However, the three New Zealand drafts, the Ramsauer draft, and the Dunkel draft all reverted back to the “in determining injury” formulation. It was only in the final AD Agreement itself that the current “for purposes of this Agreement” formulation was incorporated.

³⁸ See DSU Articles 3.4 and 19.2.

31. The words “in exceptional circumstances” do not create any requirements in addition to those set out in parts (a) and (b) of the first sentence of Article 4.1(ii). However, they do serve to characterize the circumstances described therein – where producers sell all or almost all of their production of the product in question into the regional market and demand in that market is substantially supplied by those producers – as unusual.³⁹ The U.S. experience bears this out; the vast majority of antidumping proceedings in the United States involve national industries. Very few industries have the characteristics of regional industries as they are described in the first sentence of Article 4.1(ii). Indeed, even Mexico, in its statement before the Panel at the third meeting acknowledged that “[r]egional industry cases are unusual.”⁴⁰

32. The United States understands the words “in exceptional circumstances” to reflect the unusual nature of the circumstances described in (a) and (b). Therefore, the United States perceives no redundancy in the use of those words following the words “except that” in the chapeau of Article 4.1. The fact that something is an exception does not necessarily imply that the circumstances of the exception are exceptional or unusual.

Q227. What does the reference to "such circumstances" in the second sentence of Article 4.1(ii) mean? Does the absence of the word "exceptional" in this text have any significance? Please explain your answer.

33. The words “in such circumstances” in the second sentence of Article 4.1(ii) refer to the circumstances that are described in the immediately preceding sentence, *i.e.* the exceptional circumstances under which a Member may divide its territory into two or more competitive markets and consider the producers in each to be a separate industry. As the “such” in the “in such circumstances” language necessary refers to the “exceptional circumstances” described in the first sentence of Article 4.1(ii), it is not significant that the word “exceptional” is not repeated in the second sentence of Article 4.1(ii).

Q228. The Panel understands the United States to accept that the first sentence of Article 4.1(ii) is of application in a sunset review proceeding involving a regional industry, but that the second sentence is not of application in such a proceeding.

(a) If the second sentence of Article 4.1(ii) is not of application in a sunset review proceeding involving a regional industry, is the "all or almost all" standard set out in the second sentence of Article 4.1(ii) nevertheless part of the Article 11.3 assessment

³⁹ The ordinary meaning of the word “exceptional,” is, *inter alia*, “unusual, out of the ordinary.” *The New Shorter Oxford English Dictionary* at p. 872 (Clarendon Press: Oxford 1993) (Exhibit US-199).

⁴⁰ Preliminary Replies of Mexico to the Questions on the NAFTA Panel – MEX-197, para. 13.

**of likelihood of injury that an investigating authority must
undertake in a regional industry case?**

34. To be clear, the U.S. position is that the second sentence of Article 4.1(ii) describes the conditions under which a determination of *injury* may be made in situations where the territory of a Member is subdivided into two or more markets and the producers in each considered a separate industry. The second sentence of Article 4.1(ii), by its express terms, imposes no obligations with respect to the likelihood of injury assessment that an investigating authority undertakes in a sunset review proceeding pursuant to Article 11.3. Nor is there any textual indication – such as a cross-reference in one of the provisions to the other – that might indicate that the obligations in the second sentence of Article 4.1(ii) were intended to apply to a likelihood of injury determination. This can be contrasted with another provision, Article 11.4, which does expressly apply certain of the provisions of another article to Article 11 reviews.⁴¹ Cross-references such as the one in Article 11.4 demonstrate that where the drafters wanted the obligations set forth in one provision to apply in another context, they did so expressly. The absence of such a cross-reference to the obligations in the second sentence of Article 4.1(ii) in connection with likelihood of injury proceedings under Article 11.3 must be given some meaning.

35. Further, imputing the obligations in the second sentence of Article 4.1(ii) to likelihood of injury determinations under Article 11.3, as Mexico has advocated, would result in reading the term “recurrence” out of Article 11.3 of the AD Agreement. Under Mexico’s approach, an affirmative likelihood determination could be made under Article 11.3 of the AD Agreement only where “the dumped imports *are causing* injury to the producers of all or almost all of the production within such market.” In other words, Mexico’s approach would require that there be both present dumping and present injury in order to make an affirmative likelihood determination. Article 11.3 specifically contemplates, however, that investigating authorities may be faced with a situation in which there is no present dumping or present injury. Otherwise, there would be no need for Article 11.3 to reference “*recurrence* of dumping and injury.” Mexico’s interpretation would render the reference to “recurrence of dumping and injury” a nullity.

