

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

(WT/DS281)

**Comments of the United States on Mexico's June 6, 2005
Responses to the Second Set of Panel Questions**

June 21, 2005

1. In this submission, the United States comments on certain statements made by Mexico in its June 6, 2005 responses to the second set of questions from the Panel following the second substantive meeting with the parties. The United States is mindful of the narrow scope of the Panel's invitation to comment and, therefore, responds to the extent necessary to address new factual data and arguments raised by Mexico or clarify issues that Mexico has confused in its June 6, 2005 responses. There are numerous other statements in Mexico's June 6, 2005 responses with which the United States disagrees. However, in general, the United States has already addressed the substance of those statements in its prior submissions.

A. USDOC SUNSET REVIEW – AS SUCH/AS APPLIED

Question 160

2. Far from "provid[ing] additional support for Mexico's claim that . . . [the Sunset Policy Bulletin ("SPB")] is inconsistent with Article 11.3 of the Antidumping Agreement,"¹ as Mexico asserts, Commerce's analysis in *Sugar and Syrups from Canada* – as well as in *Cement from Venezuela, Uranium from Russia, and Uranium from Uzbekistan*, which Mexico also discusses in response to Question 160 – undermine Mexico's arguments.

3. Recall that Mexico's claim is that the SPB requires Commerce to conduct an allegedly WTO-inconsistent *analysis* in sunset reviews.² Yet, in responding to this question, Mexico does not demonstrate any alleged "direction" in the SPB that Commerce is obligated to observe in conducting its analysis in sunset reviews.³ Instead, Mexico's arguments focus on the *outcomes*

¹ Mexico's Answers to Panel's Questions Following the Second Substantive Meeting, para. 11 (June 6, 2005).

² Opening Statement by Mexico at the Second Meeting of the Panel, para. 91 (Mexico claims that the SPB establishes an allegedly "WTO-inconsistent presumption" because "Section II.A.3 [of the SPB] directs the Department to attach decisive weight to historical dumping margins and declining import volumes (or the cessation of imports altogether) in every case.")

³ Indeed, even though the Panel expressly invites Mexico to "cite relevant portions of your submissions to date," Mexico provides no citation to its submissions where it analyzes the individual sunset review determinations, the texts of which it has placed on the record, to support the assertion that, in each of these proceedings, Commerce, at the alleged "direction" of the SPB, disregarded probative evidence on the record and made a finding solely on the basis of historical dumping margins and/or import volumes. In fact, Mexico has never done this but, instead, has insisted incorrectly that the burden of conducting such an analysis falls on the Panel. *See* U.S. Answers to Panel's Questions Following the Second Substantive Meeting, paras. 45-47 (June 6, 2005).

of the four sunset proceedings, even though certain of those outcomes result from logic *different* from that expressed in the SPB. This undermines Mexico’s allegation that the SPB “directs” Commerce’s analysis in sunset reviews. Moreover, Mexico addresses Commerce’s analyses in these proceedings only to complain that Commerce found “‘good cause’ to consider . . . factors [other than historical dumping margins and import volumes],”⁴ which runs counter to the factual premise of Mexico’s claim that Commerce, at the “direction” of the SPB, relies solely on historical dumping margins and import volumes *to the exclusion of other probative evidence* and therefore fails to “determine likelihood on the basis of a reasoned analysis and positive evidence.”⁵ In short, Mexico’s response to this question only confirms what the U.S. has explained in its previous submissions – that there is no basis for Mexico’s claim that the SPB is WTO-inconsistent “as such.”⁶

4. In *Sugar and Syrups from Canada*, Commerce found that the sole Canadian respondent had increased its imports of the subject product since the imposition of the antidumping order, all the while maintaining zero dumping margins.⁷ Commerce considered that this evidence “demonstrates that Rogers [the Canadian respondent] is capable of selling the subject merchandise in the United States without dumping.”⁸ Further, Commerce found unpersuasive arguments by a domestic trade association that factors such as downward price pressures on the world market price for sugar and the limited effect of U.S. tariff rate quotas in the future would lead to recurrence of dumping if the order were to be removed.⁹ Thus, Commerce preliminarily found that there was “no evidence to suggest that Rogers would begin dumping subject merchandise in the foreseeable future, regardless of the existence or absence of any outside importation restrictions.”¹⁰

5. Commerce’s preliminary analysis in *Sugar and Syrups from Canada* is generally consistent with the logic expressed in Section II.A.4 of the SPB.¹¹ However, Commerce did not

⁴ Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 15.

⁵ Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 14.

⁶ See U.S. First Written Submission, paras. 267-290; U.S. Opening Statement at First Panel Meeting, paras. 40-42; U.S. Second Written Submission, paras. 73-83; U.S. Opening Statement at Second Meeting of the Panel with the Parties, paras. 43-52.

⁷ *Preliminary Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 FR 20253, 20255 (April 26, 1999) (Exhibit MEX-188, Tab 261).

⁸ *Preliminary Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 FR at 20257 (Exhibit MEX-188, Tab 261).

⁹ *Preliminary Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 FR at 20253-20257 (Exhibit MEX-188, Tab 261).

¹⁰ *Preliminary Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 FR at 20257 (Exhibit MEX-188, Tab 261).

¹¹ In Section II.A.4, the SPB states that “the Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is not likely to lead to continuation or recurrence of dumping where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and

conform to this logic in its final results, a fact that counters Mexico’s assertion that the SPB “directs” Commerce’s analysis in sunset reviews. Rather, at the urging of the parties, Commerce examined evidence regarding the Canadian respondent’s production costs and pricing – which was verified only after the preliminary determination was issued – and found that it supported an affirmative likelihood determination. Specifically, both the respondents and the domestic trade association had made extensive arguments in their briefs and substantive responses regarding whether the Canadian respondent had been making below-cost sales.¹² The Canadian respondent took the additional step of submitting pricing and production data to support its argument that its prices had been above cost.¹³ As the Canadian respondent had placed this data on the record, and the parties’ arguments focused on the data, Commerce undertook to verify and consider the information.¹⁴

6. The verified data submitted by the Canadian respondent demonstrated that the respondent was making sales below cost, which seriously undermined Commerce’s preliminary conclusion that the Canadian respondent was capable of selling the subject merchandise in the United States without dumping.¹⁵ Accordingly, upon reconsideration of all the record evidence, Commerce made an affirmative finding of the likelihood of dumping. While Mexico criticizes the methodology Commerce used to determine whether sales were made below cost, and the “limited” data Commerce used in conducting that analysis, Mexico fails to mention that *the data was submitted by Canadian respondents, voluntarily and for precisely the purpose it was used by Commerce*.¹⁶ Thus, far from demonstrating “the great lengths that the Department will go to in order to render an affirmative likelihood determination,”¹⁷ as Mexico charges, the *Sugar and Syrups from Canada* determination demonstrates Commerce’s willingness to consider the arguments and evidence presented by the parties in sunset review proceedings and Commerce’s efforts to make a determination based on that evidence and argumentation. Commerce’s analysis in *Sugar and Syrups from Canada* demonstrates clearly that Commerce’s determinations in sunset reviews are based on the record evidence, not on any alleged “WTO-inconsistent presumption” in the SPB.

import volumes remained steady or increased.”

¹² *Final Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 FR 48362, 48363 (September 3, 1999) (Exhibit MEX-188, Tab 261).

¹³ *Final Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 FR at 48363 (Exhibit MEX-188, Tab 261).

¹⁴ *Final Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 FR at 48363-64 (“Although we had not requested the information and determined for the preliminary results that there was no basis to consider such additional information, *because Rogers had presented the information in its substantive and rebuttal responses*, we conducted an on-site verification of this information. . . .”) (Exhibit MEX-188, Tab 261).

¹⁵ *Final Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 FR at 48363-64. (Exhibit MEX-188, Tab 261).

¹⁶ See *Final Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 FR at 48363-64 (Exhibit MEX-188, Tab 261).

¹⁷ Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 15.

7. Similarly, Mexico states that the facts in *Cement from Venezuela* “met the sole criterion for a negative finding of likely dumping under the . . . SPB” because, in that case, “dumping was eliminated after issuance of the order or the suspension agreement . . . and import volumes remained steady or increased.”¹⁸ The fact that Commerce did not ultimately make a negative finding under these circumstances confirms, once again, that the SPB does not “direct” Commerce’s actions. Commerce made an affirmative finding because the record evidence demonstrated that dumping was likely to recur in the event of revocation. Specifically, *Cement from Venezuela* involved a sunset review of an investigation that was suspended pursuant to an agreement under which foreign producers/exporters agreed to price the subject imports at or above a certain constructed value calculated by Commerce. In the sunset review, domestic interested parties submitted data showing that, while Venezuelan cement producers had been priced the subject product above the benchmark, a comparison of export and home market prices showed that dumping was likely to recur if the antidumping order were revoked, especially given the particular conditions of competition in the U.S. and Venezuelan cement industries.¹⁹ The Venezuelan respondents did not contest this pricing data.²⁰ To the contrary, the respondents conceded that the suspension agreement “had imposed constraints on their ability to export freely to the United States” and stated that revocation of the order would “presumably remove the constraints.”²¹ Upon consideration of all the record evidence – including the uncontested pricing data submitted by domestic interested parties – Commerce determined that dumping would be likely to continue or recur if the order were revoked.²² Again, Commerce’s determination plainly was not based on any alleged “WTO-inconsistent presumption” in the SPB; it was based on the record evidence and the parties’ arguments on that basis.

8. Like *Cement from Venezuela*, the determinations in *Uranium from Russia* and *Uranium from Uzbekistan* demonstrate Commerce’s efforts to take into account all record evidence in reaching a determination regarding the likelihood of future dumping. In both cases, *all interested parties* – domestic and foreign – made arguments regarding factors other than historical dumping margins and import volumes and urged Commerce to take these other factors into account in

¹⁸ See Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 18.

