

April 26, 2005

Mr. Peter Palecka
Chairman
*United States – Anti-Dumping Measures on
Cement from Mexico (DS281)*
World Trade Organization
Centre William Rappard
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Dear Mr. Chairman:

My authorities have instructed me to provide the following response to Mexico's comments, dated April 20, 2005, regarding the additional BCI procedures proposed by the United States. As an initial matter, the United States notes that, instead of limiting its comments to the proposed additional BCI procedures, as the Panel expressly requested,¹ Mexico requests the Panel to expand its request for confidential information beyond the items that Mexico identified in its February 18, 2005 list, to include "*all information held by the United States International Trade Commission on the issue of whether expiry of the order would be likely to lead to the continuation or recurrence of injury.*"² This request, and Mexico's newly-articulated opposition to the BCI procedures, place in some doubt the basis for Mexico's request for the Panel to seek to obtain this confidential information under Article 13 of the DSU.

Second, it is useful to keep in perspective the discussion of additional BCI procedures. The Panel, in adopting the current 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."³ The information at issue is clearly confidential information, as indicated in the Panel's March 17, 2005, request. For the United States to provide this information, it must first obtain the consent of the submitters of the information, which in turn requires that they have a sufficient level of confidence that the procedures will maintain the confidentiality of the information. The Panel's current BCI

¹ The Panel asked Mexico to "comment on the proposed Additional BCI Procedures attached to the United States Rebuttal Submission of 15 April 2005 as Exhibit US-139." See Panel's e-mail communication to the parties (April 18, 2005).

² See Mexico's Comments on BCI Procedures (April 20, 2005).

³ See first bullet point of Communication from the Panel to the Parties (October 19, 2004).

procedures need to be supplemented in order to provide the submitters with that sufficient level of confidence. Accordingly, the discussion of additional BCI procedures is a discussion about what additional procedures would provide those submitters with a sufficient level of confidence.

Third, Mexico's comments reveal that there may be a misunderstanding by Mexico of the intended relationship between the U.S. proposed additional procedures and the Panel's current BCI procedures. Accordingly, it may be useful to clarify that intended relationship. As the U.S. proposal states, it is intended to provide "*additional* working procedures for the protection of business confidential information submitted by the United States."⁴ The proposed additional procedures are, thus, intended to supplement the current BCI procedures as they apply to the specific BCI that the Panel has requested. To avoid further confusion, the United States is submitting with this letter a revised draft of the proposed additional BCI procedures (Attachment 1) that (a) clarifies the relationship between the two sets of BCI procedures; and (b) makes two conforming changes.⁵ In addition to these, the United States respectfully requests that the Panel make one conforming change to its existing BCI procedures, as indicated in the attached document (Attachment 2), to clarify that investigating authorities in the United States will not be precluded from using the BCI at issue in other proceedings in which that information is needed.

A. Mexico's Comments on BCI Procedures

There appears to have been a major reversal of Mexico's position with regard to the adoption of additional BCI procedures. Specifically, in its February 15, 2005 "preliminary ruling request," Mexico stated unequivocally that "Mexico is well aware that this information held by the ITC is confidential. If the United States requires additional procedures to protect its Business Confidential Information, Mexico would *welcome* the adoption of any reasonable procedures to do so."⁶ Now that it is apparent that the United States is working to get the necessary authorization to submit the BCI, and has requested additional BCI procedures in that connection, Mexico states that "the United States, having accepted the Panel's BCI procedures, must be 'held bound by them.' . . . Consequently, Mexico *strongly objects* to U.S. attempts now to revise the BCI procedures."⁷ It is highly revealing that, having demanded the submission of certain BCI and, in that context, "welcomed" additional BCI procedures to protect the confidentiality of the requested information, Mexico now balks at the prospect that such procedures may be actually adopted in order to allow the BCI to be submitted.

While the United States has previously explained that the information in question is

⁴ See "Additional Working Procedures for the Protection of Business Confidential Information Submitted by the United States" (April 15, 2005) (emphasis added).

