

***UNITED STATES – ANTI-DUMPING MEASURES
ON CEMENT FROM MEXICO***

WT/DS281

REQUEST FOR PRELIMINARY RULINGS

BY THE

UNITED STATES OF AMERICA

October 26, 2004

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I. INTRODUCTION

1. Over 450 claims. That is a conservative estimate of the number of claims included in Mexico's request for the establishment of a panel in this dispute.¹ By any standard, that is a very large – perhaps unprecedented – number of claims for a single dispute. Unfortunately, not all of these claims have been advanced in accordance with the rules for a panel request under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).
2. Perhaps this is because 450 is not the only large number in this dispute. Another large number is “60 percent.” That is the simple average of the *ad valorem* dumping margins that the U.S. Department of Commerce (“Commerce”) calculated for the Mexican producer CEMEX and its close affiliate GCC Cemento, S.A. de C.V. (“GCCC”) in the twelve administrative reviews it has conducted of the antidumping duty order on gray portland cement and cement clinker from Mexico (“cement from Mexico”). The United States believes that this average dumping margin of 60 percent over a twelve-year period is the highest margin that Commerce has ever determined over such a long period of time for any foreign exporter, for any type of merchandise.²
3. Of course, we assume Mexico is going to argue that these high dumping margins are the product of allegedly WTO-inconsistent actions taken by Commerce. However, consider this: In the twelfth administrative review – the most recently completed administrative review –

¹ The United States cannot identify definitively the number of Mexican claims, because portions of the panel request are imprecise. To arrive at an estimate, for sections A-G of the panel request, the United States multiplied the “measures” that it could identify times the number of WTO provisions invoked with respect to each “measure.” The United States believes, however, that the resulting estimate of over 450 claims is conservative.

In this regard, the United States notes at the outset that it does not agree that all of the so-called “measures” identified by Mexico are properly considered measures subject to WTO dispute settlement proceedings. However, the United States is treating this as a substantive issue, and will not address it further in this submission.

² For the twelve reviews, the dumping margins for CEMEX/GCCC ranged from a low of 30 percent in the final results of the first review (published in 1993) to a high of 109 percent in the final results of the fourth review (published in 1997). The 109 percent figure was the product of the use of “facts available” due to CEMEX’s refusal to provide essential information regarding its home market sales of cement.

Commerce did not use several of the methodologies challenged by Mexico in this dispute.

Nevertheless, Commerce still found a dumping margin for CEMEX/GCCC of *80 percent*.

4. The reason why Commerce consistently has found high dumping margins for CEMEX/GCCC is simple: The Mexican cement market is closed, while the U.S. cement market is open. The Mexican cement industry is an oligopoly that is effectively insulated from both domestic and import competition. CEMEX/GCCC controls almost two-thirds of the Mexican market. Together with the next-largest producer, Cementos Apasco, they control almost 90 percent of the market. They control the domestic distribution networks for bagged cement, the ready-mixed concrete producers that purchase bulk cement, and the deep-water terminals for importing and exporting cement. As a result, Mexico imports virtually no cement, and the Mexican cement market is closed to new entrants, both domestic and foreign. Because there is no effective competition in Mexico, Mexican producers charge among the highest prices for cement in the world.

5. In contrast, the neighboring U.S. market for cement is highly competitive. There are no barriers to imports, and numerous U.S. and foreign producers compete for sales. As a result, the United States has among the lowest cement prices in the world.

6. It is the difference between the two markets that explains why Commerce consistently has found such high dumping margins for CEMEX/GCCC. Because prices in Mexico for cement are artificially high, it is inevitable that CEMEX/GCCC will sell in the United States at dumped prices.

7. Faced with this situation, a logical response to the imposition of antidumping duties would have been to open up the Mexican market for cement. This would have caused prices between the two markets to equalize, and dumping would have disappeared.

8. Unfortunately, this did not happen. Instead, CEMEX/GCCC and Mexico have pursued litigation in U.S. courts, in binational panels under the *North American Free Trade Agreement* (“NAFTA”), and now in the WTO.