¹⁹ See *Issues and Decision Memo for the Sunset Review of Gray Portland Cement and Cement Clinker from Venezuela; Preliminary Results* at 3-4 (February 18, 2000) (domestic interested parties pointed to the highly concentrated industry structure in Venezuela, lack of imports into Venezuela, high home market prices, and negligible competition in Venezuela to argue that dumping would recur if the order were revoked) (Exhibit MEX-188, Tab 125).

²⁰ See *Issues and Decision Memo for the Sunset Review of Gray Portland Cement and Cement Clinker from Venezuela; Preliminary Results* at 5 (noting that the pricing data was “uncontested by the respondent interested parties”) (Exhibit MEX-188, Tab 125).

²¹ *Issues and Decision Memo for the Sunset Review of Gray Portland Cement and Cement Clinker from Venezuela; Preliminary Results* at 4 (Exhibit MEX-188, Tab 125).

²² See *Issues and Decision Memo for the Sunset Review of Gray Portland Cement and Cement Clinker from Venezuela; Final Results* at 3 (Exhibit MEX-188, Tab 125).

reaching its determination.²³ Commerce agreed. Thus, once again, Mexico’s suggestion that Commerce considered evidence of other factors simply to “find a way to determine that continuation or recurrence of dumping would be likely” is clearly baseless.²⁴

9. Moreover, in both proceedings, Commerce found that a variety of market and economic factors discussed by the parties – including, *inter alia*, the fact that uranium is a highly fungible commodity for which purchasing decisions are made primarily on the basis of price, the likelihood that the elimination of import restrictions under the suspension agreement would result in an increase in subject import volumes and consequent fall in subject import prices, the pattern of pricing differentials between unrestricted/restricted uranium markets in the period during which the suspension agreements were in effect, and import limitations in third country markets – demonstrated that dumping was likely to continue or recur if the suspended investigations were terminated.²⁵ Some of this evidence was not even contested by the respondent interested parties.²⁶ Commerce found that the weight of the evidence supported an affirmative finding of the likelihood of continuation or recurrence of dumping in both cases.

10. Mexico misrepresents Commerce’s analysis in *Uranium from Uzbekistan*. Contrary to Mexico’s allegations, Commerce did not impose any obligation on the respondents in that proceeding “to prove that dumping would *not* be likely.”²⁷ As is clear from a review of the entire determination – and not just the isolated sentences cited by Mexico – Commerce observed that the information submitted by respondent interested parties regarding general changes in the Uzbek and worldwide uranium markets did not support *the arguments put forward by the respondents* that dumping would not be likely in event of termination.²⁸ The inquiry conducted by Commerce – to determine whether dumping was likely to continue or recur – was precisely the inquiry prescribed in Article 11.3 of the AD Agreement.

²³ *Issues and Decision Memorandum for the Sunset Review of Uranium from Uzbekistan; Final Results* at 6-9 (Exhibit MEX-188, Tab 284); *Issues and Decision Memorandum for the Sunset Review of Uranium from Russia; Final Results* at 8-14 (Exhibit MEX-188, Tab 282).

²⁴ Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 21.

²⁵ *Issues and Decision Memorandum for the Sunset Review of Uranium from Uzbekistan; Final Results* at 14-17 (Exhibit MEX-188, Tab 284); *Issues and Decision Memorandum for the Sunset Review of Uranium from Russia; Final Results* at 9-11 (Exhibit MEX-188, Tab 282). The United States addresses both proceedings together above because of their similarities and for purposes of efficiency. The determination in each proceeding was, of course, made on the basis of the particular facts of the proceeding.

²⁶ See, e.g., *Issues and Decision Memorandum for the Sunset Review of Uranium from Russia; Final Results* at 10-11, 15-16 (Exhibit MEX-188, Tab 282) (noting that Russian respondents had not contested the evidence of pricing differences between restricted and unrestricted uranium, restrictions on Russian imports into certain third country markets, or the existence of significant Russian capacity).

²⁷ Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 20 (emphasis in original).

²⁸ See *Issues and Decision Memorandum for the Sunset Review of Uranium from Uzbekistan; Final Results* at 11 (Exhibit MEX-188, Tab 284).

11. In sum, there is no basis for Mexico’s assertion that the four determinations discussed above “provide additional support for Mexico’s claim that . . . [the Sunset Policy Bulletin (“SPB”)] is inconsistent with Article 11.3 of the Antidumping Agreement.”²⁹ Mexico has not demonstrated on the basis of any record evidence that the SPB “directs the Department to attach decisive weight to historical dumping margins and declining import volumes (or the cessation of imports altogether) in every case.”³⁰ Accordingly, its claim that the SPB is inconsistent as such with Article 11.3 of the AD Agreement fails.

Question 161

12. In responding to Question 161, Mexico concedes that all of the Appellate Body reports identified by the Panel “confirm the notion that the complainant bears the burden to make its *prima facie* case; if the complainant has not done so, the panel may not make the case for the complainant.”³¹ Moreover, Mexico states that it “agrees with the reports’ discussions of party/Panel responsibility.”³² Yet, Mexico disputes the relevance of these principles to Mexico’s claim regarding the SPB because, according to Mexico, it has made a *prima facie* case that the SPB is “as such” inconsistent with Article 11.3 of the AD Agreement.³³ Mexico is wrong.

13. Mexico has failed to demonstrate on the basis of record evidence that the “measure” it has identified – the SPB – has the “scope and meaning”³⁴ that Mexico attributes to it, *i.e.* that it “directs the Department to attach decisive weight to historical dumping margins and declining import volumes (or the cessation of imports altogether) in every case.”³⁵ As the United States has explained previously, Mexico fails to make a *prima facie* case because it has not demonstrated that: (a) the SPB is capable of “directing” Commerce’s actions; (b) Commerce makes its determination “in every case” on the basis of historical dumping margins and declining import volumes “even though the probative value of other factors . . . outweighed that of [these

²⁹ Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 11.

³⁰ Opening Statement by Mexico at the Second Meeting of the Panel, para. 91.

³¹ Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 22.

³² Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 22.

³³ Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, paras. 23, 30, 35, 37.

³⁴ See *US - Argentina Sunset (AB)*, para. 201 (quoting *US - German Sunset (AB)*, para. 157 and also citing *US - Japan Sunset (AB)*, para. 168) (explaining that when a complaining party challenges a measure “as such,” the challenged measure must be presumed to be WTO-consistent and the burden is on the complaining party to establish through evidence and argumentation the scope and meaning of the challenged measure as well as its alleged WTO-inconsistency).

³⁵ Opening Statement by Mexico at the Second Meeting of the Panel, para. 91.

two factors];”³⁶ and (c) it is the SPB that caused Commerce to reach the particular determinations it has made.³⁷

14. Although Mexico asserts repeatedly in response to this question that it has made a *prima facie* case, Mexico does not even identify where in its submissions to date it has demonstrated any of the elements identified above on the basis of the record evidence. Instead, Mexico suggests that the Appellate Body signaled in *US - Argentina Sunset* that by submitting the texts of Commerce’s sunset review determinations and conducting a statistical analysis of the outcomes of these cases, the burden of making a *prima facie* case is met.³⁸ This is patently incorrect. The Appellate Body in *US - Argentina Sunset* actually found that the submission of a virtually identical compendium of sunset review determinations and statistical analysis thereof submitted by Argentina was *insufficient* to support a finding that the SPB is inconsistent “as such” with Article 11.3.³⁹ According to the Appellate Body, “without a qualitative examination of the reasons leading to such determinations, it is not possible to conclude definitively that these determinations were based exclusively on [historic dumping margins and/or import volumes] in disregard of other factors.”⁴⁰

15. The Appellate Body’s analysis in *US - Argentina Sunset* is of persuasive value here. Mexico’s claim, like Argentina’s identical claim in *US - Argentina Sunset*, centers on Commerce’s *analysis* in sunset reviews and, more precisely, whether or not the SPB imposes a WTO-inconsistent analytical approach on Commerce. As the Appellate Body recognized in *US - Argentina Sunset*, such a claim cannot be established on the basis of a review of the *outcomes* of Commerce’s sunset reviews; at a minimum, a “rigorous analysis” of the facts of the individual sunset reviews and Commerce’s evaluation of those facts in reaching its determination is necessary.⁴¹ While Mexico appears to acknowledge this,⁴² Mexico continues to argue that the burden of conducting any such analysis falls on the Panel and, thus, “encourages the Panel to engage in this issue and qualitatively assess the Department’s sunset determinations submitted by Mexico in MEX-188 and MEX-188A.”⁴³

³⁶ *US - Argentina Sunset (AB)*, para. 209 (emphasis added).

³⁷ See U.S. First Written Submission, paras. 267-290; U.S. Opening Statement at First Panel Meeting, paras. 40-42; U.S. Second Written Submission, paras. 73-83; U.S. Opening Statement at Second Meeting of the Panel with the Parties, paras. 43-52; U.S. Answers to Panel’s Questions Following the Second Substantive Meeting, para. 48.

³⁸ See, e.g., Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 30.

³⁹ *US - Argentina Sunset (AB)*, para. 209-215.

⁴⁰ *US - Argentina Sunset (AB)*, para. 212.

⁴¹ *US - Argentina Sunset (AB)*, para. 215.

⁴² See, e.g., Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 26 (recognizing that “the Appellate Body found that the panel erred by relying on the table presented by Argentina without performing a ‘qualitative assessment’ of the underlying sunset determinations.”)

⁴³ Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 28.