⁵ Specifically, the United States has proposed to eliminate paragraph 15 of the additional procedures because the existing BCI procedures already include such a provision in paragraph 7. In addition, in conformity with the existing BCI procedures, the United States has proposed to expand the number of days to submit a non-confidential version of a submission containing BCI from two to three working days.

⁶ See Mexico's Request for Preliminary Rulings (February 15, 2005) (emphasis added). This language appears in a section entitled "Additional BCI Procedures Would be Acceptable."

⁷ See Mexico's Comments on BCI Procedures (April 20, 2005) (emphasis in original).

ultimately not necessary to the Panel's decision-making in this proceeding, it is now exceedingly apparent that Mexico has little interest in obtaining the information. To the contrary, Mexico is seeking to prevent the private companies that submitted the BCI from gaining sufficient confidence in the procedures for protection of that information to authorize its release to the Panel. In this regard, the United States reiterates the Appellate Body's admonition that "[t]he procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."⁸

Moreover, Mexico's assertions that the United States "accepted" the current BCI procedures simply miss the point. Under the U.S. proposal, the Panel's current BCI procedures would remain in effect (although, as noted above, the United States requests one clarification in them). However, now that the Panel has requested specific BCI, and the submitters of that information have indicated that they would be willing to provide their consent to make it available to the Panel if some additional concerns are met through supplemental procedures, it is possible to adopt additional BCI procedures tailored to that specific information in order to provide the submitters a sufficient level of confidence. This is exactly what the additional BCI procedures proposed by the United States aim to do.

The United States notes that Mexico does provide specific comments with respect to the proposed BCI procedures "if the Panel nevertheless decides to adopt new BCI procedures over Mexico's objections."⁹ Following are the U.S. responses to those comments.

(1) Proposal to incorporate the "Basic Principles" set out in Mexico's proposed BCI procedures. Mexico first requests that "The 'Basic Principles' set out in Mexico's proposed BCI procedures should be included. This includes the provision that 'the Panel expects that parties will exercise the utmost restraint in designating information as 'business confidential'.'" The United States is confused by this request. The Panel's BCI procedures already incorporate, almost verbatim, the entire text of the "Basic Principles" in Mexico's proposal.¹⁰

Indeed, the only part of Mexico's proposed "Basic Principles" that is missing from the Panel's BCI procedures is the first sentence, which reads: "A party having access to business confidential information ("BCI") shall not disclose that information without the formal authorization of the party submitting it to the Panel." The United States welcomes Mexico's request that this be included in the BCI procedures as it is fully consistent with the principle in the AD Agreement that information cannot be disclosed to the Panel or other parties without the formal authorization of the submitting entity.

⁸ *US - FSC (AB)*, para. 166.

⁹ See Mexico's Comments on BCI Procedures (April 20, 2005).

¹⁰ The second paragraph in the "Basic Principles" set out in Mexico's proposed BCI procedures is included verbatim in paragraph 3 of the current BCI Procedures. Moreover, the last two sentences of the first paragraph of Mexico's "Basic Principles" are included in paragraph 5 of the current BCI Procedures. Compare Mexico's Proposed BCI Procedures (September 22, 2004) to "Working Procedures of the Panel Concerning Business Confidential Information" at para. 3 (October 19, 2004).

(2) Proposal to include procedures to decline to consider information as confidential. Mexico's second request is to include procedures "under which the Panel could decline to consider information that was not reasonably entitled to BCI treatment." Mexico's request ignores the BCI procedures already adopted by the Panel, which defines as BCI "any information designated as confidential business information by ... the United States International Trade Commission (the "Commission") ... in connection with the measures, proceedings, and/or the determinations set forth in the Request for the Establishment of a Panel by Mexico dated July 29, 2003 (circulated to WTO Members on August 8, 2003 as document number WT/DS281/2), including the determinations of the Commission ... in the identified ... sunset review[.]..." All the information that would be subject to the U.S. proposed additional procedures is thus already defined under the Panel's current BCI procedures as BCI. Accordingly, there is no need to add a procedure to decline to consider it as confidential.

