

*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 Relation to the Second Substantive Meeting with the Parties**

May 20, 2005

To the United States:

Q141. The Panel understands that the United States objects to seven of the individuals on Mexico's list. Would the United States currently be willing to treat the remaining seven as "approved persons" under the Panel's additional BCI procedures pending the Panel's views on how to treat issues relating to the seven that are currently the subject of this US objection?

1. As discussed during the second meeting with the Panel, the United States agrees to the treatment of the seven individuals on Mexico's May 3, 2005 list who are not the subject of a U.S. objection¹ as "approved persons" under the Panel's Additional BCI Procedures. In addition, the United States has no objection to the designation of the five individuals on Mexico's May 12, 2005 list² as "approved persons." The United States agrees to the designation of these individuals as "approved persons" with the understanding that they will comply with the Panel's Additional BCI Procedures, including the obligation under paragraph 16(b) that "[n]o approved person shall disclose 17 March 2005 BCI, or allow it to be disclosed, to any person except another approved person or a representative of the United States."

2. As to the question of how to treat the seven individuals on Mexico's May 3, 2005 list who are the subject of the U.S. objection – *i.e.* are counsel to Mexican cement companies (but not retained by the Government of Mexico) – the United States reiterates that these individuals do not qualify as "representatives" under the Panel's Additional BCI Procedures³ and therefore cannot be deemed to be "approved persons."⁴ They cannot therefore have access to the 17 March 2005 BCI pursuant to the Panel's procedures.

¹ These are Ricardo Ramírez Hernández, Mateo Diego Fernández Andrade, Carlos Véjar Borrego, Jorge A. Huerta Goldman, Alejandra G. Treviño Solís, Orlando Pérez Garate, and Aristeo López Sánchez.

² These are Cristina Reyes, Reyna Rocha, Melba Chaperon, Patricia Solís, and Carmina Lanz.

³ Paragraph 9 of the Panel's Additional BCI Procedures provides the definition of "representative" and states unequivocally that "in no circumstances shall this definition include an employee, officer or agent of a private company engaged in the manufacture or sale of gray portland cement or cement clinker." Counsel for Mexican cement producers are clearly "agent[s] of a private company engaged in the manufacture or sale of gray portland cement or cement clinker."

⁴ Paragraph 2 of the Panel's Additional BCI Procedures provides that, in the case of Mexico, an "approved person" is a "representative[] of Mexico . . . designated in accordance with these Procedures."

Q142. The Panel takes note of the following statement in Mexico's most recent communication: "...all seven lawyers are bound by Bar rules that would treat any disclosure of confidential information to be a serious and punishable breach of professional ethics".

How does the United States respond to this statement.

3. At the outset, it is important to recall the reason that additional BCI procedures have been established: to provide the submitting companies with a sufficient level of confidence that the confidentiality of their highly sensitive company-specific BCI will be protected even as the information is released to the Panel and "approved persons" of the Secretariat and Mexico for use in this dispute settlement process.⁵ The Panel's existing Additional BCI Procedures provide the requisite level of confidence. On the basis thereof, the United States has obtained the authorizations necessary to release the BCI to the Panel and other "approved persons."

4. Now, in disregard of the Panel's Additional BCI Procedures, Mexico seeks to obtain access to the BCI by "outside legal counsel who has represented a cement producer in connection with these WTO dispute settlement proceedings."⁶ In support of this, Mexico asserts that the counsel for Mexican cement companies "are bound by Bar rules that would treat any disclosure of confidential information to be a serious and punishable breach of professional ethics."⁷ As a preliminary matter, there is something entirely unsatisfactory in Mexico urging the Panel to resolve questions about the procedures to be applied in a WTO dispute settlement process on the basis of the rules of particular bar associations in which lawyers chosen by Mexican cement companies are members. But, even leaving this aside, Mexico's assertion regarding the bar association rules has no relevance; the Panel's Additional BCI Procedures bar access to BCI to such outside counsel and do not admit of any exception. Further, the Additional BCI Procedures are final and Mexico has provided no legitimate reason to revisit them, especially now that submitting companies have relied on them in deciding to permit the disclosure of their BCI.