16. There is no basis for Mexico’s argument that the Panel must “engage” to establish fundamental facts for Mexico regarding the scope and meaning of the SPB. The asserted basis for Mexico’s argument – *i.e.*, that this is somehow required under the Appellate Body’s analysis in *US - Argentina Sunset* – reflects an incorrect reading of the Appellate Body’s report in that dispute.⁴⁴ In fact, as the United States has previously explained, in *US - Argentina Sunset*, the Appellate Body made clear that the burden of making a *prima facie* case was to be borne by the complaining party in that dispute (Argentina) and did not recognize any principle that would require the panel to take on any part of that burden.⁴⁵ The Appellate Body reversed the panel in that dispute because the latter had found that Argentina had established a claim of WTO-inconsistency on the basis of a statistical analysis of Commerce’s sunset review determinations, not any “qualitative examination of the reasons leading to such determinations.”⁴⁶ As Mexico has submitted a virtually identical statistical analysis in support of the same claim made by Argentina, and nothing more, Mexico’s claim fails for the same reasons identified by the Appellate Body in *US - Argentina Sunset*.

17. In short, Mexico does not – and, indeed, cannot – reconcile its efforts to have the Panel conduct a “rigorous analysis” of Commerce’s sunset review determinations to establish the scope and meaning of the SPB for Mexico with the fundamental principle, which even Mexico recognizes, that “the complainant bears the burden to make its *prima facie* case; if the complainant has not done so, the panel may not make the case for the complainant.”⁴⁷ The burden of conducting any such analysis falls on Mexico, and Mexico alone. Mexico has failed to carry its burden in this dispute.

Question 163

18. Mexico fails to answer the question that the Panel has asked in Question 163. Specifically, the Panel’s question relates to the *dumping margin* calculated in the eighth review and whether Commerce took this into account in rendering its likelihood of dumping determination in the sunset review.⁴⁸ Mexico’s response, however, focuses mainly on the *duty absorption finding* in the eighth review and the *margin likely to prevail* determined by Commerce in the sunset review.

⁴⁴ Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 28.

⁴⁵ See U.S. Answers to Panel’s Questions Following the Second Substantive Meeting, paras. 45-46.

⁴⁶ *US - Argentina Sunset (AB)*, para. 209-215.

⁴⁷ Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, para. 22.

⁴⁸ See Panel Question 163 (asking the parties whether the Panel should understand a reference in the background section of the Commerce final sunset determination “to mean that USDOC relied on the existence of the *dumping margin* calculated in the final result of the eighth administrative review when making its final *determination of likelihood of dumping* in the sunset review”) (emphasis added).

19. In its response to Question 163, Mexico asserts that “[t]he records of the Department’s eighth and sunset reviews of cement from Mexico demonstrate that, for purposes of the likelihood of dumping determination, the Department relied on the duty absorption finding from the eighth review as well as the dumping margin calculated in that review.”⁴⁹ Mexico makes a similar assertion in its response to Question 175.⁵⁰ In both instances, however, Mexico does not provide any citation to the record evidence to support its assertion, even though, in Question 163, the Panel specifically asked the parties to respond with reference to the particular records of the reviews.

20. In fact, as the United States has explained previously, Commerce did not even address the eighth review results – either the dumping margin or the duty absorption finding – in making its likelihood of dumping determination.⁵¹ Moreover, neither the antidumping statute nor Commerce’s regulations provide for the use of a duty absorption finding or a margin likely to prevail in making Commerce’s likelihood determination.⁵² Consistent with this, Commerce does not – and did not, in the sunset review at issue in this dispute – rely upon duty absorption findings or the “margin likely to prevail” in making its determination of likelihood of continuation or recurrence of dumping.⁵³ Nor did Commerce rely upon eighth review dumping margins in making its likelihood determination.⁵⁴ Mexico has not demonstrated otherwise.

B. DUTY ABSORPTION

Question 167

21. In its response to Question 167, Mexico again shifts the target with respect to its duty absorption claims such that, even now, it is unclear to the United States – and, given the repeated questioning in this regard, presumably also the Panel – what measures Mexico is challenging and the basis on which it is challenging them. In fact, not one of the provisions identified in the Panel’s question was included in Sections C.3(a), C.3(b), C.3(c), E.9(a), E.9(b), or E.9(c) of Mexico’s panel request, the sections that deal with the issue of duty absorption.⁵⁵ Mexico only referred generally to a duty absorption “standard” in these sections of its panel request, without specifying which particular measures it was challenging.⁵⁶

⁴⁹ See, e.g., Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 40.

⁵⁰ See Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, paras. 67, 70.

⁵¹ See U.S. Answers to Panel Questions Following the Second Substantive Meeting, paras. 53-54.

⁵² See, e.g., U.S. First Written Submission, para. 306.

⁵³ See, e.g., U.S. First Written Submission, para. 306.

⁵⁴ See e.g., Answers to Panel Questions Following the Second Substantive Meeting, paras. 53-54.

⁵⁵ See Request for the Establishment of a Panel by Mexico, WT/DS281/2, circulated 8 August 2003 at 4 and 9 (“Mexico Panel Request”)

⁵⁶ See Mexico Panel Request at 4 and 9.

22. Mexico’s claims with respect to duty absorption were sufficiently unclear that the Panel, following the first panel meeting, asked Mexico to clarify which specific “legal and policy instruments” it was challenging. Mexico responded by stating that “Mexico is challenging U.S. duty absorption laws, regulations, and procedures which are established in: 19 U.S.C. 1675, including 19 U.S.C. 1675(a)(4); 19 U.S.C. 1675a, including 19 U.S.C. 1675a(c)(1)(A) and 19 U.S.C. 1675a(c)(3); 19 C.F.R. 351.213(j); and the Departments Sunset Policy Bulletin, including Section II.B.”⁵⁷ Mexico now asserts in response to the Panel’s *second* request for clarification regarding the measures subject to Mexico’s claim, that it is challenging, in addition to these statutory provisions and the SPB, certain pages of the Statement of Administrative Action (“SAA”).

23. The sections of Mexico’s panel request relating to the issue of duty absorption include no such claim against the SAA.⁵⁸ Although the SAA is mentioned in the introductory portion of its panel request, where Mexico lists all of the “measures” that are at issue in its request, Mexico does not identify which particular parts of the SAA – a document over 450 pages long – it purports to be challenging. Nor does Mexico attempt to connect the reference to the SAA to specific treaty provisions. This contravenes the principle explained by the Appellate Body recently in *US - Argentina Sunset* that:

in order for a panel request to “present the problem clearly” it must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the responding party is aware of the basis for the alleged nullification or impairment of the complaining party’s benefits. Only by such connection between the measure(s) and the relevant provision(s) can a respondent “know what case it has to answer.”⁵⁹

24. Even aside from the fact that Mexico’s newly asserted claim against the SAA is not within the Panel’s terms of reference, Mexico’s claim also fails because the SAA is not a measure that is subject to challenge “as such” in WTO dispute settlement. This was confirmed by the panel in *US - Export Restraints* which found that the SAA does not have “an operational life or status independent of the statute such that it could, on its own, give rise to a violation of WTO rules. Independent of the statute, the SAA does not *do* anything; rather it interprets (i.e., informs the meaning of) the statute.”⁶⁰

25. For the reasons above, the United States respectfully submits that the Panel should decline to consider Mexico’s new “as such” claim against the SAA and, for the reasons explained

⁵⁷ See Mexico’s Answers to Panel’s Questions Following the First Substantive Meeting, para. 161.

⁵⁸ See Mexico Panel Request, Sections C.3 and E.9 at 4 and 9.

⁵⁹ *US - Argentina Sunset (AB)*, para. 162.

⁶⁰ *US - Export Restraints (Panel)*, para. 8.99 (emphasis in original).

by the United States in its previous submissions, find that the remaining claims with respect to the other “legal and policy instruments” identified above are unsubstantiated.⁶¹

Question 168

26. Mexico’s response to Question 168 demonstrates, again, how Mexico has presented an ever-shifting target with respect to its claims involving the issue of duty absorption. Specifically, in its second submission, the United States pointed out that Mexico “appears to be making an ‘as such’ challenge to the two U.S. statutory provisions, 19 U.S.C. 1675a(a)(1)(D) and 1675a(a)(6), governing the ITC’s consideration of the duty absorption findings and the discretion to consider the margin likely to prevail in its sunset reviews.”⁶² The United States explained that, “to the extent that it does so, the United States notes that Mexico did not set forth ‘as such’ claims regarding these two statutory provisions in Section B.6 of Mexico’s panel request, the only portion of the panel request that deals specifically with the issue of ITC’s consideration of the duty absorption and margin likely to prevail findings. Thus, these provisions cannot come within the Panel’s terms of reference with respect to those claims and Mexico’s claim is limited to a challenge to the ITC’s application of U.S. law.”⁶³

27. Mexico responded in its opening statement at the second Panel meeting that “[t]he United States asserts that Mexico appears to be making an ‘as such’ claim regarding the Commission’s consideration of the Department’s duty absorption finding. Mexico confirms that it has challenged only the application of U.S. law.”⁶⁴

28. However, now, in response to the Panel’s question, Mexico appears to be suggesting that it is in fact challenging 19 U.S.C. 1675a(a)(1)(D) – and possibly also other provisions such as 1675a(a)(6) – in connection with the ITC’s alleged consideration of the duty absorption and/or margin likely to prevail findings.⁶⁵ Again, not one of these provisions is mentioned in Section B.6 of Mexico’s panel request, which clearly states that Mexico’s challenge is to “[t]he Commission’s Sunset Review Determination” (*i.e.* it is an “as applied” challenge). In this regard, it is highly revealing that, even though the Panel’s question specifically requests that Mexico “identify the specific basis for these ‘as such’ claims in Mexico’s panel request,” Mexico does not do so. The fact is that Mexico’s “as such” claims fall outside the Panel’s terms of reference.

