

NON-CONFIDENTIAL VERSION

**UNITED STATES – ANTI-DUMPING MEASURES
ON CEMENT FROM MEXICO
WT/DS281**

**Comments of the United States of America on the
June 21, 2005 Submission of Mexico
Regarding the 17 March 2005 BCI**

July 11, 2005

1. The United States appreciates the opportunity to comment on Mexico's June 21, 2005 written submission. As explained below, Mexico's chief argument in that submission – that “the BCI submitted by the United States only confirms the WTO-inconsistency of the Commission's likelihood determination” – is unfounded. Before addressing Mexico's specific arguments, however, the United States offers a few general observations.

2. First, the United States notes that Mexico has not limited itself to addressing the 17 March 2005 BCI, as contemplated in the Panel's instructions. The Panel provided an opportunity for the parties to make additional written submissions on June 21 to address the 17 March 2005 BCI and its relevance, if any, to the claims made by Mexico in this dispute.¹ Much of Mexico's June 21, 2005 submission is, however, devoted to repeating, in the same or modified form, the arguments that Mexico made in its previous written submissions regarding the ITC's sunset review determination, rather than addressing the specific issue of the relevance of the 17 March 2005 BCI to Mexico's claims. For example, in Part II of its “BCI” submission, Mexico repeats its arguments about what “legal standard” applies under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”) and presents, in support of its arguments, a highly selective listing of factual findings that the ITC purportedly made in the sunset review at issue.² No mention is made whatsoever of the 17 March 2005 BCI in this section.

3. The United States is mindful that parties were provided an opportunity to submit additional written submissions for a limited purpose and, in light of this, to the extent that the United States has, in its prior submissions, addressed the issues raised by Mexico in its June 21, 2005 submission, the United States will address Mexico's arguments only briefly and refer the Panel to relevant portions of the prior U.S. submissions, rather than repeat those points in full.

4. Second, the United States notes with surprise Mexico's renewed assertion that the Panel

¹ See communication from the Panel to the Parties (May 27, 2005). The Panel's revised timetable issued on the same day also provides that Parties may submit on June 20, 2005 “written submissions on BCI.” This deadline was later shifted, at Mexico's request, to June 21, 2005.

² Compare Mexico BCI Written Submission, paras. 7-11 (June 21, 2005) with Mexico First Written Submission, paras. 489-494.

has requested “*all* BCI held by the U.S. International Trade Commission that is relevant to the issue of whether expiry of the order would have been likely to lead to the continuation or recurrence of injury.”³ In so doing, Mexico continues to disregard the events leading up to the Panel’s March 17, 2005 request for BCI under Article 13.1 of the DSU, the clear terms of the Panel’s request, and the Panel’s own re-clarification at the second meeting that it “understood and intended its request for BCI from the United States to relate only to the specific items of information listed by Mexico [in its February 18 list].”⁴ These events and clarifications should have been sufficient to put the issue of what the Panel did or did not request to rest.⁵ There is no reason for Mexico to continue to consume the time and resources of the Panel, the Secretariat, and the United States in debating an issue that is now well-settled.

5. Third, it is important to recall the context in which Mexico’s BCI submission was made. Specifically, the United States has consistently argued that neither Mexico’s arguments in support of its claims nor the U.S. arguments in response depend on the 17 March 2005 BCI. On this basis, the United States urged the Panel to resolve the issues in dispute in light of the public information on the record, including the public versions of the BCI that were created and submitted by the United States.⁶ Mexico disagreed and insisted that the Panel collect the BCI using its authority under Article 13.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) because, according to Mexico, “access to the U.S. [BCI] data would assist the Panel to discharge its obligation under DSU Article 11 to ‘make an objective assessment of the matter before it, including an objective assessment of the facts of the case.’”⁷ Mexico not only fails to substantiate this assertion in its June 21, 2005 submission, but actually concludes that “[t]he [17 March 2005] BCI confirms what was readily apparent from the non-confidential record. . . .”⁸ While the United States disagrees with Mexico about what the information shows – and, in fact, has demonstrated on the basis of the record evidence that the ITC’s affirmative likelihood of injury determination was made pursuant to an unbiased and objective evaluation of properly established facts⁹ – the United States notes that Mexico’s statement is entirely consistent with what the United States has been arguing; that the non-

³ Mexico BCI Written Submission, para. 2 (emphasis in original).

⁴ Panel Question 149 presented to parties at the second Panel meeting and issued in writing on May 17, 2005.

⁵ Mexico’s arguments are not entirely consistent on the issue. In the very paragraph in which it asserts that the Panel requested *all* BCI, Mexico appears to concede that the Panel did *not* in fact do so because Mexico argues that “[t]he Panel should not limit itself to only the confidential information cited in the U.S. submissions.” Mexico BCI Written Submission, para. 2.

⁶ See U.S. Answers to Panel’s Questions Following the Second Substantive Meeting, paras. 15-35 and, in particular, the U.S. response to Question 20(a) (March 2, 2005); U.S. letter regarding BCI dated April 4, 2005; U.S. Second Written Submission, paras. 177, 182.

⁷ See Mexico’s Response to the Panel’s Questions Following the First Substantive Meeting, para. 64 (March 2, 2005).

⁸ See Mexico BCI Written Submission, para. 52.

⁹ See, e.g., U.S. First Written Submission, paras. 148-256; U.S. Second Written Submission, paras. 28-69.

confidential information on the record allows for the resolution of all issues in dispute.