9. Certainly, Mexico has a right under the DSU to bring its grievances to a WTO dispute settlement panel. Along with this right, however, comes a corresponding obligation, which is to put forward claims in a manner consistent with the requirements of Article 6.2 of the DSU. Mexico has not complied with this obligation, because with respect to several of its claims, Mexico’s panel request fails to “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” Mexico’s failure has prejudiced the ability of the United States to defend its interests in this dispute. As a result, the United States requests the Panel to make preliminary rulings to dismiss the defective Mexican claims.

II. FACTUAL BACKGROUND

10. In order to put the U.S. preliminary objections in context, it is useful to briefly describe the “measures” at issue. Although Mexico has included a variety of “as such” claims in its panel request, the focus of this dispute is the antidumping duty order on cement from Mexico.

11. Following investigations in which Commerce found dumping and the U.S. International Trade Commission (“ITC”) found material injury, Commerce published the antidumping duty

order on cement from Mexico in 1990.³ Since then, Commerce has conducted twelve administrative reviews of the order, and currently is in the midst of the thirteenth review.⁴ Under the U.S. retrospective system of antidumping duty assessment, administrative reviews are used to determine the amount of duties that should be definitively assessed on imports of subject merchandise – in this case, cement from Mexico – made during a specific time period (usually a one-year period). As indicated above, 60 percent is the simple average of the dumping margins that Commerce found in the course of these reviews for CEMEX/GCCC.

12. In 2000, Commerce and the ITC conducted sunset reviews. The United States will discuss these reviews in greater detail in subsequent submissions. For now, it is sufficient to note that Commerce found that dumping would be likely to continue if the order were revoked.⁵ Essentially, Commerce had no basis for concluding that the significant dumping margins it was finding for cement from Mexico would somehow disappear if the order were revoked. With respect to the ITC, it found that injury would be likely to continue or recur if the order were revoked.⁶ Not long thereafter, the Mexican producers requested the ITC to conduct a changed circumstances review. The ITC dismissed the request, finding that neither the evidence provided by the Mexican producers nor the evidence gathered by the ITC itself supported the Mexican

³ 55 Fed. Reg. 35,443 (August 30, 1990).

⁴ Under Article 18.3 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”), the provisions of the AD Agreement do not apply to the original investigation or the first four administrative reviews.

⁵ 65 Fed. Reg. 41,049 (July 3, 2000).

⁶ 65 Fed. Reg. 65,327 (November 1, 2000).

producers' claim that there were changed circumstances sufficient to warrant the initiation of a review.⁷

13. The U.S. antidumping proceeding on cement from Mexico has been heavily litigated. In both the investigatory and review phases of the proceeding, every final agency determination has been subjected to U.S. domestic judicial or NAFTA binational panel review. Both CEMEX and the U.S. petitioner sought judicial review of various aspects of the agency determinations made in the course of the original antidumping investigation and the first two administrative reviews. Thereafter, following the entry into force of the NAFTA, both sides sought binational panel review of the agency determinations under the procedures of NAFTA Chapter 19.⁸

14. On July 29, 2003, Mexico requested the establishment of a WTO dispute settlement panel.⁹

15. Mexico's panel request was considered for the first time by the Dispute Settlement Body ("DSB") at its meeting on August 18, 2003. At that meeting, the United States noted that Mexico's request for the establishment of a panel was not in conformity with Article 6.2 of the DSU and that the United States could not discern the nature of certain claims set forth in the request.¹⁰ The United States suggested that

⁷ 66 Fed. Reg. 65,740 (December 20, 2001).

⁸ Under Chapter 19, binational panels substitute for the domestic courts in the three NAFTA parties in reviewing antidumping determinations. Like domestic courts, binational panels are to determine whether the authorities of the importing country acted in accordance with that country's domestic law.

⁹ WT/DS281/2 (8 August 2003).

