

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

(WT/DS281)

**Answers of the United States to the Second Set of Questions of
the Panel in Relation to the First Substantive Meeting with the Parties**

March 18, 2005

II. STANDING

To the United States:

Q2. Does the United States agree with Mexico's statements that the United States "... made no attempt to determine domestic industry support for the petition at the time of the initiation of the original cement investigation" and "... made no attempt to determine domestic industry support in any of the subsequent reviews of the order (Mex. first written submission, paras. 284, 286, see also e.g. para. 292)?

1. At the time of the initiation of the original antidumping investigation of cement from Mexico, there was no obligation to examine and ascertain the specific degree of domestic industry support for an antidumping petition, as there is now under Article 5.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). Therefore, the investigating authorities in the United States did not conduct such an examination. Article 5.1 of the *Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ("AD Code"), which established the applicable obligations at that time, simply provided that "[a]n investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request *by or on behalf of* the industry affected."¹ Consistent with Article 5.1 of the AD Code, U.S. law provided for initiation of an antidumping duty investigation based upon a petition filed "*on behalf of* an industry that alleges the elements necessary for the imposition of the [antidumping] duty. . . ."² Unless members of the domestic industry expressed their opposition to a particular petition, the U.S. Department of Commerce ("Commerce") would rely on the petitioners' certification that the petition was filed "on behalf of" the domestic industry.

2. Mexico is correct that the United States did not determine the degree of industry support in the assessment reviews and the sunset review at issue in this dispute. As explained in paragraphs 309-335 of the U.S. first written submission, however, there is no obligation in the AD Agreement or in any other WTO agreement to do so.

¹ Tokyo Round AD Code, Article 5.1 (footnote omitted) (emphasis added) (Exhibit US-115).

² 19 U.S.C. 1673a(b)(1) (1994) (emphasis added) (Exhibit US-116).

Q3. Under US law must the USDOC automatically self-initiate sunset reviews? Was the sunset review proceeding at issue automatically initiated by USDOC on 2 August 1999, with the relevant Notice of Initiation being in Exhibit MEX-129?

3. Pursuant to 19 U.S.C. 1675(c)(1) and (2), Commerce automatically self-initiates all sunset reviews.³ The sunset review of the antidumping duty order on cement from Mexico was initiated by Commerce on August 2, 1999.⁴

III. USITC'S SUNSET REVIEW DETERMINATION (LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY)

To both Parties:

Q5. Will a Panel finding under Article 11.2 or Article 11.3 of the *Anti-dumping Agreement* necessarily be determinative also for a finding under Article 11.1? Why or why not?

4. Article 11.1 of the AD Agreement sets out a general principle that is further elaborated on in Articles 11.2 and 11.3. A Member fulfills the obligations in Article 11.1 of the AD Agreement by subjecting the continued application of antidumping duties to certain review mechanisms, including “changed circumstances” reviews as appropriate under Article 11.2, and sunset reviews under Article 11.3 of the AD Agreement.

5. As the panel explained in *EC – Cast Iron Fittings*, Article 11.2 provides a “review mechanism to ensure that Members comply with the rule contained in Article 11.1.”⁵ The Panel confirmed that Article 11.1 “does not set out an independent or additional obligation for Members.” Rather, it contains a “general, unambiguous and mandatory requirement” that antidumping duties “shall remain in force only as long as and to the extent necessary” to counteract injurious dumping. Thus, as explained by the panel in *EC - Cast Iron Fittings*, Article 11.1 “furnishes the basis for the review procedures contained in Article 11.2 (and 11.3) by stating a general and overarching principle, the modalities of which are set forth in paragraph 2 (and 3) of that Article.”⁶

6. The language of Articles 11.1, 11.2, and 11.3 of the AD Agreement is parallel to the

³ 19 U.S.C. 1675(c)(1), (2) (Exhibit MEX-4).

⁴ *Sunset Initiation* (Exhibit MEX-129); *see also* U.S. First Written Submission, para. 43 and note 80.

⁵ *EC–Cast Iron Fittings (Panel)*, paras. 7.113. In *US-German Sunset*, the Appellate Body similarly explained regarding the relationship between Articles 21.1 and 21.2 of the SCM Agreement that: “Article 21.2 provides a review mechanism to ensure that Members comply with the rule set out in Article 21.1 of the *SCM Agreement*.” *US-German Sunset (AB)*, para. 71, quoting *US – Lead and Bismuth II (AB)*, para. 53. For the full citation for the panel and Appellate Body reports discussed in this submission, please refer to the Table of Reports attached to the U.S. First Written Submission.

⁶ *EC–Cast Iron Fittings (Panel)*, paras. 7.113.

language of the corresponding Articles 21.1, 21.2, and 21.3 of the SCM Agreement. In *US – German Sunset*, the Appellate Body similarly explained the relationship between Articles 21.1 and 21.3 of SCM Agreement:

The first paragraph of Article 21 stipulates that a countervailing duty “shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury”. We see this as a general rule that, after the imposition of a countervailing duty, the continued application of that duty is subject to certain disciplines. These disciplines relate to the *duration* of the countervailing duty ..., its *magnitude*..., and its *purpose*. . . . Thus, the general rule of Article 21.1 underlines the requirement for periodic review of countervailing duties and highlights the factors that must inform such reviews.”⁷

7. Thus, as Article 11.1 of the AD Agreement simply contains a general rule that frames the basis for the review procedures in Articles 11.2 and 11.3, but does not set out an independent or additional obligation for Members, a finding under Articles 11.2 or 11.3 of the AD Agreement is not necessarily determinative also of a finding under Article 11.1.

IV. DOC’S SUNSET REVIEW DETERMINATION (LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING)

To the United States:

Q12. Please explain the status and role of the SPB under US municipal law.

8. The *Sunset Policy Bulletin* is a transparency tool published by Commerce to provide guidance to interested parties as to Commerce’s current thinking on how it might exercise its discretion under U.S. law when conducting sunset reviews. The document has no independent legal status under U.S. law and imposes no requirements on Commerce independent of the relevant statutory and regulatory provisions.

To both Parties:

Q16. To the extent that the Appellate Body in *US – OCTG from Argentina* indicated that the WTO-consistency of the SPB requires a qualitative analysis of the instances of its application, on whom does the burden of proof rest in relation to undertaking that qualitative analysis?

9. Mexico, as the complaining party, bears the burden of coming forward with argument and evidence to establish a *prima facie* case of WTO-inconsistency, and it has not done so. Mexico alleges that the compilation provided in Exhibit MEX-188 demonstrates the existence of

⁷ *US-German Sunset (AB)*, para. 70 (emphasis in original).

a WTO-inconsistent “presumption” regarding the likelihood of dumping in Commerce’s sunset reviews because, according to Mexico, the statistical “analysis” included therein proves that the SPB “instructs” Commerce to treat the scenarios in the SPB as “conclusive.” As discussed in paragraphs 286-90 of the U.S. first written submission, Mexico has assumed, rather than demonstrated, a cause and effect relationship between the SPB and Commerce’s likelihood determinations.

10. Addressing a virtually identical statistical “analysis” of sunset review determinations in *US - Argentina Sunset*, the Appellate Body found that without a “qualitative examination” of the reasons leading to Commerce’s affirmative likelihood determinations, “it is not possible to conclude definitively that these determinations were based exclusively on [the SPB] scenarios in disregard of other factors.”⁸ Because it has not provided any “qualitative examination” of the type envisioned by the Appellate Body, Mexico must be found to have failed to establish its claim.

To the United States:

Q17. Assuming Mexico put forward its own qualitative analysis of the instances of application of the SPB, does the United States agree that it would be required to respond and present its own qualitative analysis? In this respect, could the United States please comment on para. 214 of the Appellate Body Report in *US – OCTG from Argentina (DS268)* (where the Appellate Body observes that it was "regrettable" that the United States did not substantiate its assertions relating to the SPB with reference to cases where other factors constituted the basis of the USDOC's determination, and that it was also "unfortunate" that the United States did not identify cases where the circumstances were such that the probative value of the identified scenario outweighed that of other factors introduced by interested parties)?

11. The United States will continue to respond as appropriate to all arguments that Mexico makes, including any further arguments regarding the alleged “WTO-inconsistent presumption.” The United States notes again, however, that Mexico has not offered any “qualitative analysis” to support its assertions regarding the alleged “presumption.” Therefore, it has not met its burden of presenting a *prima facie* case of WTO-inconsistency. The United States cannot respond to a case that has not been made.

12. Given that Argentina did not provide any “qualitative assessment” of the facts of the individual cases, the Appellate Body in *US - Argentina Sunset* indicated that the Panel’s task might have been facilitated if the United States had undertaken its own qualitative analysis of the statistical compilation presented by Argentina. These statements are merely *obiter dicta*, however. As the Appellate Body’s findings in *US - Argentina Sunset* confirm, the complaining

⁸ *US - Argentina Sunset (AB)*, para. 212.

party bears the burden of coming forward with argument and evidence to establish a *prima facie* case of WTO-inconsistency. It is well-established that, if the balance of argument and evidence is inconclusive with respect to a particular claim – as it was in the case of Argentina’s claims of an alleged WTO-inconsistent “presumption” of the likelihood of dumping and is in the case of virtually identical claims made by Mexico in this dispute – the complaining party must be found to have failed to establish that claim.⁹

V. DECISION NOT TO INITIATE A “CHANGED CIRCUMSTANCES” REVIEW

To the United States:

Q18. At paragraph 34 of the United States' written version of the oral statement at the first meeting of the parties, the United States asserts that Article 11.2:

" ... provides no specific guidance on when a changed circumstances review is 'warranted,' or what constitutes 'positive information substantiating the need for a review.' Members are, thus, free to elaborate under their own laws the conditions under which such a review will be conducted."

(a) Is the submission of information substantiating the need for a review sufficient to trigger the requirement to initiate under Article 11.2?

13. The “submission of positive information substantiating the need for a review” triggers the requirement to initiate a review under Article 11.2 if, in addition: (i) a “reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty;” and (ii) the investigating authority finds that such a review is “warranted.”¹⁰ For a review to be “warranted,” the positive information must substantiate the need for the review of the original determination that a domestic industry is injured by reason of the dumped imports, a determination that had been made pursuant to Article 3 of the AD Agreement. Thus, when requesting a review to determine “whether the injury would be likely to continue or recur if the duty were removed or varied,” an interested party must substantiate its request by showing that, as a threshold matter, there *has been* a change in the facts – for example, in the volume of subject imports or prices of subject imports – that formed part of the foundation for the original determination of injury. To trigger the initiation of a changed circumstances review, an interested party must substantiate its

⁹ See *Canada - Dairy (Article 21.5 - New Zealand and US II) (AB)*, para. 66 (“[U]nder the usual allocation of the burden of proof, a responding Member’s measure will be treated as WTO-consistent, until sufficient evidence is presented to prove the contrary. We will not readily find that the usual rules on burden of proof do not apply, as they reflect a ‘canon of evidence’ accepted and applied in international proceedings.”) (emphasis in original).

¹⁰ Article 11.2 of the AD Agreement provides, in relevant part, that “[t]he authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.”

assertions by providing positive information to the investigating authority that indicates, as a threshold matter, a change in the facts underlying the basis of the original determination that warrants conducting a review to consider if that original determination still is justified.

(b) What information are Members permitted to assess to establish whether a changed circumstance review is warranted as opposed to what information are Members permitted to assess should a review proceed? What is the textual basis in Article 11.2 for this view?

14. When determining whether an Article 11.2 review is “warranted,” an investigating authority may consider any information that is relevant to the question before it in the initiation phase – *i.e.* whether the factors on which the original determination was made (*e.g.*, volume of subject imports) have changed so as to warrant reconsidering in a full substantive review whether the dumped subject imports are still injuring the domestic industry and, thus, whether the original determination still is justified.

15. Should the investigating authority proceed with an Article 11.2 review, it may consider any information that is relevant to the different question that it must resolve in that phase – *i.e.* “whether the injury would be likely to continue or recur if the duty were removed. . . .”

16. Thus, under Article 11.2 of the AD Agreement, the investigating authorities may conduct two phases – the initiation phase and the review phase. Article 11.2 also defines the general subject matter of the information that the investigating authority should assess in each phase. The United States notes that neither Article 11.2, nor any other provision of the AD Agreement, limits the *types* or *sources* of information that investigating authorities may consider.

