

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

(WT/DS281)

**Opening Statement of the United States at the First Meeting
of the Panel with the Parties**

February 17, 2005

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would like to thank you for agreeing to serve on this Panel.
2. We do not intend to address today each of the many claims and arguments made by Mexico in its first written submission; we have done that in our first written submission. Instead, we will limit our discussion to certain key points.
3. We will begin with the “injury-related” issues, *i.e.* the issues relating to the likelihood of continuation or recurrence of injury and the request by Mexican producers for a “changed circumstances” review. Next, we will address “dumping-related” issues, *i.e.*, the issues relating to the likelihood of continuation or recurrence of dumping and the dumping determinations made in assessment reviews. We will then turn to issues relating to the U.S. system of antidumping duty assessment. Last, we will comment on the procedural issues raised in this dispute thus far.

Issues Concerning the Likelihood of Continuation or Recurrence of Injury

4. Mexico has raised a number of issues regarding the ITC’s determination that revocation of the antidumping duty order on cement from Mexico would be likely to lead to continuation or recurrence of material injury to the U.S. cement industry within a reasonably foreseeable time. We will briefly review four of those issues this morning. First, whether the ITC has applied the term “likely” in the sunset reviews at issue consistently with Articles 11.1 and 11.3 of the AD

Agreement. Second, whether the time frame in which injury would be likely to recur provided for under U.S. law is consistent with Article 11.3 of the AD Agreement. Third, whether Article 3 of the AD Agreement applies to sunset reviews. And, fourth, whether the ITC's sunset determination with respect to cement from Mexico, which was based on an objective examination and positive evidence, was consistent with Article 11.3.

5. Before beginning, we note that Mexico has raised a number of legal arguments regarding the ITC's sunset analysis that are virtually identical to those that were before the panel and Appellate Body in *US-Argentina Sunset*. We submit that their reasoning regarding these issues is equally persuasive in this dispute.

The ITC's Application of the Term "Likely"

6. First, Mexico claims that "the Commission's likely standard" is inconsistent with Articles 11.1 and 11.3, both as such and as applied in the sunset review at issue in this dispute. These claims are without basis.

7. With respect to Mexico's "as such" claims, Mexico has not identified any measure that can be challenged "as such." What Mexico refers to as "the Commission's likely standard" appears to be the ITC's *application* of the term "likely" in past reviews. Each particular application of the statutory term "likely" in specific proceedings may be part of a "measure," but repeated application of the term does not somehow create a new separate "measure" that is subject to challenge "as such."

8. Mexico's "as such" claims fail for other reasons as well. For example, Mexico argues that the ITC's statements in earlier unrelated domestic and NAFTA litigation prove that the ITC did not interpret "likely" to mean "probable." However, the same statements were before the

panel and the Appellate Body in the *US -Argentina Sunset* dispute, in which Argentina made virtually identical arguments against the ITC's application of the term "likely" as those made by Mexico here. Argentina's arguments regarding these statements were rejected as not particularly relevant in that dispute and, for the same reasons, Mexico's arguments regarding the same statements should be given no weight here. The United States notes, in this regard, that the European Communities ("EC") has argued that the parties to the *US-Argentina Sunset* dispute did not refer to all of the statements that Mexico discusses.¹ As a review of the Appellate Body report in that dispute demonstrates, the EC is wrong.²

9. With respect to Mexico's "as applied" challenge, the ITC expressly stated in its opinion that it had determined whether revocation of the antidumping duty order would be "likely" to lead to continuation or recurrence of material injury.³ This is the same "likely" standard set out in Article 11.3 and the U.S. statute.

10. Given that the ITC expressly stated it was applying the term "likely," the question for the Panel is whether the facts supported the ITC's finding that injury would be "likely" to continue or recur in the absence of the order. As the Appellate Body explained in *US - Argentina Sunset*, by evaluating whether the ITC's determination of likely injury was supported by a sufficient factual basis, the Panel is addressing the question of whether the ITC *actually* applied the "likely" standard in the sunset review.⁴

¹Third Party Written Submission by the European Communities, para. 35.

²See *US -Argentina Sunset*, AB Report para. 312.

³ITC Report at 1, 28-31, 38, 40, and 42 (Exhibit MEX-9).

⁴*US-Argentina Sunset (AB)*, para. 311.

11. We will explain shortly that the facts in the record before the ITC supported its determination. Therefore, it is clear that the ITC *actually* applied the likely standard.

