

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

WT/DS281

**FIRST WRITTEN SUBMISSION OF
THE UNITED STATES OF AMERICA**

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Table of Reports

Short Form	Full Citation
<i>Argentina – Floor Tiles (Panel)</i>	Panel Report, <i>Argentina – Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy</i> , WT/DS189/R, adopted 5 November 2001
<i>Argentina – Poultry (Panel)</i>	Panel Report, <i>Argentina – Definitive Anti-dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>Brazil – Aircraft (AB)</i>	Appellate Body Report, <i>Export Financing Programme for Aircraft</i> , WT/DS46/AB/2, adopted 20 August 1999
<i>Brazil – Aircraft (Article 21.5 – Canada II) (Panel)</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft, – Second Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS46/RW/2, adopted August 23, 2001
<i>Brazil – Desiccated Coconut (Panel)</i>	Panel Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22//R, adopted 20 March 1997, as modified by the Appellate Body Report, WT/DS22/AB/R
<i>Canada – Dairy (Article 21.5 - New Zealand and US II) (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003
<i>Canada - Grain Corn</i>	Panel Report, <i>Canadian Countervailing Duties on Grain Corn from the United States</i> , SCM/140 and Corr. 1, adopted 28 April 1992, BISD 39S/411, 432
<i>Canada – Herring and Salmon</i>	Panel Report, <i>Canada - Measures Affecting Exports of Unprocessed Herring and Salmon</i> , L/6268, adopted 22 March 1988, BISD 35S/98, 115
<i>EC – Bananas (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Bed Linen (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001 as modified by the Appellate Body Report, WT/DS141/AB/R
<i>EC – Bed Linen (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001

<i>EC – Bed Linen (Article 21.5 - India) (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/R, adopted 24 April 2003 as modified by the Appellate Body Report, WT/DS141/AB/RW
<i>EC – Cast Iron Fittings (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R
<i>EC – Cast Iron Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>EC – Poultry (AB)</i>	Appellate Body Report, <i>European Communities - Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998
<i>EC – Sardines (AB)</i>	Appellate Body Report, <i>EC – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002
<i>Egypt – Rebar (Panel)</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted October 1, 2002
<i>Guatemala – Cement II (Panel)</i>	Panel Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/R, adopted 25 November 1998, as modified by the Appellate Body Report, WT/DS60/AB/R
<i>Guatemala – Cement I (AB)</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998
<i>India – Patent Protection (AB)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998
<i>Korea – Dairy (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000

<i>Korea – Resins</i>	Panel Report, Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States, ADP/92, and Corr.1, April 2, 1993
<i>Mexico – HFCS (Article 21.5) (Panel)</i>	Panel Report, Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 by the United States, WT/DS132/RW, adopted 21 November 2001, as modified by the Appellate Body Report, WT/DS132/AB/RW
<i>Mexico – HFCS (Article 21.5) (AB)</i>	Appellate Body Report, Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 by the United States, WT/DS132/AB/RW, adopted 21 November 2001
<i>Thailand – H-Beams (AB)</i>	Appellate Body Report, Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, WT/DS122/AB/R, adopted 5 April 2001
<i>US – 1916 Act (AB)</i>	Appellate Body Report, United States – Anti-dumping Act of 1916, WT/DS136,162/AB/R, adopted 26 September 2000
<i>US – Argentina Sunset (Panel)</i>	Panel Report, United States – Sunset Reviews of Anti-Dumping Duties on Oil Country Tubular Goods from Argentina, WT/DS268/R, adopted 17 December 2004, as modified by the Appellate Body Report, WT/DS268/AB/R
<i>US – Argentina Sunset (AB)</i>	Appellate Body Report, United States – Sunset Reviews of Anti-Dumping Duties on Oil Country Tubular Goods from Argentina, WT/DS268/AB/R, adopted 17 December 2004
<i>US – Offset Act (Byrd Amendment) (AB)</i>	Appellate Body Report, United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
<i>US – DRAMs (Panel)</i>	Panel Report, United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above From Korea, WT/DS99/R, adopted March 19, 1999
<i>US – Export Restraints (Panel)</i>	Panel Report, United States – Measures Treating Exports Restraints as Subsidies, WT/DS194/R and Corr.2, adopted 23 August 2001

<i>US – Japan Sunset (Panel)</i>	Panel Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WT/DS244/AB/R
<i>US – Japan Sunset (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – German Sunset (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002
<i>US – Hot-Rolled Steel (Panel)</i>	Panel Report, <i>United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, as modified by the Appellate Body Report, WT/DS184/AB/R
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001
<i>US – Section 129 (Panel)</i>	Panel Report, <i>United States – Section 129(c)(1) of the Uruguay Round Agreements Act</i> , WT/DS221/R, adopted 30 August 2002
<i>US – Section 211 (AB)</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002
<i>US – Softwood Lumber AD Final (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report, WT/DS264/AB/R
<i>US – Softwood Lumber AD Final (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Softwood Lumber ITC Investigation (Panel)</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/R, adopted 26 April 2004

<p><i>US – Softwood Lumber Preliminary Determinations (Panel)</i></p>	<p>Panel Report, <i>United States – Preliminary Determinations With Respect to Certain Softwood Lumber from Canada</i>, WT/DS236/R, adopted 1 November 2002</p>
<p><i>US – Steel Plate (Panel)</i></p>	<p>Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i>, WT/DS206/R and Corr.1, adopted 29 July 2002</p>
<p><i>US – Wool Shirts and Blouses (AB)</i></p>	<p>Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i>, WT/DS33/AB/R and Corr.1, adopted 23 May 1997</p>

I. INTRODUCTION

1. In this proceeding, Mexico challenges virtually every determination made by the U.S. Department of Commerce (“Commerce”) and the U.S. International Trade Commission (“ITC”) in connection with the antidumping duty order on gray portland cement and cement clinker (“cement”) from Mexico in nearly a decade. Specifically, Mexico challenges various aspects of the Commerce and the ITC sunset reviews of the Mexican cement order, seven assessment reviews conducted by Commerce covering imports of Mexican cement from August 1994 to July 2001, and a decision by the ITC to dismiss a request for a “changed circumstances” review of its affirmative final injury determination.

2. Although Mexico’s claims are many, Mexico’s message is simple – Mexico simply does not agree with the conclusions reached by the U.S. investigating authorities in the sunset and assessment reviews and in their evaluation of the request for a changed circumstances review. However, the fact that Mexico disagrees with those conclusions does not render them inconsistent with U.S. obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”). In this dispute, Mexico asserts obligations that in many cases do not exist, and its claims to have identified breaches by the United States are meritless.

3. For instance, Mexico argues that, in conducting its sunset review, the ITC applied a standard less rigorous than that prescribed in Article 11.3 of the AD Agreement for determining whether revocation of the antidumping order would likely lead to continuation or recurrence of injury. The United States will demonstrate that, contrary to Mexico’s arguments, the ITC applies a statutory standard in all sunset reviews – including the review at issue here – that is fully consistent with Article 11.3.

4. Mexico alleges that Commerce, in its sunset review, also misapplied Article 11.3 of the AD Agreement by using an alleged presumption in favor of maintaining the antidumping duties. The United States will demonstrate that, in fact, no such presumption exists, and that the U.S. sunset provision, both as such and as applied in the review at issue, is consistent with Article 11.3.

5. With respect to the seven assessment reviews, Mexico raises claims that effectively require this Panel to substitute its evaluation of facts for that of Commerce. For example, Mexico argues that the United States breached Article 2.1 of the AD Agreement by excluding certain sales of cement from the determination of normal value. However, as demonstrated below, Article 2.1 contemplates that investigating authorities will exclude sales from the scope of the normal value determination if they were not made “in the ordinary course of trade.” The cement sales excluded by Commerce were so unusual in comparison to substantially all of the Mexican producers’ other sales of cement in Mexico that Commerce found them to be outside the ordinary course of trade. Mexico’s claim of WTO-inconsistency is nothing more than an invitation to the Panel to re-weigh the facts and come to the conclusion preferred by Mexico.

6. Regarding the ITC’s dismissal of the request for a “changed circumstances” review,

Mexico alleges that the ITC misapplied Article 11.2 of the AD Agreement in finding that the information available to it did not show changed circumstances sufficient to warrant institution of a review of its affirmative final injury determination. The United States will demonstrate that Mexico's claims are based on a flawed interpretation of the AD Agreement. The ITC's findings are consistent with Article 11.2 and are based on an unbiased and objective evaluation of the facts.

7. Apart from its claims about the various ITC and Commerce determinations, Mexico also challenges the system of retrospective antidumping duty assessment in place in the United States and the U.S. law requiring the payment of interest in connection with dumping duties. The United States will demonstrate that Mexico's claims ignore the text of the AD Agreement, which plainly recognizes that Members may use either retrospective or prospective duty assessment systems, and incorrectly equate interest payments with antidumping duties.

8. In short, the United States demonstrates in this first submission that Mexico has failed to meet its burden to establish a *prima facie* case of any breach. The Panel, therefore, should reject Mexico's claims in toto.

9. In terms of structure, the U.S. first submission presents in Section II the procedural background of the dispute, followed by the factual background in Section III, which includes a description of the U.S. sunset, assessment, and changed circumstances review system and of the determinations made with respect to cement from Mexico. In Section IV, the United States sets forth its request that the Panel make further preliminary rulings that various "measures" and claims that are made for the first time in Mexico's first written submission are not within the Panel's terms of reference.¹ In Section V, the United States sets forth the general legal principles that apply to this dispute, including the correct standard of review and the proper allocation of the burden of proof. Finally, in Section VI, the United States responds to Mexico's legal arguments.

II. PROCEDURAL BACKGROUND

10. Mexico submitted a request for consultations in the instant dispute on January 31, 2003.² Mexico's request for consultations addressed Commerce's determinations in seven assessment reviews conducted by Commerce of the antidumping order on cement from Mexico, which covered imports of merchandise going back as far as August 1, 1994.³ Mexico's request for consultations also covered the sunset reviews concluded by Commerce on July 3, 2000,⁴ and the

¹ See Request for Preliminary Rulings by the United States of America (October 26, 2004).

² Request for Consultations by Mexico, WT/DS281/1, circulated 11 February 2003 ("Mexico Consultations Request").

³ See *Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review*, 62 FR 17148, 17149 (April 9, 1997) ("*Fifth Review Final Results*") (Exhibit MEX-31).

⁴ *Gray Portland Cement and Cement Clinker from Mexico: Final Results of Full Sunset Review*, 65 FR 41049 (July 3, 2000) ("*Commerce Final Sunset Results*") (Exhibit MEX-135).

14. Although, as the United States noted, “the resources of the dispute settlement system would be devoted to seeking to enforce Mexico’s compliance with Article 6.2 [of the DSU]” instead of securing a positive solution to the dispute, given Mexico’s refusal to cure the defects in its panel request, the DSB had no choice under the negative consensus rule but to establish a panel on the basis of Mexico’s defective request.¹⁵

15. While more than one year passed between the time that Mexico’s panel request was accepted and the time that the Panel was composed,¹⁶ Mexico again made no effort during this time to cure the defects in its panel request. Therefore, on October 26, 2004, the United States submitted its first preliminary ruling request, asking this Panel to find that Mexico had not complied with Article 6.2 of the DSU because, with respect to certain of Mexico’s claims, Mexico had failed to provide a brief summary of the legal basis of its complaint and had thereby prejudiced the ability of the United States to defend its interests in the dispute.

16. Mexico filed its first written submission on October 27, 2004,¹⁷ and, in doing so Mexico added to its earlier procedural errors by raising matters in its submission that were not included in its panel request. These additional matters are the subject of the further request for preliminary rulings below.

III. FACTUAL BACKGROUND

A. The Antidumping System Under U.S. Law

1. Assessment Reviews

17. Article 9.3 of the AD Agreement recognizes that Members may use either a retrospective or a prospective system to determine the final amount of antidumping duty to be assessed. The United States calculates antidumping duties on a retrospective basis.¹⁸

18. Pursuant to the U.S. retrospective duty assessment system, liability for payment of antidumping duties attaches at the time merchandise subject to a preliminary or final antidumping duty measure enters the United States.¹⁹ When such measures have been put into

¹⁵ *Id.*, para. 43.

¹⁶ The Panel was established on August 29, 2003 and the Panel was composed on September 3, 2004.

¹⁷ A courtesy English translation was filed three weeks later on November 17, 2004.

¹⁸ *See, e.g.*, 19 C.F.R. 351.212(a) (Exhibit US-1). The United States also calculates countervailing duties on a retrospective basis. Footnote 52 of the SCM Agreement recognizes that Members may use either a retrospective or a prospective system to determine the final amount of countervailing duty to be assessed.

¹⁹ The only exception applies with respect to entries made up to 90 days prior to a preliminary determination in an investigation. Article 10 of the AD Agreement contains specific provisions permitting retroactive application of an antidumping measure to these entries when certain conditions have been met. *See also* Article 20 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”). This possibility of retroactive application of antidumping duties prior to a preliminary determination is not at issue in this case.

place, the United States requires that a security²⁰ be provided to the U.S. Customs and Border Protection (“Customs”) at the time of entry.

19. The date of entry of merchandise subject to an antidumping duty measure triggers application of the antidumping duty to that merchandise. However, the ultimate amount of antidumping duties to be paid will not be calculated until an assessment review (“administrative review” in U.S. parlance) covering that entry is conducted or the time passes to request a review of the entry without a request from any party for such a review.

20. Specifically, each year, following the anniversary month of the imposition of the final antidumping duty measure (“antidumping duty order” in U.S. parlance), final duty liability is determined either through an assessment review or, if no review is requested, under “automatic assessment” procedures.²¹ In the case a review is conducted, each subject entry during the period of review (*i.e.*, the previous year) is compared to a weighted-average normal value to determine whether that entry was sold below normal value. This comparison establishes the amount of antidumping duties, if any, for that entry. Once the total amount of duties for all entries in the period of review is determined, that amount is assessed on an importer-specific basis.

21. At the conclusion of the assessment review, Commerce instructs Customs to assess definitive antidumping duties in accordance with its final results of review.²² To the extent that the definitive duties owed are less than the amount of the cash deposits paid as security, any excess plus interest is returned to the importer. To the extent that the definitive liability is greater than the cash deposits, the importer must pay that additional amount plus interest.²³

2. Sunset Reviews

22. Article 11.3 of the AD Agreement provides for the termination of any definitive antidumping duty after five years, unless the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Following the conclusion of the Uruguay Round, the United States amended its antidumping duty statute in 1995 to include provisions for such five-year, or so-called “sunset,” reviews of antidumping duty

²⁰ If the entry occurs during an antidumping duty investigation, after preliminary determinations of injury and dumping and prior to an antidumping duty order, the United States typically permits the security to take the form of cash deposits or bonds, at the preference of the importer. After an order is issued, the security must be in the form of cash deposits.

²¹ 19 C.F.R. 351.212(c) (Exhibit US-1); 19 U.S.C. 1675 (Exhibit MEX-4).

²² 19 U.S.C. 1675(a)(3)(B) (Exhibit MEX-4).

²³ 19 U.S.C. 1677g (Exhibit US-2); *see also US - Section 129*, paras. 2.7-2.8 (describing the U.S. system). Under U.S. law, final liability for payment of antidumping duties with respect to entries during the provisional measures period is capped at the amount of the provisional duty paid or payable. *See* 19 U.S.C. 1673 f(a) (Exhibit US-3).

complete substantive responses are received from foreign interested parties accounting on average for more than 50 percent of the total exports of the subject merchandise to the United States over the preceding five years.³⁹ In its sunset review on cement from Mexico, Commerce conducted a full review.

ii. *The ITC's Regulations Regarding Sunset Reviews*

28. The ITC regulations pertaining to its continuation or recurrence of injury determination in sunset reviews are set forth at 19 C.F.R. 207.60-69.⁴⁰ Under its regulations, the ITC initially determines whether to conduct a full review (which would generally include a public hearing, the issuance of questionnaires, opportunities for written submissions, and other procedures) or an expedited review (in which the ITC makes a determination on the basis of the responses that it receives to its “notice of institution” of the sunset review).⁴¹ In determining whether to conduct a full or expedited review, the ITC first determines whether individual responses to its notice of institution are adequate. Second, based on those responses deemed individually adequate, the ITC determines whether the collective responses submitted by two groups of interested parties – domestic interested parties (producers, unions, trade associations, or worker groups) and respondent interested parties (importers, exporters, foreign producers, trade associations, or country governments) – demonstrate a sufficient willingness within each group to participate and provide information requested in a full review.⁴² If there are not adequate individual or group responses, the ITC may proceed with an expedited review. In its sunset review on cement from Mexico, the ITC conducted a full review.

2. **Changed Circumstances Reviews Conducted by the ITC**

29. Section 751(b) of the Act requires the ITC to conduct a review of a final affirmative injury determination whenever it receives information, or a request from an interested party, which shows changed circumstances sufficient to warrant such a review.⁴³

30. The procedures for requesting a changed circumstances review, seeking comments on the request, and deciding whether the changed circumstances alleged in the request are sufficient are set forth at 19 C.F.R. 207.45.⁴⁴ Under its regulations, in response to a request for a changed circumstances review, the ITC will seek public comment as to whether to institute such a review. Within 30 days after the end of the comment period, the ITC will determine whether the request shows sufficient changed circumstances to warrant instituting a changed circumstances review. If not, the ITC will dismiss the request and publish a notice in the *Federal Register* indicating that the request has not shown changed circumstances sufficient to warrant a review. If the ITC

³⁹ 19 C.F.R. 351.218(e)(1)(ii) (Exhibit US-4).

⁴⁰ 19 C.F.R. 207.60-69 (Exhibit US-5).

⁴¹ 19 C.F.R. 207.62 (Exhibit US-5).

⁴² 19 C.F.R. 207.62 (Exhibit US-5).

⁴³ Section 751(b) of the Act; 19 U.S.C. 1675(b) (Exhibit MEX-4).

⁴⁴ 19 C.F.R. 207.45 (Exhibit US-6).

determines that such a review is warranted, it will conduct a changed circumstances review (including collecting additional information and providing parties an opportunity to submit written comments) to determine within 120 days whether revocation of an order would likely lead to continuation or recurrence of material injury to a domestic industry.

B. Determinations Regarding Gray Portland Cement and Cement Clinker from Mexico

31 On September 26, 1989, a petition was filed with Commerce and the ITC alleging that an industry in the United States was materially injured by reason of dumped imports of cement from Mexico.⁴⁵

32. The ITC instituted an investigation to determine whether an industry in the United States was materially injured or threatened with material injury by reason of subject imports of cement from Mexico.⁴⁶ On October 23, 1989, Commerce initiated a separate investigation to determine whether imported cement from Mexico was being dumped (“sold at less than fair value,” in U.S. parlance).⁴⁷

33. Commerce issued a final determination of sales at less than fair value on July 18, 1990.⁴⁸ On August 23, 1990, the ITC determined that an industry in the United States was being materially injured by reason of imports of cement from Mexico that were being sold at less than fair value.⁴⁹ Based on the final determinations of Commerce and the ITC, Commerce issued an antidumping duty order on imports of cement from Mexico on August 30, 1990.⁵⁰

34. Between the time that the antidumping order was issued until the time of Mexico’s request for consultations in the instant dispute,⁵¹ Commerce conducted 11 assessment reviews of the antidumping order on cement from Mexico. In addition, Commerce and the ITC conducted sunset reviews in which they found that revocation of the antidumping order on cement from

⁴⁵ *Initiation of Antidumping Duty Investigation: Gray Portland Cement and Clinker from Mexico*, 54 FR 43190 (October 23, 1989) (Exhibit MEX-11) (“*Commerce Initiation Notice*”).

⁴⁶ *Gray Portland Cement and Cement Clinker from Mexico*, 54 FR 40531 (October 2, 1989) (Exhibit MEX-12) (“*ITC Institution Notice*”).

⁴⁷ *Commerce Initiation Notice*, 54 FR at 43190 (Exhibit MEX-11).

⁴⁸ *Final Determination of Sales at Less Than Fair Value: Gray Portland Cement and Clinker from Mexico*, 55 FR 29244 (July 18, 1990) (Exhibit MEX-16) (“*Commerce Final Determination*”).

⁴⁹ *Gray Portland Cement and Cement Clinker from Mexico*, Determination of the Commission in Investigation No. 731-TA-451 (Final) Under the Tariff Act of 1930, USITC Publication 2305 (August 1990) (Exhibit MEX-10) (“*ITC Investigation Report*”).

⁵⁰ *Antidumping Duty Order: Gray Portland Cement and Clinker from Mexico*, 55 FR 35443 (August 30, 1990) (“*Cement Order*”) (US-DOC1).

⁵¹ Request for Consultations by Mexico, WT/DS281/1, circulated 11 February 2003.

Mexico would be likely to lead to the continuation or recurrence of dumping⁵² and injury,⁵³ respectively, within a reasonably foreseeable time. In addition, the ITC considered and dismissed a request from a Mexican producer to conduct a changed circumstances review of the ITC's affirmative final determination.⁵⁴

35. The fifth through eleventh assessment reviews, the sunset reviews conducted by Commerce and the ITC, and the ITC's dismissal of the request for a changed circumstances review are among the subjects of Mexico's claims in the instant dispute and are discussed in further detail below.

