

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

(WT/DS281)

**Answers of the United States to the First Set of Questions of
the Panel, in Connection with the First Substantive Meeting with the Parties,
Relating Mainly to the Parties' Preliminary Ruling Requests**

March 2, 2005

United States' Requests for a Preliminary Ruling

To the United States:

Q1. In its first request for a preliminary ruling, the United States claims that subsections C.3(a) and E.9(a) of Mexico's panel request fall outside of the Panel's terms of reference to the extent that they make claims with respect to Article 6 of the Anti-dumping Agreement. The Panel notes that subsections C.3(a) and E.9(a) of Mexico's panel request do not include any claims with respect to Article 6.

(a) Please clarify whether the United States' reference to subsections C.3(a) and E.9(a) was an oversight, or whether the United States continues to maintain its claim with respect to these subsections?

1. In its October 26, 2004 preliminary ruling request, the United States noted, *inter alia*, that subsections C.3(a) and E.9(a) of Mexico's panel request refer to Articles 2 and 6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") in their entirety.¹ Upon further review, the United States agrees with the Panel that subsections C.3(a) and E.9(a) appear to refer only to Article 2 in its entirety, not also to Article 6. Thus, the United States maintains its request for preliminary rulings only with respect to Mexico's claims based on Article 2 as a whole in those subsections.

(b) If the United States maintains this claim, please explain its basis in the light of Mexico's panel request.

2. Please see response to Q1(a) above.

Q3. Please describe, in detail, the nature of the prejudice the United States believes it has suffered as a result of the alleged insufficiency of Mexico's panel request with respect to Article 6.2.

3. Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of*

¹ Request for Preliminary Rulings by the United States, paras. 21-26 (October 26, 2004).

Disputes (“DSU”) does not speak of “prejudice.” That provision has four requirements that apply to the request for panel establishment submitted by the complaining party. Specifically, the request for panel establishment must (a) be in writing; (b) indicate whether consultations were held; (c) identify the specific measures at issue; and (d) provide a brief summary of the legal basis of the complaint “sufficient to present the problem clearly.”² Nothing in DSU Article 6.2 allows for these requirements to be ignored when the complaining party alleges there has been no prejudice to the responding party.

4. In prior disputes, the sufficiency of a panel request in respect of the standard of clarity in DSU Article 6.2 has been examined on a case-by-case basis.³ As discussed below, the facts and circumstances in this dispute support a finding that Mexico’s panel request fails to meet the Article 6.2 requirement that the legal basis of the complaint be set out with sufficient clarity “to present the problem clearly.”

5. First, in certain portions of its panel request, Mexico cites to Articles 2, 6, 10, and Annex II of the AD Agreement in their entirety, each of which encompasses multiple paragraphs and distinct obligations. As the Appellate Body recognized in *Korea – Dairy*:

[T]here may . . . be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations.⁴

The circumstance described by the Appellate Body – where a panel request refers generically to entire articles consisting of multiple, distinct obligations – is precisely the circumstance at issue here.⁵

² In cases where the panel does not have standard terms of reference, Article 6.2 also requires that the request for panel establishment include the proposed text of special terms of reference. That requirement is inapplicable in this dispute because the Panel has standard terms of reference.

³ See e.g., Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, para. 127 (“we consider that whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis”) (“*Korea – Dairy*”).

⁴ *Korea – Dairy*, para. 124.

⁵ As discussed in the U.S. request for preliminary rulings, Article 2 has seven paragraphs, three subparagraphs, two sub-subparagraphs and three clauses; Article 6 has fourteen paragraphs, seven subparagraphs, and three clauses; Article 10, which has eight paragraphs and two clauses; and Annex II has seven paragraphs. These paragraphs, subparagraphs and clauses contain distinct obligations. In many cases, there exist multiple obligations within each of these paragraphs, subparagraphs and clauses. Consistent with the Appellate Body finding in *Korea-Dairy*, panels in prior disputes have found that references to entire articles are not sufficient to satisfy the standard in DSU Article 6.2. See e.g., Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R, para. 7.14(7) (discussing Articles 6, 9, and 12 of the AD Agreement); *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams From Poland*, WT/DS122/R,

6. Second, notwithstanding the fact that DSU Article 6.2 does not contain a prejudice requirement, as the United States explained in its request for preliminary rulings and at the first meeting with the Panel, the United States has nevertheless been prejudiced by the deficiencies in Mexico's panel request. Responding parties and potential third party Members have an unqualified right under DSU Article 6.2 to know, *as of the time the panel request is submitted*, the legal basis of the claims made by the complaining party. Mexico's failure to set out its claims with specificity have impaired this right.