(c) Does the evaluation contemplated under Article 11.2 when considering whether or not to initiate a changes circumstance review include considering whether there are facts on the public record available which would counter the substance of the request for a changed circumstance review? Please cite the textual basis for your response, including, to the extent relevant, reference to the term "positive" in Article 11.2.

17. An investigating authority’s ability to consider *all* facts – whether they support or detract from the interested party’s request – is implicit in the terms of Article 11.2 and necessary for the authority to make the decision called for in Article 11.2 regarding the need for a review. Under Article 11.2, when an investigating authority is requested to initiate a review, it must determine whether the requester has submitted “positive information” substantiating the need for a review. Thus, Article 11.2 requires the investigating authority to judge whether there is a *need* for a review. Article 11.2 does not state that an investigating authority must initiate a review simply upon request. To make a such a determination, the authority must examine whether the information submitted by the interested party is “positive” information and whether it “substantiates” the “need” for a review.

18. In this regard, the United States notes that, in construing the similar term “positive evidence,” the Appellate Body has explained that “[t]he word “positive” means, to us, that the evidence must be of an *affirmative, objective and verifiable* character, and that it must be *credible*.¹¹ There is no reason to believe that “positive” has a different meaning when used to describe “information” than when used to describe “evidence.” Thus, in order to ascertain whether an interested party seeking a review has submitted “positive” information, an authority must have the ability to consider whether the information is “affirmative,” “objective,” “verifiable,” and “credible.” To do so, an investigating authority must have the ability to look to other facts to see whether they support or detract from the information submitted by the interested party in its request for a review.

19. Likewise, the phrase “substantiating the need for a review” also supports the conclusion that an authority must have the authority to consider all facts relevant to the request for a review. The word “substantiate” is defined as:

1. Give substance or substantial existence to, make real or substantial. 2. Give solidity to, make firm, strengthen. 3. Give substantial form to, embody. 4. Prove the truth of (a charge, claim, etc.); demonstrate or verify by evidence; give good grounds for.¹²

20. Again, in order for an authority to ascertain whether an interested party seeking a review has submitted positive information *substantiating* the need for a review, the authority must have the ability to consider any available facts that are relevant to the question of whether the information submitted “substantiates” or “gives good grounds” for a review. This determination may require an assessment of the information submitted by the interested party in the context of the other relevant facts. If an investigating authority were not able to consider these other facts, an interested party could, by submitting selective information, effectively self-judge whether a review of the original determination of injury is warranted. Article 11.2 does not require such a result.

(d) What does the "freedom" referred to in this paragraph imply? Is there an unlimited discretion to initiate (or not) an Article 11.2 review? Does the discretion Article 11.2 may permit with respect to initiation allow Members to pre-judge the outcome of what such a changed circumstance review might yield?

21. The “freedom” to which this paragraph refers means that Members are free to establish procedures for making the decision whether or not to initiate a review under Article 11.2. In so

¹¹ *US-Argentina Sunset (AB)*, para. 340, quoting *US-Hot-Rolled Steel (AB)*, para. 192; see also *EC-Bed Linen (AB)*, para. 114.

¹² *The New Shorter Oxford English Dictionary* (Clarendon Press: Oxford 1993), p. 3124 (Exhibit US-124).

doing, Members must apply the conditions in Article 11.2 that a review shall be conducted where “warranted,” which will be determined in major part on the basis of whether a party seeking a review has submitted “positive information substantiating the need for a review.” Moreover, in making a decision as to whether a review is “warranted,” investigating authorities must properly establish the facts and evaluate them in an unbiased and objective manner.¹³

22. A review would be “warranted” and positive information would “substantiate” the need for review to determine whether “continued imposition of the duty” is necessary if the information indicates that the bases for the original determination of injury have changed. Thus, a Member may, in determining whether the conditions for initiating an Article 11.2 review have been met, consider the factors underlying the original determination of injury set forth in Article 3 of the AD Agreement (*e.g.*, volume of subject imports). The Member may reasonably ask whether there has been a change in circumstances relating to the volume or value of subject imports that justifies a review of the “need for the continued imposition of the duty.” On the other hand, it would not be reasonable for an investigating authority to consider information that is irrelevant to the question of whether the original determination of injury is justified in making a determination of whether to initiate a review (for example, consideration of whether the investigating authority has sufficient staff to conduct such a review). Although Members have some discretion in interpreting and applying the conditions in Article 11.2 relating to initiation of a review, they cannot thereby pre-judge the outcome of such a review.

23. The threshold question of whether a review is warranted or needed is different, in that it is not comprehensive or conclusive and in that it is backward-looking rather than prospective, as compared to the question to be considered in a review, which entails determining whether injury would be likely to continue or recur if the duty were removed. Obviously, however, the factors relevant to the first question also will have some bearing on the resolution of the second question.

Q19. (a) Did the USITC generate, on its own initiative, the import volume and unit values used in the notice of dismissal of the request to initiate a CCR in Exhibit MEX-138 (e.g. forming the basis for statements such as "The volume of imports was 29.2 per cent higher for the January – September 2001 period compared with the same period in 2000")? Why and under what WTO and domestic legal authority?

24. Yes. The U.S. International Trade Commission (the “Commission” or “USITC”) looked to the import volume and unit value data at issue on its own initiative. These data were obtained from official U.S. import statistics. The Commission did so because CEMEX (the Mexican producer seeking the changed circumstances review) had provided *no* data regarding subject import volumes or values to support its assertion that its “interest in the Southern Tier eliminates any perceived incentive for [it] to import cement from Mexico into the Southern Tier in

¹³ See Article 17.6(i) of the AD Agreement.

quantities or at prices that would cause material injury to all or almost all Southern Tier cement producers in the reasonably foreseeable future.”¹⁴ Because it was presented with nothing more than CEMEX’s unsubstantiated prediction of how its acquisition of the Southdown facility in the Southern Tier would affect imports, the Commission examined the actual import data for the period following the acquisition.

25. The AD Agreement supports the Commission’s use of these data. As discussed in response to Question 18(c) above, under Article 11.2, Members must ascertain whether a party seeking a review has submitted *positive* information, and whether that information *substantiates* the need for a review. Therefore, they must have the ability to consider the submitted information in the context of other available information.

26. The domestic legal authority for the Commission’s use of the import data lies in Section 751(b)(1) of the Tariff Act of 1930, as amended (19 U.S.C. § 1675(b)(1)), which states that the Commission shall conduct a review of an affirmative injury determination whenever it receives a request that “shows changed circumstances sufficient to warrant a review.” The Commission’s authority to consider the import data is implicit in its obligation to consider whether a review request “shows changed circumstances sufficient to warrant a review.” The Commission also is guided by decisions of its reviewing courts. The U.S. Court of International Trade (one of those courts) has explained that:

the decision to undertake a review is a threshold question, . . . [which] may be made only when it reasonably appears that positive evidence adduced by the petitioner together with other evidence gathered by the Commission leads the ITC to believe that there are changed circumstances sufficient to warrant review.¹⁵

This court also has recognized that “the party seeking revocation bears the initial burden of showing the existence of such circumstances.”¹⁶

(b) How does the US respond to Mexico's allegation, in para. 780 of its first written submission, that the USITC "...did not accurately represent the information on which it reliedThus, no causal relationship between the imports and any purported price effect in the Southern Tier was demonstrated."

27. Mexico makes these allegations in an attempt to avoid what the import statistics clearly

¹⁴ CEMEX’s Request to Initiate a Change Circumstances Review at 1 (Sept. 19, 2001) (Exhibit MEX-136).

¹⁵ *Avesta AB v. United States*, 689 F. Supp. 1173, 1181 (Ct. Int’l Trade 1988) (Exhibit US-125). We note that the changed circumstances review request underlying the *Avesta* case also involved a situation where it was argued that a respondent’s acquisition in the U.S. constituted a changed circumstance sufficient to warrant a review.

¹⁶ *Avesta*, 689 F. Supp. at 1181 (Ct. Int’l Trade 1988); *A. Hirsh, Inc. v. United States*, 729 F. Supp. 1360, 1363 (Ct. Int’l Trade 1990) (Exhibit US-126), *aff’d following remand*, 737 F. Supp. 1186, 1188 (Ct. Int’l Trade 1990).

show: a sharp increase in imports of cement from Mexico accompanied by a decline in the average unit value of these imports. Each allegation is discussed below.

28. Mexico's allegation: *the Commission did not accurately represent the information on which it relied*

29. Mexico has not pointed to any specific inaccuracy in the import data which the Commission considered.

30. Mexico's allegation: *It reported the volume increase as a percentage, with no reference to the context (e.g., total volumes of imports (subject and nonsubject); the Southern Tier's import dependency; the relationship between that statistic and the overall characteristics of Southern Tier).*

31. Although the Commission referred only to the percentage amount of the increase in its notice dismissing the review request, it also considered the total volume of subject imports in the two nine-month periods (as is evident from Exhibit US-106).

32. It is not clear why an examination of non-subject imports would have been relevant to the question of whether a review is warranted. Even if the 29.2 percent increase in imports after the Southdown acquisition had occurred at the expense of non-subject imports – and Mexico has presented no evidence that this was in fact the case – this sharp increase in subject imports at declining values was wholly inconsistent with CEMEX's assertion that the acquisition would cause it to moderate its subject imports into the United States.

33. Nor is it clear why an examination of the Southern Tier's import dependency would have been relevant to the question of whether a review is warranted. Mexico is not arguing that this import dependency suddenly became so much more pronounced as to lead to an almost 30 percent increase in subject imports.

34. Finally, it is not clear why the failure of the Commission to consider how "the relationship between [the import] statistic and the overall characteristics of Southern Tier" resulted in an inaccurate portrayal of the import data.

35. Mexico's allegation: *It calculated a 29.2 percent increase in import volume during two 9-month time periods, but presented only an unspecified "decrease" in entered unit values of imports from Mexico to the United States. It eventually quantified that decrease and then admitted that the decrease was only "slight." Thus, no causal relationship between the imports and any purported price effect in the Southern Tier was demonstrated.*

36. At the initial stage of deciding whether positive information substantiates the need to conduct a changed circumstances review, the Commission does not consider price effects of subject imports, or the "causal relationship between the imports and any purported price effect."

Those are complex and interrelated questions that are examined if a full review is conducted.

37. The magnitude of the decrease in entered unit values (from \$36.56 per short ton to \$35.81 per short ton) does not detract from the fact that a decline in unit values is exactly the opposite of what CEMEX predicted would happen to prices as a result of the Southdown acquisition.

38. In sum, the allegations in paragraph 780 of Mexico's first written submission have no merit.

Q20. Mexico asserted that CEMEX's acquisition of a US cement producer was a significant event that warranted the initiation of a changed circumstances review.

(a) Does the United States consider that this event was a "changed circumstance"?

39. As discussed above, at the initiation stage, the Commission considers whether there is a need for a review of the original determination; that is, whether there is positive information substantiating a change in a factor (*e.g.*, volume of subject imports) underlying the basis for the original determination. The Southdown acquisition may well have an effect that results in a changed circumstance. The question for the Commission is whether the acquisition has changed circumstances regarding a factor that was the basis for the original determination *sufficient to warrant a review* of that original determination. This is consistent with Article 11.2, under which investigating authorities judge whether interested parties have submitted positive information substantiating a need for a review and that such a review is warranted. CEMEX alleged that its acquisition of Southdown would have a certain impact on imports. However, it did not provide positive evidence to support this allegation and the import volume/value data the Commission considered contradicted CEMEX's assertions. Accordingly, the Commission found that a review was not warranted. The Commission's assessment of the properly established facts in reaching this decision was unbiased and objective.¹⁷

(b) Does the United States consider that this acquisition would give rise to different incentives as far as importation is concerned?

40. While it is conceivable that the acquisition of Southdown *might* give rise to different incentives concerning importation, it is equally possible that it would not. Consequently, without more, the fact of the acquisition tells an investigating authority virtually nothing and leaves it in the position of speculation. The actual development of subject imports in the period following the acquisition (a 29.2 percent increase) shows that it cannot be assumed that the acquisition would give rise to an incentive to import less. Moreover, if the focus is on incentives, it should be noted that the acquisition gave CEMEX control over more than 10 inland and import distribution terminals in the Southern Tier region, and, to this extent might have

¹⁷ See Article 17.6(i) of the AD Agreement.

provided an incentive to increase imports from Mexico. In sum, speculation about possible incentives to import more or less cannot substitute for positive information substantiating the need for a review.