1. **Assessment Reviews Conducted by Commerce**

a. Fifth Assessment Review

36. On September 15, 1995, Commerce initiated the fifth assessment review of the antidumping duty order on cement from Mexico, covering entries during the period August 1, 1994 through July 31, 1995.⁵⁵ Commerce requested and received information from Mexican respondents and conducted a verification of the submitted information. On October 3, 1996, Commerce issued its preliminary results of review.⁵⁶ The parties submitted comments on the preliminary results and Commerce, at the parties' request, held a public hearing. On April 9, 1997, Commerce published its final results of review, determining a margin of 73.69 percent for CEMEX.⁵⁷ As a result of subsequent litigation, Commerce determined a revised margin of 44.89 percent for CEMEX.⁵⁸

b. Sixth Assessment Review

⁵² *Gray Portland Cement and Cement Clinker from Mexico; Final Results of Full Sunset Review*, 65 FR 41049 (July 3, 2000) (“*Commerce Final Sunset Results*”) (Exhibit MEX-135).

⁵³ *Gray Portland Cement and Cement Clinker from Japan, Mexico, and Venezuela*, Investigation Nos. 303-TA-21 (Review) and 731-TA-451, 461, and 519 (Review), USITC Publication 3361 (October 2000) (“*ITC Report*”) (Exhibit MEX-9).

⁵⁴ *Gray Portland Cement and Cement Clinker from Mexico; Dismissal of Request for Institution of a Section 751(b) Review Investigation*; 66 FR 54740 (December 20, 2001) (“*Changed Circumstances Dismissal Notice*”) (Exhibit MEX-138).

⁵⁵ *Initiation of Antidumping Duty and Countervailing Duty Administrative Reviews*, 60 FR 47930 (September 15, 1995) (“*Fifth Review Initiation*”) (Exhibit MEX-20).

⁵⁶ *Preliminary Results of Antidumping Duty Administrative Review Gray Portland Cement and Clinker From Mexico* 61 FR 51676 (October 3, 1996) (“*Fifth Review Preliminary Results*”) (Exhibit MEX-26).

⁵⁷ *Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review*, 62 FR 17148 (April 9, 1997) (“*Fifth Review Final Results*”), as amended 62 FR 24414 (May 5, 1997) (to correct clerical errors) (Exhibit MEX-31).

⁵⁸ *Gray Portland Cement and Clinker From Mexico; Notice of Extraordinary Challenge Committee's Final Decision and Amended Final Results of Antidumping Duty Administrative Review*, 68 FR 74208 (December 23, 2003) (“*Fifth Review Amended Final Results*”) (Exhibit MEX-37).

37. On September 17, 1996, Commerce initiated the sixth assessment review of the antidumping duty order on cement from Mexico, covering entries during the period August 1, 1995 through July 31, 1996.⁵⁹ Commerce requested and received information from Mexican respondents and conducted a verification of the submitted information. On September 10, 1997, Commerce published its preliminary results of review.⁶⁰ The parties submitted comments on the preliminary results and Commerce, at the parties' request, held a public hearing. On March 16, 1998, Commerce published its final results of review, determining a margin of 36.30 percent for CEMEX.⁶¹ On May 4, 1998, Commerce published amended final results to correct clerical errors and changing the margin for CEMEX to 37.49 percent.⁶²

c. Seventh Assessment Review

38. On September 25, 1997, Commerce initiated the seventh assessment review of the antidumping duty order on cement from Mexico, covering entries during the period August 1, 1996 through July 31, 1997.⁶³ Commerce requested and received information from Mexican respondents and conducted a verification of the submitted information. On September 10, 1998, Commerce published its preliminary results of review.⁶⁴ The parties submitted comments on the preliminary results and Commerce held a public hearing. On March 16, 1998, Commerce published its final results of review, determining a margin of 49.58 percent for CEMEX/CDC.⁶⁵ As a result of subsequent litigation, Commerce determined a revised margin of 37.34 percent for CEMEX/CDC.⁶⁶

d. Eighth Assessment Review

39. On September 29, 1998, Commerce initiated the eighth assessment review of the antidumping duty order on cement from Mexico, covering entries for the period August 1, 1997

⁵⁹ *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 61 FR 54154 (September 17, 1996) (“Sixth Review Initiation”) (Exhibit MEX-38).

⁶⁰ *Preliminary Results of Antidumping Duty Administrative Review Gray Portland Cement and Clinker From Mexico*, 62 FR 47626 (September 10, 1997) (“Sixth Review Preliminary Results”) (Exhibit US-7).

⁶¹ *Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review*, 63 FR 12764 (March 16, 1998) (“Sixth Review Final Results”) (Exhibit MEX-51).

⁶² *Gray Portland Cement and Clinker From Mexico: Amended Final Results of Antidumping Duty Administrative Review*, 63 FR 24528 (May 4, 1998) (“Sixth Review Amended Final Results”) (Exhibit MEX-52).

⁶³ *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 62 FR 50292 (September 25, 1997) (“Seventh Review Initiation”) (Exhibit MEX-53).

⁶⁴ *Preliminary Results of Antidumping Duty Administrative Review Gray Portland Cement and Clinker From Mexico* 63 FR 48471 (September 10, 1998) (“Seventh Review Preliminary Results”) (Exhibit MEX-63).

⁶⁵ *Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review*, 64 FR 13148 (March 17, 1999) (“Seventh Review Final Results”) (Exhibit MEX-70).

⁶⁶ *Gray Portland Cement and Clinker From Mexico; Notice of NAFTA Binational Panel’s Final Decision and Amended Final Results of Antidumping Duty Administrative Review*, 69 FR 11594 (March 11, 2004) (“Seventh Review Amended Final Results”) (Exhibit MEX-72).

through July 31, 1998.⁶⁷ Commerce requested and received information from Mexican respondents and conducted a verification of the submitted information. On September 8, 1998, Commerce published its preliminary results of review.⁶⁸ The parties submitted comments on the preliminary results. On March 15, 2000, Commerce published its final results of review, determining a margin of 45.98 percent for CEMEX.⁶⁹

e. Ninth Assessment Review

40. On October 1, 1999, Commerce initiated the ninth assessment review of the antidumping duty order on cement from Mexico, covering entries during the period August 1, 1998 through July 31, 1999.⁷⁰ Commerce requested and received information from Mexican respondents and conducted a verification of the submitted information. On September 7, 2000, Commerce published its preliminary results of review.⁷¹ The parties submitted comments on the preliminary results of review. On March 14, 2001 Commerce published its final results of review, determining a margin of 39.34 percent for CEMEX/CDC.⁷² On May 14, 2001, Commerce published amended final results to correct clerical errors and changing the margin for CEMEX/CDC to 38.65 percent.⁷³

f. Tenth Assessment Review

41. On October 2, 2000, Commerce initiated the tenth assessment review of the antidumping duty order on cement from Mexico, covering entries during the period August 1, 1999 through July 31, 2000.⁷⁴ Commerce requested and received information from Mexican respondents and conducted a verification of the submitted information. On September 13, 2001, Commerce

⁶⁷ *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 63 FR 51893 (September 29, 1998) (“*Eighth Review Initiation*”) (Exhibit MEX-73).

⁶⁸ *Gray Portland Cement and Clinker From Mexico; Preliminary Results of Antidumping Duty Administrative Review and Extension of Final Results of Administrative Review*, 64 FR 48778 (September 8, 1999) (“*Eighth Review Preliminary Results*”) (Exhibit MEX-78).

⁶⁹ *Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review*, 65 FR 13943 (March 15, 2000) (“*Eighth Review Final Results*”), and accompanying *Issues and Decision Memorandum* (“*Eighth Review Final Decision Memorandum*”) (Exhibit MEX-85).

⁷⁰ *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 64 FR 53318 (October 1, 1999) (“*Ninth Review Initiation*”) (Exhibit MEX-86).

⁷¹ *Gray Portland Cement and Clinker From Mexico; Preliminary Results of Antidumping Duty Administrative Review*, 65 FR 54220 (September 7, 2000) (“*Ninth Review Preliminary Results*”) (Exhibit MEX-93).

⁷² *Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review*, 66 FR 14889 (March 14, 2001) (“*Ninth Review Final Results*”) and accompanying *Issues and Decision Memorandum* (“*Ninth Review Final Decision Memorandum*”) (Exhibit MEX-97).

⁷³ *Gray Portland Cement and Clinker from Mexico; Notice of Amended Final Results of Antidumping Duty Administrative Review*, 66 FR 24324 (May 14, 2001) (“*Ninth Review Amended Final Results*”) (Exhibit MEX-100).

⁷⁴ *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 65 FR 58773 (October 2, 2000) (“*Tenth Review Initiation*”) (Exhibit MEX-101).

Venezuela.⁸⁸ In each of the original investigations, the ITC defined a single domestic like product, gray portland cement and cement clinker, and found appropriate circumstances existed to conduct a regional industry analysis. In making its original determination regarding subject imports from Mexico, the ITC concluded that appropriate circumstances existed for a regional industry analysis, with the regional industry consisting of the U.S. producers in the “Southern-tier Region.”⁸⁹

46. On November 1, 2000, the ITC published a notice of its final determination in the sunset review, and issued its full opinion in a separate publication.⁹⁰ As discussed in Section VI.A below, the ITC by a vote of 4-1 determined that revocation of the antidumping duty order on cement from Mexico would be likely to lead to continuation or recurrence of material injury to a regional industry in the United States within a reasonably foreseeable time.⁹¹

4. The ITC’s Dismissal of the Request for a Changed Circumstances Review

47. On September 19, 2001, the ITC received a request for a changed circumstances review with respect to imports of cement from Mexico subject to an antidumping duty order filed by CEMEX, a producer of cement in Mexico.⁹² The request alleged a single changed circumstance: that CEMEX’s acquisition of U.S. cement producer, Southdown, which was finalized on November 16, 2000, constituted changed circumstances sufficient to warrant review of its affirmative injury determination.⁹³

Mitsubishi Materials Corp. v. United States, 918 F. Supp. 422 (CIT 1996).

⁸⁸ In July 1991, the ITC determined that there was a reasonable indication that an industry in the United States was being materially injured by reason of imports of gray portland cement and cement clinker from Venezuela that allegedly were subsidized and being sold at less than fair value. *Gray Portland Cement and Cement Clinker from Venezuela*, Inv. Nos. 303-TA-21 and 731-TA-519 (Preliminary), USITC Pub. 2400 at 26-29 (July 1991). In making its determination, the ITC concluded that appropriate circumstances existed for a regional industry analysis, with the regional industry consisting of the U.S. producers in the “State of Florida Region.” Commerce issued preliminary determinations that imports of gray portland cement and cement clinker from Venezuela were being subsidized and sold at less than fair value. Subsequently, Commerce entered into suspension agreements with Venezuela, and suspended the antidumping duty and countervailing duty investigations with respect to these subject imports. As a result, the ITC suspended its investigation of cement from Venezuela.

⁸⁹ The Southern-tier Region consists of the States of Florida, Alabama, Mississippi, Louisiana, Texas, New Mexico, Arizona, and California. ITC Report at 14-17 and 53.

⁹⁰ The ITC’s notice was published at 65 FR 65327 (November 1, 2000) and a public version of the full opinion and staff report are found in the ITC Report (Exhibit MEX-9).

⁹¹ See ITC Report at 1 (Exhibit MEX-9). Commissioner Lynn Bragg did not participate. The ITC also determined by a vote of 4-1 that revocation of the antidumping duty order on gray portland cement and cement clinker from Japan would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time; and by a vote of 5-0 that termination of the suspended investigations covering gray portland cement and cement clinker from Venezuela would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. Since this is an appeal only of the Mexican determination, any discussion below of the ITC determination does not focus on the ITC findings regarding issues involving only subject imports from Japan or Venezuela.

⁹² See *Changed Circumstances Dismissal Notice*, 66 FR at 65741 (Exhibit MEX-138).

⁹³ See *Changed Circumstances Dismissal Notice*, 66 FR at 65741 (Exhibit MEX-138).

matters purported to be relevant to Commerce’s sunset review determination in Section C of its panel request.¹⁰³ Commerce’s “consistent practice in sunset reviews” is not referenced anywhere in this section, or in any other place in Mexico’s panel request. As this “measure” and the claim with respect to it are not included in Mexico’s panel request, this matter is not within the Panel’s terms of reference.

57. This particular matter is also not properly before the Panel because Commerce’s “practice” is not a “measure” for purposes of the WTO. It is well-established that Commerce is not bound by its prior determinations – which is what Mexico is actually challenging as a “practice” – but may depart from them as long as it explains its reasons for doing so.¹⁰⁴ Recognizing this, the panel in *US - Steel Plate* found that a “practice” does not constitute a measure for purposes of the WTO. As the panel explained in *US - Steel Plate*:

a practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of [Commerce]. . . . That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice. If a Member were obligated to abide by its practice, it might be possible to deem that practice a measure. The United States, however, has asserted that under its governing laws, [Commerce] may change a practice provided it explains its decision. . . .¹⁰⁵

58. For the reasons above, the Panel should decline to assume jurisdiction over Mexico’s challenge to Commerce’s “consistent practice in sunset reviews” in Section VIII.B of its first submission.

2. **Mexico Makes A New Claim Against Section 736(d) of the Act and 19 C.F.R. 351.212(f) “As Such” in Section X.5 of Its Submission**

59. In Section X.5 of its first submission, Mexico argues that “the U.S. antidumping statute and the Department’s regulations do not comply with Article 4.2 on an as such basis because they do not provide for assessment on sales only within the region in accordance with the general

¹⁰³ See Mexico Panel Request at 4-5.

¹⁰⁴ See, e.g., *Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1253 (CIT 2002), in which Commerce’s reviewing court, the U.S. Court of International Trade, stated as follows: “[a]s long as Commerce properly explains its reasons, and its practice is reasonable and permitted by the statute, Commerce’s practice can and should continue to change and evolve.” (Exhibit US-10).

¹⁰⁵ *US - Steel Plate (Panel)*, para. 7.22.

3. Mexico Makes A New “As Such” Claim Against 19 C.F.R. 351.401(f) in Section X.8 of Its Submission

63. In Section X.8 of its first submission, Mexico alleges that “the Department’s practice of ‘collapsing’ exporters as set out in 19 C.F.R. 351.401(f) is inconsistent with the obligations of the United States under Article 6.10 of the Anti-Dumping Agreement.”¹¹³

64. Mexico’s claims regarding Commerce’s determinations to “collapse” certain Mexican producers (which Mexico refers to as “amalgamation” of the producers), are presented in Section E of Mexico’s panel request.¹¹⁴ Mexico makes no mention of 19 C.F.R. 351.401(f) in this section, however, or in any part of Mexico’s panel request. Instead, Mexico indicates that it intends to make only an “as applied” challenge regarding Commerce’s collapsing determination, *i.e.*, through the “*Fifth through Eleventh Administrative Reviews and the margin adopted in the Sunset Review.*”¹¹⁵

65. Again, as 19 C.F.R. 351.401(f) is not identified in Mexico’s panel request, Mexico’s “as such” challenge to this regulation cannot come within the Panel’s terms of reference.¹¹⁶

C. Conclusion

66. For the above reasons, the United States respectfully requests that the Panel further determine preliminarily that Mexico’s claims in Section VIII.C, that Commerce’s “consistent practice in sunset reviews” is inconsistent, as such, with Article 11.3 of the AD Agreement; in Section X.5, that Section 736(d) of the Tariff Act and 19 C.F.R. 351.212(f) are inconsistent, as such, with Article 4.2 of the AD Agreement; and in Section X.9, that 19 C.F.R. 351.401(f) is inconsistent, as such, with Article 6.10 of the AD Agreement, are not within the Panel’s terms of reference – pursuant to DSU Article 7 – as such matters were not referred to the DSB by Mexico in its panel request. Additionally, to the extent that the above-mentioned “measures” were not identified specifically or that the claims were not presented sufficiently, the United States respectfully requests that the Panel also determine that Mexico is in violation of DSU Article 6.2.

V. GENERAL LEGAL PRINCIPLES

A. Applicable Standard of Review

¹¹³ Mexico First Submission, para. 980.

¹¹⁴ Mexico Panel Request at 6.

¹¹⁵ *Id.* (Emphasis added) Again, further confirmation that Mexico was making only an “as applied” challenge is found in the chapeau to Section E, in which Mexico states that “[t]he Department employed anti-dumping margin calculation methodologies inconsistently . . . in its administrative reviews and sunset reviews as follows. . . .” *Id.* (Emphasis added)

¹¹⁶ See *US - Argentina Sunset (AB)*, para. 162.

67. In any dispute under the AD Agreement, a reviewing Panel must adhere to the special standard of review set forth in Article 17.6 of that Agreement.¹¹⁷ Mexico appears to acknowledge that Article 17.6 applies to the present dispute. However, in the section of its submission setting out the applicable standard of review, Mexico discusses and relies on only selected aspects of the standard of review. The proper standard of review under Article 17.6 is set out below.

1. Review of an Investigating Authority’s Factual Findings

68. Article 17.6(I) of the AD Agreement provides that:

in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

69. The first sentence of Article 17.6(I) establishes the obligations of a Panel when reviewing an investigating authority’s factual findings: to determine whether the authority’s establishment of the facts was “proper” and its evaluation of the facts was “unbiased and objective.” The second sentence – which Mexico ignores entirely – makes clear that the task of the Panel is to review the investigating authority’s factual findings in light of the standard set out in Article 17.6(I), and not to engage in its own *de novo* evaluation of the facts. This principle is rooted in considerations of the distinct functions of investigating authorities and WTO panels. As the Appellate Body explained in *US - Hot-Rolled Steel*:

In considering Article 17.6(I) of the *Antidumping Agreement*, it is important to bear in mind the different roles of panels and investigating authorities. Investigating authorities are charged, under the *Antidumping Agreement*, with making factual determinations relevant to their overall determination of dumping and injury. Under Article 17.6(I), the task of panels is simply to review the investigating authorities’ “establishment” and “evaluation” of the facts.¹¹⁸

¹¹⁷ Article 11 of the DSU, which contains a general mandate that panels must engage in an “objective assessment” of “matters” arising under any of the covered agreements, also applies to the present dispute. However, because the obligations of Article 17.6 are specific to antidumping matters, the United States addresses only the latter in its discussion above.

¹¹⁸ *US - Hot-Rolled Steel (AB)*, para. 55.

70. In *Thailand - H-Beams*, the Appellate Body observed similarly that Article 17.6 places “limiting obligations on a panel, with respect to the review of the establishment and evaluation of facts by the investigating authority.”¹¹⁹ The Appellate Body explained that “[t]he aim of Article 17.6(I) is to prevent a panel from ‘second-guessing’ a determination of a national authority when the establishment of facts is proper and the evaluation of those facts is unbiased and objective.”¹²⁰

71. Numerous previous panels have also recognized that the role of a panel is not to conduct a *de novo* review of the factual findings. For example, in *US - Steel Plate*, the panel stated that:

[the standard of review set out in Article 17.6(I)] requires us to assess the facts to determine whether the investigating authority’s *own* establishment of facts was proper, and to assess the investigating authority’s *own* evaluation of those facts to determine if it was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves – that is, we may not engage in *de novo* review.¹²¹

72. In its first submission, Mexico invites the Panel to engage in “‘an active examination or analysis of the pertinent facts’ concerning the determinations subject to the current dispute.”¹²² The phrase “active examination or analysis” does not appear anywhere in the text of the AD Agreement, and indeed appears directly contrary to the second sentence of Article 17.6(I). Article 17.6(I) does contemplate that the Panel will conduct an “assessment of the facts of the matter.” However, that concept cannot be divorced from the corresponding requirement that the Panel refrain from conducting a *de novo* review of the facts, as Mexico implies through its use of the phrase “active examination or analysis of the pertinent facts.”

¹¹⁹ *Thailand - H-Beams (AB)*, para. 114.

¹²⁰ *Thailand - H-Beams (AB)*, para. 117. *See also Mexico - HFCS (Article 21.5) (AB)*, para. 84 (stating that Articles 17.5 and 17.6 and DSU Article 11 “do not authorize panels to engage in a new and independent fact-finding exercise. Rather, in assessing the measure,, panels must consider, in the light of the claims and arguments of the parties, whether, *inter alia*, the ‘establishment’ of the facts by the investigating authorities was ‘proper’, in accordance with the obligations imposed on such investigating authorities under the *Anti-Dumping Agreement*.”)