36. Just as the obligations in the second sentence of Article 4.1(ii) cannot be read wholesale into Article 11.3, there is no basis for carving out only the “all or almost all” language from the second sentence of Article 4.1(ii) and grafting just this onto Article 11.3. This would be tantamount to reading into Article 11.3 words that are not there. The Appellate Body has clarified that this is not permitted:

⁴¹ Article 11.4 applies “[t]he provisions of Article 6 regarding evidence and procedure” to any review conducted under Article 11.

The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.⁴²

The Appellate Body also reasoned that reading new words and concepts into treaty provisions would be inconsistent with Articles 3.2 and 19.2 of the DSU, which provide that the dispute settlement process cannot be used to add to or diminish rights and obligations provided in the WTO Agreement.⁴³

37. The fact that Article 4.1(ii) directs investigating authorities to consider whether injury exists with respect to “all or almost all” of a regional industry when making a determination of injury but Article 11.3 does not obligate authorities to consider whether revocation of an antidumping duty order is likely to lead to “all or almost all” of a regional industry when making a determination of the likelihood of injury is not surprising given the different “nature and purpose” of these two determinations.⁴⁴ As the Appellate Body has observed

[o]riginal investigations require an investigating authority, in order to *impose* an anti-dumping duty, to make a determination of the existence of dumping in accordance with Article 2, and subsequently to determine, in accordance with Article 3, whether the domestic industry is facing injury or a threat thereof at the time of the original investigation. In contrast, Article 11.3 requires an investigating authority, in order to *maintain* an anti-dumping duty, to review an anti-dumping duty order that has already been established – following the prerequisite determinations of dumping and injury – so as to determine whether that order should be continued or revoked.⁴⁵

38. Thus, as the Appellate Body’s analysis recognizes, the question of whether revocation of an antidumping order is likely to lead to continuation or recurrence of injury is a forward-looking, counterfactual inquiry that is necessarily different from the question of whether an

⁴² *India - Patents (AB)*, para. 45.

⁴³ *India - Patents (AB)*, para. 46. Article 3.2 of the DSU provides that the dispute settlement system of the WTO “serves to preserve the rights and obligations of the Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” DSU Article 19.2 provides that in their findings and recommendations, panels and the Appellate Body “cannot add to or diminish the rights and obligations provided in the covered agreements.”

⁴⁴ See *US - Argentina Sunset (AB)*, para. 279; *US - Japan Sunset (AB)*, para. 124.

⁴⁵ See *US - Argentina Sunset (AB)*, para. 279.

industry is presently facing injury due to dumped imports and the two inquiries may logically be subject to different WTO obligations.

- (b) If the "all or almost all" standard is not a part of the Article 11.3 assessment of likelihood of injury that an investigating authority must undertake in a regional industry case, is it nevertheless the Panel's task to assess whether the determination of likelihood of injury in a sunset review proceeding involving a regional industry satisfied the standards of Article 11.3?**

39. Yes. To the extent that a determination of the likelihood of injury is properly within the Panel's terms of reference and a claim is made under Article 11.3 of the AD Agreement with respect to it, the Panel is tasked with considering whether the likelihood of injury determination conforms to the obligations set out in Article 11.3. This is true regardless of whether the likelihood of injury determination pertains to the domestic industry in a market comprising the entire territory of a Member or in a regional market.

- (c) If the second sentence of Article 4.1(ii) is not of application in a sunset review proceeding involving a regional industry, to what extent is the Panel required to nevertheless examine whether the USITC analysis under the standard arguably "voluntarily adopted" by the USITC -- i.e., the "all or almost all" standard -- satisfied the requirements of Article 4.1(ii) and/or Article 11.3?**

40. The assumption underlying this question is that, although the ITC was not obligated to conduct the assessment described in the second sentence of Article 4.1(ii) in the course of the Article 11.3 sunset review, it nonetheless "voluntarily" did so. This is not correct. The inquiry contemplated in the second sentence of Article 4.1(ii) is regarding the *existence of injury* in circumstances where the territory of a Member is subdivided into two or more markets and the producers in each considered a separate industry. In such circumstances, a finding may be made about the *existence of injury* if, *inter alia*, "the dumped imports are causing injury to the producers of all or almost all of the production within such market."