⁶¹ See *e.g.*, U.S. First Written Submission, paras. 486-499; U.S. Answers to Panel Questions Following the First Substantive Meeting, paras. 53-78; U.S. Second Written Submission, para. 153; U.S. Answers to Panel Questions Following the Second Substantive Meeting, paras. 66-80.

⁶² U.S. Second Written Submission, para. 71.

⁶³ U.S. Second Written Submission, para. 71.

⁶⁴ Opening Statement by Mexico at the Second Meeting of the Panel, para. 79.

⁶⁵ See Mexico’s Answers to Panel’s Questions Following the Second Substantive Meeting, paras. 50-51.

Questions 173, 174, and 175

29. The United States offers a few observations about Mexico’s response to the Panel’s Questions 173 to 175 regarding duty absorption.

30. First, in Question 173(a), the Panel asks Mexico to identify “precisely” where in the “measures” identified by Mexico “it is envisaged that a duty absorption presumption and related evidentiary standard should be applied when the USDOC is undertaking a duty absorption inquiry.” Mexico does not do so. Mexico responds by (a) identifying the statutory and regulatory provisions that require Commerce to conduct a duty absorption inquiry, under certain circumstances, upon request;⁶⁶ (b) identifying the statutory provision that requires Commerce to consider historical dumping margins and import volumes when conducting its likelihood of dumping inquiry;⁶⁷ (c) reciting the SAA and SPB provisions regarding how Commerce might treat these two factors in reaching its likelihood determination;⁶⁸ and (d) discussing the section of the SPB that notes that Commerce may adjust the margin likely to prevail for a company to account for a duty absorption finding.⁶⁹ Even leaving aside that some of these provisions have no bearing on the duty absorption inquiry – for example, the statutory provisions regarding consideration of historical dumping margins and import volumes in making a likelihood of dumping determination, and the portions of the SAA and SPB discussing these factors – what is clear from Mexico’s discussion is that the asserted “duty absorption presumption” and “related evidentiary standard” are nowhere to be found in the “measures” identified by Mexico. Mexico’s claims with respect to these “measures” thus fail as a matter of fact.

31. Second, in response to Question 173, Mexico asserts that the incorporation of a duty absorption finding in determining a margin likely to prevail results in a breach of Articles 2.4 and 11.3 because it impermissibly increases the dumping margin that would otherwise be calculated pursuant to Article 2.⁷⁰ In response to Question 174, Mexico makes a similar assertion with regard to Article 9.3.⁷¹ Mexico is wrong in both instances. As the United States has previously explained, a duty absorption finding, either alone or as incorporated into a “margin likely to prevail,” does not establish an amount of duty that exceeds the margin of dumping established under Article 2.⁷² This is because the “margin likely to prevail” – regardless of whether it is adjusted to reflect a duty absorption finding – is not a calculated “margin of dumping” within the

⁶⁶ See Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 54-55 (discussing 19 U.S.C. 1675(a)(4) and 19 C.F.R. 351.213(j)).

⁶⁷ See Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 57 (discussing 19 U.S.C. 1675a(c)(1)).

⁶⁸ See Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 57.

⁶⁹ See Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 58.

⁷⁰ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 53.

⁷¹ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 63-66.

⁷² See, e.g., U.S. First Written Submission, paras. 490-492.

meaning of Article 2. Moreover, a “margin likely to prevail” is not used for purposes of duty imposition, duty collection, or duty assessment and therefore does not implicate Article 9. Mexico has failed to demonstrate otherwise. To the contrary, Mexico has itself conceded that a duty absorption finding does not directly affect an importer’s final liability for payment of antidumping duties and an exporter’s duty deposit rate for future sales.⁷³

32. Third, in its response to Question 175, Mexico asserts that the ITC relied on the duty absorption finding in making its likelihood determination.⁷⁴ In so doing, Mexico ignores the express statement in footnote 236 of the ITC’s opinion that the ITC did *not* rely on Commerce’s duty absorption finding in reaching its affirmative sunset determination.⁷⁵ Moreover, as discussed in detail in response to prior panel questions, the ITC did not rely either on the margins likely to prevail provided to it by Commerce or the findings of the USITC staff’s econometric model – the COMPAS model – that incorporated these margins.⁷⁶

33. Finally, the United States wishes to correct an important factual misstatement in Mexico’s response. Mexico asserts that the *only* evidence Commerce will accept when conducting a duty absorption inquiry is evidence of contractual arrangements.⁷⁷ This is incorrect. As explained previously, Commerce has simply identified contractual arrangements as one means by which a producer/exporter can demonstrate that dumping duties were being passed along to the unaffiliated customer.⁷⁸

C. METHODOLOGIES

34. Before addressing Mexico’s responses to the specific questions posed by the Panel regarding Commerce’s conduct of the assessment reviews at issue, the United States offers a general observation. Specifically, the United States notes that the Panel has repeatedly requested that Mexico substantiate its claims on the basis of record evidence from each of the assessment reviews at issue. This is unquestionably a critical aspect of the *prima facie* case that Mexico bears the burden of making with respect to its so-called “methodological” claims because they pertain to particular determinations made in the context of the particular facts that are on the record of particular assessment reviews. Yet, Mexico continues to ignore the Panel’s requests

⁷³ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 63.

⁷⁴ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 71.

⁷⁵ ITC Report at 39, n. 236. (“However, we do not rely on the duty absorption findings in making our determination that significant effects are likely upon revocation of the order.”). *See also* U.S. First Written Submission, paras. 257-264; U.S. Answers to Panel Questions Following the First Substantive Meeting, paras. 59-61, 66-67 and 69-78 (March 18, 2005); U.S. Second Written Submission, paras. 70-72.

⁷⁶ *See* U.S. Answers to Panel Questions Following the First Substantive Meeting, paras. 59-61, 67, and 69-75.

⁷⁷ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 59.

⁷⁸ *See* U.S. Answers to Panel Questions Following the First Substantive Meeting, para. 55.

and rely on generalized assertions that are not grounded in the record facts. Mexico, therefore, fails to meet its burden of making a *prima facie* case with respect to those claims.

35. Most recently, in response to the Panel's questions following the second Panel meeting in which the Panel again asked Mexico to explain which particular record evidence, if any, supports a number of its claims, Mexico merely provided a series of citations to record documents. Mexico did not provide any discussion of the information in those documents⁷⁹ or any meaningful explanation of how those record documents relate to either Mexico's claims or to the U.S. arguments in response (which, unlike Mexico's arguments, *do* reflect a review-by-review analysis of the facts and demonstrate that Commerce's findings are based on a reasoned evaluation of the record evidence).⁸⁰ With respect to many of these documents, Mexico failed even to identify relevant page numbers. Instead, Mexico appears to expect the Panel to sift through these documents to establish the facts with respect to Mexico's claims regarding each of the reviews on Mexico's behalf. This is not the task of the Panel. In fact, in *Canada – Wheat*, the Appellate Body addressed a similar situation and clarified that the burden of establishing the relevance of particular evidence to a party's legal position falls on the party submitting the evidence:

In our view, it is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation – the evidence – on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position.⁸¹

36. In sum, Mexico bears the burden of making a *prima facie* case with respect to *each* element of its "as applied" claims regarding Commerce's assessment reviews based on the individual facts on the records of *each* of the assessment reviews at issue. Mexico has failed to do this and therefore has failed to meet its burden of making a *prima facie* case.

1. "Amalgamation" of CDC/GCCC with CEMEX

Questions 176 and 177

37. Mexico's responses to Questions 176 and 177 fail to support its claims that Commerce's collapsing determinations are inconsistent with Article 6.10 of the AD Agreement. As the United States has previously explained, Article 6.10 creates a preference that an individual

⁷⁹ Mexico's Answers to Panel Questions Following the Second Substantive Meeting, paras. 96, 97, 115, 119, 132-134.

⁸⁰ Mexico's Answers to Panel Questions Following the Second Substantive Meeting, paras. 96, 97, 115, 119, 132-134.

⁸¹ *Canada – Wheat (AB)*, para. 191.

margin of dumping be assigned to each known “exporter” or “producer” and that this margin reflects, to the extent possible, information regarding the sales and production of merchandise by that investigated “exporter” or “producer.”⁸² Article 6.10 does not, however, define the terms “exporter” and “producer.” Although these terms are also not defined elsewhere in the AD Agreement, they plainly reflect commercial functions, *i.e.*, exporting and producing.

38. As Mexico conceded in the second Panel meeting and in paragraph 76 of its answers to the second set of Panel questions, nothing in Article 6.10 precludes Members from finding that two or more legal entities have such closely intertwined operations that they could effectively function as a single “exporter” or “producer.” That is a question of fact. If the facts of a particular review reveal – as they did in the assessment reviews at issue here – that two (or more) affiliated companies could effectively function as a single “exporter” or “producer,” then calculating and assigning one margin of dumping to that single “exporter” or “producer” – based on all the data for each of the component legal entities – is appropriate and properly reflects the sales and production of merchandise by that exporter or producer.