¹²¹ *US - Steel Plate (Panel)*, para. 7.6 (emphasis added). *See also Egypt - Rebar (Panel)*, para 7.8 (“it is clear that in any dispute under the AD Agreement, a panel must adhere to the standard of review set forth in Article 17.6(I) of that agreement, which precludes a *de novo* review by a panel”); *US - Softwood Lumber AD Final (Panel)*, para. 7.9 (“[w]hat is clear . . . is that we are precluded from establishing facts and evaluating them for ourselves, that is, we may not engage in a *de novo* review.”); *US - Softwood Lumber Injury Determination (Panel)*, para. 7.15 (“[a] panel’s task is not to carry out a *de novo* review of the information and evidence on the record of the underlying investigation. Nor may a panel substitute its judgment for that of the investigating authorities, even though the Panel might have arrived at a different determination were it considering the record evidence for itself.”); *EC - Cast Iron Pipe Fittings (Panel)*, para. 7.6 (“our task is not to perform a *de novo* review of the information and evidence on the record, nor to substitute our judgment for that of the EC investigating authority even though we may have arrived at a different determination were we examining the record ourselves.”)

¹²² Mexico First Submission, para. 279.

73. In sum, the question before the Panel is not whether, had it stood in the shoes of Commerce or the ITC originally, it would have reached different conclusions about dumping or injury, respectively. Rather, the question is whether the establishment of the facts by Commerce and the ITC was “proper” and their evaluation of the facts was “unbiased and objective.”

2. Review of an Authority’s Interpretation of the AD Agreement

74. Article 17.6(ii) provides the standard of review that a panel must apply when reviewing legal questions that turn on the meaning to be ascribed to the AD agreement. Specifically, Article 17.6(ii) provides that:

the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

75. The first sentence of Article 17.6(ii) establishes the obligations of a panel in reviewing questions of law under the AD Agreement: to interpret the provisions of the AD Agreement “in accordance with” customary rules of interpretation. The second sentence – which, once again, Mexico ignores – acknowledges that there may be provisions of the Agreement that “admit[] of more than one permissible interpretation.” Where that is the case, and where the investigating authority has adopted one such interpretation, the panel is directed to find the investigating authority’s interpretation to be in conformity with the AD Agreement.

B. Burden of Proof: Mexico Bears the Burden of Proving Its Claims

76. It is now well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of WTO inconsistency.¹²³ If the balance of argument and evidence is inconclusive with respect to a particular claim, Mexico, as the complaining party, must be found to have failed to establish that claim.¹²⁴

¹²³ See *US - Wool Shirts and Blouses (AB)*, page 14; *EC - Hormones (AB)*, para. 104; *Canada - Dairy (Article 21.5 - New Zealand and US II) (AB)*, para. 66.

¹²⁴ 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).

77. In the portion of its first submission dealing with the ITC's sunset review determination,¹²⁵ Mexico seeks to shift its burden of proof to the United States. As discussed in Section VI.A below, Mexico's assertions are based on a flawed interpretation of Article 11.3 of the AD Agreement. Indeed, there is no basis in this case to excuse Mexico from coming forward with argument and evidence that establish a *prima facie* case of WTO inconsistency. Moreover, as demonstrated below, Mexico has failed to discharge that burden with respect to its claims.

VI. LEGAL ARGUMENT

A. The ITC Determination that Revocation of the Antidumping Order Would Be Likely To Lead To Continuation or Recurrence of Injury Is Consistent With U.S. WTO Obligations

1. Overview of the ITC's Determination in the Sunset Review

78. The ITC by a vote of 4-1 determined that revocation of the antidumping duty order on cement from Mexico would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. The ITC's findings regarding the likely volume of subject imports, likely price effects and likely impact of subject imports on the Southern Tier regional industry if the orders were revoked are discussed in detail below in response to Mexico's arguments. First, however, as background for those discussions, the United States provides an overview of the ITC's analysis regarding domestic like product, regional industry analysis, cumulation, and conditions of competition.

a. Domestic Like Product

79. Consistent with its determination in the original *Mexican Cement* investigation, the ITC defined a single domestic like product consisting of gray portland cement and cement clinker coextensive with the scope of review.¹²⁶ The ITC found one domestic industry, consisting of all domestic producers of gray portland cement and cement clinker within the defined region.¹²⁷

80. As the ITC discussed in its opinion, the subject merchandise is a hydraulic cement used predominantly in the production of concrete, which in turn is consumed almost entirely by the construction industry.¹²⁸ The principal end uses of portland cement are highway construction, using ready-mix concrete, and building construction, using ready-mix concrete, concrete blocks, and precast concrete units. All cement, including imports, generally conforms to the standards

¹²⁵ It is unclear whether Mexico makes this argument with respect to the ITC determination only, or both the ITC and Commerce sunset review determinations. As the argument appears in the section of Mexico's submission entitled "Commission's Sunset Review Determination," the United States has assumed the former to be the case. Nonetheless, to the extent that Mexico seeks to extend this argument to Commerce's sunset determination as well, the U.S. response applies equally in that context.

¹²⁶ ITC Report at 5-8 (Exhibit MEX-9).

¹²⁷ ITC Report at 8 (Exhibit MEX-9).

¹²⁸ ITC Report at 7 and I-23-I-28 (Exhibit MEX-9).

c. Cumulation and No Discernible Adverse Impact

84. The ITC did not cumulate subject imports from any of the subject countries in these reviews.¹³⁴ First, the ITC found that the statutory requirement that all reviews be initiated on the same day was satisfied. On the issue of no discernible adverse impact, the ITC did not find, based on the current level of imports from Mexico and the likely volume of subject imports in the reasonably foreseeable future, that subject imports from Mexico would be likely to have no discernible adverse impact on the Southern Tier region if the order was revoked. In considering whether to exercise its discretion to cumulate imports from Mexico and Japan, the ITC found that if the orders were revoked, subject imports from Mexico and Japan would likely have limited geographical overlap and would likely not compete under similar conditions of competition. Thus, the ITC did not exercise its discretion to cumulate subject imports from Mexico and Japan in these reviews.

d. Conditions of Competition

85. In evaluating the likely impact of the subject imports on the domestic industry, the ITC considers all relevant economic factors “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”¹³⁵ The ITC found several conditions of competition in cement industry relevant to its determination.¹³⁶

86. The ITC found that gray portland cement is a fungible, commodity product, with domestically-produced product and imported (subject and non-subject) product readily interchangeable.¹³⁷ Price is an important factor in purchasing decisions.¹³⁸ Due to cement’s relatively low value-to-weight ratio, U.S. inland transportation costs account for a relatively large share of the delivered price of gray portland cement and are a limiting factor on the distances to which cement is shipped.¹³⁹ As a result, the market for gray portland cement tends to be regional in nature.

87. The ITC found that demand for gray portland cement in the Southern Tier region had increased substantially since the original investigation and during the period of review. The

MEX-9). Southern Tier regional producers CEMEX USA and Rio Grande imported subject merchandise from their corporate parents, Mexican producers CEMEX and GCCC, respectively, and thus were related parties. However, the ITC declined to exclude them from the Southern Tier regional industry because both CEMEX USA and Rio Grande’s interests were in both importing and domestic production.

¹³⁴ See ITC Report at 23-28 (Exhibit MEX-9).

¹³⁵ 19 U.S.C. 1675a(a)(4). (Exhibit MEX-5)

¹³⁶ See ITC Report at 32-36 (Exhibit MEX-9).

¹³⁷ ITC Report at I-23 - I-25, I-28, and II-14 - II-16 (Exhibit MEX-9).

¹³⁸ More than half of responding purchasers ranked price as the most important factor in purchasing decisions. ITC Report at II-13-14 (Exhibit MEX-9)..

¹³⁹ ITC Report at I-13, II-1, V-1, and Table 1-2 (Exhibit MEX-9).

This reduction in the industry's production, shipments, sales, market share, and revenues would have a direct adverse impact on the industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments. The ITC found that the likely loss in market share and subsequent decrease in capacity utilization would be particularly harmful in this capital intensive industry -- producers require high capacity utilization levels and operating margins to meet fixed costs and to justify capital expenditures.

97. The evidence demonstrated that the Southern Tier regional producers had undertaken, or announced plans to begin, a number of production capacity expansion projects in order to meet increased demand.¹⁶⁰ The ITC found that the regional producers' investments in additional capacity would be particularly susceptible to the likely significant increases in subject imports if the order was revoked, and the result likely would be an adverse impact on the regional industry's capacity utilization levels and profitability due to high fixed costs.

98. While the ITC analyzed the statutory factors regarding the aggregate data for the regional industry, it also examined the performance of individual regional producers to look for anomalies as a safeguard "to assure that the 'all or almost all' standard [was] met."¹⁶¹ The ITC considered whether the regional producers representing all or almost all of the production in the Southern Tier region would experience continuation or recurrence of material injury if the order was revoked and, based on the record in this review, concluded that the "all or almost all" requirement was likely to be met.

99. Accordingly, based on the record in this review, the ITC concluded that, if the antidumping duty order was revoked, the likely significant volume of subject imports from Mexico would be likely to have a significant adverse impact on the regional industry within a reasonably foreseeable time.

2. **The ITC's Applies the Term "Likely" In Reviews Consistently With Articles 11.1 and 11.3 of the AD Agreement**

100. Mexico argues that the ITC's "likely standard" for determining whether revocation of the antidumping order would be likely to lead to continuation or recurrence of injury is inconsistent with AD Agreement Articles 11.1 and 11.3, both as such and as applied in the sunset review of cement from Mexico. Mexico's arguments are not persuasive. As demonstrated below, Mexico first has not identified any measure that is subject to challenge "as such." Further, the statutory standard that the ITC applies in reviews is not inconsistent with Articles 11.1 or 11.3.

a. **Mexico Bears the Burden of Proving Its Claims**

¹⁶⁰ ITC Report at Table I-7 (Exhibit MEX-9); Domestic Producers' Final Comments at 4-7 (Exhibit US-12); Domestic Producers' Prehearing Brief at 78-83 (Exhibit US-13).

¹⁶¹ *Cemex, S.A. v. United States*, 790 F. Supp. 290, 296 (CIT 1992). ITC Report at Tables E-1 - E-8.

instrument that establishes and defines such a “standard.” What Mexico appears to be challenging as the “ITC’s likely standard” is the ITC’s application of the term “likely” that varies case-by-case basis depending on specific reviews. This simply is not a measure subject to challenge “as such” in the WTO dispute settlement system.

- ii. *The ITC Applies A Statutory Standard In Determining Whether There Is a Likelihood of Continuation or Recurrence of Injury That Is Consistent With Articles 11.1 and 11.3 of the AD Agreement*

104. The ITC determines whether there is a likelihood of the continuation or recurrence of injury in individual cases on the basis of the U.S. antidumping statute.¹⁷⁰ To the extent that Mexico challenges the standard set out in the statute, its claim would fail. Significantly, in *US - Argentina Sunset*, a panel considered an “as applied” challenge to this standard in which arguments were made virtually identical to those made by Mexico in this dispute.¹⁷¹ In *US - Argentina Sunset*, the panel found, and the Appellate Body confirmed, that the statutory standard that the ITC applied to determine whether there was a likelihood of the continuation or recurrence of injury is consistent with the AD Agreement, saying:

We note that the standard set out in Article 11.3 of the Agreement for the investigating authorities’ sunset determinations is “likely.” This standard applies to the likelihood of continuation or recurrence of dumping as well as injury determinations in sunset reviews, and this is precisely the standard that the USITC applied.¹⁷²

As the same standard applies to all sunset reviews, including the one at issue, the reasoning of the panel and Appellate Body in *US - Argentina Sunset* is equally persuasive and relevant here.

105. Mexico makes two points in support of its “as such” argument. First, it asserts that the SAA directs the ITC to apply a standard other than “likely,” inconsistently with Article 11.3; and second, it claims that the ITC’s position in domestic litigation confirms that it does not interpret “likely” to mean “probable.” Neither of these arguments is persuasive.

106. Mexico is incorrect in arguing that, based on guidance from the SAA, the ITC applies a standard in which any determination – affirmative or negative – is permissible.¹⁷³ The SAA simply recognizes the inherently predictive nature of the inquiry involved in a sunset review,

¹⁷⁰ Section 752(a)(1), 19 U.S.C. 1675a(a)(1) (stating that in a sunset review “the Commission shall determine whether revocation of an order, or termination of a suspended investigation, would be *likely* to lead to continuation recurrence of material injury within a reasonably foreseeable time”) (emphasis added) (Exhibit MEX-5).

¹⁷¹ *US-Argentina Sunset (Panel)*, paras. 7.284-7.312 and *US-Argentina Sunset (AB)*, paras. 305-314.

¹⁷² *US-Argentina Sunset (Panel)*, para. 7.285 and *US-Argentina Sunset (AB)*, para. 306 (quoting panel report).

¹⁷³ Mexico First Submission, paras. 375-376

explaining that “[t]here may be *more than one* likely outcome following revocation.”¹⁷⁴ The SAA explains further that

[t]he possibility of other likely outcomes does not mean that a determination that revocation . . . is likely to lead to continuation or recurrence of . . . injury . . . is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case.¹⁷⁵

107. The SAA thus does nothing more than explain that the “likely” standard in sunset reviews does not mean that a continuation or recurrence of injury must be inevitable. The SAA simply recognizes that there may be more than one possible outcome when projecting into the future. Contrary to Mexico’s assertions, the SAA does not direct the ITC to apply a standard that is inconsistent with Article 11.3.

108. Also contrary to Mexico’s assertions, the ITC’s position in earlier domestic litigation and in a brief to a NAFTA panel does not prove that the ITC did not interpret “likely” to mean “probable”. The domestic court decision on which Mexico relies, as well as the NAFTA panel brief, were based on the understanding of some ITC Commissioners that the term “probable” connoted a very high degree of certainty.¹⁷⁶ As it became apparent from subsequent opinions of the U.S. court, however, there are different connotations associated with the word “probable.” The U.S. courts eventually clarified that “probable” was synonymous with the statutory term “likely.” It became clear that the views of a majority of the Commissioners as to the standard applicable in sunset reviews (including the standard applied in the Cement sunset review) were either identical to that articulated by the court or indistinguishable from it.

c. Mexico’s “As Applied” Claim

109. In the sunset review at issue in the instant dispute, the ITC applied the same standard set out in both Article 11.3 of the AD Agreement and U.S. law. Specifically, the ITC determined whether revocation of the antidumping duty order would be “likely” to lead to continuation or recurrence of material injury to a regional industry in the United States within a reasonably foreseeable time.¹⁷⁷ The ITC explicitly stated in its opinion that it was applying the “likely” standard, as set out in the statute.¹⁷⁸

¹⁷⁴ SAA at 883 (emphasis added) (Exhibit US-14).

¹⁷⁵ *Id.*

¹⁷⁶ *See, e.g.*, the discussion of this issue in the July 2002 submission by the ITC in the *Usinor* case (Exhibit MEX-152 at 6).

¹⁷⁷ ITC Report at 1 (Exhibit MEX-9).

¹⁷⁸ ITC Report at 1, 28-31, 38, 40, and 42 (Exhibit MEX-9).

110. Given that the ITC explicitly stated that it was applying a “likely” standard, it only remains for the Panel to evaluate whether the facts supported the ITC’s finding. As the Appellate Body explained in *US – Argentina Sunset*:

We agree with the United States that because the USITC had explicitly stated in its final determination that it applied the “likely” standard, “the only way for the Panel to assess whether that standard was in fact applied was to evaluate whether the facts supported the finding.” Thus, by carrying out the task of evaluating whether the USITC’s determination of likely injury was supported by a sufficient factual basis, the Panel responded to the question whether the USITC *actually* applied the “likely” standard in the sunset review.¹⁷⁹

111. Mexico also relies on the ITC’s statements in domestic litigation and before a NAFTA panel, to support its “as applied” claim.¹⁸⁰ It should be noted again that Argentina made almost identical arguments to the panel and Appellate Body in *US – Argentina Sunset* regarding the same ITC statements in domestic litigation and before a NAFTA panel. The panel found that these statements were not relevant to the question of whether the ITC’s determination in the review at hand satisfied the Article 11.3 likely standard.¹⁸¹ The Appellate Body agreed, explaining:

The task of the Panel was to decide whether the determination of “likely” future injury rested, in this specific case, on a sufficient factual basis to allow the USITC to draw reasoned and adequate conclusions. In order to perform this exercise properly, the Panel did not need to resort to the statements of the USITC before domestic courts or before a NAFTA panel, because the Panel’s assessment necessarily had to be based on the meaning of “likely” within the WTO legal system -- namely the meaning attributed to this term by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*. Therefore, it was not unreasonable for the Panel to consider that the USITC’s statements to which Argentina refers were “not relevant” to the task of assessing the application of the “likely” standard in Article 11.3 with respect to injury in the sunset review at issue.¹⁸²

112. This treatment of ITC statements in other fora only reinforces the fact that the ITC’s compliance with the likely standard is best assessed by an examination of what the ITC actually

¹⁷⁹ *US-Argentina Sunset (AB)*, para. 311.

¹⁸⁰ Mexico First Submission, paras. 385, 387 and 396.

¹⁸¹ *US-Argentina Sunset (Panel)*, para. 7.285.

¹⁸² *US-Argentina Sunset (AB)*, para. 312.

did *in this review*. A discussion of how the facts in the record before the ITC supported its determination is provided in Section VI.A.6 of this submission below.

113. The United States notes that Mexico argues that the Panel is precluded from examining the evidence before the ITC to determine whether that evidence, in fact, supported a finding of “likely” continuation or recurrence of injury. Mexico maintains, citing the panel report in *US–Softwood Lumber AD Final*,¹⁸³ that this would constitute a prohibited *de novo* review. Mexico is mistaken. The panel in *US – Softwood Lumber AD Final* stated that under the standard of review set forth in Article 17.6(I) of the AD Agreement, it was “precluded from establishing facts and evaluating them for [itself], that is . . . engag[ing] in a *de novo* review.”¹⁸⁴ For this Panel to assess whether the ITC actually applied the likely standard – by examining the ITC’s analysis of the likely volume, price effects, and impact of imports if the antidumping order were revoked – does not amount to the Panel establishing facts and evaluating them for itself. Instead, the Panel would be examining, consistent with Article 17.6(I) of the AD Agreement, whether the ITC’s “establishment of the facts was proper and whether [its] evaluation of those facts was unbiased and objective.”

3. The Time Frame in Which Injury Would Be Likely to Recur

- a. Contrary to Mexico’s Assertion, the AD Agreement Does Not Require Investigating Authorities to Determine Whether Injury Would Be Likely at the Time of Revocation

114. Mexico’s position that the AD Agreement requires investigating authorities to assess “injury” at the time of the expiry of the order¹⁸⁵ has no basis in the text of the Agreement. Again, an identical argument was considered and rejected by the panel in *US – Argentina Sunset*.

115. Article 11.3 requires a determination of whether revocation “would be likely to lead to continuation or recurrence of injury.” The words “to lead to” make clear that the recurrence of injury need not be immediate – that it need not occur at the time of revocation of the order. These words affirmatively indicate that the Agreement recognizes that some time may pass between the revocation of the order and the recurrence of injury.¹⁸⁶

116. The panel in *US – Argentina Sunset* rejected the same position advanced by Argentina in that case that injury must occur upon revocation of the order. It stated: “[w]e do not agree with the proposition that Article 11.3 necessarily requires that the investigating authority base its likelihood of continuation or recurrence of injury determination upon the expiry of the duty. As

¹⁸³ Mexico First Submission, paras. 396-397.

¹⁸⁴ *US – Softwood Lumber AD Final (Panel)*, para. 7.9.

¹⁸⁵ Mexico First Submission, paras. 401-403.

¹⁸⁶ The deliberate choice of the words “to lead to” in Article 11.3 is apparent by contrasting it with Article 3.5, which refers to “causing injury” in the present tense, and Article 3.7, which refers to “imminent” injury.

“cannot justify the importation into Article 11.3 of an ‘imminent’ standard for likelihood of recurrence of injury.”¹⁹²

122. In sum, the AD Agreement is silent on the question of the relevant time frame within which injury would be likely to recur. This issue has been left to the discretion of the Members, and the standard set forth in U.S. law is reasonable. As such, Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930 cannot be found to be inconsistent with Articles 11.1 or 11.3 of the AD Agreement.

- c. The ITC’s Application of the Statutory Provisions as to the Time Frame in Which Injury Would Be Likely to Recur Was Not Inconsistent With Articles 11.3 and 3 of the AD Agreement

123. Mexico claims that the ITC’s application of the U.S. statutory requirements contained in Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930, as amended, in the sunset review on cement from Mexico was inconsistent with AD Agreement Articles 11.1 and 11.3.¹⁹³

124. Mexico’s claim has no merit. As explained in the preceding section, Articles 11.1 and 11.3 are silent on the timeframe relevant to a sunset review and imposes no explicit obligations in this respect. Therefore, the ITC cannot be found to have acted inconsistently with these articles by failing to specify the precise period that it considered relevant. As the Appellate Body has explained, “the mere fact that the timeframe of the injury analysis is not presented in a sunset review determination is not sufficient to undermine that determination. . . . A determination of injury can be properly reasoned and rest on a sufficient factual basis even though the timeframe for the injury determination is not explicitly mentioned.”¹⁹⁴

4. Obligations to Base Determinations on Positive Evidence and Conduct an Objective Examination of the Facts on the Record

125. In Section VII of its first submission, Mexico alleges that the ITC’s likelihood of continuation or recurrence of injury determination is inconsistent with U.S. obligations under Articles 11.1 and 11.3 of the AD Agreement. Mexico’s claims have no basis in law or fact. The ITC made its determination based on positive evidence and an objective examination of the record facts. The ITC set forth in a separate report the findings and conclusions reached on all issues of fact and law considered material by the ITC. Moreover, the ITC’s narrative views and related data tabulations provide reasoned explanations of its analysis in more than sufficient detail.¹⁹⁵

- a. Positive Evidence and Objective Examination

¹⁹² *US-Argentina Sunset (AB)*, para. 359.