41. In the sunset review at issue, the ITC *did not* make a determination of injury and, therefore, did not, as a part of any such determination, find that "dumped imports are causing injury to the producers of all or almost all of the production within such market." Rather, it made a determination regarding the likelihood of injury and, in the context of that inquiry, asked the additional question of whether revocation of the order would be *likely* to lead to continuation or recurrence of injury to "all or almost all" of the regional industry. This inquiry cannot be examined for its consistency with the second sentence of Article 4.1(ii) because that provision says nothing about the conditions under which an investigating authority can find that revocation

of the order would be *likely* to lead to continuation or recurrence of injury to “all or almost all” of the regional industry. Moreover, although the Panel can examine whether the ITC’s affirmative likelihood determination is consistent with Article 11.3, because that provision does not impose any obligation to conduct an assessment of the likelihood of injury to “all or almost all” of the regional industry, there is nothing in Article 11.3 against which the conformity of the ITC’s further “all or almost all” assessment can be tested. In short, the ITC’s “all or almost all” assessment falls outside of the disciplines in the AD Agreement. There is nothing in the AD Agreement that either precludes the ITC from conducting this assessment or requires it. Moreover, nothing in Article 11.3 or the second sentence of Article 4.1(ii) imposes standards as to how such an assessment must be conducted if it is voluntarily undertaken.

(d) Did the USITC, in fact, adopt the "all or almost all" standard reflected in the second sentence of Article 4.1(ii) in its sunset review determination?

42. See response to Question 228(c) above.

D. USDOC’S DETERMINATION OF LIKELIHOOD OF DUMPING

Q229. The Panel takes note of the issuance of the Panel Report in United States – OCTG from Mexico (WT/DS282) on 20 June 2005. What guidance, if any, can and should this Panel derive from that panel's analysis and findings concerning the Sunset Policy Bulletin "as such"? In particular, do the parties agree with that panel's selection of 21 reviews as the relevant ones that could inform a panel's analysis of this issue? Do the parties agree with that panel's findings? Why or why not? What other considerations, if any, should that panel have taken into account? How and in what way would these have altered the results of its analysis?

43. The report of the panel in *US - Mexico OCTG* does not alter the analysis of Mexico’s SPB-related claims in this dispute because it cannot overcome the fundamental defect in Mexico’s case. Specifically, it cannot cure Mexico’s failure to demonstrate on the basis of record evidence that the “measure” it has identified – the SPB – has the “scope and meaning”⁴⁶ that Mexico attributes to it, *i.e.* that it “directs the Department to attach decisive weight to historical dumping margins and declining import volumes (or the cessation of imports altogether) in every case.”⁴⁷ As the United States has explained previously, Mexico fails to make a *prima*

⁴⁶ See *US - Argentina Sunset (AB)*, para. 201 (quoting *US - German Sunset (AB)*, para. 157 and also citing *US - Japan Sunset (AB)*, para. 168) (explaining that when a complaining party challenges a measure “as such,” the challenged measure must be presumed to be WTO-consistent and the burden is on the complaining party to establish through evidence and argumentation the scope and meaning of the challenged measure as well as its alleged WTO-inconsistency).

⁴⁷ Opening Statement by Mexico at the Second Meeting of the Panel, para. 91.

facie case because Mexico has not demonstrated that the SPB is capable of “directing” Commerce’s actions, that Commerce makes its determination “in every case” on the basis of historical dumping margins and declining import volumes “even though the probative value of other factors . . . outweighed that of [these two factors],”⁴⁸ or that it is the SPB that caused Commerce to reach the particular determinations it has made.⁴⁹

44. It is a fundamental principle in WTO dispute settlement that the *complaining party* has the burden of making a *prima facie* case of WTO-inconsistency with respect to each of the measures that it challenges.⁵⁰ In *US - Gambling*, the Appellate Body clarified that a *prima facie* case must include both “evidence *and* legal argument put forward by the complaining party in relation to *each* of the elements of the claim.”⁵¹ Further, when a complaining party challenges a measure “as such” – as Mexico has done in the present dispute with respect to the SPB – the challenged measure must be treated as being WTO-consistent⁵² and the burden is on the *complaining party* to establish through evidence and argumentation the scope and meaning of the challenged measure as well as its alleged WTO-inconsistency.⁵³ No panel can relieve a complaining party of any part of this burden;⁵⁴ not the panel in the same dispute and certainly not a panel in a different dispute. Nor can a panel find in favor of a complaining party on a claim with respect to which the complaining party has not made a *prima facie* case;⁵⁵ to the contrary, in

⁴⁸ *US - Argentina Sunset (AB)*, para. 209 (emphasis added).