41. Again, CEMEX alleged that its acquisition of Southdown would have a certain impact on imports. However, it did not provide positive evidence to support this allegation and the import volume/value data the Commission considered contradicted CEMEX's allegations. Accordingly, the Commission found that a review was not warranted. While it is conceivable that the acquisition of Southdown could change the incentives for CEMEX and result in a change in import strategy, the relevant information did not support this conclusion.

(c) If so, would such incentives be something that warranted at least a consideration of the matter in a review, rather than reaching a "pre-emptive" conclusion and not investigating?

42. The first sentence of Article 11.2 includes significant limitations on the initiation of changed circumstances reviews; that is, such reviews are to be initiated, after a reasonable period of time has elapsed since the imposition of the duty, "where warranted" and (in the case of requested reviews) where an interested party "submits positive information substantiating the need for a review." These limitations reflect clearly that changed circumstances reviews are to be undertaken only where they are warranted and where there is a need for the review. Accordingly, it is necessary for an authority to require positive information indicating that a change in circumstances sufficient to warrant a review of the original determination *has* occurred, rather than mere conjecture as to incentives; conjecture that in this case was diametrically at odds with the actual evidence.

(d) Does the United States consider that the threshold for initiating a changed circumstances review would have been satisfied if there had been an acquisition and no change to the level of imports?

43. The United States cannot speculate as to how the Commission might have viewed these circumstances, which were not the circumstances before it when CEMEX requested a changed circumstances review.

(e) Does the United States contend that in the present circumstances, CEMEX's request for a changed circumstances review failed because, although the facts showed that a change in market structure had taken place such that could change incentives, because of evidence showing conduct pointing in the opposite direction, the warranted standard is not met?

44. Yes. CEMEX's predictions as to how the change in ownership of Southdown might affect imports were just that – predictions. The actual import data were diametrically at odds with these predictions and undermined those projections entirely.

- (f) Why, in the US view, is evidence and argumentation relating to the merits of whether or not an order should be revoked of little consequence as an isolated fact in terms of whether the review is warranted, as indicated in the notice of dismissal of the request to initiate a CCR in Exhibit MEX-138 (first column, p. 65742)?**

45. The statement in the Commission's notice of dismissal must be viewed in the context in which it was made. The most important aspect of that context is that CEMEX's request did not establish that an Article 11.2 review was warranted because it failed to provide information substantiating that a change in circumstances had occurred. Evidence and argumentation that goes to the merits of whether the original determination still is justified does not address the issue at the initiation stage. At the initiation stage, the question is a threshold one, whether there has been a change in a factor underlying the basis for the original determination sufficient to warrant undertaking a review of that original determination on the merits. By contrast, if a review proceeds, there is a comprehensive investigation of whether injury would be likely to continue or recur if the duty were removed.

- (g) How is this view in (f) consistent with the USITC statement relating to "evidence of an actual change in imports or the ability to supply imports, prices or competitive conditions in the industry" and the focus on volume and value of imports since the acquisition (Exhibit MEX-138 (third column, p. 65741))?**

46. This view is fully consistent with the statement quoted in the question. At the initiation stage, the Commission looks to whether there has been a change in circumstances sufficient to warrant a review.

To the United States:

- Q24. Do you agree that the USITC did not provide the information forming the basis for its determination to dismiss the request to initiate a CCR until the notice to dismiss the CCR request in Exhibit MEX-138?**

47. The Commission did not provide the reasons for its decision not to initiate a review before announcing this decision, but the import data on which the Commission relied were public data to which CEMEX and its counsel would have had access.¹⁸

¹⁸ See *Thailand – H-Beams (AB)*, paras. 111-112 (the Appellate Body has explained that, in making an antidumping duty determination, the AD Agreement “does *not* imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation.”).

48. The Commission's resort to this public import data should not have come as a surprise to CEMEX and its counsel. Whether an alleged changed circumstance has had an effect on imports is a central issue in deciding whether a review is warranted, as CEMEX itself recognized by including in its request speculation in that regard. CEMEX's request, however, failed to provide any import data to support its speculation. Also, as CEMEX's counsel was likely aware, in a previous case in which a party sought a changed circumstances review on the basis of the acquisition of a U.S. firm by a foreign producer, the Commission denied the petition because there had been no actual change in import strategy.¹⁹

To the United States:

Q25. How do you reconcile the text of Article 6.14 of the *Anti-dumping Agreement* -- in particular, that the procedures "set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to *initiating an investigation...*" (emphasis added) – with the view that Article 6, or certain subparagraphs thereof, do not apply to the decision whether or not to initiate a review?

49. Article 11.4 of the AD Agreement states that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article." A logical approach to applying this provision would be to replace "investigation" with "review," where the term appears in the provisions of Article 6 dealing with evidence and procedure. By doing so, it becomes apparent that the provisions of Article 6 regarding evidence and procedure are only applicable after a "review" (or "investigation") has already been initiated and not to the initiation of a review (or investigation). For example, Article 6.1 would read:

All interested parties in an anti-dumping [review] shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the [review] in question.²⁰

50. Similarly, Article 6.2 would read "[t]hroughout the anti-dumping [review] all interested parties shall have a full opportunity for the defence of their interests." Article 6.4 would state

¹⁹ This case involved the antidumping measure in *Stainless Steel Plate from Sweden*, and it led to the *Avesta* litigation discussed above.

²⁰ The United States notes that interested parties were provided opportunities to present in writing comments and evidence which they considered relevant to the request for a review. See *Request for Comments Concerning the Institution of a Section 751(b) Review Investigation: Gray Portland Cement and Cement Clinker from Mexico*, 66 Fed. Reg. 51685 (Dec. 20, 2001) (Exhibit MEX-137). While counsel for Mexican producers GCCC and Apasco submitted comments to the Commission, counsel for Mexican producer, CEMEX, did not.

The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information ... that is used by the authorities in an anti-dumping [review],"²¹

51. These provisions simply do not apply to the initiation of an investigation or review. They only apply with respect to evidence and procedure in a review or investigation itself (*i.e.* after initiation).

52. Article 6.14 of the AD Agreement is entirely consistent with this interpretation. Under the above approach, Article 6.14 of the AD Agreement would read, "The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating [a review], reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement." The fact that Article 6 should not be interpreted to prevent the expeditious initiation, conduct, and conclusion of an investigation or review does not mean that the provisions of Article 6 establish obligations with respect to the evidence and procedure applicable to initiation. Rather, Article 6.14 reflects the understanding that Members' obligations contained in Article 6 in terms of evidence and procedure during an investigation or review are to be balanced with the Member's right to proceed expeditiously from initiation to final determination in the same investigation or review.

VI. DUTY ABSORPTION

To the United States:

Q30. Please identify the statutory, regulatory, policy and/or other basis underlying both the presumption of duty absorption and the related evidentiary standard applied by the USDOC when examining the existence of duty absorption? Please also indicate whether there is any reference to any of these bases in the record of this Panel.

Q31. Please explain how the evidence required to rebut the presumption of duty absorption may be practically implemented within an enforceable contract between the affiliated importer and the first independent customer. Please confirm whether there have been any instances when this presumption has been rebutted on the basis of such evidence, and if so, please give the details of these instances.

53. This response is to both Questions Q30 and Q31. As explained in paragraph 487 of the U.S. first written submission, under U.S. law, Commerce, if requested, will conduct a duty absorption inquiry during an assessment review initiated two or four years after publication of

²¹ Compare *Thailand – H-Beams (AB)*, paras. 111-112.

the order.²² Commerce makes a duty absorption inquiry to determine whether a U.S. importer affiliated with the exporter or producer²³ has paid the antidumping duties without passing them on to its unaffiliated U.S. customers in the form of higher prices. The statute, however, does not prescribe a specific methodology for determining whether the antidumping duties have been absorbed by an affiliated importer.

54. Commerce's duty absorption regulations also do not establish a particular methodology for determining whether duties have been absorbed.²⁴ In promulgating its post-Uruguay Round regulations, Commerce specifically declined to set substantive criteria for making a duty absorption findings stating that Commerce "will need experience with absorption inquiries before it is able to promulgate such criteria."²⁵ As a result, Commerce began providing guidance on how it would address the issue of duty absorption as the issue arose in individual cases. In one of the earliest cases in which Commerce was asked by petitioners to consider whether duties had been absorbed, Commerce articulated the view that "the existence of a [dumping] margin raises an initial presumption that the [producer/exporter] and its affiliated importer(s) are absorbing the duty."²⁶ In subsequent cases, including the eighth review of the antidumping duty order on cement, Commerce explained the rationale behind this approach as follows:

This is a reasonable presumption because the continued existence of dumping duties indicates that the producer and its affiliated U.S. importer have not adjusted their prices to eliminate dumping. If the producer has not set its price to the first unaffiliated U.S. customer high enough to eliminate dumping, it is reasonable to presume that the producer is also absorbing the dumping duties. The reasonableness of this presumption is also reflected in the SAA at 885, which states that "the affiliated importer may choose to pay the antidumping duty rather than eliminate dumping. . . ."²⁷

²² 19 U.S.C. 1675(a)(4) (Exhibit MEX-4). As explained in note 761 of the U.S. first written submission, as of May 2002, Commerce no longer conducts duty absorption inquiries in reviews of transition orders, *i.e.*, antidumping and countervailing duty orders in effect as of January 1, 1995, the date that the WTO Agreement came into force for the United States. The antidumping duty order on cement from Mexico is a transition order. In May 2002, the U.S. Court of Appeals for the Federal Circuit held that the statute does not permit Commerce to do so. *See FAG Italia v. United States*, 291 F.3d 806 (Fed. Cir. 2002) (Exhibit US-102). As a result of the Court's decision, in subsequent domestic litigation involving challenges to transition orders, Commerce has annulled its duty absorption findings.

²³ Duty absorption is not an issue where the sales are made by an exporter or producer directly to an unaffiliated U.S. customer because, in those circumstances, the U.S. customer is responsible for paying the duty on imports.

²⁴ *See* 19 C.F.R. 351.213(j)(3) (Exhibit US-117) ("In determining ... whether antidumping duties have been absorbed, the Secretary will examine the antidumping duties calculated in the administrative review in which the absorption inquiry is requested.").

²⁵ *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. at 27318 (Exhibit MEX-180).

²⁶ *See Antifriction Bearings (Other Than Tapered Roller Bearings) And Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 62 Fed. Reg. 54043, 54074 (October 17, 1997) (Exhibit US-118).

²⁷ *Eighth Review Final Decision Memorandum*, at Comment 26 (Exhibit MEX-85).

Thus, where the exported product sold in the United States through an affiliated importer is sold at dumped prices, Commerce will make a finding of duty absorption unless there is evidence that the importer has passed on the duties to its unaffiliated U.S. customer.²⁸

55. Commerce also identified one means by which a producer/exporter could demonstrate that dumping duties were being passed along to the unaffiliated customer – by showing that there was an enforceable contract between the producer/exporter and customer that, by its terms, made clear that the first unaffiliated customer would pay any antidumping duties due as a result of the assessment review.²⁹ To the best of our knowledge, no producer/exporter has supplied such an agreement to date.

Q34. Please describe the methodology applied by the USDOC to arrive at the amount and margin of duty absorption and explain this methodology with the aid of an example. Please also indicate any statutory, regulatory, policy or other basis underlying this methodology, and identify any reference to such basis in the record of this Panel.

56. Commerce does not calculate either an amount or margin of duty absorption. Rather, as explained in paragraph 487 of the U.S. first written submission, in the context of an assessment review and upon request, Commerce will conduct a duty absorption inquiry and may make a *finding* of duty absorption where the facts warrant. Commerce’s finding regarding duty absorption is simply a statement as to whether a particular respondent has absorbed duties during a particular period of review. In addition, Commerce’s “finding” of duty absorption will indicate the percentage of that company’s U.S. sales in which duty absorption has occurred. For example, in the eighth review of the antidumping duty order on cement from Mexico, Commerce addressed the issue of duty absorption as follows:

We have determined that duty absorption has occurred with respect to CEMEX and CDC (collectively “CEMEX”) with respect to 99.96% of sales which this firm made through its U.S. affiliated parties.³⁰

Thus, Commerce does not calculate an “amount” or “margin” of duty absorption in an assessment review.

57. Commerce also does not calculate an amount or margin of duty absorption in a sunset

²⁸ See U.S. First Written Submission, para. 487.

²⁹ See e.g., *Extruded Rubber Thread From Malaysia; Final Results of Antidumping Duty Administrative Review*, 63 FR 12752 (March 16, 1998) (Exhibit US-119); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews*, 63 FR 2558 (January 15, 1998) (Exhibit US -120).