¹⁹³ Mexico First Submission, paras. 276-277.

¹⁹⁴ *US – Argentina Sunset (AB)*, para. 364.

¹⁹⁵ See ITC Report (Exhibit MEX-9).

126. Under Article 17.6(i) of the AD Agreement, a panel must determine whether an investigating authority's factual determinations were based on a proper establishment of the facts, and an unbiased and objective evaluation of those facts. These fundamental evidentiary and objectivity principles would be relevant to a likelihood of continuation or recurrence of injury determination under Article 11.3. As the Appellate Body noted in *US – Argentina Sunset*, these Article 17.6(i) principles parallel those set forth in Article 3.1, that injury determinations be based on “positive evidence” and an “objective examination.”¹⁹⁶ Thus, the panel would ensure that the investigating authority's determination of likelihood of continuation or recurrence of injury is made on the basis of the proper establishment of the facts, or positive evidence, and involves an unbiased and objective examination of that evidence. While positive evidence involves the facts underpinning and justifying the likelihood of continuation or recurrence of injury determination, objective examination is concerned with the investigative process itself.¹⁹⁷

127. The Appellate Body in *US-Argentina Sunset* examined the term “positive evidence” and explained that:

The term “positive evidence” relates, in our view, to the *quality* of the evidence that authorities may rely upon in making a determination. The word “positive” means, to us, that the evidence must be of an *affirmative, objective and verifiable* character, and that it must be *credible*.¹⁹⁸

128. Moreover, the Appellate Body has recognized that, because of the prospective and forward-looking nature of determinations to be made under Article 11.3, absolute certainty on what is likely to occur in the future is not required in order for such a determination to be based on “positive evidence.” Thus, the Appellate Body in *US-Argentina Sunset* explained:

The requirements of “positive evidence” must, however, be seen in the context that the determinations to be made under Article 11.3 are prospective in nature and that they involve a “forward-looking analysis.” Such an analysis may inevitably entail assumptions about or projections into the future. Unavoidably, therefore, the inferences drawn from the evidence in the record will be, to a certain extent, speculative. In our view, that some of the inferences drawn from the evidence on record are

¹⁹⁶ *US-Argentina Sunset (AB)*, paras. 284 and 340. Article 3.1 of the AD Agreement provides that an injury determination:

shall be based on positive evidence and involve an objective examination of both (a) the volume of dumped (subsidized) imports and the effects of the dumped (subsidized) imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

¹⁹⁷ *See EC-Bed Linen (AB)*, para. 114; *US-Hot-Rolled Steel (AB)*, para. 193.

¹⁹⁸ *US-Argentina Sunset (AB)*, para. 340, quoting *US-Hot-Rolled Steel (AB)*, para. 192; *see also EC-Bed Linen (AB)*, para. 114.

projections into the future does not necessarily suggest that such inferences are not based on “positive evidence.”¹⁹⁹

129. The Appellate Body has also examined the term “objective examination” in the context of the investigative process, stating:

The word “examination” relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word “objective,” which qualifies the word “examination,” indicates essentially that the “examination” process must conform to the dictates of the basic principles of good faith and fundamental fairness.²⁰⁰

130. In *EC - Bed Linen*, the Appellate Body explained the obligation to conduct an “objective examination” as follows:

In short, an “objective examination” requires that the domestic industry, and the effects of dumped imports, be investigated in an *unbiased* manner, *without favouring the interests of any interested party*, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an “objective examination” recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.²⁰¹

As discussed below, the ITC’s Article 11.3 likelihood of continuation or recurrence of injury determination was based on the proper establishment of the facts and made in an unbiased manner without favoring the interests of any interested party.

b. Reasoned and Adequate Explanation

131. Article 12.2.2 of the AD Agreement sets forth that the investigating authority’s public notice or separate report shall contain “all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . as well as the reasons for the acceptance or rejection of relevant arguments or claims made by exporters or importers.” While the AD Agreement does not elaborate further on what constitutes a reasoned explanation of the relevant facts and arguments that led to the determination, the Appellate Body and prior panels have offered some clarification.

132. According to the panel in *Mexico - HFCS (Article 21.5 - US)*, the obligation of an investigating authority to set forth its explanations in a published notice and/or report is to

¹⁹⁹ *US-Argentina Sunset (AB)*, para. 341, citing *US-Japan Sunset (AB)*, para. 105.

²⁰⁰ *EC-Bed Linen (AB)*, para. 114, quoting *US-Hot-Rolled Steel (AB)*, para. 193.

²⁰¹ *EC-Bed Linen (AB)*, para. 114, quoting *US-Hot-Rolled Steel (AB)*, para. 193 (emphasis in original).

Moreover, the ITC conducted an “objective examination” in which the “identification, investigation and evaluation of the relevant factors [was] . . . even-handed.”²⁰⁸ Mexico’s allegations that the ITC did not rely on positive evidence or evaluate the facts in an objective manner has absolutely no basis in fact and is nothing more than an effort to have the Panel reweigh the record evidence for itself.²⁰⁹

136. In its narrative views and accompanying data tabulations, the ITC identified and discussed specific factual evidence supporting its determination, as discussed below. The ITC explained why it found some evidence more reliable than other record evidence, and addressed contrary factual arguments. Significantly, a careful reading of Mexico’s submission shows that it really does not challenge the positive evidence on which the ITC relied, nor does Mexico argue that the ITC’s tabulation of record information was done incorrectly. Instead, Mexico directs this Panel to look at only certain evidence and/or asserts that the ITC should have used a different methodology to consider certain evidence.²¹⁰ Mexico alleges that certain evidence that was presented to the ITC in the underlying investigation was uncontroverted and overwhelming,²¹¹ but the simple fact is the evidence considered as a whole demonstrates otherwise, as discussed below. In other words, Mexico’s argument is not about whether the ITC’s determination is based on evidence that is affirmative, objective, verifiable, and credible. Mexico is simply, improperly, asking this Panel to reweigh the evidence in hope of a different outcome.

137. Mexico also is mistaken in its allegations that the ITC failed to conduct an objective examination. In fact, the ITC gathered evidence, made extensive inquiries, and evaluated the evidence in good faith. The ITC’s process was fundamentally fair and its investigative proceedings were transparent.

138. The ITC’s determination also reflects the ITC’s objectivity. In its first submission, Mexico questions the ITC’s verification of a certain Mexican producer’s (CEMEX) data and the methodologies used to consider certain production capacity data. Yet, the verification was done after at least two formal special requests were made to CEMEX to provide complete rather than only partial production capacity data and then to reconcile and explain the different sets of capacity numbers provided to the ITC and to other agencies, including Commerce and the U.S. Securities and Exchange Commission.²¹² The fact is, based on the verification, the ITC generally accepted CEMEX’s complete series of data and calculations regarding production capacity with one exception made in order to use a common methodology for production capacity for all Mexican producers.²¹³ The ITC applied methodologies that it uses routinely in its investigations for the Cement investigation.

²⁰⁸ See *US-Hot-Rolled Steel (AB)*, para. 196.

²⁰⁹ See, e.g., Mexico First Submission, paras. 415-488.

²¹⁰ See, e.g., Mexico First Submission, para. 423.

²¹¹ See, e.g., Mexico First Submission, para. 423.

²¹² See ITC Report at IV-14-16 (Exhibit MEX-9).

²¹³ ITC Report at 36, n.216 (Exhibit MEX-9).

146. With respect to the threshold question of why the provisions of Article 3 do not apply to Article 11.3 sunset reviews, the Appellate Body stated that:

Given the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the "review" of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3. We therefore conclude that investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination.²²⁴

147. This analysis is equally correct when applied to the Article 3 claims raised by Mexico in the instant dispute. Given the absence of a textual basis and the different nature and purpose of an original determination and a sunset review, investigating authorities are not required to follow the provisions of Article 3 when making a likelihood of injury determination. Mexico's claims that the United States has failed to comply with Articles 3.2., 3.4, 3.5, 3.7, and 3.8 of the AD Agreement are therefore without basis. The Panel should find, as the panel and Appellate Body did in *US-Argentina Sunset*, that the United States has not acted inconsistently with those provisions because there is no requirement that a Member apply those provisions in making a likelihood of injury determination under Article 11.3.

6. The ITC's Sunset Determination Was Consistent with Article 11.3 Because the Establishment of the Facts Was Proper and the Evaluation of the Facts Was Unbiased and Objective

148. The ITC's sunset determination was based on a proper establishment of the relevant facts and an unbiased and objective evaluation of those facts. As discussed below, the ITC carefully reviewed an extensive array of factors and evidence relative to the likely volume, price effect and impact of dumped imports on the domestic industry. Mexico has failed to show that the ITC's determination was biased in favor of any interested party or that the quality of the evidence considered was compromised in any way.

149. That the ITC may have given a different weight or meaning to record evidence than Mexico would have preferred does not go to whether the ITC conducted an "objective" examination of the facts gathered during the review.²²⁵ As Article 17.6(i) makes clear, the fact

additional duties. With the presence of the order, it would not be surprising that no injury or causal link presently exists, a fact recognized by the standard of "continuation or recurrence of injury."

²²⁴ *US-Argentina Sunset (AB)*, para. 280 (emphasis in original).

²²⁵ *Cf. Cast Iron Fittings (AB)*, para. 128 (stating, in the context of whether the panel made an "objective" and "unbiased" review pursuant to AD Agreement Article 17.6(i), that it is "not sufficient for [the complaining party] simply to disagree with the Panel's weighing of the evidence" and that a panel does not err in declining "to accord the evidence the weight that one of the parties sought to have accorded to it") (internal quotations and footnotes omitted).

that another conclusion might have been drawn is insufficient to find that the decision reached is inconsistent with the AD Agreement.

150. Mexico argues in the alternative that, even if Article 3 does not apply to sunset reviews, which it does not, that “Article 11.3 nevertheless imposes a number of exacting disciplines on an investigating authority when it conducts a ‘review’ and makes a ‘determination.’”²²⁶ In doing so, Mexico contends that “many of the substantive disciplines enumerated in Article 3 are inherent in Article 11.3” and thus “apply as *Article 11.3 obligations*.”²²⁷ According to Mexico, such requirements are derived from “the obligation of investigating authorities to conduct a ‘review’ and make a ‘determination.’”²²⁸

151. Once again, Mexico’s attempt to implicitly apply Article 3 to a sunset review echoes the same legal arguments made by Argentina and rejected by the Appellate Body in *US-Argentina Sunset*. The Appellate Body there indicated that it was “not persuaded by the argument of Argentina that a likelihood-of-injury determination can rest on a ‘sufficient factual basis’ and can be regarded as a ‘reasoned conclusion’ *only* after undertaking all the analyses detailed in the paragraph of Article 3.”²²⁹ Specifically, the Appellate Body in *US-Argentina Sunset* reasoned that:

The Appellate Body has concluded previously that the terms “determine” and “review” are critical to understanding the obligations of an investigating authority in sunset reviews. The ordinary meanings of these terms necessitate a “reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.” As the Appellate Body stated in *US - Corrosion-Resistant Steel Sunset Review*, however, the requirement for an investigating authority to arrive at a “reasoned conclusion” as to the likelihood of continuation or recurrence of injury does not have to be satisfied through a specific methodology or the consideration of particular factors in every case. We are not persuaded by the argument of Argentina that a likelihood-of-injury determination can rest on a ‘sufficient factual basis’ and can be regarded as a ‘reasoned conclusion’ *only* after undertaking all the analyses detailed in the paragraphs of Article 3.²³⁰

152. Thus, in spite of Mexico’s attempts to read Article 11.3 as requiring a specific methodology, the Appellate Body in *US-Argentina Sunset* reaffirmed statements in *US-Japan*

²²⁶ Mexico First Submission, para. 598.

²²⁷ Mexico First Submission, paras. 604 and 605.

²²⁸ Mexico First Submission, para. 605.

²²⁹ *US-Argentina Sunset* (AB), para. 283.

²³⁰ *US-Argentina Sunset* (AB), para. 283.

Sunset that no specific methodology is prescribed for Article 11.3 proceedings.²³¹ Rather, the Appellate Body set forth that the investigating authorities' obligations in a sunset review are as follows:

In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that *the investigating authority has to determine, on the basis of positive evidence*, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. *An investigating authority must have a sufficient factual basis* to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence.²³²

153. The ITC's cement sunset determination was consistent with the objectivity and evidentiary requirements of the AD Agreement, and rests on a factual basis sufficient to allow it to draw reasoned and adequate conclusions. The Appellate Body in *US-Argentina Sunset* recognized the ITC's three-step approach – likely volume of dumped imports, likely price effects of dumped imports, and likely impact of dumped imports on the domestic industry in the event the antidumping duties were terminated – as a legitimate manner to structure its reasoning and arrive at an overall determination.²³³ Moreover, the Appellate Body in *US-Argentina Sunset* explained that the Article 11.3 “likely” standard applies to the overall determinations regarding dumping and injury, and that the standard “need not necessarily apply to each factor considered in rendering the overall determinations of dumping and injury.”²³⁴

154. As discussed above, the inquiry contemplated by Article 11.3 is counterfactual in nature, and entails the application of a decidedly different analysis with respect to the volume, price and impact than an original determination of whether there is material injury or threat thereof by reason of subject imports. In an original investigation, the investigating authorities examine the current condition of an industry that has been exposed to the effects of unrestrained, dumped imports that are competing without remedial measures in place. Five years later, in an Article 11.3 sunset review, the ITC examines the *likely* volume of imports *in the future* that have been restrained for the last five years by the antidumping duty order, the *likely* price effects *in the future* of such imports, and the *likely* impact of the imports *in the future* on the domestic industry that has been operating in a market where the remedial order has been in place. Indeed, there may no longer be either any subject imports or material injury once an antidumping order has been in effect for five years. The authority must then decide the likely impact of a prospective

²³¹ The Appellate Body in *US-Argentina Sunset* stated:

Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11 identify any particular factors that authorities must take into account in making such a determination .

US-Argentina Sunset (AB), para. 281, *quoting US-Japan Sunset* (AB), para. 123.

²³² *US-Argentina Sunset* (AB), para. 321, *quoting US-Japan Sunset* (AB), para. 114.

²³³ *US-Argentina Sunset* (AB), para. 323.

²³⁴ *US-Argentina Sunset* (AB), para. 323.

change in the status quo; *i.e.*, the revocation of the antidumping duty order and the elimination of its restraining effects on volumes and prices of imports.

155. Mexico’s claims with regard to the likely volume of imports, likely price effects of imports, and likely adverse impact of imports, including the likely impact on “all or almost all” of the producers in the Southern Tier region, are discussed in turn below.

a. Criteria Considered in a Five-Year Review

156. Article 11.3 states in relevant part that: “any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition . . . unless the authorities determine . . . that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.”²³⁵

157. While no further guidance is provided in the AD Agreement, the U.S. statute sets forth that, in a five-year review, the ITC must determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time, by considering the likely volume, price effect, and impact of imports on the domestic industry.²³⁶ The U.S. statute specifically directs the ITC to take into account such other factors as:

(A) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued or the suspension agreement was accepted,

(B) whether any improvement in the state of the industry is related to the order or the suspension agreement,

(C) whether the industry is vulnerable to material injury if the order is revoked or the suspension agreement is terminated²³⁷

158. In evaluating the likely volume of imports of subject merchandise if the order is revoked or the suspended investigation is terminated, the U.S. statute further indicates that the ITC shall “consider whether the likely volume of imports of the subject merchandise would be significant if the order is revoked or the suspended investigation is terminated, either in absolute terms or relative to the production *or* consumption in the United States.”²³⁸

²³⁵ Article 11.3 of AD Agreement.

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

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

²³⁸ 19 U.S.C. 1675a(a)(2) (emphasis added) (Exhibit MEX-5). In doing so, the ITC must consider “all relevant economic factors,” including four enumerated factors:

(A) any likely increase in production capacity or existing unused production capacity in the exporting country,

(B) existing inventories of the subject merchandise, or likely increases in inventories,

159. The AD Agreement also provides no guidance on the consideration of likely price effects in determining whether expiry of the duty would be likely to lead to continuation or recurrence of injury. The U.S. statute provides that in evaluating the likely price effects of subject imports if the order is revoked or the suspended investigation is terminated, the ITC shall consider whether:

(A) there is likely to be significant price underselling by imports of the subject merchandise as compared to domestic like products, and

(B) imports of the subject merchandise are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like products.²³⁹

160. Moreover, the AD Agreement provides no guidance on the consideration of likely impact in determining whether expiry of the duty would be likely to lead to continuation or recurrence of injury in spite of Mexico’s repeated claims of obligations or standards set forth in Article 11.3.²⁴⁰ The U.S. statute, however, sets forth that in evaluating the likely impact of subject imports on the domestic industry, if the order is revoked or the suspended investigation is terminated, the ITC shall consider all relevant economic factors which are likely to have a bearing on the state of the industry in the United States, including, but not limited to:

(A) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(B) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and

(C) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.²⁴¹

(C) the existence of barriers to the importation of the such merchandise into countries other than the United States, and

(D) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.

19 U.S.C. 1675(a)(2)(A)-(D) (Exhibit MEX-5). The SAA further explains that the new section of the statute for five-year reviews “adapt[s] the standard volume, price effect, and impact factors contained in the Agreements for normal injury analysis to likelihood of injury analysis. . . . In addition, specific factors applied by the Commission in its threat of injury analysis have been adapted for purposes of determining the likely volume, price and impact of subject imports in the event of revocation or termination.” SAA at 886 (Exhibit US-14).

²³⁹ 19 U.S.C. 1675a(a)(3) (Exhibit MEX-5).

²⁴⁰ See, e.g., Mexico First Submission, paras. 472, 474, 479, 485, 486, and 487.

²⁴¹ 19 U.S.C. 1675a(a)(4) (Exhibit MEX-5). The U.S. legislative history to the URAA explains that “one would expect that the imposition of an order . . . would have some beneficial effect on the industry” and that the ITC should “not to determine that there is no likelihood of continuation or recurrence of material injury simply because

way to provide more consistency and reliability to our customers.²⁵⁷
(emphasis added).

Ms. Clyburn’s responsibilities are for the sales, marketing, and distribution of cement in CEMEX’s U.S. market.²⁵⁸ The ITC reasonably relied on her expertise and comments regarding the U.S. market and the likely increase in imports of Mexican cement if the order was revoked.²⁵⁹

168. Mexico contends that “[e]ven if the Southern Tier Region were a ‘natural export market for Mexico’ it does not indicate that increased exports are likely/probable” or that Mexican imports could simply substitute for non-subject imports.²⁶⁰ But the ITC did not speculate, rather it relied on actual statements made on behalf of Mexican producers that Mexican imports likely would increase.²⁶¹ The ITC stated in its opinion: “In fact, CEMEX imported significant volumes of non-subject imports into the United States during the period of review, which CEMEX likely would substitute with imports from Mexico, with their lower transportation costs, if the order is revoked.”²⁶² The record demonstrates that in 1999, CEMEX’s nonsubject imports were significant and larger than its imports from Mexico.²⁶³ The ITC reasonably found based on substantial evidence that the likely volume of imports of *Mexican Cement* would be significant in a reasonably foreseeable time if the order was revoked.

169. Mexico’s arguments therefore can not be about the ITC’s finding regarding the likely volume of imports, but rather are really about whether the likely increased volume of subject imports from Mexico is likely to lead to continuation or recurrence of material injury to the domestic industry. As discussions below regarding likely price effects and likely impact of subject imports demonstrate, it is evident that the ITC’s determination was based on positive evidence and involved an unbiased and objective evaluation of that evidence. Thus, the ITC reasonably determined that likely increased subject imports would be significant and would be likely to lead to continuation or recurrence of material injury to the domestic industry if the order was revoked.

ii. *Excess Mexican Production Capacity Was Substantial*

170. The ITC did not rely solely on CEMEX’s statements regarding likely increases in imports of Mexican cement but also considered whether Mexican producers had the ability to supply additional imports of cement to the U.S. market if the order was revoked. The ITC found that

²⁵⁷ Hearing Transcript at 154 (emphasis added); *see id.* 150-154. (Exhibit MEX-120)

²⁵⁸ Hearing Transcript at 150-154 (Exhibit MEX-120); CEMEX and GCCC’s Response to Commission Questions, Exhibit 8 at 1 (Exhibit US-15)

²⁵⁹ *Accord US-Argentina Sunset* (AB), paras. 338 and 339 (reasonable to rely on witness testimony).

²⁶⁰ Mexico First Submission, para. 444.

²⁶¹ Hearing Transcript at 154 (Exhibit MEX-120); CEMEX and GCCC’s Posthearing Brief at 15 (Exhibit US-15); GCCC’s Prehearing Brief at 12-13 (Exhibit MEX-118).