I. Mexico Continues to Rely on Flawed Interpretations of the AD Agreement

6. In its BCI submission, Mexico continues to rely on flawed interpretations of the AD Agreement. First, Mexico continues to ignore the fact that an inquiry under Article 11.3 of the AD Agreement is counter-factual and forward-looking in nature. The relevant question under Article 11.3 is whether “expiry of the duty would be likely to lead to continuation or recurrence of . . . injury.” This requires a decidedly different analysis than an original determination of whether there is material injury or threat thereof by reason of subject imports.¹⁰

7. Thus, for example, it is curious that the focus of Mexico’s arguments about likely price effects is on whether underselling occurred in every market during the period of review.¹¹ The salient question in a sunset review is not the degree to which there is present price underselling. This is only considered inasmuch as it sheds light on what is likely to happen if the order is revoked. It was entirely reasonable for the ITC to rely on as evidence of likely negative price effects if the order were to be revoked the fact that there was underselling – 45 percent underselling, in fact – even with the order in place.¹²

8. Similarly, Mexico’s repeated references to the ITC’s finding that the industry was not vulnerable at the time of the sunset determination fail to demonstrate that the ITC’s sunset determination is not based on positive evidence.¹³ In doing so, Mexico again fails to recognize that the aim of the inquiry in a sunset review is to determine whether the industry would be vulnerable or susceptible to injury if the order were revoked, not whether it is vulnerable while the order remains in place.¹⁴ As the Appellate Body confirmed in *US - Argentina Sunset*, “[t]he positive state of the domestic industry as of the date of the sunset review need not necessarily be dispositive of the future when other adverse factors are present.”¹⁵

9. Second, Mexico repeats its arguments from previous submissions about the purported

¹⁰ In an original investigation, investigating authorities examine the current condition of an industry that has been exposed to the effects of dumped imports that are competing without remedial measures in place. In a sunset review, by contrast, investigating authorities must decide the likely effect of an important change in the status quo – the revocation of the order and the elimination of its restraining effects on imports. In the case of sunset review proceedings conducted by the ITC, 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.

¹¹ Mexico BCI Written Submission, para. 17.

¹² ITC Report at Table V-4 (Exhibits MEX-9 and US-129).

¹³ Mexico BCI Written Submission, para. 10.

¹⁴ See Mexico’s Oral Statement at First Panel Meeting, para. 97.

¹⁵ See U.S. Opening Statement at Second Substantive Meeting of the Panel with the Parties, para. 27 (quoting *US - Argentina Sunset (AB)*, para. 351).

“legal standard for a regional industry analysis” under the AD Agreement.¹⁶ As the United States has explained before, these arguments are based on an incorrect interpretation of Articles 11.3 and 4.1(ii) of the AD Agreement.¹⁷ Specifically, Mexico refers to the language in the second sentence of Article 4.1(ii) about the conditions under which “injury may be found to exist” in a regional industry case and suggests that this language establishes the conditions under which a determination can be made as to the *likelihood* of injury in a proceeding under Article 11.3 of the AD Agreement.¹⁸ Mexico is incorrect. As the United States has explained previously, and as the Appellate Body confirmed in *US - Argentina Sunset*, injury determinations are distinct from *likelihood of injury* determinations and may properly be the subject of distinct WTO obligations.¹⁹ Other textual evidence – for example, the absence of any cross-reference in Article 11.3 to the second sentence of Article 4.1(ii) or *vice versa* and the use of the present tense when discussing whether “dumped imports *are* causing injury” in Article 4.1(ii)²⁰ – also confirms that the second sentence of Article 4.1(ii) does not impose obligations in the sunset review context.²¹ Thus, Mexico’s argument that, pursuant to Article 4.1(ii), “dumped imports must be “causing injury to the producers of *all or almost all* of the production within such [a regional] market” in order to make a *likelihood of injury* determination fails.²²

10. Again, the correct question under Article 11.3 of the AD Agreement is whether “the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.” As the United States has explained previously,²³ and as the Appellate Body has confirmed, “Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify

¹⁶ Mexico BCI Written Submission, paras. 7-9; Mexico First Written Submission, para. 491-494.

¹⁷ See, e.g., U.S. Opening Statement at Second Substantive Meeting of the Panel with the Parties, para 28 (May 12, 2005). This flaw permeates Mexico’s arguments regarding the ITC’s likelihood analysis. Indeed, Mexico even refers, incorrectly, to the likelihood of injury determination under Article 11.3 as an “all or almost all” determination. For example, Section III of Mexico’s Submission, in which Mexico addresses “each of the factors analyzed by the Commission, *i.e.* likely volume, likely price effects and likely impact” is entitled “The Commission’s ‘all or almost finding’” even though the determination to which Mexico refers is the ITC’s affirmative likelihood of continuation or recurrence of injury determination.

¹⁸ Mexico BCI Written Submission, paras. 8-9.

¹⁹ See e.g., U.S. First Written Submission, paras. 142-146; U.S. Opening Statement at Second Substantive Meeting of the Panel with the Parties, para 28 (discussing *US - Argentina Sunset (AB)*, paras. 278-279).

²⁰ As the United States has explained previously, in the context of sunset reviews, it is entirely possible that there could be no present injury as a result of the antidumping order. If a sunset review is conducted under those circumstances, the relevant question is whether revocation would be likely to lead to *recurrence* of injury. It is clear from the text of Article 11.3 that an antidumping order can properly be continued if an affirmative finding is made regarding the likelihood of *recurrence* of injury, even though there is no present injury being inflicted by subject imports on the domestic industry.

²¹ See U.S. Opening Statement at Second Substantive Meeting of the Panel with the Parties, para. 28.