7. In addition, the DSU sets out procedural requirements that are carefully calibrated to ensure that the proceeding moves expeditiously while providing parties adequate time to present and defend their respective cases. The United States not only lost over a year to research and address the issues at hand and otherwise prepare its defense,⁶ but the defects in Mexico's panel request continue to have negative effects in this proceeding. As evidenced by the Panel's questions to Mexico,⁷ uncertainty persists regarding the nature of Mexico's claims on the basis of whole articles of the AD Agreement. It continues to be unclear, for example, what Mexico means when it asserts that is claiming a breach of Article 2 "in its aggregate form."⁸ There are no unwritten "aggregate" obligations under the AD Agreement, as Mexico seems to suggest. The AD Agreement sets out the specific obligations of the Members to do certain things, and not do other things, under their respective antidumping regimes. As Mexico has not identified – even to this date – the particular obligations under Article 2 it is accusing the United States of having breached when Commerce conducted a duty absorption analysis in certain of the assessment reviews at issue, the United States cannot be assured that it has had a meaningful opportunity to defend itself with respect to those claims.

8. 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. Mexico's failure to be clear as to its claims is also perplexing given that it is challenging determinations by U.S. authorities going back almost a decade; this is not a dispute in which the complaining party has had little time to consider and develop its claims.

9. Third, it is significant that the United States notified Mexico of the problems in its panel request at the earliest possible opportunity – at the August 18, 2003 meeting of the Dispute Settlement Body in which Mexico's panel request was first presented.⁹ The United States cited

adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.67, paras. 7.28-7.29 (discussing Article 6 of the AD Agreement).

⁶ This argument, when advanced by Canada in the Wheat Board dispute, sufficed to warrant the conclusion that the panel request at issue was inconsistent with Article 6.2. *See Canada - Wheat Preliminary Ruling*, para. 28. "[The panel request] creates significant uncertainty regarding the identity of the precise measures at issue and thus impairs Canada's ability to 'begin preparing its defence' in a meaningful way." (Citations omitted).

⁷ *See e.g.*, Questions 4-5 in Questions to Parties Relating Mainly to Parties' Preliminary Ruling Requests (February 21, 2005).

⁸ Reply of Mexico to the U.S. Request for Preliminary Rulings, para. 44 (November 10, 2004).

⁹ Minutes of 18 August 2003 DSB Meeting, WT/DS281/1, circulated 22 October 2003, paras. 5-9.

several examples of defects in Mexico's panel request and explained that, as a result of such defects, the United States was unable to discern the legal basis of Mexico's complaint for a large part of the panel request. The United States urged Mexico to withdraw its panel request and submit a new request that complied with the requirements of DSU Article 6.2. Mexico summarily dismissed the U.S. request and, although more than a year passed between the time that Mexico's panel request was accepted and the time that the Panel was composed, made no effort to address the U.S. concerns. Mexico's reluctance to cure the defects in its panel request, despite this early notice, further supports a finding that Mexico failed to satisfy the requirements of DSU Article 6.2.

Q6. Section C.3(c) of Mexico's panel request refers to Article 11.4 as a legal basis for Mexico's claim. Article 11.4 stipulates that Article 6, in its entirety, applies to reviews conducted under Article 11. In the light of the United States' concerns over Mexico's general reference in this section to Article 6, why has the United States not complained that Mexico's reference to Article 11.4, to the extent that this refers to Article 6 in its entirety?

10. Article 11.4 of the AD Agreement contains a cross-reference to "[t]he provisions of Article 6 *regarding evidence and procedure*" and states that these provisions shall apply to all reviews under Article 11.¹⁰ This cross-reference is not, in and of itself, an obligation; it simply draws into Article 11 reviews the evidentiary and procedural obligations under Article 6, making those obligations under Article 6 applicable to Article 11 reviews. Thus, to claim a breach of those obligations in the context of an Article 11 review, the complaining party must identify specific obligation(s) *under Article 6*. In its October 26, 2004 request for preliminary rulings, the United States pointed out that Mexico had not done so.

11. In short, the fact that certain of the Article 6 obligations apply to Article 11 reviews by virtue of Article 11.4 is entirely irrelevant to the question of *which* Article 6 obligations Mexico is accusing the United States of breaching.