⁴⁹ See U.S. First Written Submission, paras. 267-290; U.S. Opening Statement at First Panel Meeting, paras. 40-42; U.S. Second Written Submission, paras. 73-83; U.S. Opening Statement at Second Meeting of the Panel with the Parties, paras. 43-52; U.S. Answers to Panel’s Second Set of Questions Following the Second Substantive Meeting, para. 48; U.S. Comments Regarding Mexico’s Response of June 6, 2005, paras. 51-59 (June 21, 2005).

⁵⁰ *US - Gambling (AB)*, para. 138 (“The complaining party bears the burden of proving an inconsistency with specific provisions of the covered agreements.”); *US - Argentina Sunset (AB)*, para. 202 (“It is well settled that, as a general rule, it rests upon the complaining party to establish the inconsistency of the measure it challenges with a particular provision of a WTO covered agreement.”); *Japan - Varietals (AB)*, para. 122 (“The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement*, on the part of the defending party, or more precisely, of its SPS measure or measures complained about.”) (quoting *EC - Hormones (AB)*, para. 98); *Korea - Dairy (AB)*, para. 143 (“As a matter of law, the burden rests with the European Communities, as complainant, and does not shift during the panel process.”) (quoting *Korea - Dairy* panel report at para. 7.24).

⁵¹ *US - Gambling (AB)*, para. 140 (underlined emphasis added; italicized emphasis in original).

⁵² See *Canada - Dairy (21.5) II (AB)*, para. 66; see also *United States - German Sunset (AB)*, para. 157.

⁵³ See *US - Argentina Sunset (AB)*, para. 201 (quoting *US - German Sunset (AB)*, para. 157 and also citing *US - Japan Sunset (AB)*, para. 168).

⁵⁴ *Japan - Varietals (AB)*, para. 129 (stating that “panels have no authority to “make the case for a complaining party”); *Korea - Dairy (AB)*, para. 149 (citing to *Japan - Varietals (AB)*, para. 129); *US - Gambling (AB)*, para. 139 (citing to *Japan - Varietals (AB)*, para. 129).

⁵⁵ *US - Gambling (AB)*, para. 139 (citing to *Japan - Varietals (AB)*, para. 129) (“[a] panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case.”)

such a situation a panel must find in favor of the defending party.⁵⁶ Thus, as Mexico has not made a *prima facie* case of WTO-inconsistency in this dispute with respect to the SPB, Mexico's claims fail, regardless of any analysis undertaken by the panel in *US - Mexico OCTG*.

45. A panel that does not follow this principle deprives itself of the benefit of the parties' arguments and input about the facts and the applicable legal provisions in rendering its findings and recommendations. This is true of the *US - Mexico OCTG* dispute, in which the panel took it upon itself to analyze Commerce sunset determinations in the first instance and to make determination-specific arguments on the basis of which to establish the alleged scope, meaning, and inconsistency of the SPB. The panel's analysis regarding the SPB in *US - Mexico OCTG* is deeply flawed and mischaracterizes several of the Commerce sunset review determinations on which the panel's analysis depends. However, as the *US - Mexico OCTG* panel report is currently under appeal, the United States cannot comment further at this time, except to note that the panel's analysis in that dispute does not correspond to that presented by Mexico and it is not, in any event, relevant to this Panel's assessment of Mexico's claims for the reasons discussed above.

E. METHODOLOGIES

Exclusion of Home Market Sales for Being Outside of the Ordinary Course of Trade

To the United States:

Q232. The United States argues that the records of the administrative reviews at issue do not confirm Mexico's contention that the USDOC excluded home market sales of cement that was physically Type V LA in each of the administrative reviews. The United States argues that it was only in the eighth and ninth administrative reviews that home market sales of cement, that was physically Type V LA, were excluded for being outside of the ordinary course of trade.⁵⁷ The Panel understands that the United States contends that this alleged mischaracterisation of the facts by Mexico means that it has failed to make a *prima facie* case with respect to each claim relating to an administrative review in which the record does not show that home market sales of cement that was physically Type V LA cement was excluded for being outside of the ordinary course of trade.⁵⁸ Please confirm

⁵⁶ See e.g., *Japan – Varietals (AB)*, para. 130-31 (reversing the panel for using record evidence and export advice to establish a claim of WTO-inconsistency where the United States had not made a *prima facie* case, instead of finding for Japan).