5. Even aside from its lack of relevance, Mexico's assertion regarding the scope and effect of the bar association rules is unsubstantiated. Mexico has not demonstrated that the particular bar association rules to which the outside counsel are said to be subject – the District of

⁵ The Panel, in adopting the October 19, 2004 set of BCI procedures, explicitly recognized that "the full cooperation of ... private persons in the WTO dispute settlement mechanism ... may depend on the appropriate protection of confidential information." See first bullet point of Communication from the Panel to the Parties (October 19, 2004).

⁶ An exception for such outside legal counsel was specifically eliminated by the Panel in formulating the final Additional BCI Procedures. Compare "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" (April 27, 2005) with "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" (April 29, 2005).

⁷ Communication from Mexico to Panel (May 10, 2005).

Columbia Rules of Professional Conduct (six of the seven counsel) and the Rules of Professional Conduct of the Law Society of Upper Canada (one of the seven counsel) – would apply in the context of dispute settlement proceedings before a WTO panel⁸ and, in the case of the Canadian rules, could be invoked by the United States government. Mexico has also not identified any principles of confidentiality contained in these particular bar association rules that would apply with respect to confidential information obtained from parties in the proceeding who are not clients of the attorneys.⁹ Further, Mexico has not cited to any prior instance in which these bar association rules have been used to sanction attorneys for breaching obligations of confidentiality in a WTO dispute settlement proceeding. Nor has Mexico demonstrated what sanctions can and would be applied in such circumstances. In fact, the experience in prior disputes, such as *Thailand - H-Beams*¹⁰ and *US - Argentina Sunset*¹¹, confirms not only the heightened risks involved in permitting access to BCI to counsel who represent private stakeholders, but also that the bar rules are *not* used to prosecute breaches of confidentiality in WTO dispute settlement.

6. In short, Mexico's assertion regarding bar association rules is simply not relevant to the question of whether outside counsel for Mexico and Mexican cement producers may have access to BCI. That question is resolved under the Panel's Additional BCI Rules, which clearly do not permit such access. Nor does Mexico's assertion provide any basis for the Panel to abrogate the BCI rules that have become final and upon which submitting companies have relied in authorizing the disclosure of their BCI.

⁸ For example, the definition of "tribunal" in the D.C. Rules of Professional Conduct is "a court, regulatory agency, commission, and any other body of individual authorized by law to render decisions of a judicial or quasi-judicial nature. . . ." The Panel is established under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), which is an international agreement to which the United States is party but is not U.S. law. The United States has not found any formal opinion suggesting that "tribunal" can mean a WTO dispute settlement panel and preliminary indications from the D.C. Bar's Legal Ethics Office suggest that this definition applies only to domestic fora.

⁹ Indeed, as Mexico conceded in response to the Panel's Question 144, the definition of "confidential information" contained in Rule II.205(1) of the Rules of Professional Conduct of the Law Society of Upper Canada means "information obtained from a client that is not generally known to the public" and "would not encompass the BCI in this proceeding." See Answers of Mexico to the Questions by the Panel on BCI Procedures (May 12, 2005).

¹⁰ As previously explained, in *Thailand - H-Beams*, different representatives of the same law firm represented the government and a private sector association. Despite the fact that the law firm, as counsel to the government, was bound by the same confidentiality obligations under the DSU as Poland, the private sector association somehow came into possession of Thailand's brief. See *Thailand - H-Beams (AB)*, paras. 62-78. No sanction was imposed in that dispute by the WTO. Moreover, the United States does not believe that any form of sanction was imposed on the law firm or its attorneys involved in the dispute by any U.S. lawyer's bar association.

¹¹ In *US - Argentina Sunset*, counsel who represented both Argentina and private stakeholders – and also represent Mexican cement companies in the present dispute – put certain BCI on the record of the WTO proceeding that they were not authorized to use in connection with that proceeding. The United States is not aware that any sanction was imposed on the law firm or its attorneys involved in the dispute by their respective bar associations.

Q143. Please respond to other elements of Mexico's 10 May communication, in particular, the assertions relating to the temporal aspects of the Panel's additional BCI procedures (relating to paragraph 12 of the procedures), and the last sentence, alleging that Mexico may be deprived of its right to counsel at this stage of the proceedings.