Panel's Terms of Reference

Q17. The heading to Section X.A.4 and paragraphs 885, 886 and 900 of Mexico's first written submission appears to include claims that USDOC calculated dumping margins in breach of Articles 2.1 and 2.4 of the Anti-dumping Agreement and Article VI of the GATT 1994. Assuming that these references are intended to amount to a claim independent to that Mexico makes with respect to Article 2.4.2 in the same Section, does the United States consider that these claims fall within the Panel's terms of reference?

¹⁰ In this regard, the United States notes that it does not agree with the statement in Q6 that Article 6 applies "in its entirety" to Article 11 reviews. As noted above, Article 11.4 of the AD Agreement provides that only the provisions of Article 6 "regarding evidence and procedure" shall apply to reviews conducted under Article 11.

12. The United States does not consider that these claims fall within the Panel's terms of reference. Mexico's so-called "zeroing" claim is set out in Section E.4 of its panel request. That claim alleges that "zeroing" is inconsistent with Article 2.4.2 of the Antidumping Agreement and does not allege an inconsistency with Article 2.1 or 2.4. Therefore, claims relating to Articles 2.1 and 2.4 are outside the terms of reference of the Panel.

Q18. The heading to Section X.A.3 and paragraphs 857 and 860 of Mexico's first written submission set out the claim that USDOC calculated dumping margins in breach of Article 2.4 of the Anti-dumping Agreement. Assuming that these references are intended to amount to a claim, does the United States consider that this claim is within the Panel's terms of reference?

13. As noted above, in its panel request, Mexico did not set out a claim that so-called "zeroing" is inconsistent with Article 2.4. Therefore, any such claim is outside the terms of reference of the Panel.

Q19. The heading to Section X.A.1 and paragraph 826 of Mexico's first written submission include what appears to be a claim that USDOC calculated dumping margins in breach of Article 2.2.1 of the Anti-dumping Agreement. Assuming that these references are intended to amount to a claim, does the United States consider that it falls within the Panel's terms of reference?

14. Section X.A.1 of Mexico's first written submission relates to the issue of sales made in the "ordinary course of trade." Mexico's claims with respect to this issue were set out in section E.1 of its panel request. In that section of the panel request, Mexico makes claims on the basis of Articles 2.1, 2.4, and 2.6, not Article 2.2.1. Thus, to the extent Mexico makes any new claim on the basis of Article 2.2.1 in section X.A.1 of its first submission, the United States considers that it would be outside the Panel's terms of reference.

Mexico's Request for a Preliminary Ruling/USITC Sunset Review Determination

Q20. With respect to the "confidential" information identified by Mexico in its preliminary ruling request:

To the United States:

- (a) **How does the United States respond, point by point, to the list of "confidential" information submitted by Mexico in conjunction with its preliminary ruling request?**

15. Please see the table in the attachment. As noted below, Mexico has not challenged the designation of certain data as confidential, the accuracy or validity of the aggregate data, or the ITC's statements for which the raw data provide support. The United States notes that Mexico

has done nothing more than list instances in which the United States recognized certain confidential information on the record of the ITC proceeding and identified the general subject matter at issue. It is difficult for the United States to provide more detailed responses regarding particular raw data unless Mexico explains the reasons it believes the confidential data is necessary. The United States respectfully submits that the Panel should ask Mexico to provide such explanations.

To both Parties:

- (b) Are the data concerned necessary in this Panel proceeding?**
- (c) Can the Panel satisfy Article 11 of the DSU without access to such data?**
- (d) How, if at all, does this issue relate to the Panel's standard of review in Article 17.6 of the Anti-dumping Agreement? For example, is the United States suggesting that the Panel's standard of review means that the Panel need not have access to it? How, if at all, is Article 17.5 of the Anti-dumping Agreement relevant to this issue?**

16. The following response is to Q20(b), (c), and (d). As discussed in the response to Q20 (a), the confidential data that is the subject of Mexico's request for preliminary rulings is confidential *raw data* (generally, individual firm data). This same data was aggregated for use by the ITC and, in such aggregated form, is non-confidential because it does not disclose the proprietary information of any one company or entity. Mexico has not challenged the designation of certain data as confidential, the accuracy or validity of the aggregate data, or the ITC's statements for which the raw data provide support.¹¹ Although it is part of the evidentiary record supporting the ITC's determination, the company-by-company confidential raw data are not necessary for the Panel to perform its functions in this proceeding. The Panel can satisfy its obligations under DSU Article 11¹² and Article 17.6(i)¹³ of the AD Agreement without access to

¹¹ As noted in the U.S. first written submission, counsel for Mexican respondents, as well as counsel for all interested parties to the proceeding, had full access to the confidential data, identified by Mexico in support of its preliminary ruling request, through release of all questionnaire responses, the ITC's pre-hearing report and the ITC's final staff report. Counsel for Mexican respondents did not challenge the accuracy, validity, or comprehensiveness of the confidential data in the underlying proceeding.