²⁶² ITC Report at 37 (Exhibit MEX-9).

²⁶³ ITC Report at I-38, n.64 (Exhibit MEX-9); CEMEX and GCCC’s Response to Commission Questions at 9-11. (Exhibit US-15).

Mexican producers had significant excess production capacity and thus had the ability to significantly increase shipments of cement to the Southern Tier region.²⁶⁴ The record demonstrates that Mexican producers had large average production capacity for gray portland cement and for cement clinker in 1999.²⁶⁵ The Mexican producers that exported to the Southern Tier region in the original investigation (CEMEX, GCCC, and Apasco) provided production data that is estimated to account for the vast majority of Mexican cement production.²⁶⁶ The record demonstrated that CEMEX and GCCC exported cement to the Southern Tier region during the period of review and all three Mexican producers exported cement to the region during the original investigation.²⁶⁷ The capacity utilization for cement and cement clinker in 1999 for those Mexican producers was low for this highly capital intensive industry.²⁶⁸ The ITC found that the excess capacity of Mexican producers for cement in 1999 was at a level equal to almost one-fifth of 1999 regional apparent consumption, and more than double the additional 2.8 million short tons that CEMEX believed likely could be imported.²⁶⁹ Thus, the ITC reasonably concluded that Mexican producers had substantial excess capacity with which to supply the Southern Tier region in a reasonably foreseeable time.²⁷⁰

171. The ITC conducted an objective evaluation of the evidence including use of a methodology for calculating CEMEX’s Mexican production capacity that was consistent with the methodology employed for calculating the production capacities for other Mexican producers and domestic producers. Before addressing the specifics of the disputed methodology, it is important to recognize that excess capacity for Mexican producers was large in 1999 when based on the ITC’s methodology and, although smaller, still large in 1999 based on the methodologies urged by CEMEX – both the methodology involving an adjustment in its production capacity calculation, and also the one that includes only what CEMEX considered “exportable” excess capacity.²⁷¹

172. In any of these cases, Mexican producers had capacity that exceeded their production by about double the additional 2.8 million short tons that CEMEX believed likely could be exported to the U.S. market if the orders were revoked.²⁷² Such excess capacity is substantial for this

²⁶⁴ ITC Report at 36-37 (Exhibit MEX-9). The ITC noted in its opinion that “[w]hile the parties disagreed on the exact level of Mexican capacity, the Commission verified Mexican producer CEMEX’s capacity records and reconciled any discrepancies.” *Id.* and at IV-14 - IV-16.

²⁶⁵ ITC Report at Tables IV-4 and IV-5 (Exhibit MEX-9).

²⁶⁶ ITC Report at IV-11 and IV-16 (Exhibit MEX-9).

²⁶⁷ ITC Report at IV-11, IV-16-18, and n.38 (Exhibit MEX-9). One of the producers which exported during the original investigation but not during the sunset review was vague with respect to its plans should the antidumping duty order be revoked.

²⁶⁸ ITC Report at Tables IV-4 and IV-5 (Exhibit MEX-9).

²⁶⁹ ITC Report at 36 and at Tables IV-4 and C-1 (Exhibit MEX-9).

²⁷⁰ ITC Report at 36 (Exhibit MEX-9).

²⁷¹ *See* Mexico First Submission, para. 437.

²⁷² Calculated from ITC Report at Tables IV-4 (Exhibit MEX-9). A CEMEX official acknowledged at the ITC’s hearing that “excess capacity has certainly existed at times” and “[t]here is excess capacity in Hermosillo [the Campana plant which ships by rail to Phoenix, Chandler, and Tucson] today.” Hearing Transcript at 152 and 177 (Exhibit MEX-120).

respondents were provided an explanation in the ITC’s verification report, which was endorsed by the ITC in its opinion.

182. The ITC’s finding that Mexican producers had substantial excess capacity was reasonable, supported by positive evidence (regardless of the methodology used), involved an objective evaluation of the evidence, and should be affirmed by the Panel.

iii. Other Possible Constraints to Increased Mexican Imports of
Cement Were Not Significant

183. In evaluating whether there were other constraints to likely increases of imports of Mexican cement, the ITC recognized that the Southern Tier region is a natural market for Mexican imports. Even with the order in place, the Southern Tier region was Mexico’s main export market, accounting for over half of its total export shipments of cement in 1999.²⁸⁷ Moreover, the ITC found based on substantial evidence in the record that Mexican producers had more export infrastructure and controlled substantially more import infrastructure in the Southern Tier region than during the original investigation.²⁸⁸

184. These findings were not speculative, as Mexico charges, but were based on statements by CEMEX officials at the ITC’s hearing as well as other evidence in the record. Specifically, CEMEX official, Rose Mary Clyburn, acknowledged at the ITC’s hearing that “we do have more [import terminal] capacity than we had ten years ago.”²⁸⁹ She also informed the ITC that Mexico’s largest producer, CEMEX, had transformed into a large global concern since the original investigation, with an increased export-oriented focus.²⁹⁰ The ITC reasonably relied on these statements as well as the statements that CEMEX likely would shift from non-subject imports to subject Mexican imports of cement if the order was revoked.²⁹¹ As discussed above, the evidence demonstrated that CEMEX had imported significant volumes of non-subject imports into the United States during the period of review.²⁹² Based on CEMEX’s statements and the evidence in the record, the ITC reasonably found that CEMEX likely would substitute imports from Mexico, with their lower transportation costs, for non-subject imports, if the order was revoked.²⁹³

185. The ITC also considered whether there were terminal capacity constraints to likely increases of Mexican imports of cement, as alleged by Mexico. The ITC reasonably relied on a statement regarding excess import terminal capacity by the same CEMEX official mentioned above. CEMEX’s Ms. Clyburn acknowledged that CEMEX’s import terminals “have the ability

²⁸⁷ ITC Report at Table IV-4 (Exhibit MEX-9).

²⁸⁸ ITC Report at 37 (Exhibit MEX-9).

²⁸⁹ Hearing Transcript at 173 and 178-180. (Exhibit MEX-120).

²⁹⁰ Hearing Transcript at 150 and 180-181 (Clyburn). (Exhibit MEX-120)

²⁹¹ Hearing Transcript at 154. (Exhibit MEX-120)

²⁹² ITC Report at I-38, nn. 64 and 66 (Exhibit MEX-9).

²⁹³ ITC Report at 37 (Exhibit MEX-9).

domestic industry that Cruz Azul had a marine terminal at Salina Cruz in southern Mexico that has been used to export to South America in recent years.³⁰⁵ While there was conflicting evidence provided by CEMEX and the domestic industry, but not by Cruz Azul, whether Cruz Azul would export to the United States, the ITC recognized that the terminal “may be used to export to California by sea.”³⁰⁶

193. The ITC also recognized that Mexican producers had acquired Southern Tier production facilities since the original investigation, but indicated that “[w]e do not believe, however, that Mexican producers’ ownership of these facilities would impede the increase of subject imports to a significant level if the discipline of the antidumping duty order is removed.”³⁰⁷ The ITC clearly provided an explanation for why it believed imports would not be impeded by the regional operations. The ITC recognized the capacity utilization levels of these facilities and indicated that “there are no plans to expand their capacity in the reasonably foreseeable future.”³⁰⁸

194. As discussed above, their corporate parents’ significantly larger facilities in Mexico had substantial excess capacity and were operating at low capacity utilization levels for this highly capital intensive industry in 1999. The high fixed cost for the cement industry would provide incentive to the Mexican producers to maximize returns on investment by increasing production to export more to the Southern Tier region in the absence of the order. However, their regional U.S. operations, unlike other domestic producers, were not expanding capacity to supply more cement to the region. Thus, they would not be affected to the same degree, if at all, by increased imports from Mexican producers. That Mexico can point to evidence of record which detracts from the evidence which supports the ITC’s decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive.

195. In fact, free of the restraining effects of the order, the ITC reasonably considered that firms with a global presence would have more flexibility to supply the Southern Tier market through a combination of production and importation.³⁰⁹ Moreover, the evidence of record demonstrated that Mexican cement producers’ subsidiaries in the Southern Tier region had established customer bases and distribution systems which the ITC recognized would facilitate the Mexican producers’ ability to increase sales of imported subject merchandise if the order was revoked.³¹⁰

³⁰⁵ ITC Report at IV-19 (Exhibit MEX-9); Domestic Producers’ Posthearing Brief (Exhibit US-23) at 14.

³⁰⁶ ITC Report at 37, n.221 (Exhibit MEX-9).

³⁰⁷ ITC Report at 37 and at I-38 and I-411 and IV-18-19 (Exhibit MEX-9).

³⁰⁸ ITC Report at 37 and at Tables I-7 and E-1 (Exhibit MEX-9).

³⁰⁹ Hearing Transcript at 150 and 180-81. (Exhibit MEX-120)

³¹⁰ ITC Report at 37-38 (Exhibit MEX-9); Hearing Transcript at 150-154, 172-173, and 177-182 (Exhibit MEX 120). For example, the evidence showed the following terminals controlled by CEMEX and GCCC’s importers: CEMEX USA had 12 active and 5 inactive terminals located in California, Arizona, Texas, and Florida; the active terminals reportedly had a large annual throughput capacity and substantial unused capacity. Rio Grande also had 2 terminals located in New Mexico and Texas. ITC Report at I-38 and I-41 (Exhibit MEX-9).

211. The ITC's finding that revocation of the antidumping duty order on gray portland cement and cement clinker would be likely to lead to significant underselling by the subject imports of the domestic like product in the Southern Tier region, as well as significant price depression and suppression, within a reasonably foreseeable time, was reasonable and a logical extrapolation of the currently available evidence. The ITC's finding of likely negative price effects by subject imports from Mexico is reasonable, based on positive evidence and an objective evaluation of that evidence, and should be affirmed by the Panel.

- d. The ITC's Findings on the Likely Adverse Impact of Subject Imports on the Regional Industry Were Based on an Unbiased and Objective Evaluation of the Relevant Facts Gathered During the Review

212. The ITC's finding that if the antidumping duty order was revoked the likely significantly increased volumes and negative price effects of the subject imports would likely have a significant adverse impact on the Southern Tier regional industry was based on positive evidence and involved an unbiased and objective evaluation of the evidence. Based on the evidence in the record, the ITC found that the order appeared to have had a beneficial effect on the performance of the Southern Tier regional industry. While the ITC did not find that the regional industry currently was in a vulnerable state with the order in place, it found that if the order was revoked the likely increases in volume at injurious prices likely would adversely impact the regional industry, especially as demand appeared to be flattening and the extremely capital intensive expansions underway were coming on line. The ITC reasonably found that the regional industry likely would be particularly susceptible to injury from subject imports and adversely impacted if the order was revoked. Mexico's arguments seek to have the Panel reweigh the record evidence, despite the substantial positive evidence supporting the ITC's findings.

- i. *The ITC Reasonably Found the Regional Industry Likely Would Be Adversely Impacted by Subject Imports If the Order was Revoked*

213. The ITC considered the evidence in the record of this review and in the record from the underlying original investigation³⁴¹ and concluded that the order appeared to have had a

³⁴¹ Pursuant to the U.S. statute, the ITC also considered the findings in the original investigation and noted that the ITC's affirmative material injury determination was based on the volume of imports, the relatively high market penetration, and the effect of the dumped imports on prices, with particular note taken of the effects of the dumped imports on the condition of the regional industry. USITC Pub. 2305 at 46-51 and 65-67. (Exhibit MEX-10). ITC Report at 40 (Exhibit MEX-9). *Accord US-Argentina Sunset (AB)*, para. 328.

beneficial effect on the regional industry’s performance.³⁴² The evidence demonstrated that the condition of the regional industry had improved since imposition of the order.³⁴³

214. The ITC also recognized that the strong demand for gray portland cement during the period of review had contributed to the regional industry’s positive financial performance.³⁴⁴ However, the evidence showed that the demand cycle appeared to have reached a peak with slower growth or constant demand expected in the Southern Tier region in the reasonably foreseeable future.³⁴⁵ A number of industry forecasts suggested that demand for cement in the Southern Tier region would continue to increase, although at a slower rate or would remain relatively constant in 2000, 2001, and 2002.³⁴⁶ Moreover, the ITC found that responses to ITC questionnaires tended to support the proposition that the growth in demand was slowing or softening in the Southern Tier region.³⁴⁷ Mexico’s arguments regarding the ITC’s findings on demand in the region ignore this evidence,³⁴⁸ including the statements that Mexican respondents provided from industry analysts such as Deutsche Bank, Value-Line and PCA, and domestic producers Southdown and Lafarge that predicted slower growth in demand over the next few

³⁴² While there is no requirement in the AD Agreement that the United States even consider, let alone make a finding, whether improvement in the industry performance is due to the order, Mexico attempts to impose such an obligation on the United States. Mexico First Submission, para. 473 (“the Commission failed to make a specific finding” with respect to the relation of the order to improvement in the state of the industry.). U.S. law, moreover, only requires the ITC “to take into account” this factor, but does not require the ITC to make a finding. 19 U.S.C. 1675a(a)(1) (Exhibit MEX-5).

³⁴³ Regional producers’ shipments in absolute terms have increased since the original investigation and capacity utilization has increased from 75.1 percent in 1989 to 92.6 percent in 1999. ITC Report at Table I-1A (Exhibit MEX-9). The regional industry’s operating income margin was 5.6 percent in 1989 as compared to 29.0 percent in 1997, 30.5 percent in 1998, and 32.4 percent in 1999. *Id.* at Tables I-1A and III-6A, III-7A, and III-8A.

³⁴⁴ The ITC found that strong demand “has contributed to the regional industry’s positive financial performance.” ITC Report at 40 (Exhibit MEX-9).

³⁴⁵ The ITC acknowledged that demand for cement tended to be cyclical in nature because it is determined by the level of general construction and that increased government expenditures for public infrastructure work might lessen the magnitude of any cyclical downturns for the cement industry resulting from declines in residential and commercial building in the reasonably foreseeable future. ITC Report at 32-33 and II-11-12, and n.35 (Exhibit MEX-9).

³⁴⁶ Domestic Producers’ Response to Commission Questions at Attachment 3 (Exhibit US-11). For the Southern Tier region, Portland Cement Association (“PCA”) (Aug. 2000) forecasted cement consumption to increase by 10.6 percent in 1999, 1.2 percent in 2000, 0.7 percent in 2001, 1.5 percent in 2002, and 1.2 percent in 2003; Greystone Insider (Spring 2000) forecasted cement consumption to increase by 11.4 percent in 1999, and decline by 0.2 percent in 2000, 0.8 percent in 2001, and 0.6 percent in 2002, and increase by 1.6 percent in 2003; International Cement Review (May 2000) forecasted cement consumption to increase by 9.4 percent in 1999, 3.6 percent in 2000, and decline by 3.7 percent in 2001, 0.7 percent in 2002, and increase by 6.9 percent in 2003. *Id.*

³⁴⁷ ITC Report at I-31, n.52 (Exhibit MEX-9). In response to the ITC’s questionnaires, producers operating 30 of the 37 plants in the Southern Tier region indicated that demand in this region was slowing or softening; 12 of 20 Southern Tier importers and 21 of 34 Southern Tier purchasers made similar observations. *Id.*

³⁴⁸ Moreover, Mexico’s allegations that “No projection submitted by any party suggested that demand would decline” ignores the declines forecasted for cement consumption by Greystone Insider (Spring 2000) – declines of 0.2 percent in 2000, 0.8 percent in 2001, and 0.6 percent in 2002. Mexico First Submission, para. 481; Domestic Producers’ Response to Commission Questions (Exhibit US-11) at Attachment 3.

included in the ITC's conservative analysis which was based only on the two-year period, 2000 and 2001. The evidence shows that announced production capacity expansions for 2002, if completed, would almost double the announced additional regional production capacity for 2000 and 2001 combined, that would be vulnerable to the likely significant increases in subject imports if the order was revoked.³⁷²

227. Contrary to Mexico's contentions, the ITC recognized the regional industry's current level of operating income, but found that it did not indicate that the regional industry likely would not be materially injured upon revocation of the order.³⁷³ Due to the cyclicity of the cement industry,³⁷⁴ the ITC found that high profits at the peak of a cycle did not indicate that the industry was immune from material injury. The evidence showed that the gray portland cement industry is very capital intensive, and as such requires high capacity utilization levels and operating margins to meet high fixed costs and to sustain its competitiveness and profitability.³⁷⁵ Moreover, due to the high fixed costs in this industry, relatively high levels of profitability are needed to justify investments and capital expenditures.³⁷⁶

228. As stated earlier, the ITC had concluded that revocation of the antidumping duty order would likely lead to a significant increase in the volume of subject imports that would undersell the domestic like product and significantly suppress or depress U.S. prices.³⁷⁷ The ITC found that regional producers' large capital expenditures for additional production capacity would be particularly susceptible to the likely significant increases in subject imports if the order was revoked, and the likely result would be an adverse impact on the regional industry's capacity utilization levels and profitability due to the high fixed costs.³⁷⁸

229. The ITC found that the volume and price effects of the subject imports would likely have a significant adverse impact on the production, shipments, sales, market share, and revenues of the regional industry.³⁷⁹ This reduction in the industry's production, shipments, sales, market share, and revenues would have a direct adverse impact on the industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments. Accordingly, based on the record in this review, the ITC concluded that, if the antidumping duty order was revoked, subject imports from Mexico would be likely to have a significant adverse impact on the regional industry within a reasonably foreseeable time.

³⁷² ITC Report at Table I-7 (Exhibit MEX-9).

³⁷³ ITC Report at 41 (Exhibit MEX-9).

³⁷⁴ ITC Report at 41 (Exhibit MEX-9); Hearing Transcript at 47-49 (Exhibit MEX-120).

³⁷⁵ Domestic Producers' Final Comments (Exhibit US-12) at 2; Hearing Transcript at 37-38, 47-50, 72-73, and 91-93 (Exhibit MEX-120).

³⁷⁶ Hearing Transcript at 37 and 49 ("it takes over \$2 of capital to generate \$1 of revenue"). (Exhibit MEX-120).

³⁷⁷ ITC Report at 40 and 42 (Exhibit MEX-9).

³⁷⁸ ITC Report at 41 (Exhibit MEX-9).

³⁷⁹ ITC Report at 42 (Exhibit MEX-9).

230. That Mexico can point to evidence of record which detracts from the evidence which supports the ITC’s decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive. However, as established earlier, it is not the function of a Panel to decide that, were it the ITC, it would have made the same decision on the basis of the evidence. The Panel’s role is limited to deciding whether the ITC’s decision involved an objective evaluation and was based on positive evidence. The ITC’s finding that, if the order was revoked, subject imports would be likely to have a significant adverse impact on the regional industry within a reasonably foreseeable time, is reasonable, based on positive evidence, and involved an unbiased and objective evaluation of the evidence. As such, the Panel should affirm the ITC’s finding.

- e. The ITC’s Finding That Its “All or Almost All” Standard Was Met Was Based on Positive Evidence and an Unbiased, Objective Evaluation

231. Even assuming, *arguendo*, that the requirements in Article 4.1(ii) of the AD Agreement apply in the context of Article 11.3 reviews, the ITC properly determined based on the evidence in the record, including individual data on the regional producers, that the requirements were met. Mexico attempts to have the Panel impose a specific methodology on the ITC’s “all or almost all” analysis, including a requirement to consider individual firm data in a certain manner and set a definition for what constitutes the “all or almost” standard. Moreover, Mexico seems to be confused about what the ITC considered in its analysis and mistakenly alleges that the ITC considered only certain firm data to the exclusion of others; a claim that simply has no basis. As Mexico’s claim regarding Article 6 is premised on this contorted view of the ITC’s analysis, it also has no foundation. Finally, Mexico’s allegations regarding the definition of the regional industry ignore the positions of the Mexican respondents during the review and the analysis undertaken to define a regional industry. At the center of these arguments, Mexico seeks to have the Panel reweigh the evidence. The Panel should reject Mexico’s arguments and affirm the ITC’s finding.

I. “All or Almost All” Analysis

232. With respect to a regional industry analysis, Article 4.1 of the AD Agreement first sets forth circumstances for defining a regional industry or market and then states in relevant part:

In such circumstances, injury may be found to exist . . . provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.³⁸⁰

³⁸⁰ Article 4.1(ii) of the AD Agreement. The U.S. statute contains a similar statement -- 19 U.S.C. 1677(4)(C) states in relevant part: “if the producers of all, or almost all, of the production within that market are being materially injured or threatened by material injury . . . by reason of the dumped imports. . . .”

Regional industry analysis in five-year reviews considers the criteria in 19 U.S.C. 1677(4)(C) as set forth by 19 U.S.C. 1675(a)(8), which states in relevant part:

its regional operation if the order was revoked seem inconsistent with this evidence of underselling while the order is in place.

239. The ITC recognized that the large capacity of the Mexican cement industry with its low capacity utilization levels and need to meet high fixed costs would provide necessary incentive for the Mexican producers to increase shipments to the Southern Tier region if the order was revoked.³⁸⁷ The ITC reasonably concluded based on the evidence that without the discipline of the order, the interests of the Mexican operations likely would not be secondary to those of their smaller Southern Tier subsidiaries.