The Time Frame in Which Injury Would Be Likely to Recur

12. Second, I will turn to the question of the time frame in which injury must be found to be likely to recur. Mexico argues that investigating authorities are required to assess “injury” at the time of the expiry of the order.⁵ This argument has no basis in the text of the AD Agreement. Article 11.3 requires a determination of whether revocation “would be likely to lead to continuation or recurrence of injury.” Moreover, as the panel in *US – Argentina Sunset* explained, Article 11.3 does not impose a particular time frame on which the investigating authority has to base its likelihood determination.⁶

13. Mexico claims, in addition, that the provisions of U.S. law regarding the time frame within which injury would be likely to continue or recur are inconsistent with Article 11.3. These provisions instruct the ITC to determine whether injury would be likely to lead to continuation or recurrence of injury "within a reasonably foreseeable time" and to "consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time." Mexico's claims regarding these provisions are also unpersuasive. The fact is that Article 11.3 is silent on the question of the appropriate time frame. As the Appellate Body correctly recognized in *US - Argentina Sunset*, this issue has been left to the discretion of the Members, and the standard set forth in U.S. law is reasonable.

Article 3 Does Not Apply to Sunset Reviews

⁵Mexico First Submission, paras. 401-403.

⁶*US-Argentina Sunset (Panel)*, para. 7.187; *accord US-Argentina Sunset (AB)*, para. 360.

14. Mexico asserts, whether explicitly or implicitly, that Article 3 disciplines “apply for all purposes under the Agreement, including during sunset reviews. . . .”⁷ As the Appellate Body recently recognized in *US - Argentina Sunset*, this assertion is incorrect.⁸ There is no textual basis to support it. Obligations set forth in Article 3 do *not* apply to likelihood of continuation or recurrence of injury determinations in sunset reviews. For example, there are no cross-references in Article 3 to Article 11, or in Article 11 to Article 3.

15. Mexico argues that, by virtue of the reference to the definition of “injury” in footnote 9 of the AD Agreement, all references in the Agreement to “injury” require a determination made in conformity with the provisions of Article 3. However, Mexico continues to confuse the *definition* of injury, which is contained in footnote 9, with the *determination* of injury. Article 3 does not elaborate on the meaning of “injury,” but rather lays down the steps involved and the evidence to be examined in making a *determination* of injury.⁹ For these reasons, the Appellate Body correctly rejected identical arguments made by Argentina in *US - Argentina Sunset*.¹⁰

16. As the Appellate Body recognized, “the lack of a sufficient textual basis to apply Article 3 to likelihood-of-injury determinations is not surprising given ‘the different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand.’”¹¹ In an original investigation, the ITC examines the current condition of an industry – exposed to the effects of unrestrained, dumped imports that are competing without remedial measures in place. Five years later, however, in an Article 11.3 sunset review, the ITC examines the *likely* volume

⁷Mexico First Submission, para. 539.

⁸*US-Argentina Sunset* (AB), para. 285.

⁹*US-Argentina Sunset* (AB), para. 277.

¹⁰*US-Argentina Sunset* (AB), para. 275.

¹¹*US-Argentina Sunset* (AB), para. 279, quoting *US-Japan Sunset* (AB), para. 124.

of imports, the *likely* price effects, and the *likely* impact of such imports *in the future* on the domestic industry – an industry operating in a market where the remedial order has been in place. Thus, a sunset determination involves an assessment of the likely impact of a prospective change in the status quo – that is, the revocation of the order and the elimination of its restraining effects on imports – and does not involve an original *determination* of injury.

17. The Panel should find that the United States has not acted inconsistently with Article 3 provisions because there is no requirement that the United States apply the provisions of Article 3 in making a sunset determination under Article 11.3.

The ITC's Sunset Determination Was Consistent with Article 11.3

18. Mexico argues in the alternative that, even if Article 3 does not apply to sunset reviews – which it does not – “Article 11.3 nevertheless imposes a number of exacting disciplines on an investigating authority when it conducts a ‘review’ and makes a ‘determination.’”¹² Mexico’s argument is without basis.

19. Article 11.3 states in relevant part that: “any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition . . . unless the authorities determine . . . that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.”¹³ No further guidance is provided in the AD Agreement. Thus, as the Appellate Body has explained in prior disputes, no specific methodology is prescribed for Article 11.3 proceedings.¹⁴ It is left to the discretion of the Members to select a reasonable methodology.

¹²Mexico First Submission, para. 598.

¹³Article 11.3 of AD Agreement.

¹⁴*US-Argentina Sunset* (AB), para. 281, quoting *US-Japan Sunset* (AB), para. 123.

20. In its sunset review proceedings, the ITC considers relevant factors to determine whether revocation of the order would be likely to lead to continuation or recurrence of injury.

Specifically, the ITC considers the likely volume of dumped imports, likely price effects of dumped imports, and likely impact of dumped imports on the domestic industry in the event the order is revoked. The Appellate Body in *US-Argentina Sunset* recognized the ITC's approach in sunset reviews as a legitimate manner to structure its reasoning and arrive at an overall determination.¹⁵ The Appellate Body also explained that the Article 11.3 "likely" standard applies to the overall determinations regarding dumping and injury, and "need not necessarily apply to each factor considered in rendering the overall determinations of dumping and injury."¹⁶

21. The ITC's cement sunset determination is based on positive evidence and is consistent with the objectivity and evidentiary requirements of the AD Agreement. That the ITC may have given a different weight or meaning to record evidence than Mexico would have preferred does not go to whether the ITC conducted an "objective" examination of the facts gathered during the review. As Article 17.6(i) makes clear, the fact that another conclusion might have been drawn is insufficient to find that the decision reached is inconsistent with the AD Agreement.