39. As the United States has explained previously, Commerce properly weighed the facts and reasonably found that the facts warranted treating CEMEX and CDC as a single exporter/producer for purposes of calculating the dumping margin in each of the reviews at issue.⁸³ Specifically, in each of the reviews at issue,⁸⁴ Commerce examined the record evidence and the arguments of the parties and provided a full explanation why it was appropriate to collapse CEMEX and CDC, given the relevant facts regarding their relationship and business operations.⁸⁵ The facts demonstrate that CEMEX owned, both directly and indirectly, a large percentage of CDC.⁸⁶ This ownership interest gave CEMEX the right to have a significant number of its managers and directors on the boards of directors for CDC and its affiliated companies. CEMEX/CDC also had a significant level of operational coordination.⁸⁷ Significantly, until the beginning months of the fifth review, CEMEX and CDC imported cement into the United States through a common affiliated U.S. importer, Sunbelt Cement.⁸⁸ CEMEX

⁸² See U.S. Answers to Panel Questions Following the Second Substantive Meeting, para. 81-82.

⁸³ See *e.g.*, U.S. First Written Submission, paras. 480-485.

⁸⁴ CDC only contested being collapsed with CEMEX in the fifth to seventh reviews and did not appeal the issue to a NAFTA panel in the seventh review or even raise it before Commerce in the eighth to eleventh reviews.

⁸⁵ See U.S. First Written Submission, para. 481; U.S. Second Written Submission, para. 151; and Exhibit US-101 (containing Commerce’s *Collapsing Memoranda* in the fifth through eleventh reviews).

⁸⁶ See U.S. First Written Submission, para. 481. Mexico’s assertion that CEMEX “merely holds a minority interest in a company that is affiliated with CDC/GCCC” is misleading inasmuch as it attempts to downplay CEMEX’s significant ownership interest. Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 79. In addition, contrary to Mexico’s suggestion, it is irrelevant whether CEMEX’s interest in CDC made it CDC’s parent or gave it *control* over CDC’s operations, pricing, or production, given that there was a significant potential that they could *jointly* act to manipulate prices and production.

⁸⁷ See U.S. First Written Submission, para. 481; U.S. Second Written Submission, para. 151.

⁸⁸ See U.S. First Written Submission, para. 481; U.S. Second Written Submission, para. 151;

also had significant input with respect to the design and construction of CDC’s export-oriented Samalayuca plant, which is located only 30 miles from the U.S. border.⁸⁹ The close-knit relationship and operations of the two companies indicated that unless the CEMEX/CDC entity were treated as a single exporter/producer and given a single rate, there was a significant potential that they could jointly manipulate prices and production to evade the antidumping order. Given that CEMEX and CDC produced a fungible commodity product, there was no impediment to their acting in their mutual interest to do so. Commerce properly established these facts and evaluated them in an unbiased and objective way.⁹⁰ Mexico has failed to demonstrate otherwise.

40. Mexico contends, however, that “record evidence did not support the Department’s finding that ‘if CDC and CEMEX are not collapsed, there is a significant potential for price manipulation which could undermine the effectiveness of the order.’”⁹¹ According to Mexico, there is no evidence of “any actual attempt by CDC and/or CEMEX to manipulate prices or circumvent the order in any manner.”⁹² This assertion, however, is misleading. Commerce does not base its decision to collapse affiliated entities on the existence of an actual scheme to manipulate prices and production, but rather on the significant potential that manipulation may occur, given the affiliated entities’ close relationship and intertwined operations. Mexico has not argued that it is inappropriate for Commerce to base its determination on a significant potential for manipulation, and nothing in Article 6.10 obligates a Member to wait for actual manipulation to occur before collapsing affiliated parties.⁹³

⁸⁹ See U.S. First Written Submission, para. 481; U.S. Second Written Submission, para. 151.

⁹⁰ See Article 17.6 of the AD Agreement.

⁹¹ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 80.

⁹² Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 80.

⁹³ Mexico also asserts that “because cement cannot be shipped long distances economically, there was no basis for a conclusion that the companies could somehow swap customers or otherwise manipulate prices to circumvent the order.” Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 80. This is apparently a reference to CDC’s assertion in the fifth and sixth reviews that CEMEX’s and CDC’s markets do not overlap and that the high cost of freight would prohibit CEMEX and CDC from selling cement in each other’s markets. See *Fifth Review Final Results*, 62 FR at 17155 (Exhibit MEX-31); *Sixth Review Final Results*, 63 FR at 12774 (Exhibit MEX-51). Evidence on the record of the fifth and sixth reviews, however, demonstrates a significant overlap in CEMEX’s and CDC’s potential marketing areas in both Mexico and the United States and that CEMEX’s Torreon plant has the ability to ship by rail into CDC’s Mexican and U.S. markets. See Petitioner’s December 19, 1997 Rebuttal Brief, Appendices 23-24 (Exhibit US-192). Commerce found that “CEMEX, which has cement operations and sales throughout most of Mexico, has no operations in the state of Chihuahua, and does not compete for CDC’s market.” *Sixth Review Collapsing Memorandum* at 4 (Exhibit US-101). As Commerce further noted, however, far from supporting CDC’s argument that this prevents CEMEX and CDC from switching markets and customers, “[a]n absence of competition is to be expected of affiliated companies.” *Sixth Review Collapsing Memorandum* at 4 (Exhibit US-101).

Question 178

41. The United States notes that Mexico did not provide the collapsing memoranda from the sixth, eighth and ninth reviews to the Panel until the Panel specifically asked Mexico to explain its failure to do so in the questions following the second Panel meeting. Significantly, Mexico had not submitted this documentation even though it had specifically challenged Commerce’s collapsing determinations in those particular assessment reviews. Although Mexico has now submitted the memoranda and certain other briefs and questionnaire responses, it has done so without even so much as a citation to where in these documents the arguments and information relevant to the collapsing issue may be found. This stands in sharp contrast to the U.S. response to Mexico’s arguments; for example, in its first written submission, the United States fully addressed the particular factual bases for collapsing CEMEX and CDC in each of the assessment reviews at issue.⁹⁴

42. As discussed above, Mexico bears the burden of making a case of WTO-inconsistency with respect to each of its claims. Given that Mexico has failed to establish facts that are central to its claims regarding Commerce’s conduct of the individual assessment reviews, it has failed to make its *prima facie* case with respect to those claims.

2. Exclusion of Home Market Sales of Type V LA Cement

43. Before commenting on Mexico’s responses to the Panel’s questions regarding Commerce’s ordinary course of trade determinations, the United States finds it necessary to clarify certain factual misrepresentations which Mexico repeats throughout its responses regarding reporting and use of the type of cement “as sold” versus “as produced.”

44. Specifically, Mexico continues to misrepresent the production and cost data reporting requirements in the fifth, sixth, seventh, and even eighth reviews by asserting that there was confusion caused by the so-called “as sold” methodology.⁹⁵ Mexico – without any explanation or reference to the obligations in the AD Agreement – even refers to the “as sold” methodology as “illegal.”⁹⁶ Mexico’s unsubstantiated assertions are unavailing. The “as sold” methodology simply refers to Commerce’s decision to rely on the type of cement specified in sales invoices to identify the cement type for purposes of matching sales of the product under consideration with sales of a like product. As the United States previously explained, Commerce decided to use this approach because it found on the basis of verified record evidence that, except in rare instances, in the cement industry, the cement type identified in the sales invoices was the type of cement that was produced.⁹⁷ In the sixth review, however, Commerce discovered that CEMEX was

⁹⁴ See U.S. First Written Submission, para. 481, n.749.

⁹⁵ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, paras. 84, 87, 90, 120-122.

⁹⁶ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 120.

⁹⁷ U.S. Answers to Panel Questions Following the Second Substantive Meeting, paras. 102-104.

producing Type V cement but selling it as Types I and II cement.⁹⁸ Thus, from the sixth review on, Commerce relied on the data regarding the type of the cement “as produced” because it discovered that the cement type data from the sales invoices was not a reliable indicator of what type of cement was actually being sold.⁹⁹

45. Thus, contrary to Mexico’s assertions, there was no confusion over what to report during the course of the assessment reviews at issue.¹⁰⁰ CEMEX and CDC were well aware – based on their participation in the investigation and subsequent assessment reviews – that Commerce considered that the cement type “as sold” data was no different from the cement type “as produced” data. At *no point* during the fifth and sixth assessment reviews, did any Mexican respondents assert that the two were not consistent. Rather, as previously explained, it was not until verification of CEMEX’s data in the sixth review that Commerce discovered that the type of cement being sold was not consistent with the type of cement being produced.¹⁰¹

Questions 179, 181, and 189

46. In its responses to the Panel’s ordinary course of trade questions, Mexico continues to make general factual assertions to support its claims which are not only inaccurate¹⁰² but fail to account for significant differences in the evidentiary records of the different assessment reviews. In answering Question 189(b), Mexico continues to assert incorrectly that CEMEX produced only Type V LA cement in its Hermosillo plants and shipped Type V LA cement to the United States throughout the fifth through the ninth reviews.¹⁰³ This is not borne out by the record evidence.¹⁰⁴

47. Regarding the fifth review, Mexico refers to a single mill test report in an effort to substantiate its assertion that it produced Type V LA cement in its Hermosillo plants in that review. However, this document does not support Mexico’s assertion; it merely reports test

⁹⁸ U.S. Answers to Panel Questions Following the Second Substantive Meeting, paras. 102-104.

⁹⁹ U.S. Answers to Panel Questions Following the Second Substantive Meeting, paras. 102-104.

¹⁰⁰ Indeed, a Mexican-majority NAFTA binational panel recently found that there was no basis for CEMEX’s assertion that its misreporting in the sixth review of the cement types it produced and sold was due to “confusion created by the methodology ‘produced as’ versus the methodology ‘sold as.’” *Gray Portland Cement and Clinker from Mexico*, Secretariat File No. USA-MEX-99-1904-03 at 79 (May 26, 2005) (Exhibit US-193).

¹⁰¹ *Sixth Review CEMEX Cost Verification Report* (July 21, 1997) at 14-15 (Exhibit MEX-98).