240. Second, the ITC also was not convinced by respondents’ arguments that, due to the regional nature of the cement industry, certain markets are insulated from competition with subject imports from Mexico and thus producers of all or almost all regional production would not be materially injured. The ITC recognized that transportation costs tended to limit the distances that cement is shipped. However, the ITC found that the evidence demonstrated that 20 percent of regionally-produced cement in the Southern Tier region was shipped more than 200 miles.³⁸⁸ Virtually all imports into the Southern Tier region are shipped within 200 miles of an import terminal with 89 percent shipped within 100 miles of an import terminal.³⁸⁹ The evidence showed that cement is shipped more economically, and thus to the expanded areas, when rail transport rather than truck transport is used.³⁹⁰ Regional producers operate an extensive network of rail-served distribution terminals in the Southern Tier region that extends their shipping and marketing range.³⁹¹ For example, there are almost twice as many distribution terminals in the Southern Tier region as plants.³⁹² Moreover, contrary to Mexico’s allegations that the ITC’s analysis was based on “theorizing” about marketing patterns,³⁹³ the ITC clearly relied on the positive evidence provided by a senior CEMEX official regarding the “hub and spoke” distribution system, described as typical of the region. CEMEX official Rose Mary Clyburn testified at the ITC’s hearing that:

Most cement producers in the United States use kind of a hub and spoke type of arrangement for trying to extend the distance they can get with their cement plants. What happens is typically, they’ll have a [m]illion ton nominal capacity plant. . . . [and] they will look to extend the ability of that

³⁸⁷ ITC Report at Tables IV-4 and E-1 (Exhibit MEX-9).

³⁸⁸ ITC Report at Table I-2 (Exhibit MEX-9).

³⁸⁹ ITC Report at Table I-2 (Exhibit MEX-9).

³⁹⁰ CEMEX and GCCC’s Response to Commission Questions, Exhibit 8 at 3 (CEMEX’s Ms. Clyburn stated in an affidavit submitted to the ITC that “Rail represents the most economical source of inland transportation for cement.” (Exhibit US-15)); see also Domestic Producers’ Response to Commission Questions at 70 (Exhibit US-11).

³⁹¹ Hearing Transcript at 179 (CEMEX official recognized the regional industry’s rail-fed inland distribution network) (Exhibit MEX-120); Domestic Producers’ Response to Commission Questions at 71 (Exhibit US-11).

³⁹² Hearing Transcript at 128 (Dorn) (Exhibit MEX-120).

³⁹³ Mexico First Submission, paras. 515 and 516.

plant to reach markets by putting in rail-fed inland terminals. A good example of that for Cemex would be our Balcones plant that's outside of San Antonio. We have three inland rail-fed terminals that are designed to be sourced from Balcones. One is Forth Worth, one is Tyler, and one is Katy. . . . The way the distribution economics are set up is the cement needs to come for the most part from the Balcones plant or from the hub plant.³⁹⁴

241. The ITC recognized that when the distribution terminals are taken into account, there are only limited areas in the Southern Tier region that may be somewhat insulated from direct competition with subject imports.³⁹⁵ The ITC then considered which operations were in these more insulated areas. The evidence demonstrated that there were four plants in Northern Alabama and two plants in central Texas that the ITC found may be somewhat more insulated from direct competition with subject imports than other regional producers.³⁹⁶ The evidence showed, however, that these regional producers combined accounted for a small percentage of regional production in 1999.³⁹⁷ Moreover, the extensive rail network, such as that in the Dallas area, permits regional producers to ship economically more than the 100 mile truck radius and thus their product shipped by rail would compete with subject imports in the 100 mile import terminal radius.³⁹⁸ In fact, Mexico's arguments seem to acknowledge that subject imports from Mexico would have an adverse impact on those regional producers that are in most direct competition with them.³⁹⁹

242. Mexico's implication that the ITC's isolation analysis is faulty because CEMEX owns no import terminals in Louisiana, Alabama, or Mississippi fails for two reasons.⁴⁰⁰ First, another Mexican producer Apasco, which imported during the original investigation, has a related import terminal in New Orleans, Louisiana. Second, CEMEX not only imports through CEMEX owned terminals, but its subsidiary CEMEX Trading sells cement to companies that import cement into their own marine terminals in the United States.⁴⁰¹

³⁹⁴ Hearing Transcript at 179-180 (Exhibit MEX-120).

³⁹⁵ ITC Report at Figure II-1 (Exhibit MEX-9); Domestic Producers' Response to Commission Questions at Exhibit 38 (Exhibit US-11). Cf. GCCC's Final Comments at 3 (Exhibit MEX-158).

³⁹⁶ ITC Report at 41, n.257 and at Figure II-1 (Exhibit MEX-9); Domestic Producers' Response to Commission Questions at Attachment 38 (Exhibit US-11); GCCC's Final Comments at 3 (Exhibit MEX-158).

³⁹⁷ ITC Report at Table E-1 (Exhibit MEX-9).

³⁹⁸ ITC Report at Figure II-1 (Exhibit MEX-9); Domestic Producers' Response to Commission Questions at Attachment 38 (Exhibit US-11).

³⁹⁹ While the ITC indicated that it had not relied on a "ripple effects" analysis to reach its conclusion, the ITC recognized, as Commissioner Lodwick did in the original investigation, that producers throughout the region may be affected due to the transporting of shipments from the area of direct competition to surrounding areas, where, in turn, others shipments may be displaced. USITC Pub. 2305 at 66, n.52 (Exhibit MEX-10). ITC Report at 41-42, n.257 (Exhibit MEX-9).

⁴⁰⁰ Mexico First Submission, paras. 514 and 516.

⁴⁰¹ CEMEX and GCCC's Response to Commission Questions at 9-11 (Exhibit US-15); ITC Report at I-38, n.66, IV-16 and Table I-9 (Exhibit MEX-9).

243. Finally, Mexico argues that GCCC's imports will not affect the profitability or operations of domestic producers other than GCCC's subsidiary Rio Grande.⁴⁰² However, the ITC found that there was positive evidence, not speculation as Mexico alleges, to demonstrate that California Portland's announced expansion of its Rillito, Arizona facilities also would serve the New Mexico market, contradicting Mexican respondents' claim that this area would not be served by any regional producer other than GCCC's subsidiary, Rio Grande. Moreover, as discussed above, the evidence shows that Mexican producers have undersold domestic product in the New Mexico market 40 percent of the time, even with the order in place.

244. Thus, the ITC reasonably concluded based on its unbiased evaluation of the positive evidence in this review that the "all or almost all" requirement was likely to be met. That Mexico can cite to evidence that might support a different conclusion does not mean that the Panel should reweigh the substantial positive evidence relied on by the ITC. The ITC's finding should be affirmed by the Panel.

ii. The ITC's "All or Almost All" Analysis Was Consistent with Article 6

245. Mexico's Article 6 claims regarding the "all or almost all" analysis are premised on a mistaken view of the ITC's "all or almost all" analysis. As discussed above, and evident in the ITC's opinion, it considered the aggregate data for the regional industry and "also examined the performance of individual regional producers to look for anomalies."⁴⁰³ In making this statement about its analysis, the ITC cited in footnote 251 to Tables E-1 - E-8 of the ITC Report. These tables contain the individual plant-by-plant data for all cement plants in the Southern Tier region for which data was reported by domestic producers in this review.

246. Counsel for Mexican respondents, as well as counsel for all interested parties to the proceeding, had full access to the business proprietary data contained in these tables, through release of all questionnaire responses, the ITC's prehearing report and the ITC's final staff report. Mexico does not challenge the accuracy or comprehensiveness of the data contained in Tables E-1 - E-8 and neither did the counsel for Mexican respondents in the underlying proceeding. Nor does Mexico point to an anomaly in the individual plant data that the ITC ignored in its analysis.

247. Instead, Mexico alleges, without supporting citation, that "the use by the Commission of . . . the arbitrary and secret selection of individual regional producers to 'look for anomalies' [and the] use of a 'black box' decision making process in the Cement case in no way provided the respondent companies with a 'full opportunity' to defend their interests."⁴⁰⁴

⁴⁰² Mexico First Submission, para. 517; *see also* GCCC's Prehearing Brief at 34-35 (Exhibit MEX-118).

⁴⁰³ ITC Report at 41 (Exhibit MEX-9).

⁴⁰⁴ Mexico First Submission, para. 525.

likely to prevail, let alone on the duty absorption findings.⁴¹⁷ The ITC clearly stated in footnote 236 of the Views of the Commission that:

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. 65 Fed. Reg. 13943 (March 15, 2000); *see also Issues and Decisions Memo for the Administrative Review of Gray Portland Cement and Clinker from Mexico -- August 31, 1997 through July 31, 1998* from Richard W. Moreland to Robert S. LaRussa, Assistant Secretary for Import Administration, dated March 15, 2000 at 47 and 48; 65 Fed. Reg. at 41050 (July 3, 2000); *see also Issues and Decisions Memo for the Sunset Review of Gray Portland Cement and Cement Clinker from Mexico; Final Results* from Jeffrey A. May to Troy H. Cribb, Acting Assistant Secretary for Import Administration, dated June 27 at 8-15; *SKF USA, Inc. v. United States*, 94 F. Supp.2d 1351 (CIT 2000), remand *aff’d*, Slip Op. 00-101 (CIT, Aug. 18, 2000). However, we do not rely on the duty absorption findings in making our determination that significant effects are likely upon revocation of the order.⁴¹⁸

258. Under the bifurcated nature of the division of responsibility for administration of the U.S. antidumping duty laws between Commerce and the ITC, Commerce decides issues relating to margins of dumping, and the ITC decides issues relating to injury. In a sunset review of an antidumping duty order, the U.S. statute explicitly provides that if Commerce makes a duty absorption finding that it “shall notify the Commission of its findings.”⁴¹⁹ If so notified, the U.S. statute further states that “[t]he Commission *shall take into account . . .* the findings of the administering authority regarding duty absorption under section 1675(a)(4) of this title.”⁴²⁰

⁴¹⁷ ITC Report at 30, n.168 and 39, n.236 (Exhibit MEX-9).

⁴¹⁸ ITC Report at 39, n.236 (emphasis added) (Exhibit MEX-9).

⁴¹⁹ 19 U.S.C. 1675(a)(4), states in relevant part that

The administering authority shall notify the Commission of its findings regarding such duty absorption for the Commission to consider in conducting a review under subsection (c) of this section.

⁴²⁰ 19 U.S.C. 1675a(a)(1)(D) (emphasis added). The duty absorption provision was added to the statute by the URAA. The SAA explains that

[d]uty absorption may indicate that the producer or exporter would be able to market more aggressively should the order be revoked as a result of a sunset review. Thus, the Commission *is to consider* duty absorption in determining whether material injury is likely to continue or recur.

SAA at 886 (emphasis added) (Exhibit US-14).

259. In the Commerce sunset review at issue in this dispute, Commerce made duty absorption findings and incorporated those findings into the margins likely to prevail provided to the ITC.⁴²¹

260. The U.S. statute is clear that the ITC must consider a finding of duty absorption that is provided to it by Commerce, but provides little guidance on how, if at all, to factor that finding into the likelihood of injury analysis.⁴²² The ITC, however, can not go behind Commerce’s duty absorption findings and the margins of dumping likely to prevail reported by Commerce to the ITC. While the ITC has the discretion to determine whether even to consider the magnitude of the margins of dumping reported to it by Commerce, the SAA explains that the “Commission shall not itself calculate or otherwise determine likely dumping margins or net countervailable subsidies or the nature of the subsidies in question.”⁴²³

261. In the ITC sunset review at issue in this dispute, the parties disagreed on whether the ITC should place any weight on the duty absorption findings.⁴²⁴ The Mexican respondents noted the decision by the CIT in *SKF USA v. United States*,⁴²⁵ which called into question the validity of Commerce’s duty absorption findings with respect to transition orders, such as the one in this review. The ITC noted this decision and case in its opinion.⁴²⁶

262. The ITC also noted the magnitude of the margins of dumping likely to prevail provided to it by Commerce in footnote 168 of its opinion, without further comment,⁴²⁷ and referred to the duty absorption findings in footnote 236 of its opinion, with the explicit statement that “we do

⁴²¹ *Gray Portland Cement and Cement Clinker From Mexico; Final Results of Full Sunset Review*, 65 FR 41049, 41050 (July 3, 2000); *see also Issues and Decisions Memo for the Sunset Review of Gray Portland Cement and Cement Clinker from Mexico; Final Results* from Jeffrey A. May to Troy H. Cribb, Acting Assistant Secretary for Import Administration, dated June 27 at 8-15.

⁴²² See SAA at 886. (Exhibit US-14).

⁴²³ SAA at 887. (Exhibit US-14).

⁴²⁴ *Cf.* CEMEX and GCCC’s Response to Commission Questions at 45-48 (Exhibit US-15) *to* Domestic Producers’ Response to Commission Questions at 81-88 (Exhibit US-11); Domestic Producers’ Prehearing Brief at 86-88, and 119 (Exhibit US-13).

⁴²⁵ *SKF USA, Inc. v. United States*, 94 F. Supp.2d 1351 (CIT 2000).

⁴²⁶ ITC Report at 39, n.236 (Exhibit MEX-9).

⁴²⁷ The ITC stated in footnote 168 of its opinion:

Section 752(a)(6) of the Act states that “the Commission may consider the magnitude of the margin of dumping” in making its determination in a five-year review. 19 U.S.C. § 1675a(a)(6). The statute defines the “magnitude of the margin of dumping” to be used by the Commission in five-year reviews as “the dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title.” 19 U.S.C. § 1677(35)(C)(iv). See also SAA at 887. . . . In the final results of its full review regarding subject imports from Mexico, Commerce found revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping. Commerce assigned Mexican company-specific margins of 91.94 percent for CEMEX/GCCC/Hidalgo, 53.26 percent for Apasco, and an all other Mexican rate of 59.91 percent. 65 Fed. Reg. at 41050 (July 3, 2000).

ITC Report at 30, n. 168 (Exhibit MEX-9).

not rely on the duty absorption findings in making our determination.”⁴²⁸ It is evident that the ITC, in accord with proposals by Mexican parties in the underlying reviews, placed no weight on the duty absorption findings and thus did not base its determination on them as Mexico mistakenly alleges.

263. Under their ordinary meanings, the terms “consider” and “rely on” should not be used synonymously as Mexico has urged. 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.”⁴²⁹ 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.”⁴³⁰

264. The ITC properly took Commerce’s duty absorption findings into account, as required by U.S. statute, but clearly indicated that it did not rely on these findings in making its determination. There is no evidence to the contrary. Moreover, Mexico’s allegations regarding the ITC’s consideration of the magnitude of the margins of dumping likely to prevail are equally unfounded. Thus, Mexico’s erroneous contention should be summarily dismissed by the Panel.

B. Neither U.S. Law, Nor Commerce’s Determination of Likelihood of Continuation or Recurrence of Dumping At Issue in the Instant Dispute, Is Inconsistent With Article 11.3

265. In Sections VIII.B-E of its first submission, Mexico argues that 19 U.S.C. 1675a(c), the SAA, and the SPB, are inconsistent “as such” with Article 11.3 because they allegedly establish a “presumption” that dumping is likely to continue or recur following revocation of an antidumping duty order.⁴³¹ Mexico also challenges under Article 11.3 of the AD Agreement what it asserts is Commerce’s “consistent practice” of applying the allegedly WTO-inconsistent presumption in sunset reviews generally, as well as in the sunset review determination in the instant case.⁴³² As demonstrated below, all of these claims fail because there is no WTO-inconsistent “presumption” that dumping is likely to continue or recur under U.S. law. Further, Commerce has applied no such “presumption” either as part of any “practice” or in the instant case.

266. In assessing Mexico’s claims, one should again bear in mind the scope of the obligations under Article 11.3. Specifically, Article 11.3 requires that within five years of an antidumping

⁴²⁸ ITC Report at 39, n. 236 (Exhibit MEX-9).

⁴²⁹ *The New Shorter Oxford English Dictionary* (Clarendon Press: Oxford 1993), p. 485 (Exhibit US-24).

⁴³⁰ *The New Shorter Oxford English Dictionary* (Clarendon Press: Oxford 1993), p. 2539 (Exhibit US-24).

⁴³¹ Mexico’s argument appears to be two-fold: (a) that U.S. law creates a “presumption” that is allegedly inconsistent with Article 11.3 and that (b) this purported “presumption” somehow diminishes the “likely” standard in Article 11.3 to a “possible” standard. Both aspects of Mexico’s claim are unfounded and are rebutted above.

⁴³² As discussed in Section IV above, Mexico’s claim regarding Commerce’s alleged “consistent practice” in sunset reviews is not within the Panel’s terms of reference. However, it is addressed above to demonstrate that, even if it were within the Panel’s jurisdiction, it nonetheless is without merit.

duty order being imposed, an investigating authority either must terminate the order or conduct a review to determine whether the termination of that order “would be likely to lead to continuation or recurrence of dumping and injury.”⁴³³ Outside of this standard and the requirement to initiate a review or revoke the order, the text of Article 11.3 contains no provisions governing the conduct of sunset reviews, the type of evidence sufficient to satisfy the “likelihood test,” or the methodologies or modes of analysis to be used in reaching a sunset determination. As explained succinctly by the Appellate Body, “Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review.”⁴³⁴

1. The Alleged “WTO-inconsistent Presumption” Does Not Exist

267. Mexico’s claims in Sections VIII.B-E of its first submission hinge upon the existence of an alleged Commerce “presumption” in sunset reviews that the continuation or recurrence of dumping is likely. As the party asserting this claim, Mexico bears the burden of proving it.⁴³⁵ As discussed below, Mexico fails to establish that any of the documents it cites – either alone or in combination – creates the alleged “presumption.” Mexico’s statistical compilation also fails to establish the alleged “presumption.”

a. The Statute, the SAA, and the SPB, Considered Individually, Do Not Establish Any “WTO-Inconsistent Presumption”

268. Mexico claims that “the text” of 19 U.S.C. 1675a(c)(1), the SAA, and the SPB demonstrate that U.S. law is inconsistent with Article 11.3 as such.⁴³⁶ As prior panels and the Appellate Body have confirmed, however, no such inconsistency exists. Each of the items identified by Mexico is considered in turn below.

⁴³³ Specifically, Article 11.3 provides as follows:

Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.²² The duty may remain in force pending the outcome of such a review.

²² When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

⁴³⁴ See *US - Japan Sunset (AB)*, para. 149; and *US - Japan Sunset (Panel)*, para. 7.166 (“That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member’s investigating authority in making such a ‘likelihood’ determination.”).

⁴³⁵ See Section V above regarding burden of proof.

⁴³⁶ Mexico First Submission, para. 654.

269. Mexico first cites 19 U.S.C. 1675a(c)(1), noting that this statutory provision requires Commerce to consider dumping margins and import volumes in sunset reviews.⁴³⁷ However, although this provision does require that Commerce consider dumping margins and import volumes in making its likelihood determination, it does not restrict Commerce in its consideration of any other relevant information submitted in a sunset review. As Mexico appears to concede, the statute itself does not establish a “WTO-inconsistent presumption.”⁴³⁸ And as a panel found in a previous case in which virtually identical claims were made, “the Statute on its face not only does not support ... allegations regarding an irrefutable presumption of likelihood, but to the contrary seems to indicate that no such irrefutable presumption exists.”⁴³⁹

270. Mexico also fails to establish any alleged “WTO-inconsistent presumption” by reading the statute in combination with the SAA. Mexico quotes the following passage from the SAA as evidence of the alleged presumption:

[19 U.S.C. 1675a(c)] establishes standards for determining the likelihood of continuation or recurrence of dumping. Under [Section 1675a(c)(1)], Commerce will examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. *For example*, declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may *provide a strong indication* that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes.

* * * *

[E]xistence of dumping margins after the order, or the cessation of imports after the order, is *highly probative* of the likelihood of continuation or recurrence of dumping.⁴⁴⁰

⁴³⁷ Mexico First Submission, para. 642.

⁴³⁸ Mexico First Submission, para. 643 (“While the statute prescribes the two factors ... that the Department must consider in making the likelihood determination, the statute does not articulate how the Department must interpret these elements in deciding whether dumping would be likely to continue or recur.”).

⁴³⁹ *US - Argentina Sunset (Panel)*, para. 7.148 (emphasis added). The panel in *US - Argentina Sunset* concluded that the statute, interpreted in light of the SAA, does not contain an irrefutable presumption of likelihood for purposes of Commerce’s likelihood determination. *Id.*, para. 7.151. See also *US - German Sunset (AB)*, para. 163 (although this dispute dealt with Article 21.3 of the SCM Agreement, the corresponding provision of the AD Agreement (Article 11.3) is virtually identical).

⁴⁴⁰ Mexico First Submission, para. 645, quoting from the SAA at 889-90 (emphasis added).