²² Mexico BCI Written Submission, para. 9 (emphasis in original).

²³ See, e.g., U.S. Second Written Submission, paras. 58-60.

any particular factors that authorities must take into account in making such a determination.”²⁴ Therefore, while a Member may decide that its investigating authorities will consider whether revocation is likely to result in injury to producers of “all or almost all” of the production within a regional industry – as, in fact, the ITC did in the sunset review at issue²⁵ – there is no *obligation* under Article 11.3 or any other provision of the AD Agreement to do so.

11. Third, just as there is no obligation to conduct an “all or almost all” analysis in the first instance, there are also no particular methodological obligations imposed on Members should they choose to conduct such an analysis. Thus, for example, there is no textual basis for Mexico’s argument that the AD Agreement “does not permit” the type of aggregate/anomalies assessment used by the ITC as part of its finding of whether producers of “all or almost all” of regional production likely would be injured in the event the antidumping order were to be revoked.²⁶ There is similarly no basis in the AD Agreement for the principle that an “all or almost all” consideration applies with respect to *each factor* considered by an investigating authority in rendering a likelihood determination,²⁷ which is the premise of many of Mexico’s arguments in its BCI submission. Indeed, given that the Appellate Body has recently clarified that “the ‘likely’ standard of Article 11.3 applies to the overall determinations regarding dumping and injury; it need not necessarily apply to each factor considered in rendering the overall determinations on dumping and injury,”²⁸ there is no basis for arguing that, in a sunset review involving a regional industry, each factor must demonstrate a likelihood of injury to “all or almost all” of the regional industry.

II. Mexico Has Failed to Demonstrate on the Basis of the BCI or Any Other Record Evidence That the ITC’s Affirmative Determination Regarding the Likelihood of Continuation or Recurrence of Injury Is WTO-Inconsistent

12. As discussed below, Mexico’s arguments in the BCI submission about the WTO-consistency of the ITC’s sunset review determination also rely on one-sided and often incorrect representations about the facts that were before the ITC at the time it made that determination. One illustration of this is the list that Mexico includes at the start of its BCI submission that purportedly reflects the ITC’s “own findings” regarding the likelihood of continuation or recurrence of injury. This list actually consists of selective pieces of evidence on the record that favor Mexico’s preferred conclusion regarding the likelihood of continuation or recurrence of injury, and does not accurately reflect the totality of the evidence before the ITC. In contrast to Mexico’s analysis, the ITC’s analysis in the sunset review at issue was conducted, consistent

²⁴ *US - Japan Sunset (AB)*, para. 123.

²⁵ *See* ITC Report at 31-32 and 41-42 (Exhibit MEX-9).

²⁶ *See* Mexico BCI Written Submission, para. 38-39.

²⁷ For the ITC, the relevant factors are likely price effects, likely volume effects, and likely impact on the domestic industry of subject imports in the event of revocation.

²⁸ *US - Argentina Sunset (AB)*, para. 323.

with Article 17.6(i), on the basis of an unbiased and objective evaluation of *all* the record evidence.²⁹

A. Likely Volume

13. Very little in Mexico’s arguments about the ITC’s assessment of the likely volume of subject imports in the event of revocation is responsive to the question of the relevance of the 17 March 2005 BCI to Mexico’s claims. In fact, Mexico includes only three sentences regarding this BCI in the section of its BCI submission regarding the ITC’s likely volume findings. Both the scarcity of discussion regarding the BCI and the substance of the three statements regarding BCI in this section confirm that the 17 March 2005 BCI has no relevance to Mexico’s arguments regarding the ITC’s likely volume findings.

14. Rather than discussing the BCI, Mexico commits the section of its BCI submission entitled “likely volume” to repeating the incorrect factual assertions and analysis from its prior submissions. For example, Mexico asserts again that “the Commission based its finding on likely export volume increase on a newspaper article.”³⁰ As the United States has explained previously, this statement is simply untrue.³¹ The ITC’s likely volume findings were based on substantial record evidence including, *inter alia*, (a) the fact that the United States was the main market for Mexican imports; (b) Mexican imports had increased even with the order in place; (c) statements by CEMEX officials to the Mexican business press, which were confirmed in an affidavit to the ITC, that CEMEX could triple the volume of imports to the United States if the order were revoked, thereby increasing Mexican imports by 2.8 million short tons; (d) evidence that Mexican respondents had substantial excess production capacity (even if one were to consider only the amounts reported by Mexican respondents as being “exportable” excess capacity); and (e) statements by CEMEX officials that CEMEX would likely substitute much of its significant volume of non-subject imports with subject imports in the event of revocation.³² Mexico has failed to demonstrate that the ITC’s finding on the basis of this record evidence is inconsistent in any way with the AD Agreement.

²⁹ See U.S. Opening Statement at Second Substantive Meeting of the Panel with the Parties, para. 13. The Appellate Body clarified recently in *US - DRAMS* that “a panel should normally examine the probative value of a piece of evidence in a similar manner to that followed by the investigating authority.” *US - DRAMS (AB)*, para. 150. Thus, according to the Appellate Body, where the investigating authority bases a particular determination on the totality of the evidence, a panel should likewise “consider the evidence in its totality, rather than individually in order, in order to assess its probative value with respect to the agency’s determination.” *US - DRAMS (AB)*, para. 150. This clarification supports the U.S. argument that Mexico’s approach of relying on selected pieces of evidence rather than addressing the totality of the evidence underlying the ITC’s affirmative likelihood determination is flawed.

³⁰ Mexico BCI Written Submission, para. 13.