(3) Proposal to apply the proposed BCI procedures to the United States. Mexico's third request is that the "confidentiality requirements apply equally to both disputing parties." Again, the United States is confused by this request. The Panel's BCI procedures already provide that "[a]s required by Article 18.2 of the DSU, a party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information without the formal authorization of the party submitting it to the Panel. The parties and third parties shall have the responsibility for all members of their delegations, and in particular shall ensure that all members of their delegations maintain the confidentiality of any BCI to which they have access in the context of these proceedings." These requirements apply equally to both disputing parties. The question now, however, concerns what additional procedures to apply with respect to the requested BCI held by the ITC. This is information already in the possession of the United States and has been and will continue to be safeguarded in accordance with normal procedures in the United States. The only remaining question is the procedures that are to apply to Mexico, the Panel and Secretariat if that information is to be divulged to them. Additional BCI procedures adopted in prior disputes have not imposed such additional requirements on the party submitting the information. For example, in the *US - Wheat Gluten* dispute to which Mexico itself refers, the confidentiality procedures clearly stated that "[t]hese procedures apply to all private confidential information submitted during the Panel process, *but do not apply to a party with respect to private confidential information first submitted by that party, including in derivative form.*"¹¹ Again, Mexico's proposed modification is not necessary given the particular BCI at issue here.

(4) Proposal to impose requirements regarding creation and submission of non-confidential "edited versions" or "summaries" of submissions containing BCI: Mexico's fourth request is to "adopt more detailed provisions regarding non-BCI versions." Again, the Panel's current BCI procedures already provide that "[a] non-confidential version, clearly marked as

¹¹ See "Procedures Governing Private Confidential Information" provided in Attachment 4 to panel report in *US - Wheat Gluten (Panel)*. See also BCI Procedures adopted in *Korea - Ships (Panel)* ("the following procedures apply to all business confidential information (BCI) submitted in the course of the Annex V procedure and the Panel process. These procedures will not apply to a party's treatment of its own BCI.")

such, of any written submission containing BCI, shall be submitted to the Panel within three work days after the submission of the confidential version. In the case of an oral statement containing BCI, a written non-confidential version shall be submitted within a day after the statement has been made. Non-confidential versions shall be redacted in such a manner as to convey a reasonable understanding of the substance of the BCI deleted therefrom.” Mexico did not object to these requirements when the Panel adopted them. Mexico has given no reason why they should be insufficient now. These procedures are almost identical to those proposed by Mexico, except that Mexico would have permitted five working days to provide the non-confidential version of a submission whereas the Panel requires three working days.¹² Also, Mexico would permit “in exceptional circumstances, a written statement:

- (a) that such a non-business confidential edited version or non-business confidential summary cannot be made, or
- (b) that such a non-business confidential edited version or non-business confidential summary would disclose facts that the party has a proper reason for wishing to keep business confidential.”

Accordingly, the United States fails to understand how Mexico’s proposal “imposes greater discipline on the parties.” The United States also notes that non-confidential aggregate data is already on the record of this dispute.¹³

(5) Proposal to govern treatment in event of an appeal. Mexico’s fifth request is to include language “that the parties would comply with any directives of the Appellate Body regarding the treatment of BCI in the event of an appeal.” However, Mexico overlooks the fact that the current discussion concerns the working procedures of the *Panel*, not of the Appellate Body. The Panel lacks the authority to specify what will transpire on appeal. Furthermore, Mexico’s request is superfluous (not to mention odd in presuming that a party would *not* comply with a directive of the Appellate Body.) The Appellate Body has full authority to ensure that the parties comply with any directive of the Appellate Body.

(6) Proposal to permit storage of BCI at Mexico’s U.S. embassy in Washington, DC: Mexico’s sixth request is to permit Mexico to store BCI at “the Embassy of Mexico in Washington, D.C.” and to provide for storage by the United States in Washington, D.C. It is unclear what role the Embassy of Mexico in Washington, D.C. plays in Mexico’s preparation and presentation of argumentation in this dispute. The United States would have assumed that this was done by officials in Mexico City in conjunction with Mexican officials in Geneva. Mexico’s own proposed BCI procedures, to which it refers the Panel on several counts, limited storage to Mexico City and Geneva. Mexico has provided no explanation as to why it would, in

¹² The additional BCI procedures proposed by the United States would have allowed only two working days for the submission of the non-confidential version of a submission. However, to maintain consistency with the Panel’s procedures, as discussed above, the United States proposes to expand the period to three days.