22. Mexico's arguments with regard to the likely volume of imports, likely price effects of imports, and likely adverse impact of imports, including the likely impact on "all or almost all" of the producers in the Southern Tier region, were addressed in detail in the first written submission. We will provide an overview of the ITC's findings in this statement.

¹⁵*US-Argentina Sunset (AB)*, para. 323.

¹⁶*US-Argentina Sunset (AB)*, para. 323.

23. *Likely volume of subject imports would be significant.*¹⁷ In finding that the likely volume of imports from Mexico would be significant, the ITC reasonably relied on such record evidence as statements, including testimony before the ITC, by CEMEX officials that subject imports from Mexico likely would increase if the order were revoked, substantial excess capacity in Mexico, and incentives for Mexican producers to increase exports to the Southern Tier region, notwithstanding their regional operations.

24. Far from being speculative, as Mexico charges, the ITC's findings regarding likely increases in the volume of subject imports from Mexico were consistent with Mexican producer CEMEX's own statements that Mexican imports likely would increase to four million tons per year,¹⁸ if the order were revoked. The ITC did not ignore CEMEX's explanation that these statements reflected "the outside limit of what would be theoretically possible," as Mexico now alleges. The CEMEX statements simply reinforced the fact that subject imports from Mexico, which already had increased during the period of review even with the order in place, likely would increase further if the order were revoked. In addition to these statements, the ITC also was presented with explicit statements at the ITC's hearing and in the Mexican respondents' briefs indicating that such increases would likely occur.

25. The fact is, CEMEX believed that, if the order were revoked, Mexican producers could triple the volume of Mexican imports to the United States. Thus, Mexican cement imports, which were 1.2 million short tons in 1999, could increase by about 2.8 million short tons,

¹⁷See U.S. First Submission, paras. 161-198.

¹⁸U.S. First Submission, paras. 165-167.

possibly reaching a total of four million tons per year, if the order were revoked. Such an increase would return Mexican imports to levels reported during the original investigation.

26. The ITC also found that Mexican producers had significant excess production capacity – more than double the proposed additional shipments – and thus had the *ability* to significantly increase shipments of cement to the Southern Tier region. In considering whether there were other constraints to likely increases of Mexican imports, the ITC found that Mexican producers had more export infrastructure and controlled substantially more import infrastructure in the Southern Tier region than during the original investigation. In fact, of the 38 foreign affiliated producers cited by Mexico this morning, 19 are affiliated with Mexican producers.

27. Moreover, CEMEX officials indicated that CEMEX had excess import terminal capacity and likely would shift from non-subject imports to subject Mexican imports of cement if the order were revoked; CEMEX had imported significant volumes of non-subject imports into the United States during the period of review. The ITC reasonably found that CEMEX likely would substitute imports from Mexico, with their lower transportation costs, for non-subject imports, if the order were revoked.¹⁹ These findings were not speculative, as Mexico charges, but were based on statements by CEMEX officials at the ITC's hearing as well as other evidence in the record.

28. *Likely negative price effects.*²⁰ The ITC found that without the discipline of the antidumping duty order, there was a substantial likelihood that Mexican cement would be priced aggressively in the Southern Tier market in order to gain market share. For example, CEMEX

¹⁹ITC Report at 37 (Exhibit MEX-9).

²⁰See U.S. First Submission, paras. 199-211.

had stated that it would realize a cost savings of \$3 per ton if it were to replace the cement imports from China that it was currently selling in the United States with cement from Mexico if the order were removed. The record evidence for this price sensitive commodity product also showed some underselling, even with the orders in place. Thus, the ITC reasonably found that revocation of the order on cement would be likely to lead to significant underselling by the subject imports of the domestic like product, as well as significant price depression and suppression, within a reasonably foreseeable time.²¹

29. *Likely Adverse Impact on Domestic Industry.*²² The ITC concluded that revocation of the order would likely lead to a significant increase in the volume of subject imports. Such increased imports would likely undersell the domestic like product and significantly suppress or depress U.S. prices, particularly with demand in the region projected to increase at slower rates or remain flat in a price-sensitive market. The likely volume and price effects of the subject imports would likely have a significant adverse impact on the condition of the regional industry. In particular, imports likely would adversely impact the industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments. This likely loss in market share and subsequent decrease in capacity utilization would be particularly harmful in this capital intensive industry. Cement producers require high capacity utilization levels and operating margins to meet fixed costs and to justify capital expenditures.

30. Moreover, the Southern Tier regional producers had undertaken, or announced plans to begin, a number of production capacity expansion projects. The ITC found that the regional

²¹ITC Report at 38-40 (Exhibit MEX-9).