¹⁰ WT/DSB/M/154, paras. 5-8 (22 October 2003).

an appropriate course of action would be for Mexico to withdraw its current panel request and submit a new request which would enable the United States and all other Members to adequately discern the legal basis of Mexico's complaint.¹¹

16. Mexico ignored the U.S. suggestion. Mexico's panel request was considered for the second time, and a panel was established, at the DSB meeting on August 29, 2003. At that meeting, the United States expressed its disappointment that Mexico had declined to cure the numerous defects in its panel request by filing an amended panel request to address U.S. concerns.¹² As a consequence of Mexico's actions, the United States reserved its right to address these issues before the Panel and stated:

It thus appeared that the resources of the dispute settlement system would be devoted to seeking to enforce Mexico's compliance with Article 6.2. This resource drain was both unfortunate and could have been avoided, inasmuch as the United States had set out its concerns to Mexico at the previous meeting and suggested a way forward for Mexico.¹³

17. Following the establishment of the Panel, more than one year passed before the Panel was finally composed on September 3, 2004. This extensive delay demonstrates that Mexico had ample time in which to withdraw and resubmit a request for the establishment of a panel that conformed to the requirements of Article 6.2 of the DSU.

III. LEGAL ARGUMENT

A. Introduction

18. Article 6.2 of the DSU states in relevant part that "The request for the establishment of a panel shall ... identify the specific measures at issue and provide a brief summary of the legal

¹¹ WT/DSB/M/154, para. 8 (22 October 2003).

¹² WT/DSB/M/155, para. 43 (7 November 2003).

¹³ WT/DSB/M/155, para. 43 (7 November 2003).

basis of the complaint sufficient to present the problem clearly.” The Appellate Body recently summarized the requirements of Article 6.2 as follows:

There are ... two distinct requirements, namely identification of *the specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*). Together, they comprise the “matter referred to the DSB”, which forms the basis for a panel’s terms of reference under Article 7.1 of the DSU.

The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, set the *due process* objective of notifying the parties and third parties of the nature of a complainant’s case. When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel “to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.”

As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be “cured” in the subsequent submissions of the parties during the panel proceedings. Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced. Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.¹⁴

19. The Appellate Body also has provided the following guidance concerning the requirement to provide a brief summary of the legal basis of the complaint:

Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is “sufficient to present the

¹⁴ *US – German Steel*, paras. 125-127 (italics in original).

problem clearly”. It is not enough, in other words, that “the legal basis of the complaint” is summarily identified; the identification must “present the problem clearly.”¹⁵

20. As demonstrated below, Mexico failed to provide a brief summary of the legal basis of the complaint sufficient to “present the problem clearly” with respect to certain of its claims contained in sections C, E and F of Mexico’s panel request.

B. Because Mexico Failed to Present the Problem Clearly, as Required by Article 6.2 of the DSU, the Panel Should Find that Certain Claims in Sections C, E and F of Mexico’s Panel Request Are Not Within the Panel’s Terms of Reference

21. With respect to certain of its claims, Mexico merely identified entire articles of the AD Agreement without identifying the paragraph or otherwise specifying the specific obligation with which the United States is alleged to have acted inconsistently. In the chapeaus to sections C.3 and E.9 and sections C.3(a), C.3(c), E.9(a) and E.9(c), which deal with the topic of duty absorption, Mexico alleges inconsistencies with Articles 2 and 6 of the AD Agreement in their entirety.¹⁶ In sections E.7 and E.8, which deal with the topic of facts available, Mexico alleges

¹⁵ *Korea – Dairy Safeguard*, para. 120.

¹⁶ Section C.3 of Mexico’s panel request, which is very similar to Section E.9, states as follows:

3. The Department's standard relating to duty absorption, its reliance on the margin of dumping based on duty absorption in determining whether termination of the anti-dumping duties would be likely to lead to continuation or recurrence of dumping, and its reporting of that margin of dumping to the Commission for the purposes of the Commission's sunset review, are inconsistent, both as such and as applied, with Articles 11.1, 11.3, 11.4, 2 and 6 of the Anti-Dumping Agreement.

- (a) The Department's duty absorption calculation is inconsistent with Articles 11.3 and 2 of the Anti-Dumping Agreement;
- (b) The Department's duty-absorption standard does not give respondents a full opportunity to defend their interests which is inconsistent with Articles 11.3, 11.4, 6.1, 6.2, 6.4 and 6.9 of the Anti-Dumping Agreement; and
- (c) The Department's duty absorption standard imposes a WTO-inconsistent presumption that violates Articles 11.1, 11.3, 11.4, 2 and 6 of the Anti-Dumping Agreement. (Underscoring added).

inconsistencies with Annex II of the AD Agreement in its entirety.¹⁷ Finally, in section F.1, Mexico alleges that the U.S. “retrospective duty assessment system” is inconsistent with Article 10 of the AD Agreement in its entirety.¹⁸

22. These allegations do not comply with the Article 6.2 requirement to “present the problem clearly,” because Articles 2, 6, and 10 and Annex II each consist of multiple paragraphs and contain multiple obligations. With respect to the claims in question, it is implausible that Mexico is alleging that the United States acted inconsistently with each one of these obligations. Without more, however, it is impossible to determine from the panel request the obligation(s) with which any relevant measures are inconsistent; *i.e.*, Mexico has failed to present the problem clearly.