³¹ See, e.g., U.S. First Written Submission, paras. 163-182; U.S. Second Written Submission, paras. 31-36; U.S. Opening Statement at First Substantive Meeting of the Panel with the Parties, paras. 23-27; U.S. Opening Statement at Second Substantive Meeting of the Panel with the Parties, paras. 18-19.

³² See, e.g., U.S. First Written Submission, paras. 163-198; U.S. Second Written Submission, para. 31-40.

15. Similarly, Mexico asserts that “the Commission itself conceded that imports from Mexico would merely substitute for third country (*i.e.* non-subject) imports.”³³ In fact, it was Mexican respondents that stated that subject imports would substitute for non-subject imports.³⁴ As the United States has explained previously, in so doing, Mexican respondents confirmed what the weight of the record evidence also demonstrates: that *subject imports* – which, unlike non-subject or total imports, are the focus of a likelihood of injury determination – would likely increase substantially if the order were revoked.³⁵ Indeed, Mexico itself confirmed to the Panel that “CEMEX alone accounted for almost three million tons of non-subject imports.”³⁶

16. Mexico also repeats its argument that “import restraints” and “export bottlenecks” would prevent the kind of increase found by the ITC to be likely. As the United States has explained previously, contrary to Mexico’s arguments, the record evidence demonstrates that the Mexican import and export infrastructure was capable of accommodating the likely significant increase in imports from Mexico to the Southern Tier region.³⁷ This includes statements by Mexican producers that, at the time of the sunset review, they had substantially more export infrastructure and controlled substantially more import infrastructure in the Southern Tier than during the original investigation, when they had imported much higher volumes of cement.³⁸ CEMEX officials also indicated that CEMEX had excess import terminal capacity³⁹ and likely would shift from the significant volume of non-subject imports to subject Mexican imports of cement if the order were revoked.

17. Finally, Mexico complains that “[t]he Commission never attempted to establish where the increased volumes would occur, or the effect of increased volume in the context of likely injury to ‘all or almost all’ of the U.S. regional industry.”⁴⁰ As explained above, Mexico has not shown that there is an obligation under the AD Agreement to assess whether “all or almost all” of the regional industry would likely be injured in the event of revocation, let alone that each factor considered in rendering a likelihood determination must be found to affect “all or almost all” of

³³ Mexico BCI Written Submission, para. 13.

³⁴ Hearing Transcript at 160-161 (Exhibit US-127).

³⁵ *See, e.g.*, U.S. Opening Statement at Second Substantive Meeting of the Panel with the Parties, para. 20.

³⁶ Mexico Opening Statement at First Substantive Meeting of the Panel with the Parties, para. 81.

³⁷ *See, e.g.*, U.S. First Written Submission, paras. 187-192 and 242; U.S. Second Written Submission, paras. 39-40; and Opening Statement of the United States at the Second Meeting, paras. 31-32.

³⁸ ITC Report at 37 (Exhibit MEX-9).

³⁹ A CEMEX official acknowledged that CEMEX’s import terminals “have the ability to take in another 1.5 million tons per year” ITC Hearing Transcript at 151 and 153 (Exhibit US-127). As the United States has explained previously, for the most part, CEMEX’s 1.5 million tons of excess import terminal capacity could be reserved for Mexican imports in addition to those resulting from a shift from nonsubject to Mexican imports. *See* U.S. Second Written Submission, para. 38.

⁴⁰ Mexico BCI Written Submission, para. 13.

the regional industry. Even apart from this, however, the record evidence demonstrates that Mexican imports had entered throughout the Southern Tier region while the order was in place and thus would likely continue to enter throughout this region if the order were revoked.⁴¹ As the United States explained in its submissions and at the second Panel meeting,⁴² Figure II-1 of the ITC Report⁴³ shows the 200-mile shipping radius for domestic cement from Southern Tier plants⁴⁴ and the 100-mile shipping radius for imported cement from import terminals.⁴⁵ As is evident from this map, there are only limited areas in the Southern Tier region where the circles do not overlap and, thus, where domestically produced cement “may be somewhat insulated from direct competition with subject imports.”⁴⁶ Moreover, Figure II of the ITC Report also shows the network of rail lines between the Mexican cement plants and the Southern Tier region.⁴⁷

18. Mexico’s assertion that there were export constraints on subject imports across the Southern Tier region, in particular east of the Mississippi River, is simply incorrect.⁴⁸ Mexico’s argument takes into account only what Mexico asserts were CEMEX’s exportable capabilities,⁴⁹

⁴¹ Mexico fails to rebut this point on the basis of any record evidence. To the contrary, Mexico’s arguments in this regard hinge on hypothetical scenarios – “if all of the increases were to take place in Arizona, New Mexico and California” – and not on the facts. Mexico BCI Submission, para. 14 (emphasis added). Interestingly, Mexico fails to include the state of Texas in its hypothetical, which is the state in which the majority of Mexico imports by truck or rail would first enter the United States.

⁴² See, e.g., U.S. Second Written Submission, paras. 64-69; Opening Statement of the United States at the Second Meeting of the Panel with the Parties, paras. 31-32; U.S. First Written Submission, paras. 240-242; and U.S. Response to Panel’s Second Set of Questions, paras. 28-29 (June 6, 2005).

⁴³ See Exhibit MEX-319.

⁴⁴ These are the partially defined circles with black dots and white background.

⁴⁵ These are the circles with black dots and gray background.

⁴⁶ ITC Report at 42 (Exhibit MEX-9). This is a conservative assessment as the map does not take into account the fact that 20 percent of domestic product is actually shipped more than 200 miles. See ITC Report at Table I-2 (Exhibit MEX-9).