¹³ See U.S. Response to First Set of Panel Questions at para. 23 (March 2, 2005).

this case, now modify its own proposal. And, as noted above, the BCI is already in the possession of the United States and maintained in Washington, D.C. The United States cannot understand what purpose would be served by stating the obvious or by trying to specify in the Panel procedures how the United States handles this information. The information is in the possession of the United States and will remain so regardless of the current dispute, and will be safeguarded as provided in, and used for the purposes prescribed under, U.S. law.

In sum, the United States drafted its proposed additional BCI procedures to take into consideration the specific BCI items that the Panel has requested. Mexico has not demonstrated that any of its proposed modifications are necessary or appropriate under the circumstances, other than the addition of the first sentence of Mexico's "Basic Principles." Accordingly, the United States respectfully requests that the Panel adopt the additional BCI procedures submitted by the United States without the modifications proposed by Mexico, other than the addition of the first sentence of Mexico's "Basic Principles."

B. Mexico's Proposed Expansion of the Panel's Request for BCI to Include "All Information Held by the United States International Trade Commission on the Issue of Whether Expiry of the Order Would Be Likely to Lead to the Continuation or Recurrence of Injury"

As noted above, Mexico now makes the request that the Panel expand its BCI request to include "all information held by the United States International Trade Commission on the issue of whether expiry of the order would be likely to lead to the continuation or recurrence of injury."¹⁴ This request would require the submission of thousands of pages of documentation, from individual producer, exporter, and purchaser questionnaire responses to charts and tables produced by the ITC staff, to confidential versions of interested party briefs, among other things.

It is useful to recall that Mexico had initially argued that "the arguments advanced by the United States in its First Submission refer to, and partly rely on, primarily confidential information."¹⁵ According to Mexico, this justified its eleventh-hour demand for BCI because "Mexico *could not* have known [at any earlier time] that the United States was going to use confidential information in its First Submission."¹⁶ At the first meeting, the Panel asked Mexico to identify *specifically* the BCI information to which Mexico's arguments pertained. Mexico did so on February 18, 2005 by producing the list of BCI items that have been the subject of all

¹⁴ See Mexico Second Written Submission at paras. 41-44; Mexico's Comments on BCI Procedures (April 20, 2005).

¹⁵ See Mexico's Request for Preliminary Rulings (February 15, 2005).

¹⁶ See Mexico's Request for Preliminary Rulings (February 15, 2005) (emphasis in original). By now urging the Panel to request "all information held by the United States International Trade Commission on the issue of whether expiry of the order would be likely to lead to the continuation or recurrence of injury," Mexico confirms that it was, in fact, entirely irrelevant to Mexico's argument what information the U.S. first written submission did or did not "refer to and partly rely on." Consequently, Mexico has cast into doubt its purported reason for the timing of its "preliminary ruling request" on the eve of the first Panel meeting when the United States would have little opportunity to respond.

discussions regarding BCI between the Panel and the parties since that time. Moreover, in requesting the BCI at issue, the Panel referenced “Mexico’s elaborations [regarding its request for BCI], and the United States responses (including the 2 March 2005 written responses and associated table).”¹⁷ Contrary to Mexico’s assertions, the Panel has never asked the United States to submit “all information held by the United States International Trade Commission on the issue of whether expiry of the order would be likely to lead to the continuation or recurrence of injury.”