³⁰ *Eighth Review Final Results*, 65 FR at 13943 (MEX-85) (cited in paragraph 488 of U.S. First Written Submission).

review. Rather, as explained in paragraphs 490-492 of the U.S. first written submission, Commerce may adjust the “margin likely to prevail” that it reports to the Commission to account for any duty absorption findings. As illustrated in Exhibit MEX-323, this adjustment involves increasing the margin calculated in the assessment review on the percentage of sales for which Commerce found duty absorption; Commerce may choose to report this adjusted margin to the Commission as the “margin likely to prevail”. The adjustment is described in the *Sunset Policy Bulletin*.³¹ As explained in paragraph 492 of the U.S. first written submission, the sole purpose of any duty absorption finding is for possible use in determining the “margin likely to prevail” that is reported to the Commission in the context of a sunset review. The “margin likely to prevail” is *not* a calculated margin that is used for the imposition, collection, or assessment of duties.

Q.35 Does the United States law allow for any situation whereby there could be partial absorption of the duty and, if so, how does the United States address such a situation? If not, why not?

58. As discussed in response to Question 31, neither the statute nor the regulations prescribe a specific methodology for determining whether the antidumping duties have been absorbed by an affiliated importer. Commerce has, to date, considered that the affiliated importer absorbs 100 percent of the duties on dumped sales absent evidence that the importer has passed on the antidumping duties to its unaffiliated customer. Nothing in U.S. law, however, precludes the possibility of a finding of partial absorption. However, to the best of our knowledge, this issue has not been raised in any assessment review. Nor has Mexico raised this issue with the Panel.

Q36. 19 USC 1675a(a)(6) provides that in making a determination of likelihood of injury in a sunset review, the USITC “may” consider the magnitude of the margin of dumping. Please confirm that this provision leaves consideration of the “margin likely to prevail” in a sunset review to the discretion of the USITC?

59. Yes. As the Panel correctly notes, the U.S. statute, 19 U.S.C. 1675a(a)(6), provides that “the Commission *may* consider the magnitude of the margin of dumping”³² in making its sunset review determination. Thus, the U.S. statute provides the Commission with the discretion in sunset reviews to decide whether to consider as a factor the “magnitude of the margin of dumping that is likely to prevail” that Commerce provides.³³

Q37. 19 USC 1675a(1)(D) stipulates that the USITC “shall” take into account USDOC’s duty absorption findings when making a determination of likelihood of injury in a sunset review. 19 USC 1675a(a)(6) provides that in making a determination of

³¹ See *Sunset Policy Bulletin*, Section II.B.3.b (Exhibit MEX-131).

³² 19 U.S.C. 1675a(a)(6) (Exhibit MEX-5) (emphasis added).

³³ Under the U.S. statute, 19 U.S.C. 1675a(c)(3), Commerce “shall provide to the Commission the magnitude of the margin of dumping that is likely to prevail if the order is revoked.”

likelihood of injury in a sunset review, the Commission “may” consider the magnitude of the likely margin of dumping. Do these provisions imply that the USITC will always take into account duty absorption findings, but will not always take into account the magnitude of the likely margin of dumping? Is it therefore possible for the USITC to take into account duty absorption findings, but choose not to consider the magnitude of the likely margin of dumping, even if the latter is derived from the same duty absorption findings?

60. The U.S. statute, 19 U.S.C. 1675a(a)(1)(D), provides that the “Commission shall take into account . . . in an antidumping proceeding under section 1675(c) of this title [sunset reviews], the findings of the administering authority [Commerce] regarding duty absorption under section 1675(a)(4) of this title.”³⁴ As indicated in response to Question 36 above, the U.S. statute leaves to the Commission’s discretion whether to consider as a factor the “magnitude of the margin of dumping that is likely to prevail” that Commerce provides. Thus, under the U.S. statute, in conducting a sunset review, the Commission may consider the margin of dumping but must consider or take into account any duty absorption finding made by Commerce.

61. As discussed in response to Question 55 below, there is a clear distinction between “considering or taking into account” a fact and “relying on” that fact. While, the U.S. statute may require the former (“considering” or “taking into account”) with respect to a duty absorption finding made by Commerce, neither the U.S. statute nor the AD Agreement require the latter. In this case, the Commission considered both the margin of dumping likely to prevail and the duty absorption finding made by Commerce, but did not rely on either fact in making its affirmative sunset determination.

To both Parties:

Q38. How, if at all, would Article 9.3.3 be relevant to the Panel's consideration of the issues raised in Mexico's claims with respect to duty absorption?

Q39. How, if at all, do you consider Article 9.3.3 to be relevant to: (i) the duty absorption calculation made by the USDOC in the 8th administrative review; and (ii) the calculation of the "margin likely to prevail" reported in the sunset review?

62. This response is to Questions 38 and 39. Article 9.3.3 is not relevant to the issue of duty absorption or the “margin likely to prevail”. As previously discussed, the sole purpose of any duty absorption finding is for possible use in determining the “margin likely to prevail” that Commerce reports to the Commission in the context of a sunset review. The “margin likely to prevail” is *not* a calculated margin that is used for the imposition, collection, or assessment of duties and, thus, Article 9.3.3 is not implicated.

³⁴ 19 U.S.C. 1675a(a)(1)(D) (Exhibit MEX-5).

To the United States:

Q44. To what extent does the United States consider that information about the USDOC's decision to rely on findings from the 8th administrative review for the purpose of determining the "margin likely to prevail" amounts to "essential facts" forming the basis of the decision to maintain anti-dumping duties? Please explain with reference to the terms of Article 6.9 of the *Anti-dumping Agreement*.

63. As explained in paragraphs 306-308 of the U.S. first written submission, Commerce did not rely upon duty absorption findings from the eighth review or the "margin likely to prevail" in making a determination regarding the likelihood of continuation or recurrence of dumping in the sunset review. Also, as explained in paragraphs 257-264 of the U.S. Submission, the Commission majority's determination of the likelihood of continuation or recurrence of injury in the sunset review of cement from Mexico was not based, in any part, on the magnitude of the margin of dumping likely to prevail or the duty absorption findings. Thus, Commerce's decision to use the duty absorption findings from the eighth assessment review to adjust the margin likely to prevail in no way impacted the decision to maintain antidumping duties. As such, information about that decision did not constitute "essential facts" forming the basis of the decision to maintain antidumping duties.

To the United States:

Q47. Does the United States consider that the due process and procedural disciplines contained in Article 6 apply to administrative review proceedings carried out under Article 9.3.1? What is the textual basis in the *Anti-dumping Agreement* for the United States' position.

64. The provisions of Article 6 of the AD Agreement do not apply to assessment reviews conducted under Article 9.3.1. The provisions of Article 6 refer to "investigations."³⁵ Nothing in Article 6 states that the provisions of that article also apply to assessment review proceedings carried out pursuant to Article 9.3.1. Moreover, neither Article 9.3.1, nor any other provision of Article 9, incorporates generally the provisions of Article 6. In contrast, the provisions of Article 6 regarding evidence and procedure are explicitly made applicable to review proceedings under Article 11.³⁶ There is no similar cross-reference to the provisions of Article 6 in Article 9.³⁷

³⁵ See e.g., Article 6.1 ("All interested parties in an anti-dumping investigation. . ."); Article 6.2 ("Throughout the anti-dumping investigation. . ."); Article 6.4 ("The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information . . . that is used by the authorities in an anti-dumping investigation. . .")

³⁶ See Article 11.4 of the AD Agreement ("The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article.")

³⁷ Certain of the provisions of Article 9 refer to specific provisions in Article 6. For example, Article 9.4 sets out obligations regarding the application of anti-dumping duties in cases where, because of the large number of exporters, producers, importers or types of products, investigating authorities have decided to limit their

Q48. Please explain how the alleged presumption of duty absorption and the related evidentiary standards are communicated, in general, to respondents in administrative reviews?

Q49. Please identify when and how the alleged presumption of duty absorption and the related evidentiary standards were communicated to respondents in the 8th administrative reviews?

65. This response is to both Questions 48 and 49. As explained in response to Questions 30 and 31 above, neither U.S. law nor Commerce's regulations provide a specific methodology for determining whether duties have been absorbed. Commerce, therefore, began providing guidance on how it would address the issue of duty absorption as the issue arose in individual cases. Commerce's guidance was communicated to respondents through publication in the *Federal Register* and on Commerce's website. Mexican respondents in the eighth assessment review had access to this publicly available information. Moreover, Commerce also discussed both of these issues in the Mexican cement sixth assessment review preliminary determination.³⁸ The same Mexican respondents participated in both the sixth and eighth assessment reviews. Furthermore, Mexico concedes that Commerce provided Mexican respondents with the opportunity in the sixth and eighth reviews to argue and present evidence concerning duty absorption.³⁹

To the United States:

Q53. The Panel notes that the USITC sunset review determination (Exhibit MEX-9) indicated, in note 168 on p. 30:

"Commerce assigned Mexican company-specific margins of 91.94 per cent for CEMEX/GCCC/Hidalgo, 53.26 per cent for Apasco, and an all other Mexican rate of 59.91 per cent. 65 Fed. Reg. at 41050 (July 3, 2000)."

(a) Is this the only reference to the margins reported by the USDOC to USITC in the report (apart from the treatment of duty absorption findings in note 268 of the report)?

66. Note 168 contains the only reference by the Commission majority to the "margins of dumping that are likely to prevail" in its determination. The USITC staff listed these margins at I-2 of the ITC Staff Report and also included the *Federal Register* notice issued by Commerce which

investigation to a particular "sample" of the same under Article 6.10. However, these references in Article 9 do not incorporate, generally, all of the provisions of Article 6 and in fact support the opposite interpretation that Article 6 applies only in the instances in which it is specifically referenced.

³⁸ *Sixth Review Preliminary Results*, 62 FR at 47627 (Exhibit US-7).

³⁹ See Mexico First Submission, para. 715. See also *Sixth Review Preliminary Results*, 62 FR at 47627, 47632 (Exhibit US-7) (providing parties with an opportunity to comment on the preliminary results, which included a preliminary finding of duty absorption).

provided the margins of dumping that are likely to prevail at Appendix A of the ITC Staff Report.

- (b) How is the Panel to assess the extent to which the USITC relied on this evidence that the USITC explicitly acknowledged formed part of its record through the reference in note 168?**

67. As discussed in response to Question 55 below, the terms “consider” and “rely” are distinct and not interchangeable. The Commission considered the margins likely to prevail that Commerce is required to provide to the Commission (and that, thus, become part of the record of the USITC’s review) by listing them in footnote 168 of its opinion. The Commission did not indicate that it relied on these margins in its decision-making nor did it indicate that these margins (or the COMPAS model findings that incorporated these margins) formed any basis of support for its affirmative sunset determination. The Panel, therefore, has no need to assess the extent of the Commission’s reliance on the margins, since the Commission did not rely on them.

- Q54. In note 268 of the USITC sunset review determination (Exhibit MEX-9), the USITC indicates:**

"In reaching our conclusion on likely price effects, we have weighed all the pertinent evidence on price and taken into account Commerce's duty absorption finding on Mexico, although we note respondents' argument that a recent CIT decision calls into question the validity of Commerce's duty absorption findings with respect to transition orders However, we do not rely on the duty absorption findings in making our determination that significant effects are likely upon revocation of the order."

- (a) Is the Panel correct in understanding that the margins reported by the USDOC to the USITC pertaining to CEMEX included the level of duty absorption, but that the margins for Apasco and "all others" did not (because of their "unaffiliated" status)?**

68. The Panel’s understanding is correct, in part. The margin of dumping likely to prevail reported by Commerce to the Commission for CEMEX was adjusted to reflect Commerce’s duty absorption findings. However, the margins likely to prevail reported by Commerce for Apasco and “all others” were not, because Commerce did not make duty absorption findings with respect to those companies. Commerce did not do so because the petitioners’ request for a duty absorption inquiry was limited to CEMEX/CDC.

- (b) To what extent does the USITC's stated non-reliance on the duty absorption findings (in note 268 of the USITC sunset review determination) also relate to its overall consideration of the margins reported in reaching the affirmative determination of likelihood?**
- (c) Does the response differ in the case of the reported margins that were (e.g.**

CEMEX) and were not (e.g. Apasco, all others) not associated with any duty absorption findings? Why or why not?