271. Ignoring the plain language of the SAA, Mexico argues that this passage demonstrates that Commerce must give “decisive weight” to dumping margins and import data, to the exclusion of all other evidence, when making a likelihood determination.⁴⁴¹ Mexico is wrong. Phrases such as “[f]or example,” “provide a strong indication,” and “highly probative” are not indicative of any presumption. Again, addressing virtually identical arguments in *US - Argentina Sunset*, the panel correctly found that,

not only does the SAA contain nothing that would cause us to disregard the plain meaning of the Statute, but to the contrary the SAA confirms that the Statute does not provide for the irrefutable presumption alleged ...⁴⁴²

Thus, this passage from the SAA – the only passage on which Mexico relies – cannot be the source of the alleged “WTO-inconsistent presumption.”⁴⁴³

272. Mexico also argues that the SAA “confirms” a standard for Commerce’s likelihood determinations that is less than “probable.”⁴⁴⁴ To support this assertion, however, Mexico cites a determination by the ITC, not Commerce.⁴⁴⁵ Mexico fails to explain why a statement by the ITC is evidence of Commerce’s interpretation of “the likely” standard. In any case, the statutory provisions governing Commerce’s sunset determinations explicitly require a determination based on “likelihood.”⁴⁴⁶ Mexico provides no evidence that U.S. law requires or that Commerce actually applies anything other than a likelihood standard. Nor can it, because that is, in fact, not the case.

273. Finally, Mexico cites Section II.A.4 of the SPB as the “unambiguous articulation” of the alleged presumption.⁴⁴⁷ Section II.A.4 of the SPB provides the following:

[T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where –

(a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;

⁴⁴¹ Mexico First Submission, para. 654.

⁴⁴² *US - Argentina Sunset (Panel)*, para. 7.150 (emphasis added).

⁴⁴³ Furthermore, as Mexico itself acknowledges, the SAA provides interpretive guidance in respect of the statute. Mexico First Submission, para. 644, citing *US - Export Restraints (Panel)*. Thus, the SAA does not constitute an instrument with a functional life of its own and therefore is not a measure for purposes of WTO dispute settlement, let alone a measure challengeable “as such”.

⁴⁴⁴ Mexico First Submission, paras. 661-63.

⁴⁴⁵ See Mexico First Submission, para. 662 and note 672.

⁴⁴⁶ 19 U.S.C. 1675(c)(1) (Exhibit MEX-4) and 1675a(c)(1) (Exhibit MEX-5).

⁴⁴⁷ Mexico First Submission, para. 688.

(b) imports of the subject merchandise ceased after issuance of the order or suspension agreement, as applicable; or

(c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.

274. There are at least four defects in Mexico’s allegations about the SPB. First, the SPB does not compel or “instruct” Commerce to do anything. It merely provides guidance to the general public on Commerce’s current views on issues not explicitly addressed by the statute and regulations.⁴⁴⁸ In particular, the SPB in no way binds Commerce as a “rule” or “norm” in individual sunset reviews.⁴⁴⁹ Thus, the SPB cannot be found to be WTO-inconsistent “as such” because, as a matter of fact, it cannot mandate any action, let alone a WTO-inconsistent action.⁴⁵⁰

275. Second, and once again, claims identical to those made by Mexico in the instant dispute have been considered and rejected by the Appellate Body in *US - Japan Sunset* and *US - Argentina Sunset*.⁴⁵¹ In both disputes, the complainants argued that the text of the SPB establishes a WTO-inconsistent presumption and their arguments were rejected. As the Appellate Body correctly stated in *US - Argentina Sunset*:

[T]he text of the SPB is not dispositive of the question whether the three scenarios set out in the SPB are regarded as determinative/conclusive, or merely indicative in [Commerce’s] likelihood determinations.⁴⁵²

Section II.A.3 of the SPB, on its face, simply does not evince the “presumption” alleged by Mexico.

276. Third, Mexico’s allegation that the SPB creates a WTO-inconsistent presumption rests on the premise that one of the scenarios described in Section II.A.4 of the SPB, above, must *always* follow the imposition of an antidumping duty order. Based on this erroneous assumption, Mexico argues that the various circumstances noted in the SPB have “decisive weight.”⁴⁵³ Because Mexico’s premise is faulty, its argument again fails.

⁴⁴⁸ See SPB, 63 FR 18871 (April 16, 1998) (Exhibit MEX-131).

⁴⁴⁹ See *US - Japan Sunset (AB)*, para. 82.

⁴⁵⁰ See, e.g., *US - 1916 Act (AB)*, paras. 88-89.

⁴⁵¹ *US-Japan Sunset (AB)* paras. 178-181 (finding that the language of Section II.A.3 of the SPB does *not* clearly indicate that import volumes and evidence of continued dumping will always be conclusive with respect to likelihood); and *US-Argentina Sunset (AB)*, para. 202 (“the text of the SPB is equivocal ...”).

⁴⁵² *US - Argentina Sunset (AB)*, para. 200 and para. 199, quoting *US - Japan Sunset (AB)*.

⁴⁵³Mexico First Submission, para. 650. Mexico also cites Section II.C of the SPB, which references the “good cause” provision of the antidumping statute. Mexico First Submission, para. 649. Mexico, however, does not make any claims with respect to the application of this provision in sunset reviews conducted by Commerce.

277. Fourth, Mexico’s quoted passage from the SPB does not *require* Commerce to make an affirmative finding in any of these circumstances. As discussed above, the SPB merely provides guidance to the public – it does not bind Commerce. Moreover, the passage to which Mexico cites merely indicates what Commerce “normally” will do. The use of the word “normally” demonstrates that there is discretion on the part of the decision-maker, depending on particular facts on a case by case basis.⁴⁵⁴

278. In other words, the SPB provides a limited variety of scenarios that may follow the imposition of an antidumping order. The SPB simply recognizes that those limited scenarios are highly probative of a likelihood that dumping will continue and, therefore, “normally” will lead to an affirmative determination.⁴⁵⁵ The SPB does nothing more than describe what Commerce “normally” will do when presented with a specific set of facts. With different or additional facts, what Commerce “normally” would do becomes irrelevant. This is hardly evidence of a “presumption” of likelihood.

b. The Statute, the SAA, and the SPB, “Taken Together,” Do Not Establish Any “WTO-Inconsistent Presumption”

279. Mexico also argues that the statute, the SAA, and the SPB are inconsistent with Article 11.3 because, “taken together,” they allegedly require consideration of dumping and import volumes “to the exclusion of other factors that may be relevant.”⁴⁵⁶ Mexico’s claim fails in two significant respects.

280. First, as previously discussed, Article 11.3 does not set forth any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review.⁴⁵⁷ Thus, Article 11.3 does not prescribe any particular set of factors or evidence that an investigating authority is required to consider. Rather, Article 11.3 obligates an investigating authority to examine the likelihood of continuation or recurrence of dumping. Further, as the Appellate Body has clarified, “[i]n drawing conclusions from that examination, the investigating authority must arrive at a reasoned determination resting on a sufficient factual basis; it may not rely on assumptions or conjecture.”⁴⁵⁸ The analysis conducted by Commerce in its sunset reviews complies fully with these obligations.

281. Second, under U.S. law, Commerce considers the behavior of producers/exporters since the imposition of the order and whether that behavior is likely to continue or recur. While U.S.

⁴⁵⁴ *US - Japan Sunset (AB)*, para. 156. A “measure” cannot be found to be WTO-inconsistent “as such” unless it mandates a WTO-inconsistent action or precludes a WTO-consistent action. *See, e.g., US - 1916 Act (AB)*, paras. 88-89.

⁴⁵⁵ SPB at Section II.A.4 (Exhibit MEX-131).

⁴⁵⁶ Mexico First Submission, paras. 655-58.

⁴⁵⁷ *US - Japan Sunset (AB)*, para. 149.

⁴⁵⁸ *US - Argentina Sunset (AB)*, para. 180.

law does require Commerce to consider evidence of dumping and import volumes, it also provides for consideration of other factors, such as price, cost, market, and other relevant economic factors.⁴⁵⁹ Further, in addition to the so-called “good cause” factors, Commerce’s sunset regulations afford all parties in the sunset review the opportunity to submit “any other relevant information or argument that the party would like [Commerce] to consider.”⁴⁶⁰ The Appellate Body itself has noted that even the SPB sets out a broad range of factors other than import volumes and dumping margins that may potentially be relevant to Commerce’s likelihood determination.⁴⁶¹

282. There is nothing WTO-inconsistent about according probative value to evidence of continued dumping and import volumes in a sunset analysis. As the Appellate Body has concluded, “[t]he importance of the two underlying factors (import volumes and dumping margins) for a likelihood-of-dumping determination cannot be questioned”⁴⁶² Furthermore, there can be no doubt that “U.S. law provides for consideration of ‘other factors’”⁴⁶³

283. The burden is on Mexico to establish a *prima facie* case. It has failed to meet its burden.

284. Moreover, as discussed below, Mexico has failed to demonstrate that Commerce considers evidence of dumping and import volumes *to the exclusion of* other relevant information on the record or that Commerce’s likelihood determinations, as a general matter, are not founded on rigorous examination or a sufficient factual basis.⁴⁶⁴ In other words, the legal framework for Commerce’s likelihood determination is entirely WTO-consistent.

c. Mexico’s Statistical Compilation Does Not Demonstrate Any “WTO-Inconsistent Presumption”

285. In support of its “as such” claims, Mexico offers Exhibit MEX-188, which purports to analyze exhaustively Commerce’s sunset determinations and demonstrate the existence of the

⁴⁵⁹ 19 U.S.C. 1675b(c)(2) (Exhibit MEX-142).

⁴⁶⁰ See 19 CFR 351.218(d)(3)(iv)(A) (submission of information or evidence showing good cause for consideration of other factors under 19 U.S.C. 1675b(c)(2)) and (B) (submission of other information or argument) (Exhibit US-4).

⁴⁶¹ *US - Japan Sunset (AB)*, para. 186.

⁴⁶² *US - Argentina (AB)*, para. 208.

⁴⁶³ *US - Argentina (AB)*, para. 213.

⁴⁶⁴ See *US - Argentina Sunset (AB)*, para. 202.

“presumption” allegedly inherent in Commerce’s sunset reviews.⁴⁶⁵ In fact, Exhibit MEX-188 does nothing of the sort.

286. In the first instance, Mexico’s “analysis” of the so-called “consistent application” of the SPB is fundamentally flawed. Mexico does no more than note a correlation between the results in particular sunset reviews and the scenarios set forth in the SPB. Nowhere does Mexico demonstrate that the indicia set forth in the SPB *caused* the determinations in question. Instead, Mexico baselessly assumes a cause and effect relationship, notwithstanding that the correlation is equally well explained by the fact that the SPB does precisely what it purports to do – reflect the views of Commerce on how it normally expects to exercise its discretion when actually faced with a particular set of facts.

287. This type of statistical “analysis” fails to demonstrate that the SPB required Commerce to act in a certain way. Addressing a virtually identical statistical “analysis” in *US - Argentina Sunset*, the Appellate Body reached the same conclusion. Specifically, 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.”⁴⁶⁶ These types of statistics alone reveal very little, if anything, about the circumstances of individual cases. Thus, contrary to Mexico’s claim, Exhibit MEX-188 fails to demonstrate that the SPB “instructs” Commerce to treat these scenarios as “conclusive.”⁴⁶⁷

288. What Exhibit MEX-188 does show is that the overwhelming majority of Commerce sunset reviews are uncontested by one side or the other. Of the 316 sunset reviews discussed in Exhibit MEX-188, 75 were reviews in which no domestic industry party participated and in which Commerce revoked the antidumping order in question. In addition, Exhibit MEX-188 shows that there were 203 reviews in which respondent interested parties chose not to participate. Thus, of the 316 sunset reviews listed in Exhibit MEX-188, 88 percent of those reviews were uncontested. Even considering the 241 reviews in which at least one domestic interested party

⁴⁶⁵ Mexico First Submission, para. 668. Mexico also challenges Commerce’s “consistent practice” as such. Mexico First Submission, Section VIII.C, paras. 665-682. As discussed before in Section IV, this claim is not within the Panel’s terms of reference, and is not a measure for purposes of WTO dispute settlement proceedings. Moreover, what Mexico calls a “practice” is merely past determinations by Commerce in prior cases. It cannot be found WTO-inconsistent because it is not “mandatory;” *i.e.*, it neither requires WTO-inconsistent action nor precludes WTO-consistent action. The Appellate Body and several panels have recognized that a Member may challenge, and a WTO panel may find against, a measure “as such” only if the measure has mandatory effect. The burden is on the complaining party to demonstrate that any challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action. Mexico has not provided any evidence whatsoever that Commerce is bound by its past determinations. Nor can it because, as a matter of U.S. law, Commerce is not so bound. Thus, this Commerce “practice” cannot be said to mandate any action by Commerce, let alone WTO-inconsistent action. In any case, Mexico’s statistical compilation could not amount to evidence of any “consistent practice” because it reveals little, if anything, about the circumstances of individual cases.

⁴⁶⁶ *US - Argentina Sunset (AB)*, para. 212. Thus, Mexico’s reliance on the panel’s findings in *US - Argentina Sunset* is misplaced. Mexico First Submission, paras. 676-82.

⁴⁶⁷ Mexico First Submission, para. 668.

expressed an interest, 84 percent of those reviews were uncontested by respondent interested parties.

289. By the U.S. count, this leaves 38 reviews (only 16 percent) in which respondent interested parties may have contested the issue of likelihood to some extent. Although, in these reviews, Commerce found a likelihood of continuation or recurrence of dumping, that fact does not by itself establish the existence of a “presumption” of the likelihood that dumping will continue or recur. Mexico appears to assert that the existence of a “presumption” is proven by the fact that the respondents in these reviews did not “overcome” the alleged “presumption” that dumping would likely continue or recur. This is nothing more than circular reasoning. It assumes the existence in these determinations of a “presumption” and uses that assumption to support a conclusion that the assumed presumption exists. As demonstrated above, however, these determinations do not prove the existence of any such “presumption.”

290. Sunset review determinations are based on the facts of the record.⁴⁶⁸ The SPB does nothing more than indicate as guidance that certain facts may reasonably give rise to a conclusion that dumping is likely to continue or recur. Mexico has failed to demonstrate otherwise. Accordingly, Mexico’s “as such” claims of an alleged “WTO-inconsistent presumption” must fail.

2. Commerce Properly Found Likelihood of Continuation or Recurrence of Dumping in This Case

291. In August 1999, Commerce initiated a sunset review of the antidumping duty order on cement from Mexico.⁴⁶⁹ Subsequently, domestic interested parties and three foreign interested parties – Apasco, CEMEX, and CDC – filed substantive responses to the notice of initiation submitting information and argument⁴⁷⁰ as provided for in Commerce’s sunset regulations.⁴⁷¹ These parties also then filed rebuttals to the other parties’ substantive responses.⁴⁷²

⁴⁶⁸ United States law provides that “[t]he court shall hold unlawful any determination, finding, or conclusion ... unsupported by *substantial evidence on the record*, or otherwise not in accordance with law” 19 U.S.C. 1516a(b)(1)(B)(i) (emphasis added) (Exhibit US-25). This standard applies to Commerce’s determinations in full sunset reviews. By law, the record includes “a copy of all information presented to or obtained by ... [Commerce], including all governmental memoranda pertaining to the case and the record of ex parte meetings ... and a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.” 19 U.S.C. 1516a(b)(2)(A)(i) (Exhibit US- 25); *see also* 19 CFR 351.104 (“Record of Proceeding”) (Exhibit US-26). To the extent an interested party believes that, *inter alia*, Commerce’s determination was based on something other than the evidence on the record, they have a private right of action under the U.S. legal system. *See* 19 U.S.C. 1516a(a)(2) (Exhibit US-25).

⁴⁶⁹ *Commerce Investigation Initiation* (Exhibit MEX-11).

⁴⁷⁰ STCC Substantive Response (Exhibit US-27); Apasco Substantive Response (Exhibit US-28); CEMEX Substantive Response (Exhibit US-29); and CDC Substantive Response (Exhibit US-30).

⁴⁷¹ 19 CFR 351.218(d)(3) (Exhibit US-4).

⁴⁷² STCC Rebuttal (Exhibit US-32); CEMEX Rebuttal (Exhibit US-33); and CDC Rebuttal (Exhibit US-34).

292. After considering the factual record in the review, including evidence and arguments put forward by the parties, Commerce issued a preliminary determination finding likelihood of continuation or recurrence of dumping. In particular, since issuance of the order, Commerce had completed seven assessment reviews analyzing pricing behavior during the years 1990 - 1997.⁴⁷³ In addition, only a few months before its preliminary sunset determination, Commerce had issued a preliminary determination in the eighth assessment review involving sales during 1997-1998. In each of those reviews, Commerce found that Mexican producers/exporters were dumping cement in the United States, with margins ranging from 37 to 73 percent *ad valorem*.⁴⁷⁴ In addition, Commerce found that the level of imports had declined from 3.9 million metric tons in 1989, the year before the order was imposed, to 1 million metric tons in 1991, the year after the order was imposed, where the level of imports remained through 1998.⁴⁷⁵ Based on the fact that “dumping has continued over the life of the order, that the import volume of the subject merchandise decreased significantly after the issuance of the order, and that there are no arguments and/or evidence to the contrary,” Commerce preliminarily found that there was a likelihood of continuation or recurrence of dumping.⁴⁷⁶

293. Commerce subsequently considered and addressed the parties’ arguments concerning its preliminary sunset results,⁴⁷⁷ but did not find that these warranted a change to the affirmative likelihood determination in the final results.⁴⁷⁸ By the time Commerce issued its final sunset determination, it had completed the eighth assessment review and determined a margin for Mexican producers/exporters of 45 percent *ad valorem*.⁴⁷⁹

a. Commerce’s Likelihood Determination is Based Upon the Behavior of Mexican Producers/Exporters

294. Mexico argues that Commerce applied a “WTO-inconsistent presumption” in making its likelihood determination.⁴⁸⁰ As discussed above, Mexico has failed to establish its alleged “presumption.” Moreover, if there is evidence that dumping has continued under the discipline of the order, it is reasonable for Commerce to find that dumping will continue without the discipline of the order. This is not a presumption that dumping is likely to continue or recur in every case. On the contrary, it is a reasonable inference about future behavior based upon past behavior.

⁴⁷³ *Commerce Preliminary Sunset Decision Memorandum*, at note 19 (Exhibit MEX-132).

⁴⁷⁴ *Commerce Preliminary Sunset Decision Memorandum*, at note 19 (Exhibit MEX-132).

⁴⁷⁵ *Commerce Preliminary Sunset Decision Memorandum*, at notes 20 and 21 (Exhibit MEX-132).

⁴⁷⁶ *Commerce Preliminary Sunset Results*, and *Commerce Preliminary Sunset Decision Memorandum*, at 7 (Exhibit MEX-132).

⁴⁷⁷ STCC Brief (Exhibit US-35); CEMEX Brief (Exhibit US-36); and CDC Brief (Exhibit US-37).

⁴⁷⁸ *Commerce Final Sunset Results*, and *Commerce Final Sunset Decision Memorandum* (Exhibit MEX-135).

⁴⁷⁹ *See Commerce Final Sunset Decision Memorandum*, at 2 (Exhibit MEX-135).

⁴⁸⁰ Mexico First Submission, paras. 688-91.

295. Mexico also argues that Commerce applied a “less than likely standard” in making its likelihood determination.⁴⁸¹ The evidence in this case, however, belies Mexico’s claim. In making its likelihood determination, Commerce relied upon the following facts: (1) Mexican producers/exporters had continued to dump in each of the eight years since the imposition of the duty; (2) the two most recent assessment reviews evincing continued dumping by Mexican producers/exporters had been completed immediately prior to the initiation of the cement sunset review and immediately prior to the final sunset determination, respectively; (3) the level of imports in the years preceding the cement sunset review remained significantly lower than pre-order volumes; and (4) parties provided no evidence or argument to the contrary.⁴⁸²

296. Commerce’s reliance on the behavior of Mexican producers/exporters was entirely reasonable. Moreover, the inference Commerce drew in this case from that behavior, *i.e.*, that because Mexican producers/exporters have continued to dump since the imposition of the order, they would be likely to continue dumping if the order were revoked, was also reasonable.

297. As the Appellate Body in *US - Japan Sunset* recognized, it is the exporters or producers themselves who possess the best evidence of their likely future pricing behavior.⁴⁸³ Pursuant to Commerce’s sunset regulations, parties are permitted to place any information they choose on the administrative record, including information to demonstrate that the existence of dumping and reduced or depressed import volumes should not support a finding that dumping is likely to continue or recur in the particular case. Specific information requested by Commerce includes:

A statement regarding the likely effects of revocation of the order or termination of the suspended investigation under review, which must include any factual information, argument, and reason to support such statement.⁴⁸⁴

298. In response to this question, CEMEX stated:

Revocation of the antidumping duty order against gray portland cement from Mexico would not result in material injury to the regional industry producing gray portland cement. Due to cement shortages endemic to the southern tier region, imports of Mexican cement are necessary to supplement regional production in order to supply the growing demands of regional customers. Revocation of the order would facilitate the ability of regional customers to obtain required supplies of cement at world market prices, rather than

⁴⁸¹ Mexico First Submission, paras. 692-94.