⁵⁷ United States, response of 6 June 2005 to question 180.

⁵⁸ United States, comments of 21 June 2005, to Mexico's response of 6 June 2005 to questions 179, 181 and 189, at para. 49.

this understanding and identify exactly which of Mexico's claims the United States asserts should be dismissed for this reason.

46. As the Panel correctly notes, it is the United States position that Mexico has not made a *prima facie* case of WTO-inconsistency with respect to Commerce's ordinary course of trade determinations. As the U.S. has explained, this conclusion is compelled by a number of factors.⁵⁹ Specifically, although Mexico has claimed that the ordinary course of trade determinations made in each of the fifth through ninth assessment reviews are inconsistent with Articles 2.1, 2.4, and 2.6 of the AD Agreement,⁶⁰ these articles do not, in fact, support Mexico's arguments.⁶¹ Mexico's arguments also fail on the facts. As the United States has explained, Mexico does not substantiate its arguments on the basis of review- and record-specific facts.⁶² Moreover, many of the factual statements that Mexico *does* make in support of its arguments are inaccurate.⁶³ One example of this is the incorrect assertion referenced in the Panel's question – Mexico's contention that Commerce excluded home market sales of cement that was physically Type V LA in each of the administrative reviews. As the United States has explained, the record evidence contradicts Mexico's contention.⁶⁴

47. However, this is *only one* of the factual defects in Mexico's arguments. Other such defects also exist; for example, Mexico's assertion that CEMEX produced only Type V LA cement in its Hermosillo plants and shipped Type V LA cement to the United States throughout the fifth through the ninth reviews.⁶⁵ That assertion, too, fails to find a basis in the records of the reviews.⁶⁶ Factual defects such as these – as well as Mexico's failure to properly identify and address the specific facts underlying the ordinary course of trade determinations that are on the

⁵⁹ See U.S. First Written Submission, paras. 336-377; U.S. Second Written Submission, paras. 100-106; U.S. Response to Second Set of Panel Questions Following Second Meeting, paras. 83-86; U.S. Comments Regarding Mexico's Response of June 6, 2005, paras. 43-58.

⁶⁰ See Request for Establishment of a Panel by Mexico, WT/DS281/2, at p.5, para. E.1. Mexico thereafter expanded its arguments to encompass Article 2.2.1. Those claims are outside the Panel's terms of reference for the reasons explained in the U.S. Response to the First Set of Panel Questions Following First Substantive Panel Meeting, para. 14 (March 2, 2005). Moreover, Article 2.2.1 of the AD Agreement does not support Mexico's arguments. See U.S. First Written Submission, paras. 365-69; U.S. Second Written Submission, paras. 105-106.

⁶¹ See *e.g.*, U.S. First Written Submission, paras. 359-77; U.S. Comments Regarding Mexico's Response of June 6, 2005, paras. 51-59.

⁶² U.S. Second Written Submission, para. 104; *see also*, U.S. Comments Regarding Mexico's Response of June 6, 2005, para. 49.

⁶³ See, *e.g.*, U.S. Second Written Submission, paras. 100-104; U.S. Response to Second Set of Panel Questions Following Second Meeting, paras. 83-86; U.S. Comments Regarding Mexico's Response of June 6, 2005, paras. 43-50.

⁶⁴ See U.S. Response to Second Set of Panel Questions Following Second Meeting, paras. 83-86.

⁶⁵ See *e.g.*, Mexico Response to the Second Set of Panel Questions Following First Panel Meeting, para. 307; Mexico Second Written Submission, paras. 346-48; Mexico Response to Panel Questions Following Second Panel Meeting, paras. 93-94 & n.113.