¹² DSU Article 11, which defines the function of panels, provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. . . ."

¹³ Article 17.6(i) of the AD Agreement, which sets forth the specific standard of review applicable in the antidumping context, complements DSU Article 11. Article 17.6(i) provides that:

in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall

the raw confidential data collected by the ITC because the non-confidential data on the record is sufficient to substantiate the U.S. arguments.

17. The task of the Panel in this dispute settlement proceeding is to assess whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner. In so doing, the Panel may “not . . . perform a *de novo* review of the information and evidence on the record of the underlying sunset review, nor . . . substitute [its] judgment for that of the US authorities.”¹⁴ As the Appellate Body recognized in *Thailand – H-Beams*, Articles 17.5¹⁵ and 17.6, “place limiting obligations on a panel, with respect to the review of the establishment and evaluation of facts by the investigating authority.”¹⁶ According to the Appellate Body, “[t]he aim of Article 17.6(i) is to prevent a panel from ‘second-guessing’ a determination of a national authority when the establishment of facts is proper and the evaluation of those facts is unbiased and objective.”¹⁷

18. The proper establishment of the facts does not limit an investigating authority to basing an injury determination only upon non-confidential information.¹⁸ Moreover, the AD Agreement recognizes that the United States, like any Member, is precluded from disclosing confidential information “without specific permission of the party submitting it.”¹⁹ Mexico has not raised any claims under Article 6.5 of the AD Agreement concerning the designation of the identified information by the ITC as confidential.

19. Under DSU Article 13.1, a panel may request information that the panel considers “necessary and appropriate.” “Necessary” means “[t]hat which cannot be dispensed with or done without; requisite, essential, needful,”²⁰ and “appropriate” means “specially suitable . . . proper, fitting.”²¹ Thus, a panel may request such information as is essential for resolution of the dispute before the panel and suitable for use in that dispute. By definition, if the dispute can be

not be overturned.

¹⁴ Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Duties on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, para. 322 (“If the panel is satisfied that an investigating authority’s determination on continuation or recurrence of dumping or injury rests upon a sufficient factual basis to allow it to draw reasoned and adequate conclusions, it should conclude that the determination at issue is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.”) (“*US - Argentina Sunset*”). This principle is rooted in considerations of the distinct functions of investigating authorities and WTO panels.

¹⁵ Article 17.5 states, in relevant part, that “[t]he DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon . . . the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.”

¹⁶ Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, para. 114 (“*Thailand – H-Beams*”).

¹⁷ *Thailand - H-Beams (AB)*, para. 117.

¹⁸ See *Thailand - H-Beams (AB)*, para. 107.

¹⁹ Article 6.5 of the AD Agreement.

²⁰ The New Shorter Oxford English Dictionary, p. 1895 (Clarendon Press 1993).

²¹ The New Shorter Oxford English Dictionary, p. 103.

resolved without reference to specific information, that information cannot be considered “necessary” to resolution of a dispute. As discussed in response to questions 20 (a), (e), and (f), the information identified by Mexico is not “necessary” for the panel to resolve the claims in this dispute. Prior panels have declined to require the disclosure of confidential data where it is not necessary to resolution of the dispute.²²

20. The United States notes, in this regard, that the burden is on *Mexico* to establish that the confidential data to which its preliminary ruling request relates is “necessary.” It has not done so. Mexico has done nothing more than list instances in which the United States recognized certain confidential information on the record of the ITC proceeding and identified the general subject matter at issue. The Panel in *US-DRAMs* recently rejected a similar request by the complaining party, stating:

. . . it would only be appropriate and necessary to request the relevant confidential information from the US if Korea had established a basis for its case However, we consider that Korea failed to do so.²³

21. Mexico has similarly failed to establish a basis for its case that the identified confidential raw data should be requested by the Panel from the United States as “necessary” and “appropriate.”