⁴⁷ Exhibit MEX-319. This map shows the rail lines that connect GCCC’s Chihuahua and Juarez cement plants to the import terminal in El Paso, Texas; the rail lines that connect CEMEX’s Torreon, Hidalgo, and Monterrey cement plants and Apasco’s Ramos Arizpe cement plant to the import terminals in San Antonio and Houston, Texas; and the rail lines that connect CEMEX’s Campana and Yaqui cement plants to the import terminals in Tucson, Arizona and California.

⁴⁸ See Mexico BCI Submission, paras. 15 and 35; Mexico Second Written Submission, para. 195.

⁴⁹ Mexico maintains that CEMEX had only one export terminal on the east coast of Mexico, which, according to Mexico, has only 250,000 tons of unused export capacity. Mexico has provided this Panel with new information, which was not presented or verified during the sunset review, regarding CEMEX’s alleged exportable capabilities on the east coast of Mexico. Mexico BCI Written Submission, paras. 35 and 36. The evidence on the record demonstrates, however, that prior to the imposition of the order annual Mexican imports to Florida alone were 1.5 million short tons of cement, which indicates that sufficient marine terminal infrastructure existed on Mexico’s east coast to allow for the shipment of significant export volumes of cement. ITC Report at Table I-1C (Exhibit MEX-9).

rather than the totality of the evidence on which the ITC relied.⁵⁰ In fact, there were other Mexican producers with the capacity and capability to import east of the Mississippi, including Apasco, which imported during the original investigation and which, according to its parent firm, likely would have resumed importing if the order were revoked.⁵¹

19. In short, Mexico’s arguments with respect to the ITC’s findings regarding likely volume effects continue to be unavailing.

B. Likely Price Effects

20. The United States notes, as a preliminary matter, that Mexico’s arguments with respect to the ITC’s findings on likely price effects do not implicate the confidential pricing information included in the 17 March 2005 BCI. Instead, Mexico’s arguments relate, for the most part, to the pricing tables for subject imports that are on the non-confidential record.⁵² This again supports the argument that the United States has consistently made that the 17 March 2005 BCI is not necessary to resolve the issues in dispute.

21. Further, Mexico’s arguments about likely price effects are without merit. First, contrary to Mexico’s assertions, the United States has demonstrated that there is substantial record evidence supporting the ITC’s likely price effects findings.⁵³ Mexico’s attempts to dismiss this

⁵⁰ It is important to note regarding import infrastructure east of the Mississippi River that: 1) CEMEX owned import terminals in Florida and not only imported through CEMEX-owned terminals, but its subsidiary CEMEX Trading sold cement to customers that imported cement through their own marine terminals in the United States; 2) another Mexican producer, Apasco, which imported during the original investigation, had a related import terminal in New Orleans, Louisiana; and 3) six of the 16 import terminals east of the Mississippi were controlled by Mexican affiliated companies. See CEMEX and GCCC’s Response to Commission Questions at 9-11 (Exhibit US-15); ITC Report at I-38, n.66, IV-16 and Table I-9 (Exhibit MEX-9).

⁵¹ See ITC Report at 37, n.221 (noting that “[t]he record indicates that Apasco, which could only export to the Florida and Gulf Coast of the United States by sea from its Veracruz terminal on the Gulf Coast of Mexico prior to the order, could now export to California by sea from its new plant in Tecoman and its associated marine terminal at Manzanillo on the Pacific Coast of Mexico”) and IV-17 (noting that “[d]uring the original investigation, Apasco exported through the Port of Veracruz and had two plants located in the Gulf coast area”); ITC Report at IV-12, Figure IV-1 (showing Apasco’s marine export terminals) and *El Financiero*, Petitioners’ Prehearing Brief at Exhibit 70 (Exhibit US-13(d)) (Apasco’s parent noting that revocation would be to its benefit because it “would be able to sell much more cement through its subsidiary Apasco”).

⁵² Notwithstanding this fact, Mexico has chosen to bracket certain of this public information.

⁵³ These include, *inter alia*, (a) the likelihood of negative pricing pressures as a result of the likely substantial increases in the volume of subject imports in the event of revocation; (b) the price sensitive nature of sales of cement, which is a commodity product, and likely increased price sensitivity due to increases in supply resulting from the domestic industry’s capacity expansion projects; (c) evidence of substantial underselling by Mexican imports even with the order in place and during a period of increasing demand; (d) statements by CEMEX officials that imports from Mexico would realize lower transportation costs of at least \$3 per ton than the imports from other sources for which they would likely be substituted, which would allow CEMEX to lower its prices for Mexican imports without reducing its profit margins; and (e) the incentives for Mexican respondents to increase

record evidence – in particular, the evidence regarding underselling by Mexican imports and the likely cost savings to Mexican producers of \$3 per ton if subject imports were substituted for non-subject imports in the event of revocation – are unavailing. As discussed above, Mexico’s arguments are based on the flawed premise that there must be significant and pervasive *existing* price underselling in order for an investigating authority to make an affirmative *likelihood* determination. In fact, with an antidumping order in place, one would expect little if no underselling rather than the 45 percent reported in this case.⁵⁴

22. Second, as discussed above, Mexico’s argument that the ITC was obligated to [[* * *]].⁵⁵ Thus, Mexico’s observation that price underselling occurred [[* * *]] is of questionable relevance.⁵⁶ Mexico has not shown that evidence of underselling can only be considered relevant in making a likelihood determination if such underselling is found in each and every market. To the contrary, as the ITC properly found, the fact that substantial underselling took place in *any* market even with the order and high antidumping duty rates in place is an indicator that underselling would likely continue and intensify if the discipline of the order were eliminated.⁵⁷

C. Likely Impact

23. As with its arguments regarding the ITC’s analysis of likely volume and price effects, Mexico’s arguments with respect to the ITC’s likely impact analysis present no new issues and

exports as a result of their substantial excess capacity in the highly capital intensive cement industry. See, e.g., U.S. First Written Submission, paras. 199-210; U.S. Second Written Submission, paras. 41-48; U.S. Opening Statement at First Substantive Meeting of the Panel with the Parties, para. 28; U.S. Opening Statement at Second Substantive Meeting of the Panel with the Parties, para. 21-24; and U.S. Responses to Second Panel Questions (June 6, 2005) at 22-24.