69. This response is for both Questions 54(b) and (c). As discussed above, the Commission considered or took into account both findings provided by Commerce – the margins of dumping that are likely to prevail and the duty absorption findings – by noting them in its opinion. The Commission expressly stated in footnote 268 of its opinion that it did not rely on Commerce’s duty absorption findings in making its affirmative sunset determination. The Commission did not indicate in its opinion that it relied on either of these facts to support its sunset determination. This response is the same whether for CEMEX, Apasco, or “all others.”

Q55. Please explain what USITC means when it states in its sunset determination that it had “taken into account” USDOC’s duty absorption finding, but not relied upon such finding, when making its determination that significant effects were likely upon revocation of the anti-dumping order.

70. As a general matter, the terms “consider” and “rely on” are distinct and cannot be used synonymously. The term “consider” means “[l]ook at attentively; survey; scrutinize. . . . Give mental attention to; think over, mediate or reflect on; pay heed to, take note of; weigh the merits of. . . . [t]ake into account; show regard for; make allowance for.”⁴⁰ On the other hand, the term “rely” means “[d]epend on or upon with full trust or confidence; be dependent on . . . Put trust or confidence in.”⁴¹

71. The Commission considered the duty absorption findings pursuant to the U.S. statutory requirement, but explicitly stated in footnote 268 of its opinion that it did not rely on (*e.g.*, did not depend on as a supporting fact) Commerce’s duty absorption findings in making an affirmative sunset determination.

Q56. Please clarify whether the "margin likely to prevail" including the duty absorption was actually used in USITC's econometric modelling, and if so, was that econometric modelling then part of the basis of USITC's determination of likelihood of recurrence or continuation of injury?

72. The inputs used in the USITC staff’s econometric model – the COMPAS model – include the market shares for the domestic industry, subject imports, and non-subject imports; the “margin of dumping that is likely to prevail” provided by Commerce; the elasticities of demand, substitution, domestic supply, subject import supply, and nonsubject import supply estimated by the USITC staff; market growth projections estimated by the USITC staff; and transportation costs obtained from U.S. Customs data. The USITC staff included the “margin of dumping that is likely to prevail”

⁴⁰ *The New Shorter Oxford English Dictionary* (Clarendon Press: Oxford 1993), p. 485 (Exhibit US-24).

⁴¹ *The New Shorter Oxford English Dictionary* (Clarendon Press: Oxford 1993), p. 2539 (Exhibit US-24).

provided by Commerce for CEMEX (91.9 percent) in all its COMPAS simulation exercises.⁴²

73. The USITC staff's COMPAS model results were not referenced by the Commission, nor did the Commission indicate that they formed any part of the basis of the Commission majority's affirmative determination of likelihood of recurrence or continuation of injury. Conversely, in the Dissenting Views of Commissioner Thelma J. Askey, the latter referred to and indicated her reliance upon the COMPAS model findings in her negative determination regarding subject imports from Mexico.⁴³

Q57. Page II-27 of MEX-9 indicates that the COMPAS model applied by the USITC included the margin likely to prevail, based on duty absorption, as an input. If, as the United States argues, the USITC was not going to rely on the duty absorption finding, forming part of the likely margin of dumping, why was it included in this econometric analysis?

74. As indicated in response to Question 56 above, the "margin of dumping that is likely to prevail" – which, in the sunset review at issue in the instant dispute, included the duty absorption finding for CEMEX – is a standard input into the COMPAS simulation model. Thus, if the USITC staff determines that it has sufficient inputs to run the model,⁴⁴ the "margin of dumping that is likely to prevail" that has been provided by Commerce (whether or not Commerce also has made a finding on duty absorption) will be used to run the COMPAS model. The decision of the USITC staff on whether it can run the COMPAS model is distinct and bears no relationship to whether the Commission decides to rely on the duty absorption finding, consider the margin of dumping likely to prevail, or consider the COMPAS model results; all of which, in the sunset review at issue in this dispute, the Commission majority did not do.

Q58. Was the COMPAS econometric analysis, including the margin likely to prevail, referred to at page II-27 of MEX-9, put before the Commission or was it adjusted, annotated or otherwise identified as a matter for the USITC to take into account? Please explain.

75. The USITC staff presented its COMPAS model results to the Commission in the ITC Report at II-27 and Appendix D. Mexican respondents presented their econometric simulation model findings in the Mexican Respondents' Prehearing Brief, Vol. II, Exhibit 37 and petitioners provided their COMPAS model findings (based on their suggested input values) in Petitioners' Prehearing

⁴² ITC Report at II-27 and Appendix D at D-3-D-11.

⁴³ ITC Report at 66, n. 85 ("COMPAS results support my conclusion"), 68, n. 98 ("COMPAS results support my conclusion"), and 70, n. 111 ("COMPAS model results further support my conclusion").

⁴⁴ The United States notes that the USITC staff does not always run the COMPAS analysis. For example, in the related sunset review involving cement imports from Japan, the USITC staff determined that there were not sufficient imports from Japan, and thus did not run the COMPAS simulation model for Japan. ITC Report at II-26, n. 62.

Brief, Economic Appendix, Section III. The USITC staff provided the Commission a brief summary of the findings presented by Mexican respondents and petitioners in the ITC Staff Report at II-26 and II-27. The Commission majority, however, did not rely on the COMPAS model, or any other econometric model, results in making its affirmative sunset determination.

Q59. Does the United States believe that mere consideration of facts, as opposed to reliance, when determining whether injury is likely to continue or recur for the purpose of a sunset review can fall within the scope of Article 11.3 the *Anti-dumping Agreement*?

76. As discussed in response to Question 55 above, the ordinary meaning of the terms “consider” and “rely” are not synonymous. For example, “consider” means, *inter alia*, “survey. . . take note of . . . or take account of” whereas “rely” means, *inter alia*, “depend on . . . put trust or confidence in.”⁴⁵

77. Article 11.3 of the AD Agreement does not identify any particular factors or prescribe any specific methodology for an investigating authority to use in making a determination of likelihood of injury in a sunset review. However, in the context of original antidumping determinations where specific factors have been identified for consideration, other WTO panels have recognized that consideration of factors, without reliance or making findings on those factors, by an investigating authority, is sufficient and satisfies the requirements of Article 3 of the AD Agreement. For example, the *US – Softwood Lumber ITC Investigation* panel recognized that while the Commission “considered” the nature of the subsidies, it “did not rely on its consideration of the nature of the subsidies as an element of its affirmative determination of threat of material injury.”⁴⁶ That panel concluded that “[i]n such a case, where the nature of the subsidies is *not* an element cited in support of the determination in dispute, we cannot conclude that the failure to make an explicit finding on this factor demonstrates a violation of the Agreement.”⁴⁷

78. Similarly, in a case pursuant to Article 11.3 of the AD Agreement, which does not even identify facts or factors to be considered, the investigating authority’s consideration of facts on the record without reliance on those facts as an element cited in support of its determination is consistent with the Agreement.

VII. METHODOLOGIES

⁴⁵ *The New Shorter Oxford English Dictionary* (Clarendon Press: Oxford 1993), pp. 485 and 2539 (Exhibit US-24).

⁴⁶ *US – Softwood Lumber ITC Investigation (Panel)*, para. 7.75.

⁴⁷ *US – Softwood Lumber ITC Investigation (Panel)*, para. 7.75. On a related issue, the *US – Softwood Lumber* panel explained, “we do not understand the obligation to ‘consider’ a factor to require the investigating authorities to make an explicit finding regarding the evidence concerning the factor.” *Id.* at para. 7.74; *see also Thailand – H-Beams (Panel)*, para. 7.161 (“We therefore do not read the textual term ‘consider’ in Article 3.2 to require an explicit ‘finding’ or ‘determination’ by the investigating authorities. . . .”).

"Arm's Length Test"

To the United States:

Q62. Does the United States contest Mexico's assertion that USDOC applied the identical "arm's length test" in the 5th to 11th administrative reviews that it did in the proceedings at issue in the *US – Hot Rolled Steel* case? If so, what is the basis for the United States' contestation of Mexico's claim?

79. No. The United States does not contest this assertion.

Q63. Does the United States concede that the "arm's length test", to the extent that it was applied in the 5th to 11th administrative reviews and was identical to the test at issue in the *US – Hot Rolled Steel* case, is inconsistent with Article 2.1? If not, how does the United States consider the application of the test in the 5th to 11th administrative reviews can be distinguished from that applied in the *US - Hot Rolled Steel* case?

80. The "arm's length test" applied in the fifth through eleventh assessment reviews is the same test that was at issue in *US - Hot-Rolled Steel*. Commerce changed its arm's length test in response to the DSB's rulings in that case.

"Zeroing"

To the United States:

Q71. Please identify any decisions of United States' judicial organs (other than *Timken*) on the question of whether 19 USC 1677(35) and/or 19 CFR 351.414 direct the USDOC to undertake so-called "zeroing"?

81. No court decisions hold that 19 U.S.C. 1677(35) and/or 19 CFR 351.414 "direct the USDOC to undertake so-called zeroing."

82. The *Timken* decision was issued by the Court of Appeals for the Federal Circuit (CAFC). No judicial organ, other than the U.S. Supreme Court, can overturn the CAFC. Respondents appealed the *Timken* decision, but the Supreme Court declined to hear the case. Therefore, as a matter of U.S. law, the statute does not mandate zeroing.

83. Since the decision of the CAFC in *Timken*, the Court of International Trade (the lower court to which appeals of Commerce decisions may first be made) has, on two occasions, relied on that decision in declining to revisit the issue.⁴⁸ Additionally, in January 2005, in *Corus Staal BV v.*

⁴⁸ *SNR Roulements v. United States*, 341 F. Supp. 2d 1334, 2004 Ct. Intl. Trade LEXIS 99, Ct. Int'l Trade No. 2004-100, SLIP OP. 2004-100 (2004) (Exhibit US-121) and *NSK Ltd. v. United States*, 2005 Ct. Intl. Trade LEXIS

United States, the CAFC reaffirmed its holding in *Timken*.⁴⁹ Therefore, other judicial decisions merely confirm that the statute does not mandate zeroing.

Q72. Please explain, in detail, the methodology applied by the USDOC to compare normal value and export price in assessing the extent of dumping in administrative reviews in general, and specifically, with respect to each of the 5th to 11th administrative reviews that are the subject of Mexico's claim.

84. In the 5th through 11th administrative reviews, Commerce calculated the amount of antidumping duty owed by comparing individual U.S. export prices or constructed export prices to weighted average monthly home market normal values. Commerce made as contemporaneous a comparison as possible between individual export sales and monthly weighted average normal values.⁵⁰ Because there were no home market sales of the identical cement Type in the ordinary course of trade, Commerce identified the most similar match and made adjustments as appropriate consistent with Article 2.4.

85. Commerce calculated antidumping duty liability on an importer-specific basis. Individual importers were only liable for antidumping duties on their entries that were at dumped prices. An importer for whom all transactions took place at non-dumped prices was not liable for payment of any antidumping duties. The importer was not liable for antidumping duties owed by other importers, nor did positive margins for dumped transactions by other importers in any way inflate (through weight-averaging or otherwise) the amount of duty owed by an importer that was only involved in non-dumped transactions.

86. Commerce also calculated a new cash deposit rate in the assessment proceedings. This is the margin that was published in the *Federal Register*. The new cash deposit rate reflected the weighted average amount of dumping which occurred during the reviewed period and was used so that the United States continued to collect, as cash deposits, an amount that reflected the average amount of dumping by the exporter/producer and that closely approximated the amount of antidumping duty that would be owed if the exporter/producer continued its average pricing practices. To calculate the new deposit rate, the aggregate amount of dumping by the exporter/producer was divided by the aggregate of all U.S. export prices for that exporter/producer.

8, Ct. Int'l Trade No. 2005-1, SLIP OP. 2005-1 (Jan. 3, 2005) (Exhibit US-122).

⁴⁹ *Corus Staal BV v. United States*, No. 04-1107, 2005 U.S. App. LEXIS 1077 (Federal Circuit, Jan. 21, 2005) (Exhibit US-123). Notably, Commerce did not even argue that the statute prohibited offsetting.

⁵⁰ While not applicable in these reviews, if no sales of the identical model were made in Mexico in the same month as the U.S. sale, Commerce would attempt to find sales of the identical model one month prior, then two months prior, and then three months prior to the month of the U.S. sale. If that were unsuccessful, Commerce would then look one month after and then two months after the month of the U.S. sale for sales of the identical model. If Commerce found no sales of the identical model in this window, Commerce would conduct a search in the same manner for sales of the most similar model. If comparable sales in the foreign market did not exist in this window, normal value would be based on constructed value.