²²See U.S. First Submission, paras. 212-256.

producers' investments in additional capacity would be particularly susceptible to the likely significant increases in subject imports if the order were revoked. The result likely would be an adverse impact on the regional industry's capacity utilization levels and profitability due to high fixed costs.

31. In making its determination of continuation or recurrence of material injury if the order were revoked, the ITC considered the aggregate data for the regional producers representing all or almost all of the production in the Southern Tier region and, as a safeguard, examined the performance of individual regional producers to look for anomalies. Based on the record in the sunset review, the ITC concluded that the "all or almost all" standard was likely to be met.

32. Accordingly, based on the record in the review, the ITC concluded that, if the antidumping duty order were revoked, the likely significant volume of subject imports from Mexico that likely would undersell the domestic product would be likely to have a significant adverse impact on the regional industry within a reasonably foreseeable time. The ITC's determination was based on an objective evaluation and positive evidence, and thus is consistent with Article 11.3 of the AD Agreement.

Issues Relating to the ITC's Decision Not to Initiate a "Changed Circumstances" Review

33. I will turn now to the ITC's decision not to initiate a "changed circumstances" review of the antidumping duty order on cement from Mexico.²³ Article 11.2 of the AD Agreement requires a review to consider the need for continuation of the order – what the United States terms a "changed circumstances" review – if the review is "warranted" and if an interested party submits "positive evidence substantiating the need for review." These conditions were not

²³See U.S. First Submission, paras. 500-533.

satisfied in this case. CEMEX (the Mexican cement producer requesting the review) failed to submit “positive information substantiating the need for a review.” In addition, the actual data on import volumes and prices did not show that a change had occurred in importing strategy that would warrant a full review.

34. Article 11.2 provides no specific guidance on when a changed circumstances review is “warranted,” or what constitutes “positive information substantiating the need for a review.” Members are, thus, free to elaborate under their own laws the conditions under which such a review will be conducted.

35. The question for the ITC at the initial stage of deciding whether to conduct a review is whether there is positive evidence showing that a change in circumstances has occurred. It is not a question of whether a change in circumstances is alleged solely to occur in the future. It is also not a question of whether subject imports would be likely to lead to continuation or recurrence of material injury if the order were revoked. That inquiry is made only if a review is deemed to be warranted. This distinction is an important one.

36. The only “changed circumstance” that CEMEX pointed to was the completion of its acquisition of the U.S. cement producer Southdown. CEMEX provided no evidence that there had been any changes since this acquisition in the volume or price of imports from Mexico into the Southern Tier, or in any of the competitive conditions in the Southern Tier regional market. In fact, it provided no data whatsoever on the volume and prices of Mexican cement imports into the Southern Tier market since the acquisition.

37. Instead, CEMEX tried to use economic forecasts to show why it would have a strong disincentive to import and price in an injurious manner if the order were revoked. In other

words, CEMEX relied entirely on unsubstantiated allegations regarding its possible future actions and possible future changes in U.S. and Southern Tier market conditions.

38. In the absence of any positive evidence from CEMEX on the volume and prices of imports of Mexican cement, the ITC decided to gather this information – official import statistics – itself. What it found was that subject Mexican imports had not fallen or even remained steady since the Southdown acquisition. Instead, they had increased substantially. In the nine months after the completion of the Southdown acquisition, the volume of imports of Mexican cement was almost 30 percent higher than in the comparable period a year earlier. Moreover, the unit values of these imports had declined since the Southdown acquisition.

39. In other words, the actual data on import volumes and prices did not provide evidence of a change in importing strategy by CEMEX resulting from the acquisition that would warrant a full changed circumstances review. The ITC reasonably concluded that CEMEX had failed to provide sufficient evidence to substantiate the need for a review. The ITC's decision not to initiate a changed circumstances review was thus fully consistent with Article 11.2 of the AD Agreement.

Issues Concerning the Likelihood of Continuation or Recurrence of Dumping

Sunset Determination

40. With regard to Commerce's sunset determination, Mexico claims that the United States breached its obligations under Article 11.3 of the AD Agreement because U.S. law and so-called "practice" require that a "presumption" of likelihood be applied in favor of maintaining the antidumping duty order. However, Mexico fails to demonstrate the critical fact upon which its

claims depend – the existence of the allegedly “WTO-inconsistent presumption” in U.S. law.

This is hardly surprising, because no such presumption exists.

41. Mexico alleges that the U.S. sunset review statute, the Statement of Administrative Action (“SAA”), and the *Sunset Policy Bulletin* (“SPB”) give rise to the alleged presumption, and are therefore WTO-inconsistent “as such.” However, as the Appellate Body has correctly recognized before, most recently in the *US - Argentina Sunset* dispute, the U.S. statute establishes no such presumption. The same is true of the SAA and SPB, neither of which “establish” anything, and both of which confirm that Commerce determines likelihood on the basis of the facts of each case.