To the United States:

- (e) **Recalling that it is generally for each party asserting a fact to provide proof thereof²⁴, and that, therefore, it is also for the United States to provide evidence for the facts which it asserts, how does the US substantiate, in these Panel proceedings, the validity of its "all or almost all" and other "regional industry" injury findings (or other findings concerned) in light of the fact that certain of the data cited by the US is currently redacted from the Panel record? Does the US rely on this information in these proceedings?**

²² See e.g., *United States – Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, adopted 7 June 2000, as modified by the Appellate Body Report, WT/DS138/AB/R, para. 6.7 (“we do not consider it necessary to request the relevant information from the United States. In our view, the present dispute can be resolved without reference to the precise facts surrounding the Richemont spin-off in *Stainless Steel Sheet and Strip*.”); *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams From Poland*, WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.67 (“[A] panel clearly may refer to the confidential version of the application. However, in light of the particular arguments of Poland . . . we consider that the non-confidential version of the application provides a sufficient basis for our examination under Article 5.2 of the AD Agreement in this case.”).

²³ *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, WT/DS296/R, adopted 21 February 2005, para. 7.239 (“*US – DRAMS*”).

²⁴ See *US – Wool Shirts and Blouses (AB)*, p. 14.

22. The confidential individual firm data that is the subject of Mexico's preliminary ruling request, primarily the data in Tables E-1 - E-8 of the ITC Report, has little relevance to the issues raised before this Panel and, specifically, to Mexico's claims regarding whether the "all or almost all" criteria likely would be satisfied if the order were revoked.

23. As discussed in the U.S. first written submission,²⁵ in conducting its analysis, the ITC first considers aggregate regional data to determine whether it shows injury and, next, examines individual producer data as appropriate to determine whether anomalies exist that an aggregate analysis would disguise. Thus, in the sunset review at issue, the ITC analyzed the aggregate data for the regional industry regarding the U.S. statutory factors likely to have a bearing on the condition of the industry (*e.g.*, domestic producers' production, shipments, capacity, employment, financial performance). The non-confidential aggregate data showing the condition of the Southern Tier regional industry are contained in Tables I-1A, III-1A, III-2A, III-4A, III-5A, III-6A, III-7A, III-8A, III-9A, III-10A, and C-1 of the ITC Report (Exhibit MEX-9). The ITC also examined the individual firm data (regarding domestic producers' production, shipments, capacity, employment, financial performance) from January 1997 to March 2000 in Tables E-1 - E-8 of the ITC Report (Exhibit MEX-9) to determine whether anomalies – significant deviations from the normal or average – existed that an aggregate analysis would disguise.²⁶ No counsel for any of the interested parties to the underlying proceeding,²⁷ all of which had access (pursuant to administrative protective orders) to the confidential data in these tables, alleged that there were such deviations for certain firm's performances from the aggregate data for regional industry performance during the period of the review (January 1997 - March 2000) that would be likely to preclude the "all or almost all" standard from being satisfied if the order were revoked.

24. Moreover, Mexico's challenge to the ITC's likely "all or almost all" finding does not implicate the regional industry performance data during the period of review that is included in these confidential tables. Rather, Mexico's claims that regional producers representing all or almost all of the production in the Southern Tier region likely would not experience continuation or recurrence of material injury if the order was revoked, is based on arguments that: 1) certain regional producers, which are related to the Mexican producers, CEMEX, GCCC, or Apasco, likely would not be injured, or 2) producers in certain markets likely would be insulated from competition with subject imports. The ITC considered these arguments in making its determination and based on the evidence in the record did not find either of them convincing.

²⁵ See U.S. First Written Submission, paras. 231-256.

²⁶ ITC Report at 41-42 (Exhibit MEX-9).

²⁷ Mexican respondents in the underlying review argued that a plant-by-plant analysis was required of all or almost all producers in a regional industry sunset review, but did not allege that there were deviations from the norm in individual firms' data (*i.e.*, Tables E-1 - E-8) to challenge the likely "all or almost all" finding. See CEMEX and GCCC's Response to Commission Questions at 41-44 (Exhibit US-15).

25. As discussed in the U.S. first written submission,²⁸ the United States has substantiated the ITC's regional industry findings. For example, in response to Mexican arguments regarding the likely "all or almost all" analysis, the United States discussed the evidence supporting the ITC's finding that it was not convinced that the Mexican producers would refrain from using their excess capacity to ship cement to the Southern Tier region at volume or price levels that would injure regional producers including their regional subsidiaries. While the Mexican producers told the ITC that Mexican imports would not be shipped in volumes or at prices that would injure the Southern Tier regional industry if the order was revoked, their actions, such as statements regarding likely increases in volume and underselling, are positive evidence that belie these assertions. The ITC reasonably concluded based on the evidence that without the discipline of the order, the interests of the Mexican operations likely would not be secondary to those of their smaller Southern Tier subsidiaries.