⁶⁶ U.S. Response to Second Set of Panel Questions Following Second Panel Meeting, paras. 83-86.

records of the particular assessment reviews at issue⁶⁷ and Mexico's flawed interpretations of Articles 2.1, 2.4, and 2.6 – confirm that Mexico has failed to make a *prima facie* case of WTO-inconsistency with respect to Commerce's ordinary course of trade determinations.⁶⁸

48. On this basis, the Panel may exclude all of Mexico's ordinary course of trade claims (*i.e.* those with respect to the ordinary course of trade determinations in the fifth through ninth reviews) on the basis of Article 2.1.⁶⁹ As the United States has explained previously, the other provisions that are the subject of Mexico's claims – Articles 2.4 and 2.6 – are not relevant to the question of whether or not sales may properly be excluded as being outside the ordinary course of trade.⁷⁰ Nonetheless, to whatever extent they are taken into account, the defects identified above pertain equally to the claims on the basis of those Articles.

Comparison of Bagged and Bulk Cement

To both Parties:

Q234. In the US – Softwood Lumber V, the panel made the following observation with respect to the nature of the obligations set out in Article 2.6:

Article 2.6 therefore defines the basis on which the product to be compared to the "product under consideration" is to be determined, that is, a product which is either identical to the product under consideration, or in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration. As the definition of "like product" implies a comparison with another product, it seems clear to us that the starting point can only be the "other product", being the allegedly dumped product. Therefore, once the product under consideration is defined, the "like product" to the product under consideration has to be determined on the basis of Article 2.6. However, in our analysis of the AD Agreement, we could not find any guidance

⁶⁷ See *US – Hot-Rolled Steel (AB)*, paras. 146-47 (noting that an ordinary course of trade inquiry is necessarily case-specific and fact-dependent, and no single methodology is appropriate to analyze the panoply of different fact patterns that may indicate sales outside the ordinary course of trade).

⁶⁸ See *US - Gambling (AB)*, para. 140 (noting that “[a] *prima facie* case must be based on ‘evidence and legal argument’ put forward by the complaining party in relation to *each* of the elements of the claim.”).

⁶⁹ See U.S. First Written Submission, paras. 336-34, 359-72; U.S. Second Written Submission, paras. 100, 105-106.

⁷⁰ See *e.g.*, U.S. First Written Submission, paras. 373-77; U.S. Comments Regarding Mexico's Response of June 6, 2005, paras. 55-58.

**on the way in which the "product under consideration" should
be determined."⁷¹**

**Please comment on how this passage suggests Mexico's claims with respect to
Article 2.6 should be assessed by the Panel in the light of the "product under
consideration" in the administrative reviews at issue.**

49. The observations of the *US - Softwood Lumber V* panel reflected above with respect to Article 2.6 of the AD Agreement are consistent with, and confirm, the U.S. arguments in this dispute regarding Mexico's "comparison of bagged and bulk cement" claims. The Panel may recall that the United States has consistently argued that:

[u]nder Article 2.6, an investigating authority must first identify the "product" under consideration. Then it must turn to consider whether there is another "product" in the comparison market that is identical to or, if no identical product exists, has characteristics closely resembling those of the product under consideration. The product thus identified as the "like product" is to be used in the calculation of normal value. The "product" under consideration in the instant dispute is the cement itself, not the cement plus any packaging in which it happened to be sold.⁷² Therefore, in determining whether there was a "product" that was identical or otherwise comparable, Commerce's focus was properly on the cement itself, not any packaging.⁷³

50. Mexico responded arguing that the "product under consideration" must be understood to be "bulk Type V LA cement"⁷⁴ and that, therefore, the "like product" must also be "bulk" cement. The United States explained that Mexico's argument is incorrect because

[t]he assessment reviews at issue in this dispute define the product under consideration, *i.e.* the product within the scope of the U.S. antidumping duty measure, as 'gray portland cement and clinker' from Mexico. Thus, the 'product under consideration' is simply the cement itself, not the cement plus any packaging in which it happened to be sold. *Nothing in the [AD] Agreement precludes Commerce from defining the product under consideration in this manner.*⁷⁵

⁷¹ Panel Report, *US – Softwood Lumber V*, para. 7.153.

⁷² See, e.g., *Sixth Review Final Results*, 63 FR 12764 (Exhibit MEX-51) (stating in the "Scope of the Review" that "[t]he products covered by this review include gray portland cement and clinker.").

⁷³ U.S. First Written Submission, para. 383; see also U.S. Response to Second Set of Panel Questions Following First Panel Meeting, para. 106; U.S. Second Written Submission, para. 109.

⁷⁴ Mexico Response to Second Set of Panel Questions Following First Panel Meeting, paras. 315, 322.