To both Parties:

Q73. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body cautioned that a panel should not, "as a jurisdictional matter", examine whether a challenged "measure" is mandatory.⁵¹ The Appellate Body noted that the mandatory/discretionary distinction was "relevant, if at all, only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations."⁵² Given these observations, what do you consider to be the relevance of the discretionary/mandatory distinction to the "zeroing" claims at issue in this dispute?

87. The mandatory/discretionary test – in the context of assessing whether a measure is, as such, inconsistent with WTO obligations – is well-established and has been consistently applied in GATT and WTO dispute settlement proceedings.⁵³ For example, in *United States - Section 129(c)(1) of the Uruguay Round Agreements Act*, the panel found that Canada's principal claims would be sustained only if it succeeded in establishing that the statutory provision at issue "mandates the United States to take action which is inconsistent with the WTO provisions which form the basis for those claims or mandates the United States not to take action which is required by those WTO provisions."⁵⁴ The panel said that it would therefore first analyze whether the statutory provision mandated the United States to take or not to take the identified actions.⁵⁵ Ultimately, the panel concluded that Canada had failed to establish that the statutory provision identified by Canada required the United States to take any of the actions complained of.⁵⁶ As a result, the panel concluded that Canada had failed to establish that the measure was inconsistent with the Agreement.⁵⁷

88. The test reflects the fact that, as the Appellate Body has noted, panels may not presume bad faith on the part of Members.⁵⁸ If a Member has discretion to act in a WTO-consistent manner, it thus may not be presumed that the Member will exercise that discretion in bad faith.⁵⁹ Moreover, the test accords with the presumption in many Members' legal systems against conflicts in the interpretation of laws and treaty provisions.⁶⁰ This approach was recently followed in *Korea –*

⁵¹ The Appellate Body made the following remark: "We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the "mandatory/discretionary distinction" may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion." para. 93.

⁵² *Id.*, para. 89.

⁵³ *US - Softwood Lumber Dumping (AB)*, para. 111 (quoting *Japan - Alcohol*, p. 14).

⁵⁴ *U.S.-Section 129*, paras. 6.22-25.

⁵⁵ *Id.*

⁵⁶ *Id.*, paras. 6.122-123.

⁵⁷ *Id.*, paras. 6.122-123.

⁵⁸ *Brazil - Aircraft (AB)*, para. 114.

⁵⁹ It should be noted that this does not preclude the possibility that a particular obligation, by its terms, prohibits such discretion.

⁶⁰ In general,

[A]lthough national courts must apply national laws even if they conflict with international law, there is a presumption against the existence of such a conflict. As international law is based upon

Vessels, where the panel recognized that the mandatory/discretionary distinction remains valid for assessing whether a measure is WTO-inconsistent. As the panel noted, “[h]aving explicitly applied the traditional mandatory / discretionary distinction in US – Section 211 Appropriations Act, we fail to see how the Appellate Body could be understood to have excluded the continued application of that distinction in a subsequent case in which it was not even conducting a ‘comprehensive examination’ of the distinction.”⁶¹

89. Therefore, the mandatory/discretionary test remains relevant to the question of whether a measure can be found WTO-inconsistent. Here, it is well-established, as a matter of U.S. municipal law, that the statute and regulations do not require Commerce to apply the methodology about which Mexico complains. Therefore the mandatory/discretionary test is directly relevant in this dispute, as Mexico is claiming that the measures in question mandate a breach of a WTO agreement. And because Mexico has failed to establish that the measures in question mandate a breach, the Panel should reject Mexico’s “as such” claims, regardless of the Panel’s findings with respect to Mexico’s “as applied” claims.

Q74. How do you interpret the first sentence of Article 2.4 and do you consider that it has application beyond the investigation phase, in particular, to the assessment of anti-dumping duties under Article 9.3.1? If so, please describe the extent of such application?

90. First, as the United States noted in response to questions 17 and 18 of the Panel’s questions regarding preliminary rulings, Mexico has failed to include any claim pursuant to Article 2.4 of the AD Agreement within the terms of reference of the Panel.

91. Second, the United States does not dispute that Article 2.4 applies beyond the investigation phase and applies to assessment proceedings conducted pursuant to Article 9.3.1. However, the United States does not agree with Mexico’s unsubstantiated assertion that Article 2.4 creates any obligations with respect to “zeroing.”

92. Article 2.4 addresses how authorities are to select transactions for comparison and make appropriate adjustments for differences that affect price comparability. With respect to this obligation to make appropriate comparisons and to make adjustments for differences that affect price comparability, Article 2.4 applies to the assessment of antidumping duties under Article 9.3.1. Article 2.4 establishes the obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. Article 2.4 recognizes that the normal value and export transactions to be compared may occur, *inter alia*,

the common consent of the different states, it is improbable that a state would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible always be so interpreted as to avoid such conflict.

Oppenheim’s International Law, 9th ed., at 81-82 (footnote omitted).

⁶¹ *Korea - Ships (Panel)*, para. 7.63.

(a) with respect to models with differing physical characteristics, (b) at distinct levels of trade, (c) pursuant to different terms and conditions, and (d) in varying quantities.

93. To the extent that Mexico suggests that the requirement to make “symmetrical” comparisons between normal values and export prices (*e.g.*, average-to-average comparisons) in assessment proceedings can be found in the fair comparison language of Article 2.4, such an argument cannot be reconciled with the text. The first sentence of Article 2.4.2 provides that those “symmetrical” comparisons are “subject to” the provisions governing “fair comparison.” Plainly, the drafters never intended “fair comparison” to cover symmetrical comparisons, because such coverage would have rendered this language superfluous.

Comparison Between Weighted Average Normal Value And Individual Export Price

To the United States:

Q77. The United States draws on the text of Article 9.4(ii) to argue that the requirements in Article 2.4.2 for the use of a weighted average normal value to individual export price comparison methodology, do not apply to Article 9 assessments. Does the United States accept that the text of Article 9.4(ii) limits its operation to cases where duty assessment is conducted on the basis of a “prospective normal value”? If so, how can Article 9.4(ii) be used to indicate anything other than the non-applicability of Article 2.4.2 to duty assessment on the basis of prospective normal value?

94. No, the United States does not accept that the text of Article 9.4(ii) limits its operation to cases where duty assessment is conducted on the basis of a “prospective normal value.” The text of Article 9.4(ii) expressly provides for the use of a methodology whereby weighted average export prices are compared to individual export prices. Nothing in the language of Article 9.4(ii) limits the use of such comparisons to prospective normal value antidumping duty assessment systems. Consequently, there is no basis under the Agreement to import a limitation on the use of weighted average normal value-to-individual export price comparisons to prospective normal value systems.

95. As the United States explained in detail in its first written submission, Article 2.4.2 is limited by its express terms to the investigation phase of an antidumping proceeding. Nothing in the text of Article 9, including Article 9.4(ii), suggests that the investigation-specific language of Article 2.4.2 applies in assessment reviews. The inclusion in Article 9.4(ii) of a reference to the use of asymmetrical comparisons cannot be interpreted as representing an exception to a non-existent general obligation to apply Article 2.4.2 outside of the investigation phase.

96. An analogous issue of textual interpretation arose in *Argentina OCTG*. There, the panel and the Appellate Body evaluated whether, in Article 3.3 of the AD Agreement, the introductory phrase “[w]here imports of a product from more than one country are simultaneously subject to anti-dumping investigations” meant that cumulation itself was permissible only in investigations, rather than in sunset reviews. The Appellate Body rejected that argument, stating

This provision plainly speaks to the situation “[w]here imports of a product from more than one country are simultaneously subject to *anti-dumping investigations*.” (emphasis added) It makes no mention of . . . analyses undertaken in any proceeding other than original investigations; nor do we find a cross-reference to Article 11, the provision governing reviews of anti-dumping duties, which itself makes no reference to cumulation. We therefore find Articles 3.3 and 11.3, on their own, not to be instructive on the question of the permissibility of cumulation in sunset reviews. The silence of the text on this issue, however, cannot be understood to imply that cumulation is prohibited in sunset reviews.⁶²

97. In short, just because Article 3.3 provides a methodology for analyzing cumulation in investigations does not mean that cumulation is prohibited in sunset reviews; by analogy, just because Article 9.4(ii) provides a methodology for using a weighted average to export price analysis for calculations on the basis of prospective value does not mean that it prohibits using weighted average to export price analyses in other circumstances.

98. Moreover, the U.S. retrospective assessment system is equivalent in all material respects to a prospective normal value system. The only material difference between a prospective and retrospective normal value assessment system is the time at which final antidumping duty liability is assessed. The calculation methodology itself – a comparison of a weighted average normal value with individual export prices – is fundamentally the same. Consequently, there is no rational basis to find that the use of certain calculation methodologies at the assessment phase (such as the use of weighted average normal value to individual export price comparisons) is limited to prospective normal values system. Nothing in the text of the AD Agreement indicates that Members agreed to undertake dramatically different obligations with respect to offsets depending upon their particular system of duty assessment.

Amalgamation Of CDC/GCCC With CEMEX

To both Parties

Q78. Do you consider that Article 6.10 contains some sense of either legal entities or kinds of affiliations which can or cannot be taken into account for the purposes of Article 6.10?

(a) Is there any way of understanding 6.10 to have a theory of affiliation as part of its implicit content?

(b) If not, in assessing whether a Member has complied with Article 6.10, is it ultimately a question of whether the facts sufficiently support the single economic entity theory that is being applied in the particular circumstance? If so, is the question before the Panel in the present instance to judge the facts

⁶² US – Argentina Sunset (AB), para. 294.

against the threshold applied to establish the existence of a single economic entity?

99. This response is to both Questions 78(a) and (b). Article 6.10 states that “authorities shall, as a rule, determine an individual margin of dumping for each known *exporter or producer* concerned in the investigation.” (Emphasis added) Although the terms “exporter” and “producer” are not defined in the AD Agreement, they plainly reflect commercial functions (*i.e.* exporting and producing). Thus, the facts of a particular case may demonstrate that the operations of one or more separate legal entities are so closely intertwined that – as a matter of commercial fact – they constitute a single “exporter” or “producer.” Affiliation is a relevant and important consideration in determining whether this is the case.⁶³ Moreover, this determination is a question of fact that can only be made on a case-by-case basis. When reviewing determinations of fact made by Commerce, the Panel must ascertain whether establishment of the facts was “proper” and the evaluation thereof “unbiased and objective”.

Imposition of Duties In Regional Industry Cases

To both Parties:

Q86. How do you understand condition (b) of Article 4.2? What is the rationale for condition (b) of Article 4.2 in the light of the rule set out in the second sentence of Article 4.2?

100. As discussed in paragraphs 428-448 of the U.S. first written submission, when “the domestic industry has been interpreted as referring to the producers in a certain area” within the meaning of Article 4.1(ii), Article 4.2 requires that antidumping duties be assessed only on the products in question consigned for final consumption to the area in question *except* in certain circumstances. Specifically, where a Member’s constitutional law does not permit the levying of duties on a regional basis, the Member may levy duties “without limitation” if two conditions are met: (a) the exporters “shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8;” and (b) duties cannot be levied “only on products of specific producers which supply the area in question.” Clause (b) of Article 4.2 sets out this second condition and effectively requires that a Member levy duties on a “limited” basis (*i.e.* by exempting the products of those producers that do not supply the region in question) if it is able to do so.

101. In the instant dispute, all Mexican exporters of the subject merchandise since the imposition of the antidumping order supplied the Southern Tier region. Because there were no Mexican

⁶³ In *US - Hot-Rolled Steel*, the Appellate Body recognized that the fact of affiliation may affect the commercial relationship between legally distinct entities. Specifically, in addressing whether transactions between certain parties were made in the “ordinary course of trade,” the Appellate Body recognized that “where the parties to a transaction have common ownership, although they are legally distinct persons, usual commercial principles might not be respected between them.” *US - Hot-Rolled Steel (AB)*, para. 141.

exporters that supplied only areas of the United States outside the Southern Tier region, the United States could not limit its duty assessment by means of producer-specific exemptions. Instead, the United States applied antidumping duties to all imports of cement from Mexico consistent with Article 4.2.

Q87. Please comment on the extent to which the application of 19 USC 1673e(d) and 19 CFR 351.212(f) can result in the imposition of duties, in regional industry cases, only on the products of producers that supply the particular region under investigation.