¹⁰² For example, Mexico asserts that Commerce has “acknowledged” or “specifically recognized” that CEMEX maximized its profits on sales of Type V LA cement by supplying Type V LA customers from Hermosillo. Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, paras. 98 and 107. Mexico provides no citation for these assertions, and none is possible because Commerce has never made any such statement.

¹⁰³ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, paras. 98, 99, 102, 133 (June 6, 2005).

¹⁰⁴ See U.S. Answers to Panel Questions Following the Second Substantive Meeting, paras. 83-86.

results compared to the chemical standards of Type I, II, and V cement.¹⁰⁵ Further, the fact that Mexico relies on a single document – presented out of context – to support its assertions is significant when one considers, in contrast, the numerous explicit, consistent, and verified statements and representations by CEMEX on the record that it produced only Types I and II cement at the Hermosillo plants.¹⁰⁶ In fact, despite the series of questionnaires to CEMEX during the course of the fifth review in which Commerce asked specific questions regarding the ordinary course of trade issue, *at no time did CEMEX report any actual instances of production or sale of Type V LA cement.* Additionally, CEMEX never suggested in its case briefs or rebuttal briefs to Commerce that only Type V LA had actually been produced at Hermosillo during the relevant period of review. Thus, contrary to Mexico’s assertions, the evidence on the record of the fifth review supports Commerce’s finding that the Hermosillo plants only produced Type I and Type II cement during the relevant period of review.

48. For the sixth and seventh reviews, Mexico cites only selected portions of questionnaire responses that are taken out of context.¹⁰⁷ However, as the United States previously explained, the record of the sixth review demonstrates that CEMEX had misreported its production data for the Hermosillo plants as Types I, II and V cement, when it was actually all Type V cement.¹⁰⁸ With respect to the seventh review, the record demonstrates that after initially misreporting its production data, CEMEX, in reaction to Commerce’s findings in the sixth review verification, submitted corrected production data for the Hermosillo plants indicating that it was all Type V LA cement.¹⁰⁹ In fact, contrary to Mexico’s assertions, it was only in the eighth and ninth reviews that the record evidence demonstrated that the Hermosillo plants produced only Type V LA cement.¹¹⁰

49. As the discussion above demonstrates, Mexico has not addressed the actual review- and record-specific facts necessary to establish a *prima facie* case. Rather, Mexico continues to rely on its “as sold” versus “as produced” argument in an attempt to establish its ordinary course of trade claims.¹¹¹ Once again, Mexico’s general factual premise is wrong. As explained above, the

¹⁰⁵ See Excerpt of CEMEX’s March 15, 1996 Supplemental Questionnaire Response, at Exhibit S-B-1 (Exhibit BCI-MEX-1).

¹⁰⁶ *Fifth Review Preliminary Results*, 61 FR at 51679 (Exhibit MEX-26). See *CEMEX Fifth Review Section B Questionnaire Response* (Jan. 31, 1996), at B1-3 (Exhibit US-146); *CEMEX Fifth Review Section A Questionnaire Response* (Dec. 8, 1995), at 6, 13, 28, Appendix A-3 (Exhibit US-147) (reporting specifically sales of Type II, along with Type I, Type V, masonry pozzolanic, and white cement); *Cemex Sales Verification Report* (July 22, 1996), at 44-45 (Exhibit US-148) (confirming CEMEX’s plants only sold Type I and Type II in the home market during the fifth review).

¹⁰⁷ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, paras. 86-89.

¹⁰⁸ U.S. Answers to Panel Questions Following the Second Substantive Meeting, paras. 83-86, 111, 112, 115, 116

¹⁰⁹ U.S. Answers to Panel Questions Following the Second Substantive Meeting, paras. 83-86, 111, 112, 115, 116

¹¹⁰ U.S. Answers to Panel Questions Following the Second Substantive Meeting, paras. 83-86, 111, 112, 115, 116

¹¹¹ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, paras. 84-93; see also Mexico Opening Statement for the Second Panel Meeting, para. 119.

“as sold” methodology simply refers to Commerce’s decision to rely on the type of cement as reported in the sales invoices to identify cement type for purposes of matching sales of the product under consideration with sales of a like product. This methodology was irrelevant to Commerce’s ordinary course of trade determinations.¹¹²

50. As the United States has explained, Commerce examined the normal business conditions and practices of CEMEX’s cement sales in Mexico and found that certain sales were unusual and, thus, outside the ordinary course of trade. Commerce based its ordinary course of trade determinations in each review upon the facts – including data regarding the types of cement produced at each plant – submitted by CEMEX.¹¹³ The record evidence that was before Commerce at the time it made its determinations – which is also the evidence on the basis of which the Panel must assess the WTO-consistency of Commerce determinations – does not support Mexico’s assertions regarding CEMEX’s production of Type V LA cement. In sum, Mexico has failed to establish that Commerce’s determinations were not based on a unbiased and objective evaluation of the facts.

Question 190

51. The United States has explained previously that a fundamental flaw in many of Mexico’s claims is that Mexico asserts WTO obligations that do not exist.¹¹⁴ These claims, if accepted, would run afoul of the fundamental requirement in Article 3.2 of the DSU that the dispute settlement process cannot be used to add to or diminish the rights and obligations of Members under the WTO agreements. This analysis applies with respect to the obligations Mexico asserts in its response to Question 190. Specifically, Mexico asserts that it is challenging under Article 2.1 of the AD Agreement “both the USDOC’s failure to give reasons for its course of conduct and its use of the profit on Type I cement as the particular profit benchmark.”¹¹⁵

52. Although the Panel asks Mexico to “explain what precise obligation(s) in Article 2.1 Mexico alleges have been breached by the conduct being challenged,” Mexico does not do so. Nor can it. Article 2.1 provides that:

For purposes of this Agreement, a product is considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if

¹¹² See U.S. Second Written Submission, para. 100.

¹¹³ See *Fifth Review Ordinary Course of Trade Memorandum* (Sept. 25, 1996) (Exhibit US-149); *Sixth Review Ordinary Course of Trade Memorandum* (Mar. 9, 1998)(Exhibit US-155); *Seventh Review Ordinary Course of Trade Memorandum*, at 5-6 (Exhibit MEX-64); *Eighth Review Ordinary Course of Trade Memorandum* (Exhibit US-61); *Ninth Review Ordinary Course of Trade Memorandum* (Exhibit US-62) (explaining the multiple factors and the supporting evidence for each ordinary course of trade decision for each review).

¹¹⁴ See, e.g., Opening Statement of the United States at the First Meeting of the Panel with the Parties (February 17, 2005) at paras. 46-52.

¹¹⁵ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 100.

the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

53. Article 2.1 expressly recognizes that sales of the like product that are not in the ordinary course of trade must be excluded from the dumping analysis.¹¹⁶ However, as the Appellate Body recognized in *US - Hot-Rolled Steel*, Article 2.1 does not require that investigating authorities adopt any particular methodology in determining *which* sales are in the ordinary course of trade.¹¹⁷ Nor does Article 2.1 establish particular procedural obligations that an investigating authority must follow in determining whether sales are in the ordinary course of trade. Thus, Mexico’s allegations that the United States has somehow breached Article 2.1 are without any basis in the text of that provision.

54. In fact, Commerce’s ordinary course of trade determinations are entirely consistent with Article 2.1 which, as the Appellate Body has clarified, “*requires* investigating authorities to exclude sales not made ‘in the ordinary course of trade,’ from the calculation of normal value, precisely to ensure that normal value is, indeed, the ‘normal’ price of the like product, in the home market of the exporter.”¹¹⁸ In the very same documents that Mexico had, until its response to the second set of Panel questions, failed to provide to the Panel, Commerce explained how the facts of each review demonstrated the extraordinary circumstances of certain home market sales and supported its determinations that these sales were outside the ordinary course of trade.¹¹⁹ A review of these documents shows that Commerce considered significantly more evidence than just the profit on CEMEX’s cement sales, as Mexico alleges.¹²⁰

Question 191

55. Mexico’s response to Question 191 again evidences Mexico’s efforts to read into the AD Agreement obligations that do not exist. Specifically, Mexico claims that the United States has breached Article 2.4 of the AD Agreement because Commerce determinations in different

¹¹⁶ See also *US - Hot-Rolled Steel (AB)*, para. 139 (concluding that “[i]nvestigating authorities must exclude, from the calculation of the normal value, all sales which are not made ‘in the ordinary course of trade.’”).

¹¹⁷ See *US - Hot-Rolled Steel (AB)*, para. 148 (noting that the AD Agreement, and in particular Article 2.1, “affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not ‘in the ordinary course of trade,’ but clarifying that “the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation.”)

¹¹⁸ *US - Hot-Rolled Steel (AB)*, para. 140 (emphasis added).

¹¹⁹ U.S. Answers to Panel Questions Following the Second Substantive Meeting, paras. 87-95.

¹²⁰ See, U.S. First Written Submission, paras. 347-372; See also *Fifth Review Ordinary Course of Trade Memorandum* (Sept. 25, 1996) (Exhibit US-149); *Sixth Review Ordinary Course of Trade Memorandum* (Mar. 9, 1998)(Exhibit US-155); *Seventh Review Ordinary Course of Trade Memorandum*, at 5-6 (Exhibit MEX-64); *Eighth Review Ordinary Course of Trade Memorandum* (Exhibit US-61); *Ninth Review Ordinary Course of Trade Memorandum* (Exhibit US-62).

assessment reviews that certain sales were outside the ordinary course of trade were based on different facts.¹²¹ Mexico’s claim finds no basis in the text.