⁷⁵ U.S. Second Written Submission, para. 109 (emphasis added).

51. The reasoning of the panel in *US - Softwood Lumber V* confirms both that (a) in selecting the “like product” the investigating authority must start by identifying the “product under consideration” and (b) nothing in the AD Agreement precludes an investigating authority from identifying the “product under consideration” with reference just to the product itself, not the product plus packaging.

52. As the “like product” must be selected by determining whether there is another product in the comparison market that is identical to or, if no such product exists, has characteristics closely resembling those of the product under consideration (the “foreign like product” in U.S. parlance), an investigating authority’s selection of the “like product” will be influenced by the obligations that apply with respect to the definition of the “product under consideration.” Just as there is no obligation to include packaging in the definition of the “product under consideration,” there is no obligation to include packaging in the definition of the “like product” under Article 2.6. Mexico’s claims that Commerce breached Article 2.6 by not taking packaging into account in selecting the “like product” therefore fail.

"Difmer" Adjustment

To both Parties:

Q235. In the US – Stainless Steel Plate case, the panel made the following observation with respect to the nature of the obligations set out in Article 2.4:

In our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing. A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of prices within the meaning of Article 2.4.”⁷⁶ (footnote omitted)

Is this a faithful interpretation of Article 2.4, which requires that “[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability ... (emphasis added)? Please explain your answer.

53. As an initial matter, the United States notes that the *US - Stainless Steel Plate* dispute involved very different facts and different sections of Article 2.4 and, therefore, the reasoning of

⁷⁶ Panel Report, *US – Stainless Steel Plate, Sheet and Strip from Korea*, WT/DS179/R, para. 6.77. The first sentence of this passage was cited with approval in Panel Report, *EC – Tube or Pipe Fittings*, para. 7.183.

the panel in that dispute is largely inapposite in the present dispute. Specifically, *US - Stainless Steel Plate* involved a price adjustment made by Commerce to account for differences in bad debt expenses arising out of the bankruptcy of a Korean respondent's U.S. customer. It was in this context that the panel reflected on the "anticipation" of transaction differences. By contrast, in this dispute, the "difmer" adjustment at issue relates to differences in merchandise. The discussion about "anticipating" a transaction difference does not make sense when talking about a difference in merchandise, which is established, and therefore may reasonably be presumed to be known by the producer/exporter, even prior to sale.

54. Further, the analysis in *US - Stainless Steel Plate* concerned the parts of the third sentence of Article 2.4 which concern "differences in conditions and terms of sale" and "other differences which are also demonstrated to affect price comparability."⁷⁷ The panel did not extend its analysis to the language in Article 2.4 relating to "differences in . . . physical characteristics," which is the key language here.⁷⁸ For these reasons, the language above regarding "anticipation" of transaction differences is not relevant to the issues in this dispute.

55. That said, the United States agrees with the statement of the panel that "the requirement to make due allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing." This statement is consistent with the U.S. arguments in connection with the difmer adjustment. Specifically, the United States has explained that Commerce makes a difmer adjustment once it determines that there are physical differences in the U.S. and home market comparison products. The difmer adjustment is made on the basis of differences in variable production costs that are attributable to the differences in the physical characteristics of the products. Commerce makes this adjustment based on the reasonable expectation that a company will charge more for a product that costs more to produce.⁷⁹ The reasoning of the *US - Stainless Steel Plate* panel confirms that such an adjustment for differences that "an exporter could reasonably be expected to have reflected in his pricing" is consistent with Article 2.4.

⁷⁷ *US - Stainless Steel Plate*(Panel), paras. 6.74 - 6.79.

⁷⁸ The *EC - Tube or Pipe Fittings* panel report, while it does cite to the first sentence of the above passage, also does not involve differences in physical characteristics. It also focuses on differences in taxation and packing costs. *EC - Tube or Pipe Fittings*(Panel), paras. 7.157 (taxation) and 7.193 (packing cost).

⁷⁹ See U.S. Response to Second Set of Panel Questions Following First Panel Meeting, paras. 108-109.

Table of Exhibits

- US-198 *Co-Steel Raritan v. ITC*, 357 F.3d 1294 (Fed. Cir. 2004)
- US-199 Definition of “Exceptional;” *The New Shorter Oxford English Dictionary*, page 872 (Clarendon Press: Oxford 1993)