102. By their express terms, both the U.S. statute and regulations permit the imposition of duties, in regional industry cases, only on the products of producers that supply the particular region at issue. The statute, 19 U.S.C. 1673e(d), requires that Commerce “to the maximum extent possible” direct that duties be assessed only on the subject merchandise of the specific exporters or producers that export the subject merchandise for sale in the region concerned. The regulations elaborate on this requirement and allow the exemption from antidumping duty assessment all merchandise of producers/exporters that export for sale entirely outside the relevant region. In the instant case, however, a producer/exporter-specific exemption was not possible because there were no Mexican exporters of the subject merchandise that supplied only areas of the United States outside the Southern Tier region. For this reason, the United States applied antidumping duties to all imports of cement from Mexico, consistent with Article 4.2 of the AD Agreement.

Bagged and Bulk Cement

To the United States:

Q96. Does the United States claim that gray Portland cement sold in Mexico is the "like" product to gray Portland cement sold to the United States because: (i) the former is "identical, i.e., alike in all respects" to the latter; or (ii) the former is "not alike" the latter "in all respects", but "has characteristics closely resembling" those of the latter? Please substantiate this claim with reference to the facts of the 5th to 9th administrative reviews.

103. In the fifth to ninth assessment reviews, Commerce compared CEMEX’s export product under consideration with a product sold by CEMEX in Mexico that, although not alike in all respects, had characteristics closely resembling those of the product under consideration based on their respective ASTM specifications.⁶⁴ In each of these reviews, Commerce determined that sales of the product sold in Mexico that was physically identical to the product under consideration should be excluded from the calculation of normal value. With one exception (sales of Type V cement invoiced as Type I cement in the sixth review), these Mexican sales were excluded because they

⁶⁴ In each of the reviews at issue, the parties submitted the ASTM standards for the different types of cement relevant to each review. See, e.g., *Sixth Review CEMEX Questionnaire Response* (February 14, 1997) at 36 and Exhibit D-11 (Exhibit US-89); *Eighth Review CDC Questionnaire Response* (November 12, 1998) at Exhibit A32 (Exhibit US-88). The ASTM standards identify the chemical composition of each type of cement and their uses.

were outside the ordinary course of trade. In all five reviews, Commerce used, instead, CEMEX's Mexican sales of Type I cement, which was similar in ASTM specifications to the product sold in the United States, to normal value.

104. A chart showing the products compared for purposes of calculating dumping margins in each review is provided below:

Review	Export Product Under Consideration	Comparison Product Sold in Mexico	Observation
Fifth	Type II	Type I	CEMEX's Mexican sales of Type II excluded because outside the ordinary course of trade. ⁶⁵
Sixth	Types II and V	Type I	CEMEX's Mexican sales of Type V invoiced as Types V and II excluded because outside the ordinary course of trade. Mexican sales of Type V invoiced as Type I excluded as facts available because CEMEX misreported data regarding the sales. ⁶⁶
Seventh	Types II and V	Type I	Mexican sales of Type V invoiced as Types V, II, or I excluded because outside the ordinary course of trade. ⁶⁷
Eighth	Types II and V	Type I	Mexican sales of Type V LA invoiced as Types V LA, II LA, or I and Type V cement invoiced as Type I excluded because outside ordinary course of trade. ⁶⁸
Ninth	Types II and V	Type I	Mexican sales of Type V LA invoiced as Types V LA, II LA, or I and Type V cement invoiced as Type I excluded because outside ordinary course of trade. ⁶⁹

Q97. The record appears to show that the products under investigation in each of the 5th to 9th administrative reviews were described to "include gray portland cement and clinker". Please explain what is intended by the use of the word "include" in the definition of the product under investigation.

105. In every assessment review, Commerce describes the scope of the products covered by the antidumping order and, thus, by the review itself. Commerce also provides the Harmonized Tariff Schedule (HTS) item numbers for the products covered by the order. The scope of the antidumping

⁶⁵ *Fifth Review Preliminary Results*, 61 FR at 51679-80 (Exhibit MEX-26); *Fifth Review Final Results*, 62 FR at 17153-54 (Exhibit MEX-31).

⁶⁶ *Sixth Review Final Results*, 63 FR at 12767, 12770-72 (Exhibit MEX-51).

⁶⁷ *Seventh Review Final Results*, 64 FR at 13153-54, 13156-58 (Exhibit MEX-70).

⁶⁸ *Eighth Review Preliminary Results*, 64 FR at 48780, 48781 (Exhibit MEX-78); *Eighth Review Final Decision Memorandum* at Comments 2 and 3 (Exhibit MEX-85).

⁶⁹ *Ninth Review Preliminary Results*, 65 FR at 54222 (Exhibit MEX-93); *Ninth Review Final Decision Memorandum* at Comment 2 (Exhibit MEX-97).

duty order in the instant dispute includes both gray portland cement and clinker (an intermediate product created in the manufacture of cement). Imports of products not included within the scope of the order, such as white cement, are not subject to antidumping duties.

To both Parties:

Q98. If the product being compared with the product under consideration is not identical to the product under consideration, what factors should be taken into account to determine whether that product is “like” the product under consideration within the meaning of Article 2.6 of the *Anti-dumping Agreement*?

106. Article 2.6 defines “like product” to mean “a product which is identical, *i.e.* alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.” Under Article 2.6, an investigating authority must first identify the “product” under consideration. Then it must turn to consider whether there is another “product” in the comparison market that is identical to or has “characteristics closely resembling those of the product under consideration.” The term “characteristics” is not defined in the Agreement. The ordinary meaning of the word is “a distinctive mark, a distinguishing trait, peculiarity, or quality.”⁷⁰ Whether a product has “characteristics closely resembling those of product under consideration” is a fact- and case-specific determination.

107. U.S. law concerning the determination of whether a foreign product is “like” the product under consideration is fairly general in this regard.⁷¹ Under U.S. law, factors to consider in conducting this analysis include whether the product is produced in the same country and by the same person as the product under consideration, and whether the product is like the product under consideration “in component material or materials and in the purposes for which used”. However, in each proceeding, Commerce works closely with the parties to develop criteria for matching the foreign like product with the product under consideration to ensure that appropriate comparisons are made. In the case of cement, the criteria in the ASTM categories were determined to be the most appropriate.⁷²

"Differences In Merchandise" Adjustment

To the United States:

⁷⁰ The New Shorter Oxford English Dictionary (definition of “characteristic”) (Exhibit US-67).

⁷¹ 19 U.S.C. 1677(16) (Exhibit MEX-153).

⁷² *Commerce Preliminary Determination*, 55 FR at 13818 (“because of what appears to be the relative uniformity of the ASTM Type designations, we have considered all cement classified within the same ASTM Type to be identical merchandise”) (Exhibit MEX-14).

Q107. What analysis did the United States undertake of the extent to which the cost differences, identified to result from the alleged physical differences in the products, affected price comparability? Where is any such analysis shown on the record.

108. Consistent with Article 2.4, Commerce made adjustments to price to account for differences in the physical characteristics of products based on differences in the costs of production of the products. Commerce did not analyze the extent to which cost differences affect price comparability, nor does Article 2.4 require such an analysis. Rather, Commerce reasonably considered that a company will charge more for a product that costs more to produce, at least to the extent of the differences in variable cost.

Q108. Although there may be a difference in costs between an exported product and a product sold on the domestic market, it may be that if those two products were sold into the same market that there would be either some distinguishable characteristics which would have value for a purchaser or there may be no distinguishable characteristics. In this particular case, were the distinguishable characteristics between the exported cement and the cement sold on the domestic market that would, if those two products were placed in the same market, result in a discernible difference which would have an impact on a purchaser's decision to pay a different price or a seller's decision to charge a different price?

109. It is not clear what is meant by “distinguishable characteristics” in this question. With respect to differences in “physical characteristics” between the cement sold in the United States and the cement sold in Mexico that affect price comparability, as explained in paragraphs 450-467 of the U.S. first written submission, and consistent with Article 2.4, Commerce made adjustments to price to account for physical differences between the different Types of cement sold in the two markets. As explained in response to Question 107, Commerce does not analyze the extent to which cost differences affect price comparability, nor does Article 2.4 require such an analysis. Rather, Commerce reasonably considers that a company will charge more for a product that costs more to produce, at least to the extent of the differences in variable cost.

110. As explained in paragraph 398 of the U.S. first written submission, and consistent with Article 2.4, Commerce also accounted for differences in the conditions of sale that affect price comparability – *i.e.*, the fact that some sales were in bulk and some sales were in bag – by making adjustments to price for the cost of packaging.

111. As explained in paragraphs 378-391 of the U.S. first written submission, there is no merit to Mexico's argument that packaging is a “*characteristic*” of cement within the meaning of the “like” product analysis in Article 2.6. The ordinary definition of the word “characteristic” is “a distinctive mark, a distinguishing trait, peculiarity, or quality.”⁷³ This indicates that the presence or absence of packaging is ordinarily not a “characteristic” of a product, because packaging normally is not

⁷³ The New Shorter Oxford English Dictionary (definition of “characteristic”) (Exhibit US-67).

intrinsic to the product itself and thus is not a “distinctive” or “distinguishing” feature or “quality” of the product. Because Commerce found on the basis of the facts of the reviews at issue that the “presentation or packaging of the merchandise ... does not affect the constitution or component material of the product in question,”⁷⁴ and “bags are not ‘an integral part of the product’ but, rather, incidental to shipment,”⁷⁵ Commerce did not consider packaging a “characteristic” of cement for determining the foreign like product for comparison purposes.

Q109. At paragraph 452 of the United States' first written submission, the statement is made that USDOC "compared export sales of ASTM Type V cement with home market sales of ASTM Type I cement" in each of the 5th to 8th administrative reviews. However, at paragraph 459 of its first written submission, the United States argues that the "difmer adjustment in the fifth review ... was made for comparisons of Type I cement sales in the home-market and Type II cement sales in the U.S. market." Please reconcile these two statements in the light of the facts of the 5th administrative review.

112. As accurately stated at paragraph 459, the record of the fifth review indicates that the Mexican respondents made no sales in the United States of Type V cement. The difmer adjustment in that review was made for comparisons between Type II cement sold in the United States and Type I cement sold in Mexico. The United States notes, however, that in the subsequent (sixth) review, Commerce learned that Mexican respondents had sold Type V cement as Type II cement in the United States during the fifth review period. Thus, the statement at paragraph 452 is technically correct, but does not correctly represent the facts that were on the record of the fifth review.

VIII. RETROACTIVITY

To the United States:

Q116. At paragraph 539 of its first written submission, the United States argues that Article 9.1 provides Members with a discretion to "collect either the full amount of the duty or some lesser amount". Please explain why in the United States' view, Article 9.1 applies to the "collection" of anti-dumping duties, even though it explicitly refers to the "imposition" of anti-dumping duties not their "collection".

113. The United States recognizes that Article 9.1 of the AD Agreement refers to the “imposition” of antidumping duties, rather than their “collection.” However, while the two terms are distinct, they nevertheless are closely linked.

114. As the AD Agreement does not define the terms “impose” or “collect,” it is appropriate to consider their ordinary meanings. The ordinary meaning of “impose” is “lay or inflict (a tax, duty, charge, obligation, etc.) (on or upon), esp. forcibly; compel compliance with; force (onself) on or

⁷⁴ *Ninth Review Final Decision Memorandum*, at Comment 9 (Exhibit Mex-97).

⁷⁵ *See Seventh Review First Redetermination*, at 27 (quoting *Fresh Salmon from Chile*, 63 FR 31411, 31415 (1998)) (Exhibit US-65).

upon the attention etc. of.”⁷⁶ The term “impose” is used in Article 9.1 to refer to the imposition of the border measure itself.

115. The ordinary meaning of the term “collect” is to “[g]et or receive (money, contributions, etc.) from a number of people Receive donations or (colloq.) a payment.” Article 9.2 of the AD Agreement states that once an antidumping duty is “imposed” with respect to a product, the duty is to be “collected” on imports of that product “in the appropriate amounts” and on a non-discriminatory basis. Thus, antidumping duties can only be “collected” on imports once the antidumping measure has been “imposed.”