⁵⁴ ITC Report at Table V-4 (Exhibits MEX-9 and US-129).

⁵⁵ Mexico BCI Written Submission, para. 16. In fact, by complaining that [[* * *]], Mexico appears to go even further and suggest that investigating authorities are obligated to find that *each piece of evidence* considered with respect to *each factor* in a likelihood determination must be linked to likely injury to producers of “all or almost all” of the regional production. To the extent Mexico advances such an argument, it has failed to demonstrate any textual basis whatsoever for the asserted obligation.

⁵⁶ See Mexico BCI Written Submission, para. 17. It is curious that Mexico has chosen to bracket this information, given that it is from the public pricing tables on the record.

⁵⁷ ITC Report at 39 and n. 234. (Exhibit MEX-9). Mexico also ignores the fact that the ITC expressly discussed the relevance of price underselling in specific markets to the likelihood of price effects if the order were revoked. For example, the evidence showed that subject imports from Mexico predominately undersold the domestic product in the Phoenix, Arizona market (36 of 39 months), with consistent underselling from August 1998 to March 2000, and had mixed underselling in the Tucson, Arizona market (20 of 39 months). ITC Report at Table V-4 (Exhibit MEX-9). Taking into account a CEMEX official’s acknowledgment that CEMEX’s Hermosillo plant, which supplies customers in Arizona, had excess capacity during the review period, the Commission stated “[t]he predominant underselling in the Arizona market where subject imports from Mexico face competition with two domestic producers, California Portland and Phoenix Cement, even with the order in place, provides an indication of the likely pricing patterns for subject imports from Mexico if the order is revoked.” ITC Report at 39, n. 234 (Exhibit MEX-9) and Hearing Transcript at 177 (Exhibit US-127).

rely on a selective and distortive recitation of the relevant facts. These arguments also are not limited to explaining the relevance of the 17 March 2005 BCI, if any, to Mexico’s claims.

24. Mexico argues, first, that the [[* * *]].⁵⁸ According to Mexico, there are thus “overwhelming and uncontested” facts supporting a negative determination.⁵⁹ As the United States has explained previously, Mexico’s argument is entirely off the mark.⁶⁰ The relevant question under Article 11.3 is not whether the domestic industry is healthy while the order is in place but rather whether “*expiry of the duty* would be likely to lead to continuation or recurrence of . . . injury.” As explained above, the Appellate Body has recognized that nothing in the AD Agreement precludes an investigating authority from making an affirmative likelihood finding simply because of the “[t]he positive state of the domestic industry as of the date of the sunset review.”⁶¹ This is especially true where, as here, the positive state of the industry was found to be due in part to the remedial effect of the antidumping order itself and it was determined that the removal of the order would likely cause “other adverse factors,”⁶² such as likely substantial increases in subject imports and aggressive subject import pricing, to manifest.⁶³ Mexico has failed to demonstrate how the positive performance of the domestic industry as of the time of the sunset review supports its arguments about the alleged WTO-inconsistency of the ITC’s likelihood determination.

25. Second, and again without explaining any connection to the 17 March 2005 BCI, Mexico challenges the ITC’s findings regarding projected demand. The United States has rebutted Mexico’s arguments in its previous submissions, including pointing out that Mexico’s assertion that “[e]ven the most pessimistic analysis suggested that demand would remain ‘flat’” is factually incorrect.⁶⁴ The United States has demonstrated that the weight of the record evidence, including a number of the industry forecasts and the responses to ITC questionnaires, indicated that the demand cycle appeared to have reached a peak with slower growth or constant demand expected in the Southern Tier region in the reasonably foreseeable future.⁶⁵ The ITC relied on this evidence in making its likely impact finding, considering it in light of the other record evidence

⁵⁸ Mexico BCI Written Submission, paras. 18-19.

⁵⁹ Mexico BCI Written Submission, paras. 18-19.

⁶⁰ See U.S. First Written Submission, paras. 216-217; U.S. Second Written Submission, para. 51; U.S. Opening Statement at Second Substantive Meeting of the Panel with the Parties, para. 27.

⁶¹ See U.S. Opening Statement at Second Substantive Meeting of the Panel with the Parties, para. 27 (quoting *US - Argentina Sunset (AB)*, para. 351).

⁶² *US - Argentina Sunset (AB)*, para. 351.

⁶³ See U.S. First Written Submission, paras. 213-230; U.S. Second Written Submission, paras. 49-57.

⁶⁴ As the United States has explained twice before, Mexico ignores the declines forecasted for cement consumption by Greystone Insider (Spring 2000). See U.S. First Written Submission, para. 214, n. 348; U.S. Second Written Submission, para. 49.