7. The United States has responded to Mexico's May 10, 2005 communication in the letter accompanying its submission of the requested BCI on May 12, 2005. The United States refers the Panel to the U.S. responses therein and also provides the following chronology of events. This chronology establishes clearly that there is no basis for Mexico's assertion that its due process rights were violated because the Panel did not solicit Mexico's response to the U.S. comments regarding the Panel's Additional BCI Procedures.

September 22, 2004 Mexico proposes additional BCI procedures. "Representative" is defined in Mexico's proposal as "any person that a Member selects to act as its representative, counsel or consultant during the dispute and whose selection as such has been notified to the Chairman of the Panel and to the other party, but in no circumstances shall this definition include an employee, officer or agent of a private company engaged in cement production." *There is no exception for "outside legal counsel who has represented a cement producer in connection with these WTO dispute settlement proceedings."*¹²

April 15, 2005 United States proposes additional BCI procedures. Just as with Mexico's proposed procedures, "representative" is defined in the U.S. proposal as "any person that a party selects to act as its representative, counsel, or consultant during the Panel process and whose selection has been notified to the Chairman of the Panel and to the other party, but in no circumstances shall this definition include an employee, officer, or agent of a private company engaged in gray portland cement or cement clinker production." *Again, there is no exception for "outside legal counsel who has represented a cement producer in connection with these WTO dispute settlement proceedings."*

April 20, 2005 Mexico submits comments on the U.S. proposed additional BCI procedures, including a request for six modifications to the proposed procedures. *Mexico does not request a modification to the definition of "representative" to include an exception for "outside legal counsel who has represented a cement producer in connection with these WTO dispute settlement proceedings."*

¹² These BCI Procedures were ultimately not accepted because Mexico failed to identify the types of BCI it intended to submit.

- April 27, 2005 Panel issues preliminary version of Additional BCI Procedures. “Representative” defined in that version as “any individual selected by a party to act as representative, legal counsel or other advisor of a party, who has been authorized by a party to act on behalf of such party in the course of the dispute and whose selection has been notified to the Chairman of the Panel and to the other party, but in no circumstances shall this definition include an employee, officer or agent (*other than outside legal counsel who has represented a cement producer in connection with these WTO dispute settlement proceedings*) of a private company engaged in the manufacture or sale of gray portland cement or cement clinker.”
- April 28, 2005 United States and Mexico submit comments on Panel’s preliminary Additional BCI Procedures. United States requests elimination of exception in Panel’s draft for outside legal counsel given concerns about protection of BCI and because neither Mexico nor the United States has ever requested such an exception. The United States urges the Panel to return to a definition of “representative” that is consistent with the definitions proposed by the United States and Mexico. Mexico submits six pages of comments demanding that the Panel apply adverse inferences but requests no modifications to the BCI procedures and does not address the new exception for outside counsel for cement producers.
- April 29, 2005 Panel issues final version of Additional BCI Procedures. Definition of “representative” in the final version is virtually identical to that in U.S. and Mexican proposals: “any individual selected by a party to act as representative, legal counsel or other advisor of a party, who has been authorized by a party to act on behalf of such party in the course of the dispute and whose selection has been notified to the Chairman of the Panel and to the other party, but in no circumstances shall this definition include an employee, officer or agent of a private company engaged in the manufacture or sale of gray portland cement or cement clinker.”
- May 4, 2005 Mexico submits a request for access to BCI for outside legal counsel who represent Mexican cement companies and complains that it was deprived it of its due process rights because Panel did not solicit Mexico’s response to U.S. comments. Mexico, however, acknowledges that in past disputes where access to such outside counsel for foreign/domestic stakeholders was contemplated and provided, an exception was carved out from the definition of “representative” for such counsel.¹³

¹³ See Mexico’s May 4, 2005 Letter to the Panel Regarding BCI at 3 (noting that in *Korea - Shipbuilding*, the Panel adopted BCI procedures that contained an express exception for access to BCI by “legal counsel who has represented a shipbuilder in connection with these WTO dispute settlement proceedings.”)