116. Consistent with this relationship between the imposition and the collection of antidumping duties, the United States finds support in Article 9.1 of the AD Agreement for the proposition that nothing in the AD Agreement requires Members to “impose,” “collect,” “levy,” or “assess” antidumping duties at less than the full amount of dumping. Specifically, because Article 9.1 of the AD Agreement leaves it to the discretion of Members whether to “impose” an antidumping duty in the amount of the full margin of dumping or some lesser amount, it follows that Members may therefore “collect” antidumping duties in the amount of the full margin of dumping or some lesser amount. Moreover, there is no basis in the AD Agreement for inferring, as Mexico does, that Members operating a retrospective antidumping duty assessment system are proscribed from “collecting,” “levying,” or “assessing” antidumping duties in the amount of the full margin of dumping on any entry.

To both Parties:

Q117. Do you consider that the *Anti-dumping Agreement* differentiates between the "imposition" of anti-dumping duties and the "collection" of anti-dumping duties? If so, please explain by referring to the relevant sections of the *Anti-dumping Agreement*.

117. Yes. As discussed above in response to Question 116, the United States considers that there is a distinction between the terms “imposition” and “collection” as they are used in Article 9 of the AD Agreement. “Imposition” of an antidumping duty occurs at the completion of an investigation, once affirmative findings of both injury and dumping have been made and an antidumping duty “order” (a “definitive duty” or “antidumping measure”) is put in place as a border measure. The initial “collection” of antidumping duties then occurs on an entry-by-entry basis – on each import of the subject product, a cash deposit of estimated antidumping duties is collected by customs officials. As discussed in response to Question 118, under the United States’ retrospective system, the final legal assessment or collection occurs at a later time.

Q118. To what extent do you consider that footnote 12 of the *Anti-dumping Agreement* informs the meaning of Members' obligations under Article 9?

⁷⁶ The New Shorter Oxford English Dictionary (1993).

118. Footnote 12 of the AD Agreement defines the term “levy” for purposes of the AD Agreement as the “definitive or final legal assessment or collection of a duty or tax.” The United States considers footnote 12 to be relevant in understanding the sequence of steps undertaken by some Members’ consistent with Article 9 of the AD Agreement.

Step 1 – the “imposition” of an antidumping duty measure;

Step 2 – the “collection” of estimated antidumping duties at the time of entry;

Step 3 – the “determination of the final liability for payment of anti-dumping duties” pursuant to an Article 9.3.1 assessment proceeding; and

Step 4 – the “levying” or “final legal assessment or collection” of the antidumping duty determined in Step 3.

IX. PAYMENT OF INTEREST

To the United States:

Q120. Under 19 USC 1677g, an economic operator may be charged/repaid interest for underpayment/overpayment of anti-dumping duties on imported products after importation, on the basis of a liability unknown at the time of importation. Does any other United States law contemplate the possibility of charging/repaying an importer interest on duties/charges underpaid/overpaid on the basis of a liability unknown at the time of importation? If so, please explain the circumstances when this will be possible and please provide a reference to the relevant legal instrument.

119. U.S. law provides for the collection/payment of interest on under- or over-payment of duties with respect to ordinary customs duties. *See* 19 U.S.C. 1505. The United States notes that Mexico’s challenge is limited to Section 778 of the Tariff Act of 1930.⁷⁷

To both Parties:

Q121. Does the *Anti-dumping Agreement* speak to the question of whether Members are permitted to charge/repay "interest" on anti-dumping duty liabilities? Please explain your answer with reference to the text of the *Anti-dumping Agreement*. Are there any WTO agreements or documents that may shed any light on this question, or the question of whether Members are permitted to charge/repay "interest" on customs duty liabilities in general?

120. The United States is not aware of any provisions of the AD Agreement that prohibit Members from collecting or paying interest in an amount that reflects the time value of the money that was under- or over-collected at the time of importation.

⁷⁷ 19 U.S.C. 1677g (Exhibit MEX-184).

121. With respect to the question regarding other WTO or international agreements, the United States notes that Mexico is challenging the U.S. interest provision as being inconsistent with the AD Agreement. Mexico has not asserted that the interest provision is inconsistent with any other WTO or international agreements. The provisions of any agreement other than the AD Agreement are, therefore, not within the terms of reference of the Panel or relevant to Mexico's challenge.

Q122. Please describe what Mexico understands to be the definition of a dumping duty for the purpose of the *Anti-dumping Agreement* and identify the basis for such a view in the language of the *Anti-dumping Agreement*.

122. Although this question is addressed to both parties, the United States assumes that it applies to Mexico, given that it requests a description of Mexico's understanding regarding the definition of a dumping duty for the purpose of the AD Agreement. The United States has not, therefore, responded to this question.

XI. REMEDY

To the United States:

Q125. In its first written submission, the United States asserts that the "specific remedy" sought by Mexico is not consistent with the requirement in Article 19.1 of the *DSU*. The Panel notes that this Article distinguishes between a panel's "recommendation" and "suggestions". How does the United States reconcile its "specific remedy" argument with the existence of an explicit opportunity in the *DSU* for a panel to *suggest* "ways in which the Member concerned could implement the recommendations".

123. Article 19.1 provides that, in the event a panel or the Appellate Body finds that a Member's measure is inconsistent with a covered agreement, "it *shall* recommend that the Member concerned bring the measure into conformity with that agreement." (Emphasis added). This recognizes that a Member generally has many options available to it to bring a measure into compliance. It also facilitates the goal of encouraging parties to reach mutually satisfactory solutions.

124. Ignoring the plain text of Article 19.1, Mexico urges the Panel to make specific recommendations, including requiring the United States to revoke the antidumping order on cement and refund all antidumping duties.⁷⁸ Specific recommendations of the type requested by Mexico, *i.e.* that particular actions be taken, are inconsistent with DSU Article 19.1.

⁷⁸ See *e.g.*, Mexico First Submission, para. 1224 ("... Mexico urges the Panel to recommend that the United States refund the anti-dumping duties that have been assessed. . . ."); para. 1225 ("... the Panel should recommend that the U.S. Government refund all of the antidumping duty deposits for entries that remain unliquidated. . . ."); para. 1226 ("... the Panel should recommend to the United States that it should not assess any antidumping duties on any unliquidated entry. . . ."); para. 1226 ("... the Panel should under any circumstance recommend that the U.S. Government not collect any interest on any unliquidated entry."); and para. 1224 ("... the Panel should recommend that with respect to all unliquidated entries, the United States apply antidumping duties only to the extent that the duties are based upon WTO-inconsistent methodologies.").

125. Article 19.1 of the DSU provides that “[i]n addition to its recommendations, the panel or Appellate Body *may* suggest ways in which the Member concerned *could* implement the recommendations.” (Emphasis added). In *US – Hot-Rolled Steel*, the panel explained the differences between a recommendation and a suggestion, stating that “suggestions on implementation . . . are not part of the recommendation, and are not binding on the affected Member.”⁷⁹ Even if Mexico’s requests are construed as requests for suggestions instead of recommendations, they would be inconsistent with Article 19.1 because they reach far beyond possible “suggestions” for implementing a recommendation and, instead, seek action nowhere called for under the WTO agreements.

XIII. QUESTIONS TO BOTH PARTIES (THAT ARE ALSO BEING POSED TO THIRD PARTIES).

Q127. To what extent, if at all, is the textual reference in Article 11.3 to "likelihood of continuation or recurrence of *injury*" (emphasis added) relevant to the concept of "standing"?

126. The United States notes that “standing” is not a term used in the AD Agreement. To the extent this question relates to the obligations in Article 5 of the AD Agreement regarding examination of industry support prior to initiation of an investigation, the United States notes that this obligation does not apply to sunset reviews under Article 11.3. As discussed in paragraphs 324-330 of the U.S. first written submission, nothing in Article 5 in general – or Article 5.4, in particular – requires consideration of industry support beyond the investigation phase of an antidumping proceeding. In addition, there is no cross reference to Article 5.4 in Article 11 or vice versa and, therefore, no obligation to consider industry support in the context of a sunset review.⁶³ The reference in Article 11.3 to “likelihood of continuation or recurrence of *injury*” does not import the obligations of Article 5.4 into the sunset review context.

Q128. The Panel recalls that Article 11.2 of the *Anti-dumping Agreement* provides, in part:

"The authorities shall review the need for the continued imposition of the duty, *where warranted*, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review...." (emphasis added)

Does the phrase "where warranted" apply to both reviews that are self-initiated and those that are initiated upon request? On what basis?

127. The phrase “where warranted” applies both with respect to reviews that are self-initiated and those that are initiated upon request. This is apparent from the placement of that phrase in the first sentence of Article 11.2. If the drafters had intended the phrase “where warranted” to apply only to

⁷⁹ *US - Hot-Rolled Steel (Panel)*, para. 8.6.

self-initiated reviews, they would have placed it after the word “on their own initiative,” so that the sentence would read:

The authorities shall review the need for the continued imposition of the duty on their own initiative, *where warranted*, or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review...."

Q129. Assuming, *arguendo*, that the phrase "where warranted" in Article 11.2 applies to requested reviews:

(a) What are the limiting boundaries of "warranted" within which a Member is "free" to elaborate its own standard?

128. The ordinary meaning of the word “warranted” is “justified.”⁸⁰ The question of whether a review is “warranted” or “justified” must be resolved on a case-by-case basis, in light of the particular facts. Thus, it is not possible to delineate precisely when a review will be “warranted” in all cases. As discussed in response to the Panel’s question 18(d) above, it is reasonable for a Member to interpret “warranted” as relating to the factors underlying the original determination of injury set forth in Article 3 of the AD Agreement (*e.g.*, volume of subject imports), and not to completely extraneous matters.

(b) Is there any threshold requirement in the language of "warranted", for example, concerning the information which indicates that there is something to investigate?

129. As discussed above, for an investigating authority to find a review to be warranted, the threshold requirement is that there be positive information regarding a factor underlying the basis for the original determination that substantiates the need to investigate whether that original determination still is justified.

Q130. Please comment on the following European Communities' statement in its 18 February oral statement (at para. 20): "...an investigating authority cannot, by the device of transposing substantive investigative activity into the pre-initiation phase, avoid the obligations imposed on it by Article 11.2...".

130. The Commission did not “by the device of transposing substantive investigative activity into the pre-initiation phase, avoid the obligations imposed on it by Article 11.2.” As discussed above, in response to Question 18, in deciding whether to initiate a review, an investigating authority must determine whether a requester has submitted “positive information substantiating the need for a review” and whether a review is “warranted” based on the particular facts before the investigating

⁸⁰ *The New Shorter Oxford English Dictionary* (Clarendon Press: Oxford 1993), p. 3627 (Exhibit US-124).

authority. A decision as to whether these threshold requirements have been met does not constitute an impermissible “transposing [of] substantive investigative activity into the pre-initiation phase.”

Q131. The Panel would like to understand how Members view the concept of duty assessment and the extent to which it is contemplated in domestic anti-dumping systems.

(a) Does your domestic law envisage the possibility that exporters/importers subject to duties may apply for refunds under Article 9.3.2 of the *Anti-dumping Agreement*?

131. Article 9.3.2 of the AD Agreement deals with antidumping duty assessment on a prospective basis. As the United States has a retrospective system of antidumping duty assessment, this question does not apply to it.

(b) If so, does your law treat anti-dumping duties when constructing export price for the purpose of assessing whether an exporter/importer is entitled to a refund under Article 9.3.2? In your answer, please refer to the relevant legal provisions of your domestic legislation.

132. Please see response to Question 131(a) above.

133. Q132. How do you consider Article 9.3.3 requires investigating authorities to treat anti-dumping duties when constructing export price for the purpose of assessing a refund application under Article 9.3.2? What is the rationale for this particular treatment?

134. Please see response to Question 131(a) above.

Q133. The Panel would like to understand the extent to which Members charge and/or pay interest to economic operators in the context of the importation of products into their customs territories.

(a) Please explain the extent to which your domestic law permits of the possibility that an economic operator may be charged/repaid interest for underpayment/overpayment of customs duties on imported products at a time after importation? Please explain the circumstances when this will or will not be possible and please provide a reference to the relevant legal instrument(s).

135. Please see response to Question 120 above.

(b) Please explain the extent to which your domestic law permits of the possibility that an economic operator may be charged/repaid interest for underpayment/overpayment of customs duties on imported products on the basis of a liability that was unknown at the time of importation? Please explain

the circumstances when this will or will not be possible and please provide a reference to the relevant legal instrument(s).

136. Please see response to Question 120 above.

- (c) **Are there any international agreements, e.g., those pertaining to the World Customs Organisation, that may shed light on the general practice of the international community with respect to the application of interest in the field of customs law?**

137. Please see response to Question 121 above.