42. Mexico also purports to have analyzed exhaustively Commerce’s prior sunset determinations and has offered a statistical “analysis” that, Mexico asserts, demonstrates the alleged “presumption of likely dumping.” Mexico is wrong. Mexico’s statistical compilation is devoid of any qualitative evaluation and analysis of the particular factual circumstances in each case. Because of this, the Appellate Body found that a similar statistical compilation did not demonstrate any presumption of likelihood when presented with nearly identical claims in *US - Argentina Sunset*.

43. With respect to Mexico’s claims against the likelihood determination in the instant case, those too fail. Commerce’s determination was premised upon the following facts: (1) Mexican producers/exporters had continued to dump in each of the eight years since the imposition of the duty; (2) the two most recent assessment reviews evincing continued dumping by Mexican producers/exporters had been completed immediately prior to the initiation of the cement sunset review and immediately prior to the final sunset determination, respectively; (3) the level of

imports in the years preceding the cement sunset review remained significantly lower than pre-order volumes; and (4) parties provided no evidence or argument to the contrary. Under these circumstances, Commerce reasonably concluded that revocation of the order on cement from Mexico would be likely to lead to continuation or recurrence of dumping. The United States respectfully submits that the Panel should reject Mexico's arguments to the contrary.

44. The Panel should also reject Mexico's claim concerning the "margin likely to prevail". As explained in our first submission, as a matter of U.S. law, Commerce is required to report the "margin likely to prevail" to the ITC for possible consideration in its likelihood of continuation or recurrence of injury determination. Commerce does not, and did not, rely upon the "margin likely to prevail" in making its likelihood determination. Thus, the premise of Mexico's claim – that Commerce "relied" on the margin likely to prevail in making its likelihood determination – simply is incorrect as a factual matter.

Issues Relating to Assessment Reviews

45. Mexico raises many and varied claims and arguments regarding Commerce's conduct of assessment reviews. In the interest of time, we will not address each of these in great detail. Rather, we will address generally – and illustrate by reference to particular claims – some of the fundamental flaws in Mexico's arguments. These flaws, and others we discuss in our submission, render Mexico's claims relating to the assessment reviews untenable.

Mexico Asserts WTO Obligations That Do Not Exist

46. First, with respect to many of its claims, Mexico asserts obligations that simply do not exist in the AD Agreement or in any other covered agreement. Mexico's claims, if accepted, would run afoul of the fundamental requirement in Article 3.2 of the DSU that the dispute

settlement process cannot be used to add to or diminish the rights and obligations of Members under the WTO agreements. Consider the following three examples.

47. Mexico contends that Commerce was required to “update” its original industry support determination in an assessment or a sunset review subsequent to the imposition of the 1990 cement order. Mexico’s claims are primarily based in Article 5 of the AD Agreement.

However, the Article 5 obligations with respect to examination of industry support are applicable only to the *investigation phase* of the antidumping proceeding. Neither Article 9, which governs assessment reviews, nor Article 11, which governs sunset reviews, requires examination of industry support in the context of those types of reviews. Thus, there is no basis in the AD Agreement for Mexico’s argument that Commerce was obligated to make industry support findings in the assessment reviews or sunset review at issue.

48. Similarly, Mexico claims that Commerce acted inconsistently with the AD Agreement when it “collapsed” the affiliated companies, CEMEX and CDC, and determined a common dumping margin based on the data for the economic entity as a whole. Mexico’s chief contention is that, because CEMEX and CDC are separate companies, Commerce was required to calculate separate dumping margins for each of them under Article 6.10 of the AD Agreement.

49. Again, Mexico asserts an obligation that does not exist under Article 6.10. That provision sets out the general rule that, in an investigation, an individual margin of dumping must be calculated for each known “exporter or producer.” It does *not* require that an individual margin be calculated for each known *legal entity* that produced or exported subject merchandise. Moreover, the AD Agreement does not define either “exporter” or “producer.” Thus, nothing in

the Agreement requires investigating authorities to construe these terms with reference to corporate structure rather than actual commercial reality.

50. The facts of a particular case may well demonstrate that two separate legal entities function as a single “exporter” or “producer” within the meaning of Article 6.10. That was true of the assessment reviews at issue. As detailed in our first written submission, Commerce properly determined that the facts warranted treating CEMEX and CDC as a single “exporter or producer” for purposes of calculating the dumping margin. Nothing in Article 6.10 requires a different result.

51. With respect to the so-called “zeroing” issue, to date, there have been two disputes which have addressed this issue in some detail – *EC – Bed Linen* and *US – Softwood Lumber AD* – and both disputes involved investigations. While Mexico seeks to extend the findings in those reports to the assessment proceedings identified in its panel request, Mexico provides no legal analysis to support such an extension.