56. Article 2.4 requires that a “fair comparison” be made between the export price and normal value and identifies various adjustments that should be made to ensure such a “fair comparison.” Contrary to Mexico’s assertions, Article 2.4 does not set out obligations with respect to the consideration of whether sales are in the ordinary course of trade and thus can be part of the normal value calculation.

57. Mexico’s argues that “fairness requires consistency” and that the use of the word “fair” in Article 2.4 somehow translates into an obligation that investigating authorities find that sales are outside the ordinary course of trade only if the exact same evidence in each assessment review supports such a finding.¹²² Mexico’s argument is illogical. Even leaving aside that the word “fair” in Article 2.4 refers to the *comparison between export price and normal value* and not to the determination of whether sales are in the ordinary course of trade (a term that is not even mentioned in Article 2.4), Mexico has shown no reason why Article 2.4 would obligate investigating authorities to take such a mechanistic approach to assessing whether sales are in the ordinary course of trade. The inquiry into whether sales are in the ordinary course of trade is necessarily a highly fact-specific inquiry that must take into account the particular record evidence that is before the investigating authority.

58. Consistent with this, in making a determination as to whether certain sales are outside the ordinary course of trade, Commerce does not evaluate a single factor taken in isolation, but rather all the factors and circumstances relevant to the sales in question.¹²³ Where the relevant factors, considered together, indicate that the sales are made under conditions and practices that are unusual for sales of the merchandise in the home market, Commerce excludes such sales when determining normal value. This is the approach that Commerce took with respect to the ordinary course of trade determinations at issue in this dispute. Mexico has failed to demonstrate that anything in either the manner or outcome of Commerce’s ordinary course of trade analyses is WTO-inconsistent.

Comparison of Bulk and Bagged Cement

Question 192

59. In response to Question 192, Mexico seems to abandon its “as applied” claim concerning comparison of bagged and bulk cement in the fifth review. The basis for Mexico’s decision appears to be the outcome of a NAFTA proceeding which concluded in December 2003.

¹²¹ See Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 108-111.

¹²² Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 108.

¹²³ See U.S. First Written Submission, paras. 345, 349.

Leaving aside the significant time and energy expended by the United States and the Panel with respect to a claim which Mexico now acknowledges it had no reason to pursue, to the extent Mexico’s response suggests that the NAFTA panel decision has any relevance for the instant proceeding, Mexico is wrong. A NAFTA panel sits in place of the U.S. court and reviews the agency’s determination for consistency with U.S. law.¹²⁴ This Panel, by contrast, is obligated to consider whether Mexico has demonstrated that any of Commerce’s determinations at issue is inconsistent with particular obligations under the WTO Agreement. Mexico has failed to make any such demonstration.¹²⁵

Questions 195 and 196

60. In Question 195, the Panel notes correctly that Commerce made adjustments to normal value when comparing sales of bagged and bulk cement to account for packaging differences. In light of this, the Panel requested that Mexico explain “exactly how and why” – with references to the facts of each of the fifth through ninth assessment reviews – Commerce’s approach “did not satisfy the ‘fair comparison’ requirement in Article 2.4.” Similarly, in Question 196, the Panel requested that Mexico explain the extent to which each of the submissions identified by Mexico as being relevant supports Mexico’s claim that the United States breached its obligations under Article 2.4. Mexico has not complied with either of these requests.

61. In its response to Question 195, Mexico does not even *mention* Article 2.4, let alone explain “exactly why and how” the United States fails to satisfy its obligations under that provision. Mexico asserts generally in response to Question 196 that “respondents demonstrated that the market placed a premium on bagged cement that exceeded the cost of packaging. Accordingly, merely making an adjustment for the cost of packing failed to result in the “fair comparisons” required by Article 2.4.”¹²⁶ However, Mexico does not substantiate this assertion with either any analysis of Article 2.4 or the relevant record evidence. Mexico simply provides a string of citations to record documents, without any meaningful explanation of the content or relevance of each document to its claim. This clearly falls short of satisfying the Panel’s request and confirms, yet again, that Mexico has not met its burden of making a *prima facie* case.

¹²⁴ See NAFTA Article 1904(1) (“[E]ach Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.”)

¹²⁵ Interestingly, Mexico fails to mention that the Extraordinary Challenge Committee (the NAFTA appellate process) expressly disagreed (although in dicta) with the NAFTA panel’s finding that the Commerce’s treatment of bagged and bulk sales was contrary to U.S. law. See *Fifth Review Amended Final Results* (Exhibit MEX-37). Mexico also fails to mention that two subsequent NAFTA panels, reviewing the sixth and seventh review results, found that treating bagged and bulk as the same like product is consistent with U.S. law. *Gray Portland Cement and Clinker from Mexico*, Secretariat File No. USA-MEX-99-1904-03 (May 26, 2005) (Sixth Review) (Exhibit US-193); *Gray Portland Cement and Clinker from Mexico*, Secretariat File No. USA-MEX-99-1904-03, at 9-23 (May 30, 2002) (Seventh Review) (Exhibit US-64).

¹²⁶ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 119.

62. In answer to Question 195, Mexico correctly states that the only adjustment Commerce made under Article 2.4 for differences between bag and bulk cement sales which affect price comparability was for packing.¹²⁷ However, packing was not the only factor Commerce examined in this context. As the United States explained previously, as part of its analysis of level of trade, an adjustment factor also set forth in Article 2.4, Commerce analyzed other elements, such as distribution channels, customer categories, and selling functions, which the Mexican companies alleged had an affect on price comparability.¹²⁸ In each review, Commerce found that the record facts did not support the Mexican companies' allegations and determined that the distribution channels, customer categories, and selling functions were substantially the same.¹²⁹ Commerce found, on this basis, that there was only a single level of trade for bagged and bulk sales, a finding that Mexico has not challenged in this proceeding.¹³⁰ Thus, Mexico's assertion that Commerce's adjustment for packing fails to reflect the difference in price between bagged and bulk cement is not supported by record evidence.¹³¹

63. Mexico also notes that, prior to the fifth review, Commerce performed the dumping comparisons on a bag-to-bag and bulk-to-bulk basis.¹³² While this is true, the implication that Commerce arbitrarily changed its dumping comparison methodology is inaccurate. The simple fact is that the records in those earlier reviews support Commerce's determinations in those reviews. Similarly, and as demonstrated by the United States in its previous submissions, the records in the fifth through ninth reviews (which are at issue in this dispute) support Commerce's determinations in these reviews. Mexico has failed to demonstrate otherwise.

¹²⁷ Mexico's Answers to Panel Questions Following the Second Substantive Meeting, para. 117.

¹²⁸ U.S. Answers to Panel Questions Following the Second Substantive Meeting, para. 101; *Fifth Review Final Calculation Memorandum* (April 2, 1997) (Exhibit US-186); *Sixth Review Level-of-Trade Memorandum* (March 8, 1998) (Exhibit US-186); *Seventh Review Level of Trade Memorandum* (August 31, 1998) (Exhibit US-186); *Eighth Review Level of Trade Memorandum* (August 30, 1999) (Exhibit US-186); *Ninth Review Level of Trade Memorandum* (August 21, 2000)(Exhibit US-186).

¹²⁹ *Fifth Review Final Calculation Memorandum* (April 2, 1997) (Exhibit US-186); *Sixth Review Level-of-Trade Memorandum* (March 8, 1998) (Exhibit US-186); *Seventh Review Level of Trade Memorandum* (August 31, 1998) (Exhibit US-186); *Eighth Review Level of Trade Memorandum* (August 30, 1999) (Exhibit US-186); *Ninth Review Level of Trade Memorandum* (August 21, 2000)(Exhibit US-186).

¹³⁰ *Fifth Review Final Calculation Memorandum* (April 2, 1997) (Exhibit US-186); *Sixth Review Level-of-Trade Memorandum* (March 8, 1998) (Exhibit US-186); *Seventh Review Level of Trade Memorandum* (August 31, 1998) (Exhibit US-186); *Eighth Review Level of Trade Memorandum* (August 30, 1999) (Exhibit US-186); *Ninth Review Level of Trade Memorandum* (August 21, 2000)(Exhibit US-186).

¹³¹ Mexico's Answers to Panel Questions Following the Second Substantive Meeting, para. 117.

¹³² Mexico's Answers to Panel Questions Following the Second Substantive Meeting, para. 116.

"Difmer" Adjustment

Question 198

64. In Question 198, the Panel requested that Mexico identify any submissions it made in the *fifth review* addressing the issue of whether export sales should be compared to home market sales on an “as sold” or an “as produced” basis and to explain the rationale behind any such submissions.¹³³ Mexico fails to respond to the Panel’s request and, instead, refers only to CEMEX’s arguments in the *sixth review*, essentially confirming that there were no such submissions in the fifth review.

65. Mexico also argues that it is not limited to the arguments made by the Mexican respondents in the fifth review.¹³⁴ Even if so, however, Mexico’s challenge to Commerce’s determinations must be supported by sufficient evidence, in particular in light of “the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.”¹³⁵ Mexico simply has not cited to any record documents in any review which support its arguments about the so-called “as sold” methodology.¹³⁶

Question 202

66. In Panel Question 202, the Panel asks Mexico to explain whether, in the fifth review, the Mexican respondents had argued to Commerce that CEMEX’s difmer data for Type I and Type II cement was based on production data for Type V LA cement and, if so, where on the record of that review these arguments can be found. In its response, Mexico again fails to cite to a single document from the record of the fifth review showing that CEMEX had indicated to Commerce that Types I and II cement allegedly were not produced at the Hermosillo plants.¹³⁷ In fact, no such document exists. Thus, Commerce properly found, based on the record evidence, that the Hermosillo plants produced Type I and Type II cement. There was no record evidence to suggest that these plants produced Type V LA cement during the fifth review period.

