

May 12, 2005

Mr. Peter Palecka
Chairman
*United States – Anti-Dumping Measures on
Cement from Mexico (DS281)*
World Trade Organization
Centre William Rappard
Rue de Lausanne 154
1211 Geneva 21

Dear Mr. Chairman:

My authorities have instructed me to submit, pursuant to paragraph 14 of the Panel’s “Additional Procedures for the Protection of Business Confidential Information Submitted by the United States in Response to the Panel’s Request of 17 March, 2005,”¹ a copy of the business confidential information that was the subject of the Panel’s March 17, 2005 request. As the Panel is aware, upon receipt of the request, the United States sought from the over 30 private companies that submitted the BCI the authorizations necessary to disclose the information under the Panel’s BCI procedures. The last of these authorizations were received this week while the U.S. delegation was traveling to Geneva for the second meeting with the Panel. With the receipt of these authorizations, we are now able to submit the requested BCI. The United States is confident that review of this BCI will confirm the U.S. arguments that the Panel does not need the confidential information to settle the issues in dispute, and can do so on the basis of the information in the public record.

The United States wishes to emphasize that, pursuant to paragraphs 15(a) and 16(b) of the Additional BCI Procedures, the BCI being submitted along with this letter can be disclosed to only those representatives of Mexico that have been designated as “approved persons.” Under paragraph 12, the BCI cannot be disclosed to the outside counsel that are the subject of the U.S. objection until after the Panel decides on the objection and, if it rejects the objection, the United States is given a reasonable opportunity to withdraw the BCI. Nor can the BCI be disclosed to the unspecified “number of office staff (paralegals and secretaries)” to whom Mexico refers in its May 3, 2005 letter. The United States trusts that Mexico will respect these obligations regarding the treatment of the attached BCI. It is with this understanding that the United States is

¹ Hereinafter referred to as “the Panel’s Additional BCI Procedures.”

providing, pursuant to paragraph 14 of the Additional BCI Procedures, two copies of the attached 17 March 2005 BCI directly to Mexico.

The United States also takes note of Mexico's letter of May 10, 2005 in which Mexico continues to ask for access to the 17 March 2005 BCI for certain outside legal counsel who are also counsel to Mexican cement companies.² As the United States noted in its May 9, 2005 letter, these counsel do not fall within the definition of "representative" in paragraph 9 of the Panel's Additional BCI Procedures and therefore cannot be designated as "approved persons" pursuant to those procedures.

In addition, Mexico charges the Panel with violating Mexico's "due process" rights by not providing Mexico an opportunity to respond to the U.S. comments on the Panel's proposed BCI procedures. This is a serious charge, but one that does not withstand scrutiny. Mexico did not raise the issue of access to BCI for counsel for Mexican cement companies until *after* the Panel's final BCI procedures were adopted. Both the BCI procedures initially proposed by Mexico and those proposed by the United States included a definition of "representative" that is virtually identical to the definition ultimately used by the Panel in its final Additional BCI Procedures.

At no point, either after it submitted its proposed procedures or in its response to the proposed U.S. procedures, did Mexico advocate that an exception should be created to allow access to BCI for counsel to Mexican cement companies. Nor does Mexico explain how "due process" requires that Mexico be afforded an opportunity to respond to each and every comment by the United States. Presumably Mexico would admit that its approach would mean that the United States would also have a "due process" right to respond to every one of Mexico's comments. The process would thus be never-ending, which would have its own "due process" implications. Accordingly, there is no basis for the Panel to find that it has violated Mexico's "due process" rights.

Mexico also claims that the Panel's BCI procedures violate Mexico's "due process" right to be represented by counsel of its choice. Again, however, Mexico's charge is without basis. Mexico is free to choose counsel. It does not, however, have the right to provide confidential business information to unauthorized persons. Mexico has accepted throughout the discussion of BCI procedures that there can be limitations on who is authorized to have access to BCI. It is thus clear that Mexico does not assert some principle or "due process right" barring the Panel from adopting procedures limiting those persons authorized access to BCI. Mexico provides no basis for distinguishing between representatives of cement producers and other employees,

² The United States of course rejects both Mexico's multiple mischaracterizations regarding the United States in that letter (as elsewhere in this dispute) and Mexico's supposed telepathic ability to know the motives of the United States. Neither is appropriate in WTO dispute settlement. At the same time, the United States cannot help but note the irony that, in a letter emphasizing the need to comply with the Panel's procedures, Mexico is at the same time insisting that it need not abide by those procedures and may seek access to BCI by persons specifically excluded from access under those procedures.

officers or agents of cement companies, other than that Mexico wants such a distinction to be drawn for Mexico's own purposes. Indeed, according to Mexico's approach, Mexico has a "due process" right to designate the chief executives of each Mexican cement producer as Mexico's "counsel" in this dispute and hand them the confidential business information of all their key competitors.

The United States regrets that Mexico continues to ask the Panel and the parties to divert attention and resources away from the merits of the dispute to focus on BCI. It is perhaps telling that Mexico now claims in its letter that the "core issue" is "compliance" with DSU Article 13, rather than any of the claims actually contained in Mexico's panel request.

Sincerely,

Stephen Kho
Legal Advisor

cc: H.E. Mr. Fernando de Mateo y Venturini, Permanent Mission of Mexico