8. As this chronology shows, Mexico not only did not include an exception for outside counsel representing Mexican cement producers in its own proposed BCI procedures, it did not request such an exception in connection with the BCI procedures proposed by the United States. In fact, the first time Mexico raised the issue of access to BCI by outside counsel was after the process of adopting Additional BCI Procedures was over. Mexico tries to excuse itself by arguing “there were no problems with the Panel’s procedures on this issue until *after* the United States proposed, and the Panel adopted, the U.S. request to eliminate the exception for outside legal counsel who have represented cement producers in connection with this dispute.”¹⁴ Since Mexico had “no problems” with its own proposed definition of “representative” or the definition initially proposed by the United States, it cannot now allege that it has somehow been deprived of “due process” because an *identical* definition has been adopted as part of the Panel’s final Additional BCI Procedures.

9. As explained in the U.S. letter of May 12, 2005, there is also no merit to Mexico’s complaint that it will be “deprived of its right to counsel” if outside counsel who represent Mexican cement producers are not provided access to the BCI of their clients’ competitors. The United States notes the rather surprising statement by Mexico that these lawyers are not Mexico’s counsel after all. Even though Mexico has maintained throughout this process that these counsel “have been selected by a party – Mexico – to act as its representatives or legal counsel,”¹⁵ in a letter filed May 19, 2005, Mexico reverses itself and admits that, in fact, “the Government of Mexico does not retain these lawyers.” The United States assumes that Mexico accordingly has withdrawn its claim that it will be “deprived of its right to counsel” if certain counsel do not have access to BCI since it has not even retained the counsel at issue.

10. In any event, the United States notes that, in the second meeting with the Panel, Mexico again asserted that it does not need the BCI to “prosecute its case”¹⁶ and that the sole purpose of the requested BCI is to “facilitate the Panel’s assessment of the facts.”¹⁷ In light of Mexico’s argument – as well as the consistent position of the United States that the BCI is not necessary to evaluate the U.S. arguments in this dispute – the United States fails to understand the basis for Mexico’s assertion that it would be “deprived of its right to counsel” if counsel for Mexican cement companies are not given access to the 17 March 2005 BCI. This, and Mexico’s assertion that these particular counsel must have access to the requested BCI because “[m]ost of the seven attorneys are extremely familiar with the confidential record . . . and therefore are particularly well-placed to evaluate this U.S. information”¹⁸ – simply do not square with Mexico’s arguments that the requested BCI is necessary only to assist the Panel. The United States also notes that Mexico could not in any event have been complaining that it has an unlimited “right to counsel” that would require that anyone

¹⁴ Statement of Mexico on Business Confidential Information (BCI) at 3 (May 12, 2005).

¹⁵ Communication from Mexico to Panel (May 10, 2005).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Answers of Mexico to the Questions by the Panel on BCI Procedures, Response to Question 146(b) (May 12, 2005).

designated by Mexico have access to the BCI. Mexico accepts that there can be limits placed on those having access to the BCI. Mexico simply wants to have those limits expanded. Thus, it is not a question of some fundamental “right to counsel” but rather a matter of Mexico’s convenience.

To both Parties:

Q152. The last sentence of Article 13.1 DSU reads: "Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information".

- (a) What does this sentence mean?**
- (b) To whom is the obligation in this sentence directed the Panel, the Parties, or both the Panel and the Parties?**

11. The last sentence of DSU Article 13.1 governs the treatment of confidential information that has been submitted pursuant to a request for such information made by the panel. In these circumstances, Article 13.1 of the DSU precludes the further disclosure of the confidential information without the “formal authorization” of the “individual, body, or authorities of the Member” that submitted the information. Although Article 13.1 does not expressly identify who “shall not” reveal the confidential information that is provided in response to a panel’s request, its context makes clear that the obligation would apply to anyone receiving the information, including the panel and Secretariat. The rest of Article 13.1 deals with a panel’s right to seek information, and the information may not have been submitted by a party - or even a third party - or a national thereof, and it is unlikely that there would be anything in the working procedures that would otherwise govern the treatment of this information (since at the time those working procedures were being drafted a panel is unlikely to have known it would be requesting this information). This interpretation also finds support in the similar language used in Article 17.7 of the AD Agreement, which is a “special or additional rule” under Article 1.2 and Appendix 2 of the DSU. Article 17.7 provides that where confidential information is “requested from the panel,” it shall not be disclosed without formal authorization from the person, body, or authority providing such information.