67. Mexico attempts to excuse the lack of record evidence by asserting that CEMEX reported production data for Type I and Type II cement because Commerce required reporting of this data on an “as sold” basis.¹³⁸ This assertion is entirely unsubstantiated. As explained above and in the U.S. response to Panel Question 199, Commerce’s “as sold” methodology only related to the

¹³³ Panel Questions Following The Second Substantive Meeting, Panel Question 197.

¹³⁴ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 120.

¹³⁵ Article 17.5(ii) of the AD Agreement

¹³⁶ See Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, paras. 84, 87, 90, 120-122.

¹³⁷ See Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, paras. 121-124.

¹³⁸ See Mexico’s Answers to the Panel Questions Following the Second Substantive Meeting, paras. 121-124.

sales matching criteria not to the *reporting of production and cost data*. Commerce never requested that CEMEX report its production and cost data on an “as sold” basis. Moreover, CEMEX never provided any indication that it was reporting its production and cost data on an “as sold” basis.

68. Mexico also asserts, in response to Question 202(b), that monthly variations in production costs and sales are responsible for differences in variable costs, not differences in physical characteristics of the merchandise.¹³⁹ In so asserting, Mexico once again does not cite to any record evidence. The fact is that the evidence on the record of the fifth review supports only one finding: that the Hermosillo plants produced Type I and Type II cement.¹⁴⁰ As such, the difmer adjustments made by Commerce on the basis of the reported, verified production and cost data were entirely proper.

Questions 204 and 205

69. In its responses to Questions 204 and 205 concerning the difmer adjustment made in the eighth review, Mexico argues that because the cement exported to the United States was produced at the Hermosillo plants but the difmer cost data for Type I and Type V LA cement came from the Hidalgo plants, a difmer adjustment was not “justified.”¹⁴¹ Mexico is incorrect. Article 2.4 requires an adjustment to be made for differences in physical characteristics which affect price comparability. It is undisputed that Type V LA and Type I cement are not identical products and that they have different physical characteristics.¹⁴² In addition, because these products satisfied standard ASTM specifications, there was no difference between the Type V LA and Type I cement produced at the Hidalgo plant and the same products produced at other CEMEX plants. As explained previously, in the eighth review, CEMEX reported variable cost data from the Hidalgo plant that demonstrated a difference in the variable costs of manufacturing between Type V LA and Type I cement.¹⁴³ As the production cost data came from a single plant, Commerce was able to isolate the exact cost difference for producing the different products. Consistent with Article 2.4, Commerce made a difmer adjustment based on those cost differences.¹⁴⁴ Mexico has not demonstrated that this adjustment is inconsistent with any obligation under the AD Agreement.

70. Although the Panel’s question relates to the difmer adjustment made in the eighth review, Mexico cites, in its response, to the ninth review difmer determination; a determination that

¹³⁹ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, para. 123.

¹⁴⁰ See, e.g., Exhibit BCI-MEX-2.

¹⁴¹ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, paras. 125 and 128.

¹⁴² See, e.g., U.S. First Written Submission, para. 458; and Exhibit MEX-8 (ASTM Designation C-150).

¹⁴³ U.S. First Written Submission, para. 461.

¹⁴⁴ U.S. First Written Submission, para. 461.

Mexico has not even challenged in this dispute.¹⁴⁵ Mexico’s citation to the ninth review determination is not only non-responsive to the Panel’s question, it is irrelevant for purposes of assessing the WTO-consistency of Commerce’s difmer determination in the eighth review. As the United States explained in its second written submission, Mexico incorrectly assumes that the facts remained the same in each review.¹⁴⁶ The United States, however, has demonstrated that the record facts concerning the difmer determinations differed from review to review.¹⁴⁷

Interest

Question 212

71. The United States offers the following comments in connection with Mexico’s response to Question 212.

72. First, Mexico suggests that the United States has failed to respond to Mexico’s arguments with regard to the GATT panel report in *EEC – Fruits and Vegetables*.¹⁴⁸ The United States refers the Panel to paragraphs 170 and 171 of its second submission. While those paragraphs address the analysis of the panel in *US – Import Measures*, as Mexico has recognized, both panel reports address the same GATT provision, Article II:1(b). Thus, the U.S. comments regarding the analysis of GATT Article II:1(b) in *US – Import Measures* are equally applicable with respect to the consistent analysis of the same provision in *EEC – Fruits and Vegetables*.

73. Second, the United States notes that Mexico has failed to rebut the U.S. arguments regarding GATT Article II:1(b). As the United States explained previously, GATT Article II:1(b) – and thus also the panel reports considering its application – are of little relevance to the Panel’s assessment of Mexico’s claims in this dispute (*i.e.*, that the provisions of U.S. law that require the payment/collection of interest are allegedly inconsistent with GATT Article VI:2 and Article 9 of the AD Agreement). GATT Article II:1(b) provides that products that are listed in a Member’s Schedule of Concessions shall be “exempt from ordinary customs duties in excess of those set forth and provided therein.” In addition, GATT Article II:1(b) provides that “[s]uch products shall also be exempt from other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.”

74. Even assuming, *arguendo*, that interest charges of the type at issue here are a type of “other charge,” the fact is that, unlike GATT Article II:1(b), there is no obligation set out in

¹⁴⁵ Mexico’s Answers to Panel Questions Following the Second Substantive Meeting, paras. 129-130, 133.

¹⁴⁶ U.S. Second Written Submission, fn 228.

¹⁴⁷ U.S. First Written Submission, 456-467; U.S. Second Written Submission, 143-147.

¹⁴⁸ Mexico Answers to Panel Questions Following the Second Substantive Meeting, para. 170.

Article 9 of the AD Agreement or GATT Article VI:2 with respect to “other charges.”¹⁴⁹ Nor has Mexico, in response to the Panel’s question, identified any language in these provisions that may properly be characterized as “equivalent” to the “other charges” language of GATT Article II:1(b). Instead, Mexico has argued that “the disciplines” governing “other duties or charges” in GATT Article II:1(b) and “antidumping duties” in GATT Article VI and in the AD Agreement are “remarkably similar” inasmuch as both are subject to some type of “upper limit.”¹⁵⁰ Even if this were true,¹⁵¹ it would provide no basis for obligations applicable only to “antidumping duties” under Article 9 of the AD Agreement and GATT Article VI:2 to be extended to apply to interest charges, which are not addressed in those provisions.

75. Third, Mexico attempts to dismiss the fact that Article 9 of the AD Agreement and GATT Article VI:2 impose obligations with respect to antidumping duties and not interest charges by arguing that this is only a matter of “labeling.”¹⁵² According to Mexico, “from the *perspective of the importer*, the words or labels chosen by the United States for such charges are irrelevant” and that therefore the limitations in Article 9 of the AD Agreement and GATT Article VI:2 with respect to “antidumping duties” should be understood to apply with respect to interest charges as well. Mexico’s argument is unavailing. Mexico has provided no reason why the obligations under Article 9 of the AD Agreement and GATT Article VI:2 must be interpreted on the basis of the perceptions of importers rather than on the basis of the particular words used in the text of those provisions. Moreover, the fact that the drafters of GATT Article II:1(b) found it necessary to separately address “ordinary customs duties” “other duties” and “other charges” confirms that there are important distinctions between different types of duties and charges that cannot be overlooked simply because “the end result [to the importer (*i.e.* the fact that the importer has to pay the duty or charge)] is the same.”¹⁵³

76. Finally, the United States notes that in its response to Question 212, Mexico asserts inconsistencies that extend beyond the claims identified in its panel request. In Section F of its panel request, where Mexico presents its claims in connection with the issue of interest, Mexico states:

The United States statutory provision, 19 U.S.C. § 1677g, is inconsistent with Article 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI.2 of the

¹⁴⁹ As no claims have been brought under GATT Article II:1(b) and as there is no reference to “other charges” in either GATT Article VI:2 or Article 9, which form the basis for Mexico’s claims, there is no need for the Panel to address the question of whether interest charges would be considered “other charges.”

¹⁵⁰ Mexico Answers to Panel Questions Following the Second Substantive Meeting, para. 159.

¹⁵¹ The United States finds it difficult to agree, however, that such different provisions can be characterized as “remarkably similar” simply because they are both subject to “upper limits.”

¹⁵² Mexico Answers to Panel Questions Following the Second Substantive Meeting, para. 171.

¹⁵³ Mexico Answers to Panel Questions Following the Second Substantive Meeting, paras. 172.

GATT 1994 because it requires the payment of interest over and above the amount of the margin of dumping.¹⁵⁴

77. Notwithstanding this scope of its claim, Mexico's arguments suggest inconsistencies with Article 1¹⁵⁵ and Article 18.1¹⁵⁶ of the AD Agreement. Not only do these arguments fail to overcome the deficiencies in Mexico's case with respect to interest, because Articles 1 and 18.1 of the AD Agreement were not identified in Mexico's panel request, any claims that Mexico now purports to assert on the basis of these provisions are not within the Panel's terms of reference.¹⁵⁷

¹⁵⁴ Mexico Panel Request, section F.2.

¹⁵⁵ Mexico Answers to Panel Questions Following the Second Substantive Meeting, paras. 163-64.

¹⁵⁶ Mexico Answers to Panel Questions Following the Second Substantive Meeting, paras. 158, 171.

¹⁵⁷ U.S. Second Written Submission, para. 169 and fn. 259.

Table of Exhibits

US-192	Petitioner's December 19, 1997 Rebuttal Brief, Appendices 23-24
US-193	<i>Gray Portland Cement and Clinker from Mexico</i> , Secretariat File No. USA-MEX-99-1904-03 (May 26, 2005)