⁶⁵ U.S. First Written Submission, para. 214; U.S. Second Written Submission, para. 49, U.S. Opening Statement at Second Substantive Meeting of the Panel with the Parties, para. 26.

indicating that revocation of the order would likely lead to a significant increase in the volume of subject imports into the Southern Tier region, that these shipments would likely undersell the domestic product and significantly depress or suppress the regional industry's prices, and that the industry had invested in extremely expensive capital expansion projects that were coming on line and would be particularly susceptible to the likely significant increases in subject imports at low prices if the order were revoked.⁶⁶ Mexico's challenge to the ITC's findings regarding projected demand, and the relevance of these findings to the ITC's overall likely impact findings, are therefore without merit.

26. Third, Mexico repeats its arguments with respect to the domestic industry's expansion projects. Not only are these arguments unfounded for the reasons specified in the prior U.S. submissions,⁶⁷ but the 17 March 2005 BCI now referenced by Mexico in connection with these arguments only serves to reaffirm the ITC's findings. For example, in contending that subject imports would not affect the producers with new capacity expansion projects, Mexico asserts that *[[* * *]]*⁶⁸ As discussed above, Figure II-1 of the ITC Report⁶⁹ shows that rail lines connect Mexican cement plants to import terminals in Texas, Arizona, and California, and that Mexican cement can be shipped to import terminals in California, Texas, Louisiana, and Florida.⁷⁰ Thus, subject imports enter in the *[[* * *]]*.⁷¹

27. Mexico's remaining arguments regarding expansion plans focus, as they have in Mexico's previous submissions,⁷² on one expansion plan which was *[[* * *]]* in the expansion plans considered by the ITC in its likely impact analysis. In finding that investments in additional capacity would be particularly susceptible to the likely significant increases in subject imports, the ITC clarified that it took the conservative approach of relying only on the expansion plans that would be placed on line in the following two years (2000 and 2001).⁷³ The ITC explicitly stated that "[i]n the next two years alone, over 5 million short tons in production capacity is expected to come into service in the Southern Tier region."⁷⁴ The confidential version

⁶⁶ U.S. First Written Submission, para. 218-220; U.S. Second Written Submission, para. 52-53, U.S. Opening Statement at Second Substantive Meeting of the Panel with the Parties, para. 26.

⁶⁷ See U.S. First Written Submission, paras. 220-229; U.S. Second Written Submission, paras. 51-57; and U.S. Responses to Second Panel Questions (June 6, 2005), paras. 31-37.

⁶⁸ Mexico BCI Submission, para. 24. The Southern Tier region consists of the eight states of California, Arizona, New Mexico, Texas, Louisiana, Mississippi, Alabama, and Florida. ITC Report at 8 (Exhibit MEX-9).

⁶⁹ Exhibit MEX-319.

⁷⁰ ITC Report at Table I-9 and Figure II-1 (Exhibit MEX-9).

⁷¹ BCI Version of Table I-7.

⁷² Mexico BCI Submission, paras. 25-30.

⁷³ See U.S. First Written Submission, paras. 221-226; U.S. Second Written Submission, paras. 22-26; and U.S. Responses to Second Panel Questions (June 6, 2005), paras. 30-36.

⁷⁴ ITC Report at 41 and n. 248 (Exhibit MEX-9). This is confirmed by the public version of Table I-7, which shows that in 2000 and 2001 almost 5.5 million short tons in additional capacity would be placed on line.

of Table I-7 of the ITC Report shows that California Portland’s expansion plans for Rillito, Arizona were [[* * *]] in the over 5 million short tons in additional production capacity considered by the ITC in its likely impact analysis.

28. Moreover, as the United States has explained previously,⁷⁵ and as Mexico acknowledges,⁷⁶ the ITC specifically discussed the expansion plans for the Rillito, Arizona facility in a different context, *i.e.*, in addressing GCCC’s argument that its post-revocation imports would not affect any domestic producer other than its U.S. subsidiary Rio Grande, which is located in New Mexico. Even in this context, though, it is clear from the ITC’s opinion that its finding that Mexican producers would likely not “refrain from using their excess capacity to ship cement to the Southern Tier region at volumes or price levels that would injure regional producers including their regional subsidiaries” is based on other evidence.⁷⁷ The ITC specifically stated: “the large capacity of the Mexican cement industry with its low capacity utilization levels and need to meet high fixed costs would provide necessary incentive for the Mexican producers to increase shipments to the Southern Tier region if the order is revoked. 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, which are running [[* * *]].”⁷⁸ The ITC’s reference to the Rillito, Arizona facility, by contrast, was in the context of whether other regional producers also would compete with subject imports in New Mexico.⁷⁹ Thus, Mexico’s arguments with respect to the ITC’s findings regarding expansion projects, and the relevance of these findings to the ITC’s overall likely impact findings, fail.

D. “All or Almost All”

29. At the core of Mexico’s arguments with respect to the ITC’s “all or almost all” finding is the contention that the AD Agreement imposes particular obligations with respect to the assessment an investigating authority may conduct in determining whether “all or almost all” of a regional industry would be likely to be injured in the event of revocation. Specifically, Mexico asserts that the AD Agreement “does not permit” the type of aggregate/anomalies assessment used by the ITC as part of its finding of whether producers of “all or almost all” of regional production likely would be injured.⁸⁰ Further, Mexico argues that the ITC was required to establish and apply a precise percentage of production that must be affected in order to find that

⁷⁵ U.S. Opening Statement at Second Panel Meeting, paras. 10-11; U.S. Response to Second Panel Questions (June 6, 2005), paras. 30-32.

⁷⁶ Mexico BCI Submission, paras. 25-27.