- (c) How should the obligation in this sentence be understood in the light of Article 18.1 of the DSU and Article 17.7 of the *Anti-Dumping Agreement*?**

The obligation in the last sentence of Article 13.1 of the DSU supplements the provisions of Article 18.2¹⁹ of the DSU and 17.7 of the AD Agreement. Article 18.2 is limited to information provided to a panel or the Appellate Body by a Member. Article 17.7 of the AD Agreement is limited to

¹⁹ The United States assumes that, in Question 152, the Panel meant to refer to Article 18.2 of the DSU, which sets out obligations of Members with respect to confidential information submitted in the course of the dispute settlement process by other Members (and not to Article 18.1 which deals with *ex parte* contacts).

disputes under that agreement. Article 13.1 of the DSU however would apply to information received from any source and in any type of dispute.

12. Article 13.1 of the DSU and Article 17.7 of the AD Agreement recognize that ultimate control over disclosure of confidential information rests with the individual/person, body, or authority of the Member providing it to the panel (*i.e.* their authorization is required for any further disclosure of the confidential information by a panel and they may legitimately refuse such authorization). These principles are also reflected in the Panel's Additional BCI Procedures, which provide assurances to submitting parties that the Panel and all "approved persons" will protect the confidentiality of the 17 March 2005 BCI and give to the United States the ability to object to the designation of particular individuals as "approved persons" if, for example, such designation might result in a conflict of interest or undermine the protections offered by the Additional BCI Procedures.²⁰

(d) Do Articles 13.1 and 18.1 DSU and Article 17.7 of the *Anti-Dumping Agreement* establish a regime for protecting BCI which effectively renders the possibility of sanctions, pursuant to the Bar rules cited by Mexico, for unauthorised disclosure of any such information by lawyers subject to those Bar rules irrelevant?

13. As noted above in response to Question 142, the issue of whether bar association rules apply in the context of WTO dispute settlement and whether they provide any sanctions for breaches of confidentiality in that context are irrelevant to the question of whether the seven outside counsel who represent Mexican cement companies may have access to the BCI submitted by the United States. That question is resolved, in the negative, by the Panel's Additional BCI Procedures. Articles 13.1 of the DSU and 17.7 of the AD Agreement recognize that access to BCI may be limited in this manner.

14. The availability of sanctions – or the lack thereof in WTO dispute settlement – is relevant only insofar as it explains why submitting companies may agree to the disclosure of BCI to lawyers for competitor companies in the context of ITC proceedings, which provide for severe sanctions to protect against breaches of confidentiality, but not in circumstances such as these, where the panel has no authority to impose such sanctions. These considerations, *inter alia*, prompted the U.S. request that the Panel eliminate the exception for "outside legal counsel who has represented a cement producer in connection with these WTO dispute settlement proceedings" in the preliminary version of the Panel's Additional BCI Procedures. This request was accepted and the Additional BCI Procedures are now final. The United States thus respectfully reiterates its request that the Panel reject Mexico's efforts to persuade the Panel to disregard its own Additional BCI Procedures and the objection of the United States to the designation of individuals as "approved persons" who are not authorized to have access under the Panel's rules.

²⁰ See *e.g.*, "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" at paragraphs 12 and 16(b) (April 29, 2005).

- (e) **In so far as Articles 13.1 and 18.1 DSU and Article 17.7 of the *Anti-Dumping Agreement* do establish a regime for protecting BCI which creates a veto power, who exercises the veto power?**

15. Articles 13.1 of the DSU and Article 17.7 of the AD Agreement recognize that control over disclosure of confidential information rests with the individual/person, body, or authority of the Member providing it to the panel. They, therefore, have the ability to agree or refuse to authorize disclosure. Under Article 18.2 of the DSU, control rests with the Member submitting the information.