26. The United States also discussed in the U.S. first written submission²⁹ the evidence supporting the ITC's finding that it was not convinced by respondents' arguments that, due to the regional nature of the cement industry, certain markets are insulated from competition with subject imports from Mexico and thus producers of all or almost all regional production would not be materially injured. The ITC recognized that transportation costs tended to limit the distances that cement is shipped. However, the ITC found that the evidence demonstrated that 20 percent of regionally-produced cement in the Southern Tier region was shipped more than 200 miles.³⁰ Virtually all imports into the Southern Tier region are shipped within 200 miles of an import terminal with 89 percent shipped within 100 miles of an import terminal.³¹ The evidence showed that cement is shipped more economically, and thus to the expanded areas, when rail transport rather than truck transport is used.³² Regional producers operate an extensive network of rail-served distribution terminals in the Southern Tier region that extends their shipping and marketing range.³³

27. Moreover, the United States discussed the ITC's recognition that when the distribution terminals are taken into account, there are only limited areas in the Southern Tier region that may be somewhat insulated from direct competition with subject imports.³⁴ The ITC then considered which operations were in these more insulated areas. The evidence demonstrated that

²⁸ U.S. First Written Submission, paras. 238-239.

²⁹ U.S. First Written Submission, paras. 240-244.

³⁰ ITC Report at Table I-2 (Exhibit MEX-9).

³¹ ITC Report at Table I-2 (Exhibit MEX-9).

³² CEMEX and GCCC's Response to Commission Questions, Exhibit 8 at 3 (CEMEX's Ms. Clyburn stated in an affidavit submitted to the ITC that "Rail represents the most economical source of inland transportation for cement." (Exhibit US-15)); *see also* Domestic Producers' Response to Commission Questions at 70 (Exhibit US-11).

³³ Hearing Transcript at 179 (CEMEX official recognized the regional industry's rail-fed inland distribution network) (Exhibit MEX-120); Domestic Producers' Response to Commission Questions at 71 (Exhibit US-11).

³⁴ ITC Report at Figure II-1 (Exhibit MEX-9); Domestic Producers' Response to Commission Questions at Exhibit 38 (Exhibit US-11). *Cf.* GCCC's Final Comments at 3 (Exhibit MEX-158).

there were four plants in Northern Alabama and two plants in central Texas that the ITC found may be somewhat more insulated from direct competition with subject imports than other regional producers.³⁵ The evidence showed, however, that these regional producers combined accounted for a small percentage of regional production in 1999. Moreover, the extensive rail network, such as that in the Dallas area, permits regional producers to ship economically more than the 100 mile truck radius and thus their product shipped by rail would compete with subject imports in the 100 mile import terminal radius.³⁶

28. The United States has, thus, demonstrated that the ITC's regional industry findings were based on an unbiased evaluation of the positive evidence in this review that the "all or almost all" requirement was likely to be met.

- (f) Could the United States submit the data concerned? The data could be summarized, indexed or presented in some other form to preserve confidentiality, while remaining sufficiently understandable to the Panel.**

29. As noted in response to question 20(a), the volume, pricing, and "all or almost all" data identified by Mexico are already presented in a non-confidential aggregate form.³⁷

To Mexico:

- (g) How does Mexico respond to the US statement in para. 246 of its first written submission that: "Counsel for Mexican respondents, as well as counsel for all interested parties to the proceeding, had full access to the business proprietary data contained in [Tables E-1-E-8 of Exhibit MEX-9], through release of all questionnaire responses, the ITC's prehearing report and the ITC's final staff report."**
- (i) How does Mexico respond to the US statement in para. 246 of the US first written submission that "Mexico does not challenge the accuracy or comprehensiveness of the data contained in Tables E-1 –E-8 [of Exhibit MEX-9] and neither did the counsel for Mexican respondents in the underlying proceeding".**

³⁵ ITC Report at 42, n.257 and at Figure II-1 (Exhibit MEX-9); Domestic Producers' Response to Commission Questions at Attachment 38 (Exhibit US-11); GCCC's Final Comments at 3 (Exhibit MEX-158).

³⁶ ITC Report at Figure II-1 (Exhibit MEX-9); Domestic Producers' Response to Commission Questions at Attachment 38 (Exhibit US-11).