⁷⁷ ITC Report at 41 (Exhibit MEX-9).

⁷⁸ ITC Report at 41 (Exhibit MEX-9) and BCI Table E-1 of the ITC Report. The ITC also discussed the low price levels in note 234 of the ITC Report.

⁷⁹ ITC Report at 42 (Exhibit MEX-9).

⁸⁰ See Mexico BCI Written Submission, paras. 38-39.

producers of “all or almost all” of the regional production are likely to be injured.⁸¹

30. As discussed above, Mexico has failed to substantiate these arguments on the basis of the AD Agreement. Mexico has not even shown that any provision of the AD Agreement *requires* administering authorities in regional industry cases to determine that “all or almost all” of the regional industry is likely to be injured if the order were revoked, let alone that any provision requires a particular methodological approach to be taken if such an analysis is undertaken. Further, as the United States has previously explained,⁸² Mexico’s assertion that a GATT Panel in *Mexico Cement* set out guidance as to what can constitute “all or almost all” of production is incorrect.⁸³ A review of the GATT panel report cited by Mexico reveals that it addressed an altogether different issue, namely that of domestic industry support for an antidumping petition.⁸⁴

31. Other than making the unfounded assertion that the AD Agreement “does not permit” the aggregate/anomalies assessment undertaken by the ITC, Mexico provides little explanation and no basis in the record evidence for its argument that the ITC’s analysis was insufficient. Indeed, even though Mexico has access to the company-specific data for each of the U.S. producers, it does not even argue that there was any anomaly that the ITC failed to address.⁸⁵ Nor can it. A review of the data makes clear that there were no such anomalies.

32. In any event, as the United States has explained in its previous submissions, the aggregate/anomalies assessment conducted by the ITC was only one aspect of the overall analysis used to make the “all or almost all” finding.⁸⁶ The ITC also considered, as part of its “all or almost all” analysis whether, as a result of factors such as affiliation with Mexican producers or operation in certain markets that may be isolated or insulated from competition with the subject imports, certain regional producers would be likely not to experience recurrence of material injury.⁸⁷ The ITC found, however, that the record evidence did not indicate that the Mexican producers would refrain from using their substantial excess capacity to ship cement to the Southern Tier region at volume or price levels that would injure regional producers including

⁸¹ See, e.g., Mexico BCI Written Submission, paras. 31-37; Mexico First Written Submission, para. 500.

⁸² See, e.g., U.S. Second Written Submission, para. 61, n. 116; U.S. Opening Statement at Second Meeting of the Panel, para. 29.

⁸³ See Mexico BCI Written Submission, para. 34; Mexico Oral Statement at First Panel Meeting, para. 56; Mexico Second Written Submission, para. 182.

⁸⁴ *United States Anti-dumping Duties on Gray Portland Cement and Cement Clinker from Mexico* (Unadopted GATT Panel Report), ADP/82, para. 5.31-5.34 (circulated September 7, 1992).

⁸⁵ In fact, Mexico’s discussion of the operating income margin by percentage of sales supports the U.S. argument that there is nothing in the individual company results that meaningfully deviates from the aggregate results for all producers. Accordingly, the BCI information from individual companies demonstrates that the ITC’s determination was supported by positive evidence. See, e.g., Mexico BCI Written Submission, para. 44.

⁸⁶ See, e.g., U.S. First Written Submission, paras. 237-243; U.S. Second Written Submission, paras. 64-68; and U.S. Opening Statement at Second Meeting of the Panel, paras. 30-32.

⁸⁷ ITC Report at 41 and 42 (Exhibit MEX-9).

their regional subsidiaries. The ITC also found that there are only limited areas in the Southern Tier region, accounting for a small percentage of regional production in 1999 (10 to 15 percent), that may have been somewhat insulated from direct competition with subject imports.⁸⁸ As discussed above with respect to the likely volume effects,⁸⁹ this is confirmed by Figure II-1 of the ITC Report, which shows the substantial overlap between the imports and regional shipments. The ITC conducted an objective evaluation of all of this positive evidence in making its “all or almost all” finding. Mexico has failed to show that this finding is not WTO-consistent.

33. Instead, Mexico continues to try to undermine the ITC’s findings by stressing the positive condition of the regional industry at the time of the sunset review.⁹⁰ As discussed above, however, these efforts are unavailing. Mexico also repeats the incorrect argument that there are constraints on imports across the Southern Tier, and particularly east of the Mississippi.⁹¹ As discussed above regarding likely volume effects, however, the evidence demonstrates clearly that, contrary to Mexico’s assertions, Mexican imports had entered throughout the Southern Tier region with the order in place and would likely continue to do so if the order were revoked.

III. Conclusion

34. Few of Mexico’s arguments in its BCI submission even address the question of the relevance of the 17 March 2005 BCI to Mexico’s claims, confirming that this BCI was not necessary to resolve the issues in dispute. The majority of Mexico’s arguments are simply repeated from its previous submissions and fail for the same reasons previously explained by the United States and summarized above.

⁸⁸ 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).

⁸⁹ The United States also discussed this map at the second Panel meeting and in its prior submissions. *See, e.g.*, U.S. Second Written Submission, para. 67; U.S. Opening Statement at Second Meeting of the Panel, para. 31; and U.S. Response to Second Panel Questions (June 6, 2005), para. 29.

⁹⁰ Mexico BCI Submission, paras. 35, 37, 38, 39, 42, 43, 44, 45, and 46.

⁹¹ *See* Mexico BCI Written Submission, para. 35-36; Mexico Second Written Submission, para. 195.