¹⁷ Sections E.7 and E.8 read as follows:

7. The Department improperly applied the facts available: (i) in the Fifth to Eighth Administrative Reviews and the margin adopted in the Department's Sunset Review Determination, by failing to take account of cost-related evidence on the record in relation to "differences in merchandise" which affected price comparability when making the difference-in-merchandise ("difmer") adjustment in a manner inconsistent with Articles 2.1, 2.4, 6.8 and Annex II of the Anti-Dumping Agreement; and (ii) by calculating the anti-dumping margin in the Seventh Administrative Review by using the facts available, in a manner inconsistent with Articles 2.1, 2.4, 6.8, 6.13 and Annex II of the Anti-Dumping Agreement.

8. In the Fifth to Eleventh Administrative Reviews and the margin adopted in the Sunset Review, the Department improperly "amalgamated" the firms Cementos de Chihuahua, S.A. de C.V. and CEMEX S.A. de C.V. in order to calculate a single weighted average margin, in a manner inconsistent with Articles 2.1, 2.2, 2.4, 6.8, 6.10 and Annex II to the Anti-Dumping Agreement. (Underscoring added).

¹⁸ Section F.1 reads as follows:

1. The United States retrospective duty assessment system, implemented by 19 U.S.C. §§ 1673e, 1673f, 1675, 1675a and 1677g, is inconsistent with Articles 9.1, 9.2, 9.3 and 10 of the Anti-Dumping Agreement and Article X.2 of the GATT 1994 inasmuch as:

- (a) Importers are not notified at the time of entry of the goods of their maximum liability for definitive anti-dumping duties; and
- (b) definitive anti-dumping duties are imposed in review periods at higher rates than established at the time of entry. (Underscoring added).

23. The Appellate Body has found that “where the articles listed establish not one single, distinct obligation, but rather multiple obligations ... the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.”¹⁹ Consistent with this finding, panels have found, for example, that references to Article 6, Article 9, or Article 12 of the AD Agreement are not sufficiently specific to satisfy the requirements of Article 6.2 of the DSU.²⁰ In this instance, Mexico has only identified in their entirety Article 2, which has seven paragraphs, three subparagraphs, two sub-subparagraphs and three clauses; Article 6, which has fourteen paragraphs, seven subparagraphs and three clauses; Article 10, which has eight paragraphs and two clauses; and Annex II, which has seven paragraphs. Needless to say, these paragraphs, subparagraphs and clauses contain distinct obligations. In many cases, there exists multiple obligations within each of these paragraphs, subparagraphs and clauses.

24. In this dispute, the circumstances are such that the mere listing of, for example, “Article 2” does, indeed, “fall short of the standard of Article 6.2.” Thus, Mexico’s failure, in the sections identified above, to cite – at the very least – particular paragraphs within Articles 2, 6 or 10 or Annex II demonstrate that Mexico’s request fell short of the requirement of DSU Article 6.2.

25. This type of defect may possibly be overcome if a panel request “also sets forth facts and circumstances describing the substance of the dispute”²¹ or if there are “textual similarities”

¹⁹ *Korea – Dairy Safeguard*, para. 124.

²⁰ *EC – Pipe Fittings*, 7.14(7) (discussing Articles 6, 9 and 12 of the AD Agreement); and *Thailand – H-Beams (Panel)*, paras. 7.28-7.29 (discussing Article 6 of the AD Agreement).

²¹ *Mexico – HFCS*, para. 7.15.

between the panel request and relevant paragraphs, subparagraphs, or clauses.²² However, sections C.3, E.7-9, and F.1 include no text, much less “facts or circumstances,” that provide the United States any guidance regarding the nature of Mexico’s potential claims.