The United States has already demonstrated in the first meeting with the Panel and in subsequent submissions¹⁸ that, to resolve the issues in this dispute, the Panel does not need the BCI that Mexico alleges the United States “refer[s] to and partly rel[ies] on.” Mexico has not rebutted these arguments, let alone demonstrated why it is “necessary and appropriate” under DSU Article 13.1 to require the submission of BCI that Mexico, by necessary implication, concedes the United States has *not* “refer[red] to” or “partly rel[ied] on.” In fact, in this process, Mexico has made a *single* assertion to support its request that the United States submit the entire ITC confidential record: “[a]nything less might hinder the Panel’s ability to discharge its responsibilities under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU.”¹⁹ This one sentence stands in sharp contrast to the detailed arguments the United States had submitted on this issue. Mexico does not even attempt to support its assertion with any explanation or any citation to a prior dispute in which such a request was ever made or granted. Nor can it. Indeed, the United States is not aware of *any* prior dispute involving a determination by an investigating authority, in which a panel has found that it is “necessary and appropriate” to require the submission of the entire confidential record before the investigating authority, including information not even *alleged* to be “referred to” or “relied on.”²⁰ Mexico has not established any basis for the Panel to do so now.

Moreover, it is difficult to understand Mexico’s request for “all information held by the United States International Trade Commission on the issue of whether expiry of the order would be likely to lead to the continuation or recurrence of injury” as anything but the first step in an effort to have the Panel conduct a *de novo* review of all of the facts that were before the ITC. This is precluded under Article 17.6 of the AD Agreement. As the Appellate Body has clarified, Article 17.6 does not “authorize panels to engage in a new and independent fact-finding exercise. Rather, in assessing the measure, panels must consider, in the light of the claims and arguments of the parties, whether, *inter alia*, the ‘establishment’ of the facts by the investigating authorities

¹⁷ See Panel’s BCI Request at para. 1 (March 17, 2005).

¹⁸ See U.S. Responses to the First Set of Panel Questions (March 2, 2005); U.S. letter to Panel (April 4, 2005); and U.S. Second Written Submission at paras. 172-184.

¹⁹ See Mexico Second Written Submission at para. 43.

²⁰ In fact, in the recent *US - DRAMs* dispute, the panel indicated that a limited approach would be appropriate when considering whether to request BCI under DSU Article 13.1. That panel refused, despite Korea’s urging, to request that certain BCI be submitted under DSU Article 13.1 saying “[w]e considered that 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 using . . . ‘proxy’ data. . . . However, we consider that Korea failed to do so.” *US - DRAMs (Panel)*, para. 7.239.

was ‘proper’, in accordance with the obligations imposed on such investigating authorities under the *Anti-Dumping Agreement*.”²¹

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In closing, the United States reiterates that it is making progress in securing the consent of the companies that submitted the BCI in the items requested by the Panel. To date, the ITC has received such authorization from a few companies²² and authorization from many additional companies is pending, contingent upon the Panel’s adoption of additional BCI procedures. The United States is hopeful that, if the proposed BCI procedures are adopted by the Panel, it will be able to secure the consent of all of the companies that submitted the BCI and will be able to release the information to the Panel in short order.

The United States thanks the Panel for its consideration of these comments. The United States is providing a copy of this submission directly to Mexico.

Sincerely,

Stephen Kho
Legal Advisor

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

²¹ *Mexico - HFCS (Article 21.5) (AB)*, para. 84.

²² The United States wishes to respond to Mexico’s statement in its April 20, 2005 comments that two companies affiliated with Mexican producers, CEMEX USA and Rio Grande Portland Cement, had transmitted their consent to disclosure of their confidential information to the ITC on or after April 14, 2005 and that other Mexican producers and exporters had not received such requests for authorization. According to Mexico, “[i]t is therefore not accurate to state, as the United States does in its Second Submission, that the submitting Mexican companies have not consented to the release of their BCI to this Panel.” The ITC is grateful that it now has the authorization from the two companies referenced in Mexico’s comments. However, at the time it submitted its second written submission – on April 15, 2005 – these authorizations had not been received. Moreover, the United States has requested authorization for disclosure only from the companies that actually submitted the BCI in the requested items; in the case of BCI relating to Mexican parties or their subsidiaries, these were CEMEX USA and Rio Grande Portland Cement.