52. Mexico’s legal theory is premised on the application of Article 2.4.2 to Article 9 assessment proceedings; however, the obligations contained in Article 2.4.2 are explicitly applicable “during the investigation phase.” It would be inconsistent with the customary rules of treaty interpretation to read this language out of Article 2.4.2, yet that is precisely what Mexico seeks to do in this dispute. In the absence of applying Article 2.4.2 to assessment proceedings, Mexico lacks even a *prima facie* case that the U.S. methodology in Article 9 assessment proceedings is inconsistent with the AD Agreement.

Certain of Mexico’s Claims Fail As a Factual Matter

53. Second, a number of Mexico's claims fail as a matter of fact. For example, Mexico claims that the United States has breached its obligations under Article 4.2 by levying duties on a nationwide basis. This is simply not true. In antidumping proceedings involving a "regional industry," Article 4.2 of the AD Agreement requires that antidumping duties be assessed on a regional basis *except* in certain circumstances in which a Member's constitutional law does not permit the levying of duties on such a basis. This exception applies to the United States because the U.S. Constitution requires the uniform levying of antidumping duties at every U.S. port of entry.

54. The United States has demonstrated that it also satisfied the two other conditions under Article 4.2 for nationwide assessment in regional industry cases. Specifically, consistent with Article 4.2(a), Mexican exporters were afforded the opportunity to obtain an undertaking. Moreover, because all Mexican exporters of cement supplied the region in question, the type of exporter-specific duty exemptions contemplated in Article 4.2(b) are not applicable. Thus, contrary to Mexico's arguments, the facts plainly demonstrate that the United States acted consistently with its obligations under the AD Agreement.

55. Mexico also challenges Commerce's duty absorption findings in certain assessment reviews, claiming that these findings allow Commerce to establish an amount of duty that exceeds the margin of dumping in breach of the AD Agreement. Again, Mexico's claim fails as a matter of fact. Commerce makes duty absorption findings under certain circumstances where the subject product is sold in the United States through an importer affiliated with the exporter or producer. These findings indicate whether antidumping duties have been "absorbed" by the affiliated importer. The *sole* purpose of any duty absorption finding is for possible use in

determining the “margin likely to prevail” that is reported to the ITC in a sunset review.

Contrary to Mexico’s assertions, a duty absorption finding does not affect, in any way, the amount of duty that is calculated or assessed.

Mexico Asks the Panel to Undertake a *De Novo* Review of the Facts

56. Third, certain of Mexico’s arguments effectively require the Panel to re-weigh the facts and substitute its evaluation thereof for that of Commerce. For example, Mexico claims that Commerce acted inconsistently with Article 2.1 of the AD Agreement by excluding certain home market sales as being outside the “ordinary course of trade.” The term “ordinary course of trade” is not defined in the AD Agreement. Thus, as the Appellate Body recognized in *US - Hot-Rolled Steel*, authorities have the discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not in the ordinary course of trade. By its very nature, this is necessarily a case-specific and fact-intensive inquiry.

57. In making its ordinary course of trade determinations, Commerce conducted a careful assessment of the business conditions and practices with respect to the Mexican producers’ home-market sales during the relevant periods of review. This included evaluations of such factors as freight costs, shipping distances, relative profit, sales volume, and the customers to whom sales were made, among other things. A fact-specific determination was made in each assessment review at issue.

58. Mexico offers no evidence or argument to demonstrate that the facts on which Commerce based its findings were not properly established or that evaluation of the facts was not unbiased or objective. Mexico’s complaint seems to be that Commerce should have discounted certain facts and relied on others, or analyzed the evidence in a different way. Under Article 17.6(i) of

the AD Agreement, that is not a sufficient basis to find Commerce's determinations to be WTO-inconsistent.

59. Similarly, Mexico claims that Commerce acted inconsistently with the AD Agreement because, as the "like product" for purposes of establishing normal value, Commerce used sales of cement of the same or similar type, whether it was sold in bagged or bulk form. There is, however, no requirement in the AD Agreement that packaging be taken into account in determining the "like product" in all cases. Although it is presented as a question of U.S. obligations under the AD Agreement, Mexico's challenge goes to whether Commerce's decisions to treat bulk and bagged forms of the same or similar type of cement as a single like product were proper. Mexico has offered no evidence or argument to show that they were not.

60. Mexico also has failed to offer any evidence or argument to show that Commerce acted inconsistently with the AD Agreement when it made adjustments to price to account for differences in the physical characteristics of the cement it compared to calculate dumping margins. Where Commerce's factual determinations are based on properly established facts that have been evaluated in an unbiased and objective manner – as they are here – they must not be found inconsistent with U.S. obligations.

61. In sum, for the reasons above, and other reasons addressed at length in our first submission, Mexico has failed to meet its burden of proving its claims with respect to the conduct of assessment reviews. These claims should, therefore, be rejected.