³⁷ The United States notes that, as provided in Article 6.5 of the AD Agreement, the ITC is precluded from disclosing confidential information "without specific permission of the party submitting it." Information by nature is confidential if, for example, "its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information." Article 6.5 of the AD Agreement.

To the United States:

- (h) How is the US statement in (g) relevant for the purposes of these Panel proceedings?**

- (j) How is the US statement in (i) relevant for the purposes of these Panel proceedings?**

30. The relevance of the two statements in paragraph 246 of the U.S. first written submission is to demonstrate that the ITC's establishment of the facts was proper and that its evaluation of those facts was unbiased and objective. The United States made these statements in response to Mexico's Article 6 claims regarding the "all or almost all" analysis. Consistent with U.S. obligations under Article 6 of the AD Agreement, interested parties were provided ample opportunities to present evidence and comment through questionnaires, hearing testimony, prehearing briefs, and posthearing briefs regarding this issue, and any other issue. Mexican respondents took full advantage of these opportunities.

To the United States:

Q22. Under United States law, would any United States domestic court (including but not limited to the CIT), and/or parties to a domestic court proceeding and/or their legal counsel, have access to the confidential information? If so, under what mechanism?

31. Consistent with Article 6.5³⁸ of the AD Agreement, U.S. law provides that information submitted to the ITC in an antidumping or countervailing duty investigation "which is designated as proprietary [(e.g., business confidential information or business proprietary information)] by the person submitting the information shall not be disclosed to any person without the consent of the person submitting the information."³⁹

32. Under U.S. law,⁴⁰ the ITC provides access to all confidential information gathered in an investigation to certain representatives of certain parties subject to an administrative protective

³⁸ Article 6.5 of the AD Agreement recognizes that information may be provided by parties during an antidumping investigation on a confidential basis, and that "[s]uch information shall not be disclosed without specific permission of the party submitting it." The AD Agreement also recognizes that "disclosure [of such confidential information] pursuant to a narrowly-drawn protective order may be required" in the territory of certain Members. Article 6.5, note 17, of the AD Agreement.

³⁹ See 19 U.S.C. 1677f(b) (Exhibit US-108). Such information can, however, be disclosed, without prior consent, to an employee of the ITC "who is directly concerned with carrying out the investigation in connection with which the information is submitted or any review under this subtitle covering the same subject merchandise," or to an "employee of the United States Customs Service who is directly involved in conducting an investigation regarding fraud under this subtitle."

⁴⁰ 19 U.S.C. 1677f(c) (Exhibit US-108).

order.⁴¹ In general, counsel for interested parties, but not the interested parties themselves,⁴² have access to confidential information under an administrative protective order during an underlying ITC proceeding. If a person subject to an administrative protective order breaches such an order, that person may be subject to sanction, including disbarment from practice before the agency.⁴³

33. In the event of judicial or NAFTA panel review of the ITC's determination, similar protective mechanisms are undertaken to continue to protect the confidentiality and limit the disclosure of such information.

34. In an appeal to the ITC's reviewing courts (*i.e.*, the U.S. Court of International Trade ("CIT") or the U.S. Court of Appeals for the Federal Circuit), the confidential information referred to in submissions and included in appendices is filed with the domestic court under seal.⁴⁴ An attorney or consultant representing a party to the judicial proceeding may retain or otherwise have access to confidential information in the administrative record of the underlying antidumping or countervailing duty proceeding if, for proceedings at the CIT, such person files a Business Proprietary Information Certification and is granted access by CIT order. For other judicial proceedings, such a person must file and be granted a judicial protective order by the relevant court.

35. In an appeal to a NAFTA panel, the process is very similar to that in the underlying administrative proceeding and is governed by the Secretary to the ITC. Under U.S. law,⁴⁵ and Rules of Procedure for NAFTA Article 1904 Binational Panel Reviews,⁴⁶ the ITC provides

⁴¹ To be an authorized applicant for an administrative protective order, a person must represent an interested party, as defined in 19 U.S.C. 1677(9) (Exhibit MEX-153), which is a party to the relevant antidumping or countervailing duty investigation. An authorized applicant for an administrative protective order must be one of the following: 1) an attorney; 2) a consultant or expert under the direction and control of an attorney representing an interested party which is a party to the investigation; 3) a consultant or expert who appears regularly before the Commission; or 4) a representative of an interested party which is a party to the investigation, if such interested party is not represented by counsel. Finally, the authorized applicant must not be involved in competitive decision making for an interested party which is a party to the investigation. 19 C.F.R. 207.7(a)(3) (Exhibit US-112). The administrative protective order granted by the Secretary of the ITC to the authorized applicant contains a list of obligations that the person to whom the confidential information is disclosed under the protective order must assume. These obligations include requirements regarding protection, use, storage, reporting of possible breaches, and return or destruction of the confidential information.