26. Within the same sections of the request, as well as in other sections, Mexico demonstrates that, when it chooses to, it is perfectly capable of identifying the specific paragraphs of the WTO agreements at issue. For example, in sections C.3(b) and E.9(b), Mexico alleges that Commerce’s duty absorption standard is inconsistent with Articles 6.1, 6.2, 6.4, and 6.9 of the AD Agreement. Thus, there is no excuse for Mexico’s failure, in the identified sections, to cite to specific paragraphs, subparagraphs or clauses of Articles 2, 6 and 10 and Annex II.

C. The United States Has Been Prejudiced by Mexico’s Failure to Comply With Article 6.2 of the DSU

27. With respect to the due process objective of Article 6.2 in particular, the Appellate Body has stated: “A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence.”²³ According to the Appellate Body, “This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings.”²⁴

28. In this dispute, by not complying with the requirements of DSU Article 6.2, Mexico has denied the United States the fundamental due process objectives guaranteed by Article 6.2 of the

²² *US – Argentina OCTG*, para. 7.47.

²³ *Thailand – H-Beams*, para. 88.

²⁴ *Thailand – H-Beams*, para. 88.

DSU. The United States has been prejudiced by Mexico’s failure to comply with Article 6.2 of the DSU.²⁵

29. In the case of the defects in Mexico’s panel request identified above, it continues to delay the United States’ preparation of its defense because Mexico’s failure to comply with Article 6.2 of the DSU has to date prevented the United States from knowing “what case it has to answer.” For example, with respect to Mexico’s claims relating to the topic of “duty absorption,” the United States still does not know which obligation(s), of the many obligations contained in Articles 2 and 6 of the AD Agreement, with which it is accused of having failed to comply. The current inability to even begin preparing any defense to these potential claims means that the United States’ “fundamental” due process rights have been – and continue to be – severely prejudiced by Mexico’s violation of Article 6.2 of the DSU. The prejudice to the United States is compounded by the fact that Mexico’s panel request appears to include over 450 claims and the United States has been allowed only four weeks in which to respond to Mexico’s first written submission, which will undoubtedly be very long and very complicated, even by Mexico’s own assessments.²⁶

30. Finally, this is not a case where the respondent failed to object earlier in the proceeding.²⁷ The United States identified the defects in Mexico’s panel request at the first meeting of the DSB

²⁵ The United States does not concede that a failure to comply with Article 6.2 can be excused by a finding that the respondent has not been prejudiced. Nevertheless, under the circumstances of this dispute it is clear that the United States has suffered prejudice.

²⁶ We note Mexico’s representations on this point during the panel organization meetings in this dispute on September 17 and 28, 2004, as well as its request at these meetings for additional time to file its first written submission above and beyond the maximum 6 weeks proposed for a complainant’s first submission in Appendix 3 of the DSU.

²⁷ See *US – Lamb Meat*, para. 5.42.

at which the request was on the agenda, made it clear at that time that it did not understand the substance of several of Mexico's claims, and requested that Mexico submit a new panel request that complied with Article 6.2 of the DSU. Even with the 12-month delay in composing this Panel, Mexico has adamantly refused to remedy the defects in its panel request, thereby leaving the United States with no choice but to seek redress from the Panel.

IV. CONCLUSION

31. For the foregoing reasons, the United States respectfully requests that the Panel find that Mexico's panel request failed to conform to the requirements of Article 6.2 of the DSU, and that the following claims are not within the Panel's terms of reference:

- (i) the claims concerning Article 2 of the AD Agreement set forth in the chapeaus to sections C.3 and E.9 and sections C.3(a), C.3(c), E.9(a) and E.9(c);
- (ii) the claims concerning Article 6 of the AD Agreement set forth in the chapeaus to sections C.3 and E.9 and sections C.3(a), C.3(c), E.9(a) and E.9(c);
- (iii) the claims concerning Annex II of the AD Agreement set forth in sections E.7 and E.8; and
- (iv) the claims concerning Article 10 of the AD Agreement set forth in section F.1.²⁸

²⁸ The United States reserves the right to object should Mexico's future submissions include other claims that are not within the Panel's terms of reference.