Issues Relating to the System of Duty Assessment

Retrospective Antidumping Duty Assessment

62. I will turn now to issues relating to retrospective antidumping duty assessment. Mexico alleges that the U.S. retrospective antidumping duty assessment system is inconsistent with various provisions of the AD Agreement because final antidumping duties are not assessed until a period after entry of the subject imports and because such duties may be higher than the estimated duties paid at the time of entry. Notwithstanding Mexico's denial earlier this afternoon, in so doing, Mexico challenges the very nature and validity of retrospective antidumping duty assessment systems. Contrary to Mexico's assertions, the AD Agreement *expressly* recognizes that Members may use either retrospective or prospective antidumping duty assessment systems.

63. Under the U.S. retrospective antidumping duty assessment system, Customs collects a deposit, not the final duty, at the time of entry. The final duty levied is based on the amount of dumping actually found to exist, consistent with Article 9.3 of the Agreement. The retrospective system, therefore, does not result in the collection of duties in excess of the dumping actually found to exist. Moreover, Mexico fails to demonstrate that any provision in the AD Agreement requires Members to under-collect assessed duties simply because they are using a retrospective system.

Interest on Over- and Under-Payment of Antidumping Duties

64. Turning to the issue of interest, U.S. law requires the payment and collection of interest whenever the estimated duties on deposit differ from the actual duties due. Mexico argues that the levying of interest results in the collection of anti-dumping duties in excess of the margin of dumping. However, the basic premise of Mexico's argument is incorrect. Interest paid on antidumping duties, whether by the United States (in the case of over-payment) or an importer

(in the case of under-payment) is not an antidumping duty. Rather, is a separate payment or charge that reflects the time value of money. There is no basis for Mexico's contention that payment of interest is precluded by the AD Agreement, or any other WTO agreement.

Procedural Issues

65. Finally, the United States would like to address briefly the procedural issues presented in this dispute: first, the issue of certain defective claims in Mexico's panel request; second, the issue of certain new matters in Mexico's first submission; and, third, Mexico's new preliminary ruling request.

Defective Claims in Mexico's Panel Request

66. Mexico failed to comply with its obligations under Article 6.2 of the DSU because, in certain portions of its panel request, it cited whole articles of the AD Agreement, without identifying the particular obligations within those articles alleged to be breached. Mexico does not appear to deny that the Appellate Body and prior panels have found that this can fail to satisfy the requirements of Article 6.2.²⁴ Instead, Mexico responds with arguments that either are not relevant or undermine the text of Article 6.2.

67. Mexico asserts, first, that it was obligated to present only claims, not arguments, in its panel request.²⁵ This assertion is irrelevant. The United States has never argued that Mexico was required to present its arguments in its panel request. What the United States *has* argued is that Mexico was obligated to "provide a brief summary of the legal basis of the complaint

²⁴Reply of Mexico to the U.S. Request for Preliminary Rulings, paras. 24, 25 (November 10, 2004) (hereinafter "Mexico November 10 Submission").

²⁵Mexico November 10 Submission, para. 42.

sufficient to present the problem clearly” consistent with Article 6.2. Mexico provides no effective rebuttal to that argument.

68. Second, Mexico argues that the United States should have known by virtue of “textual similarities” which treaty provisions were at issue.²⁶ Mexico not only exaggerates the alleged “textual similarities,” it ignores the fact that Article 6.2 places the burden on *complaining parties* to “present the problem clearly.” The burden is not on the responding party and potential third party Members to decipher ambiguous panel requests and infer claims not properly set out therein.

69. Third, Mexico asserts that, in certain cases, it was justified in citing to whole articles of the AD Agreement because the basis of its claim was that *no provision* within the cited articles permits the challenged action.²⁷ Mexico’s argument is premised on the incorrect assumption that any action not expressly “permitted” under the AD Agreement is WTO-inconsistent. That is not so. The AD Agreement sets out the *obligations* of the Members to do certain things, and not do other things, in their respective antidumping regimes. Asserting that the text is silent with respect to an action does not satisfy Mexico’s burden of identifying a specific *obligation* in the AD Agreement that the United States has allegedly breached.

70. Fourth, Mexico argues that the United States has not shown sufficient prejudice for the Panel to find the defective claims outside its terms of reference.²⁸ As a threshold matter, no provision in the WTO agreements states that a lack of prejudice cures a breach of Article 6.2. Even so, the United States has shown that it has been prejudiced because of the deficiencies in

²⁶Mexico November 10 Submission, paras. 49-54 and 65-69.

²⁷Mexico November 10 Submission, paras. 44-48 and 70-78.

²⁸Mexico November 10 Submission, paras. 83-91.

Mexico's panel request. These deficiencies impaired the right that the United States and potential third party Members have under Article 6.2 to know, *as of the time the panel request is submitted*, the legal basis of Mexico's claims. The United States also lost well over a year to research and address the issues at hand and otherwise prepare its defense. In a dispute involving a large number of claims, such as this, a complaining party's failure to be clear and include each claim at issue in its panel request is particularly prejudicial.