⁴² Parties, of course, have access to their own confidential information and can waive protection of, or disclose, such information at any time.

⁴³ 19 U.S.C. 1677f(c)(1)(C) and 19 C.F.R. 207.7(d) (Exhibits US-108 and US-112).

⁴⁴ *See, e.g.*, Rule 73.2(c) of the U.S. Court of International Trade Rules (Exhibit US-113). The CIT is not provided all the confidential information in the administrative record, but only that confidential information which is referred to by parties in submissions and included in a confidential appendix; submissions containing confidential information and confidential appendices are submitted to the domestic court under seal.

⁴⁵ 19 U.S.C. 1677f(f) (Exhibit US-108).

⁴⁶ *See* NAFTA Article 1904.14 and NAFTA Article 1904 Rules 44-51 and 54 (Exhibit US-114).

access to “authorized persons” to all confidential information in the administrative record of the underlying antidumping or countervailing duty proceeding subject to NAFTA administrative protective orders (“NAFTA APO”). All “authorized persons” must file NAFTA APOs and be granted access to such confidential information before disclosure is permitted. Authorized persons include: the Panel members and their staffs; the staff of the NAFTA Secretariat; and counsel and their employees representing parties in the NAFTA proceeding.⁴⁷ Authorized persons are subject to sanctions for violation of protective orders, similar to those that would apply under the administrative proceeding.

To both Parties:

Q23. Does the Article 4.1(ii) iteration of regional "domestic industry" apply to a sunset review finding of likelihood of continuation or recurrence of "injury"? Why or why not?

36. Article 4.1 of the AD Agreement defines the term “domestic industry.” Article 4.1(ii) of the AD Agreement sets forth the circumstances for defining a regional domestic industry or market and making a determination of injury to that regional domestic industry by reason of dumped imports.

37. The panel in *Mexico – HFCS* referred to Article 4.1 and footnote 9 to Article 3 of the AD Agreement in recognizing that: “These two provisions inescapably require the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1.”⁴⁸ In the original Mexican Cement investigation, the ITC defined a regional industry (Southern Tier Region) and made an affirmative determination of injury to this industry by reason of dumped imports.⁴⁹

38. As discussed in the U.S. first written submission, a sunset review, pursuant to Article 11.3 of the AD Agreement, does not involve the determination of injury, but instead

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

⁴⁷ If an extraordinary challenge is sought, extraordinary challenge committee members and their staff, U.S. Government employees (e.g., U.S. Trade Representative staff), and any Canadian or Mexican government employees involved in the ECC, must file NAFTA APOs and be granted access by the ITC Secretary before disclosure of confidential information is permitted.

⁴⁸ *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, para. 7.147 (“*Mexico – HFCS*”).

⁴⁹ *Mexico Cement*, USITC Pub. 2305. (Exhibit MEX-10).

the prerequisite determinations of dumping and injury – so as to determine whether that order should be continued or revoked.⁵⁰

39. Consistent with Article 11.3, in a sunset review, the ITC examines the *likely* volume 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.

40. While Article 11.3 does not contain any textual cross-reference to – and, thus, does not include any explicit requirement to apply – Article 4.1(ii), a sunset determination must be made regarding likely injury with respect to a particular industry. Thus, assuming, *arguendo*, that the iteration of regional “domestic industry” in Article 4.1(ii) of the AD Agreement applies to a sunset review, it applies in the context of the forward-looking (*i.e.* “likely”) analysis under Article 11.3. In the sunset review at issue, the ITC applied a reasonable methodology in determining that, if the order was revoked, a regional market likely existed based on the two “market isolation” factors identified in subsections (a) and (b) of Article 4.1 (ii), subject imports likely would be concentrated in this defined regional market, and such imports would be likely to lead to the continuation or recurrence of injury to “all or almost all” producers in the region.

⁵⁰ *US-Argentina Sunset (AB)*, para. 279. Given the difference in the nature of the inquiries in an original investigation and a sunset review, the tests for each cannot be identical. See U.S. First Written Submission, paras. 140-155.