71. It is important to note, in closing, that Mexico could have avoided causing this prejudice simply by submitting a new panel request that set out its claims in a manner sufficient to "present the problem clearly." That would have avoided the need to resolve these issues before the Panel. Unfortunately, Mexico chose not to do so, despite early notice from the United States of the problem.

Certain Matters Not Identified in Mexico's Panel Request

72. Next, regarding certain new matters in Mexico's first submission, the United States notes that the forced interpretive efforts in which Mexico engages to demonstrate that these certain matters were identified in its panel request speak for themselves.²⁹ They just confirm that Mexico did not identify in its panel request any "as such" claims against Commerce's "consistent practice in sunset reviews" and the U.S. legal provisions governing regional assessment and collapsing. These new matters are therefore outside the Panel's terms of reference under DSU Article 7.1.

²⁹Further Reply of Mexico to the U.S. Request for Preliminary Rulings at paras. 8-14 and 22-41 (January 13, 2005) (hereinafter Mexico January 13 Submission).

73. In addition, there is no basis for Mexico's argument that the so-called "consistent practice" of Commerce is a measure subject to challenge "as such."³⁰ Mexico apparently is using the term "practice" to refer collectively to a number of previous applications by Commerce of the U.S. antidumping law in making its determinations. Yet each application of the U.S. antidumping law is dependent on the particular facts of each proceeding. If similar facts arise in different proceedings, it can be expected that the law would be applied similarly. However, the fact that a law is repeatedly applied does not somehow create a new, distinct "measure" that can be challenged independently. This is true regardless of whether the law has been applied in a consistent manner, and it is true regardless of whether the description of how the law has been applied is labeled a "practice."

74. Moreover, as past panels have correctly recognized, Commerce is not bound by its prior determinations. Thus, what Mexico refers to as Commerce's "practice" does not obligate Commerce to *do* anything in future determinations. For these reasons, when panels have been asked, in other disputes, to find that so-called Commerce "practice" is a measure subject to challenge as such, they have uniformly declined. Mexico's assertions to the contrary are erroneous.

Mexico's New Preliminary Ruling Request

75. With respect to the preliminary ruling request that Mexico filed two days ago asking for all confidential documents on the record of the ITC sunset review, the United States would first note that this is in fact not a "preliminary ruling request" at all. Mexico is not seeking any "ruling" on a procedural dispute or substantive issue. Rather, Mexico is simply requesting the

³⁰Mexico January 13 Submission, paras. 15-21.

Panel to exercise its right under Article 13.1 of the DSU to seek “information and technical advice from any individual or body which [the Panel] deems appropriate.” As such, this is not a subject on which the Panel would need to make a finding, and it is just a question of whether to do it as a “preliminary” matter or wait until the Panel report. Consequently, Mexico is not entitled to a “ruling” by the Panel. A panel has the unconditional discretion to exercise (or not exercise) its Article 13.1 authority. The fact that Mexico has chosen to label its request as a “preliminary ruling request” does not change the nature of the question presented or give Mexico any say in whether or how the Panel exercises its Article 13.1 authority.

76. Second, Mexico’s request is flawed and should be rejected. Mexico’s request appears to be the first step in attempting to have the Panel engage in de novo review of the ITC’s determination on whether expiry of the order would be likely to lead to the continuation or recurrence of injury. The sole reason Mexico gives for why this information would assist the Panel is: “Having access to this information would assist the Panel to review the evidence and arguments relied upon by the United States to justify the Commission’s determinations.” However, the Panel is not tasked with reviewing the raw data and information to draw its own conclusions about whether injury were likely to continue or recur. Mexico gives no explanation as to why the Panel should need to obtain or review documents that neither party has placed before the Panel. This alone is sufficient basis for the Panel to deny Mexico’s request.

77. Furthermore, in its submission of 15 February 2005, Mexico’s sole reason for making its request at this late stage is its claim that the United States “refer[red] to, and partly rel[ied] on, primarily confidential information” in its first submission, yet Mexico does not provide a single citation to the U.S. submission to prove this allegation. For this reason also, the Panel should

decline Mexico's request to exercise its Article 13.1 right. The United States also notes that Mexico does not appear to limit its request to "confidential information."

78. One final thought: even on Mexico's own terms, its "preliminary ruling request" is untimely. As our earlier comments make clear, Mexico has not shown "good cause" for waiting for almost four months after filing its first written submission to make this request. Nor has Mexico shown "good cause" for submitting the request two days before this Panel meeting, at a time when the U.S. delegation was en route to Geneva and in the midst of preparations for the meeting. Indeed, if anything, Mexico's resort to such eleventh-hour litigation tactics simply confirm that Mexico cannot satisfy its burden of making a *prima facie* case.

Conclusion

79. Mr. Chairman, that concludes the opening statement of the United States. We would be pleased to answer any questions the Panel may have.