⁴⁸² *Commerce Preliminary Sunset Decision Memorandum*, at 4-7 (Exhibit MEX-132); *Commerce Final Sunset Decision Memorandum* at Comment 4 (Exhibit MEX-135).

⁴⁸³ See *US - Japan Sunset (AB)*, para. 199.

⁴⁸⁴ 19 CFR 351.218(d)(3)(ii)(F) (Exhibit US-4).

having to pay a price premium caused by the artificial scarcity of cement within the region.⁴⁸⁵

299. Also in response to this question, CDC stated,

CDC's affiliate, RGPCC produces gray portland cement at its plant in Tijeras, New Mexico and sells this cement primarily in New Mexico. In addition, RGPCC also imports and sells CDC cement largely in New Mexico and West Texas. In order to meet the demand for cement by RGPCC's customers in this area, it is necessary to supplement the cement that RGPCC produces in the U.S. at its New Mexico plant with cement imported from CDC in Mexico. West Texas and New Mexico are a natural part of CDC's market. CDC Samalayuca plant is located close to (i.e., within 25 miles of) El Paso, Texas. The revocation of the order would facilitate RGPCC's ability to supply U.S. customers in this area.⁴⁸⁶

300. In other words, neither of the Mexican producers/exporters in the sunset review argued that dumping would cease if the order were revoked.⁴⁸⁷ In fact, neither CEMEX nor CDC even mentioned dumping in response to this question from Commerce.

301. Under these circumstances, Commerce reasonably concluded that revocation of the order on cement from Mexico would be likely to lead to continuation or recurrence of dumping. In reaching this conclusion, Commerce examined the pertinent facts and provided an adequate explanation as to how the facts support its determination. Therefore, the Panel should find that an unbiased and objective investigating authority evaluating the evidentiary record of the sunset review in this dispute could have reached the same conclusions as those drawn by Commerce.

302. In this case, Commerce found that the Mexican exporters were dumping the subject merchandise in every assessment review since the imposition of the order. If dumping occurs when there is an order in place, it stands to reason that dumping will likely continue when there is no order in place. Historical dumping while an antidumping measure is in place is highly probative of the behavior of exporters without the discipline of the measure. Commerce's sunset determination, therefore, meets the Article 11.3 requirement that the authorities determine whether dumping is likely *to continue* or recur in the absence of the duty.

b. Commerce's Likelihood Determination is Not Dependent On the Magnitude of Dumping

⁴⁸⁵ CEMEX Substantive Response, at 2-3 (Exhibit US-29).

⁴⁸⁶ CDC Substantive Response, at 4 (Exhibit US-30).

⁴⁸⁷ *Commerce Preliminary Sunset Decision Memorandum*, at 5 (Exhibit MEX-132).

303. Mexico argues that Commerce relied on allegedly flawed dumping margins as evidence of likelihood of continued dumping, thereby “necessarily” tainting its likelihood determination.⁴⁸⁸ Mexico is wrong. Commerce’s likelihood determination is *not* dependent on any specific magnitude of dumping.

304. Article 11.3 provides that a definitive antidumping duty must be terminated after five years unless the authorities determine that “the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.” The focus of a sunset review under Article 11.3 is on future behavior, *i.e.*, whether dumping and injury are likely to continue or recur in the event of expiry of the duty, not whether or to what extent dumping or injury currently exists. Thus, neither the precise amount of dumping in any one year, nor the precise amount of likely future dumping, is determinative. Indeed, such precision is unattainable in what is inevitably a somewhat speculative projection of future behavior.⁴⁸⁹ Commerce’s *likelihood* determination is not dependent on the *magnitude* of the margin of dumping in any of the assessment reviews. Thus, Mexico failed to establish a *prima facie* case concerning Commerce’s likelihood determination.

3. Commerce Does Not Use the “Margin Likely to Prevail” in Making a Determination of Likelihood of Continuation or Recurrence of Dumping⁴⁹⁰

305. Mexico argues that the U.S. legal standard for determining the “margin likely to prevail” in a sunset review is inconsistent, both as such and as applied, with the AD Agreement.⁴⁹¹ The essence of Mexico’s claim is that the “margin likely to prevail” was calculated inconsistently with the AD Agreement and that Commerce “relied” on this allegedly defective margin in making its likelihood determination in contravention of Article 11.3. Mexico asserts that Exhibit MEX-188 shows that because Commerce always uses a margin from the original investigation or subsequent assessment reviews, it fails to conduct a prospective analysis in determining the margin likely to prevail.⁴⁹² Mexico also alleges that Commerce artificially inflates the “margin likely to prevail” as a result of its duty absorption findings.⁴⁹³ Mexico’s arguments are flawed at the core.

306. As a matter of U.S. law, Commerce is required to report the “margin likely to prevail” to the ITC for possible consideration in its likelihood of continuation or recurrence of injury

⁴⁸⁸ Mexico First Submission, para. 696.

⁴⁸⁹ See, e.g., *US - Argentina Sunset (AB)*, para. 341 (discussing prospective nature of analysis in Article 11.3 reviews). Although there is no requirement to quantify the amount of dumping likely to continue or recur, as discussed below, the United States does so under its domestic law. Commerce transmits this information to the ITC.

⁴⁹⁰ See Section VI.A.7 for discussion of Mexico’s duty absorption arguments regarding the ITC.

⁴⁹¹ Mexico First Submission, paras. 730-744.

⁴⁹² Mexico First Submission, para. 733.

⁴⁹³ Mexico First Submission, paras. 737-744. Mexico’s additional arguments concerning duty absorption are discussed in Section V.E below. As discussed therein, neither the duty absorption findings nor the “margin likely to prevail” are taken into account for either duty imposition or collection purposes. See Section VI.A.7 for ITC discussion.

determination.⁴⁹⁴ Under certain circumstances, Commerce may adjust the “margin likely to prevail” to account for duty absorption findings made in an assessment review.⁴⁹⁵ Commerce did so in the instant case.⁴⁹⁶ However, Commerce *does not*, and *did not*, rely upon duty absorption findings and/or the “margin likely to prevail” in making its determination of likelihood of continuation or recurrence of dumping, as asserted by Mexico.⁴⁹⁷ Thus, the premise of Mexico’s claim – that Commerce “relies” on a defective “margin likely to prevail” in its likelihood determination – is simply incorrect as a factual matter.

307. Moreover, as mentioned earlier, Article 11.3 of the AD Agreement does not require quantification of past or future amounts of dumping. In other words, there simply is no obligation under the AD Agreement to consider or quantify the *magnitude* of dumping in determining likelihood of continuation or recurrence of dumping. This is reinforced by note 22 of Article 11.3, which provides that “[w]hen the amount of the antidumping duty is determined on a retrospective basis, a finding in the most recent assessment proceeding ... that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.” Thus, no specific level of dumping – even an absence of dumping in the most current assessment period – is decisive as to whether dumping is likely to continue or recur.

308. The Panel should reject Mexico’s claim that Commerce “relied” on an allegedly defective margin in making its likelihood determination. Commerce does not and did not do so. Nor does the Agreement require quantification or consideration of a “margin likely to prevail.”

C. There is No Obligation Under the AD Agreement to Update a Pre-WTO Industry Support Determination in a Post-WTO Assessment or Sunset Review

309. Mexico asks the Panel to apply retroactively obligations undertaken in the Uruguay Round. Specifically, Mexico alleges that the original determination to initiate the antidumping investigation on imports of cement from Mexico “is legally defective.”⁴⁹⁸ Thus, according to Mexico, the United States lacks the legal authority to continue to apply antidumping duties to imports of cement from Mexico because Commerce failed to determine domestic industry support in *reviews* subsequent to the 1990 order.⁴⁹⁹ According to Mexico, by maintaining the antidumping duty order on cement without “updating” the industry support determination, the United States is in breach of various WTO obligations.⁵⁰⁰

⁴⁹⁴ 19 U.S.C. 1675a(c)(3) (Exhibit MEX-5).

⁴⁹⁵ U.S. law requires that Commerce “notify” the ITC of its findings regarding the margin likely to prevail and duty absorption. 19 U.S.C. 1675a(a)(1)(D) (Exhibit MEX-5).

⁴⁹⁶ *See Commerce Sunset Review Final Decision Memo*, at Comment 7 (MEX-135).

⁴⁹⁷ *See generally, Commerce Sunset Review Final*, 65 FR 41049, and *Commerce Sunset Review Final Decision Memorandum* (Exhibit MEX-135).

⁴⁹⁸ Mexico First Submission, paras. 292, 304, 309, 344.

⁴⁹⁹ Mexico First Submission, paras. 284-353.

⁵⁰⁰ *See, e.g., Mexico First Submission*, paras. 284-85, 292, 293-312, 304, 316-324, 344.

310. Mexico’s claims are unfounded. Pursuant to Article 18.3 of the AD Agreement, the “legality” of the cement order – the outcome of an investigation based on an application filed prior to January 1, 1995 – cannot now be challenged before this Panel. Nor is there any WTO obligation to update a pre-WTO industry support determination in a post-WTO assessment or sunset review.

311. The express terms of Article 5.4 of the Agreement limit the industry support requirements to the investigation phase of an antidumping proceeding. Furthermore, nothing in Article 9 (governing assessment reviews) or Article 11 (governing sunset reviews) requires consideration of industry support in the context of assessment or sunset reviews, respectively. There is, therefore, no WTO obligation in any case to make an industry support determination in an assessment or sunset review.

1. The Determination of Industry Support In the Original Investigation Is Not Subject to Challenge Under the AD Agreement

312. The antidumping investigation on imports of cement from Mexico was initiated in 1989⁵⁰¹ and the antidumping duty order was issued in 1990.⁵⁰² Although Mexico states that it is not challenging the original investigation,⁵⁰³ its claims are premised upon the contention that the original determination to initiate the investigation is “legally defective.” As discussed below, the original determination is not subject to the AD Agreement.

a. Article 18.3 Operates to Preclude the Application of the AD Agreement to the Original Industry Support Determination

313. As explained by the Panel in *Brazil - Desiccated Coconut*, Article 18.3 is a transition rule “which defines with precision the temporal application” of the AD Agreement.⁵⁰⁴ Article 18.3 provides that:

[s]ubject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.⁵⁰⁵

⁵⁰¹ *Investigation Initiation*, 54 FR 43190 (Exhibit MEX-11).

⁵⁰² *Cement Order*, 55 FR 35443 (Exhibit US-39).

⁵⁰³ Mexico First Submission, para. 2.

⁵⁰⁴ See *Brazil - Desiccated Coconut (Panel)*, para. 228 (discussing Article 32.3 of the SCM Agreement, the provision identical to Article 18.3 of the AD Agreement).

⁵⁰⁵ Article 18.3.1 provides that “[w]ith respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.” Article 18.3.2 provides that “[f]or purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already

The AD Agreement thus applies only to investigations⁵⁰⁶ that were based on applications filed after January 1, 1995, the date of entry into force of the *Marrakesh Agreement Establishing the World Trade Organization* (“WTO Agreement”) with respect to the United States.

314. The application (“petition,” in U.S. parlance) for antidumping duties in the instant case was made on September 26, 1989, and resulted in a final determination by Commerce on July 18, 1990.⁵⁰⁷ As noted previously, Commerce published an antidumping duty order (definitive duties) on August 30, 1990.⁵⁰⁸ Thus, the investigation began and finished well before January 1, 1995, the date on which the WTO Agreement entered into force for the United States. Therefore, determinations made by the U.S. authorities in the course of that investigation are not subject to the provisions of the AD Agreement and may not be reviewed by this Panel.

315. The Appellate Body confirmed this conclusion in *Brazil - Desiccated Coconut*. That dispute involved the transition provision for countervailing duties contained in Article 32.3 of the SCM Agreement, a provision that the Appellate Body found to be “identical” to Article 18.3 of the AD Agreement.⁵⁰⁹ The Appellate Body described Article 32.3 as follows:

[t]he Appellate Body sees Article 32.3 of the *SCM Agreement* as a clear statement that for countervailing duty investigations or reviews, the dividing line between the application of the GATT 1947 system of agreements and the *WTO Agreement* is to be determined by the date on which the application was made for the countervailing duty investigation or review. Article 32.3 has limited application only in specific circumstances where a countervailing duty proceeding, either an investigation or a review, was underway at the time of entry into force of the *WTO Agreement*. This does not mean that the *WTO Agreement* does not apply as of 1 January 1995 to all other acts, facts and situations which come within the provisions of the *SCM Agreement* and Article VI of the GATT 1994. However, the Uruguay Round negotiators expressed an explicit intention to draw the line of application of the new *WTO Agreement* to countervailing duty investigations and reviews at a different point in time from that for other general measures. Because a countervailing duty is imposed only as a result of a sequence of acts, a line had to be drawn, and

included a clause of the type provided for in that paragraph.”

⁵⁰⁶ Because Mexico’s industry support claims are premised upon its contention that the original determination to initiate the investigation is “legally defective” the arguments in this section of the U.S. submission, focus on the applicability of the AD Agreement to the cement investigation. There is no dispute that the AD Agreement applies to reviews that were based on applications filed after January 1, 1995.

⁵⁰⁷ *Investigation Final Determination*, 55 FR 29244 (Exhibit MEX-16).

⁵⁰⁸ *Cement Order*, 55 FR 35443 (Exhibit US-39).

⁵⁰⁹ *Brazil - Desiccated Coconut*, at p. 19, n.23.

drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of states and private parties under the domestic laws in force when the *WTO Agreement* came into effect.⁵¹⁰

316. Mexico asserts that the industry support determination in the original investigation does not satisfy the requirements of Articles 4 and 5 of the AD Agreement and argues, on this basis, that the continued application of antidumping duties is inconsistent with various provisions of the WTO Agreement.⁵¹¹ Mexico's argument directly conflicts with the specific language of Article 18.3 of the AD Agreement.

317. Moreover, Mexico's reliance on the "general commitment" in Article 1 of the AD Agreement,⁵¹² as well as Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT"),⁵¹³ is misplaced. Pursuant to Article 18.3, Commerce's original industry support determination is not subject to the AD Agreement. Neither Article 1 of the AD Agreement nor GATT Article VI vitiate the temporal rules set forth in Article 18.3, and they must be read in light of the specific obligations in that provision.⁵¹⁴ By challenging a determination made before the WTO Agreement came into effect, Mexico is attempting to undo the sharp line drawn in Article 18.3 and generate the very uncertainty, unpredictability, and unfairness that the drafters sought to avoid.⁵¹⁵

⁵¹⁰ *Brazil - Desiccated Coconut*, at p. 19 (footnotes omitted).

⁵¹¹ *See, e.g.*, Mexico First Submission, paras. 292, 302-303, 324, 350-353.

⁵¹² Mexico First Submission, paras. 300-303, 305. Article 1 of the AD Agreement provides that:
An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated¹ and conducted in accordance with the provisions of this Agreement.
The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

¹ The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

Contrary to Mexico's arguments, Article 1 does not purport to require the re-examination of determinations made before the AD Agreement came into effect.

⁵¹³ Mexico First Submission, para. 305.

⁵¹⁴ *See Brazil - Desiccated Coconut (AB)*, at 16-21 (discussing the parallel provisions under the SCM Agreement). If there were any conflict between the provisions of the AD Agreement and Article VI of GATT 1994, the provisions of the AD Agreement would prevail as a result of the general interpretive note to Annex 1A of the WTO Agreement.

⁵¹⁵ An analogous situation also was presented in *US - DRAMs*. In that case, the United States maintained that a WTO proceeding arising from the final results of the third assessment and revocation review of the order did not provide an appropriate forum in which to challenge a product scope determination made during the original investigation. The panel agreed, stating that the AD Agreement applies only to those parts of a pre-WTO measure that "are included in the scope of a post-WTO review." *US - DRAMs*, para. 6.14. In the instant case, the issue of industry support was not revisited in subsequent reviews. Nor, as discussed below, is there any obligation under the AD Agreement or the WTO Agreement to examine industry support in a review.

318. Mexico's references to the Appellate Body and panel reports in *US - Byrd Amendment* and *US - 1916 Act* as supporting its claim also are misplaced.⁵¹⁶ There is no dispute between the parties that industry support is a requirement under Article 5 of the AD Agreement. Unlike the present dispute, the *US - Byrd Amendment* and *US - 1916 Act* disputes involved challenges in the context of post-WTO investigations. Thus, the findings in those disputes have no bearing on the issue of the applicability of the AD Agreement to measures that pre-date the WTO. For the same reason, the findings of the GATT panel in *Mexican Cement* also are irrelevant.⁵¹⁷

319. The obvious purpose of Article 18.3 is to preclude retroactive application of the obligations that were undertaken in the Uruguay Round.⁵¹⁸ Mexico's argument that the Panel should examine whether the continued collection of duties is consistent with obligations that did not exist at the time those measures were imposed is in direct conflict with Article 18.3.

320. As the *Brazil - Desiccated Coconut* panel reasoned,

[i]f ... a panel could examine in light of the SCM Agreement the continued collection of a duty even where its imposition was not subject to the SCM Agreement, and if ... that examination of the collection of the duty extended to the basis on which the duty was imposed, then in effect the determinations on which those duties were based would be subject to standards that did not apply – and which, in the case of determinations made before the WTO Agreement was signed, did not yet even exist – at the time the determinations were made. In our view, such an interpretation would be contrary to the object and purpose of Article 32.3 and would render that Article a nullity.

⁵¹⁶ Mexico First Submission, paras. 313-316.

⁵¹⁷ Mexico First Submission, para. 306. As conceded by Mexico, the unadopted GATT panel decision carries no legal weight. Mexico First Submission, para. 347 (“Mexico readily acknowledges that this unadopted GATT Panel report is not legally binding [on the United States]”). See *Japan - Alcohol (AB)*, pp.14-15. Regardless of its legal status, the GATT panel's findings simply are not relevant. There is no dispute that, at the time of initiation of the original investigation, Commerce did not evaluate industry support in terms of the specific numerical thresholds set forth in Article 5.4 of the AD Agreement – for the obvious reason that Article 5.4 did not exist in 1989. As discussed above, there is no obligation under the Agreement to reconsider or remake this determination.

⁵¹⁸ See *Brazil - Desiccated Coconut (Panel)*, para. 229 (discussing parallel provision, Article 32.3, in the SCM Agreement).

321. The same logic applies in this case.⁵¹⁹ In fact, the panel in *Brazil - Desiccated Coconut* recognized that a pre-WTO industry support determination is exactly the kind of determination that is not to be re-visited under the new rules established under the WTO agreements:

[a]s an example, the determination of the domestic industry must be made at an early stage as a prerequisite to subsequent steps in the investigation. The SCM Agreement contains provisions relating to this definition that are not part of the Tokyo Round SCM Code. If the SCM Agreement applied to ongoing investigations, a WTO Member would be required to re-examine its domestic industry determination in light of these new provisions.⁵²⁰

The panel concluded that an interpretation of the SCM Agreement that would require such a re-examination would be contrary to the transition rules and would render them a nullity.⁵²¹ The Panel in this dispute should find no differently.

322. In sum, as discussed above, the transition rules contained in Article 18.3 make clear that the AD Agreement only applies to investigations that were based on applications filed “on or after the date of entry into force” of the WTO Agreement. Commerce completed its investigation and issued an order on Mexican cement prior to January 1, 1995, the date on which the WTO Agreement entered into force for the United States. Thus, the operation of Article 18.3 precludes the application of provisions of the AD Agreement to the pre-WTO cement investigation, let alone determinations made in the context of that investigation. Moreover, as demonstrated below, the Article 5 obligations with respect to examination of industry support are applicable only to the investigation phase of the antidumping proceeding.

⁵¹⁹ In an attempt to bolster its arguments, Mexico cites the fact that the United States “implemented transitional rules” regarding injury investigations. Mexico First Submission, paras. 330-43. The United States’ transition determinations for countries acceding to the GATT or assuming obligations under the Subsidies Code are legally irrelevant. As demonstrated above, in accordance with Article 18.3, the industry support requirements in the AD Agreement are not applicable for purposes of this dispute. Furthermore, while the customary rule of treaty interpretation in Article 31(3)(b) of the Vienna Convention permits consideration of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” transition determinations made by one Member for purposes of its domestic legislation – and unrelated to the WTO Agreement – do not constitute “subsequent practice” in the application of the WTO Agreement within the meaning of Article 31(3)(b). See, e.g., *EC - Cotton Yarn*, para. 497 (“The practices of three of the total signatories to an Agreement did not constitute subsequent practice in the application of the treaty in accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties.”).

⁵²⁰ *Brazil - Desiccated Coconut (Panel)*, note 61. See, also, *US - German Sunset (AB)*, notes 80 and 81 (where the Appellate Body noted, without criticism the fact that, had WTO rules been applicable to the original (pre-WTO) investigation in that case, the results of the investigation would have been significantly different; specifically, the investigation would have been terminated).

⁵²¹ *Brazil - Desiccated Coconut (Panel)*, para. 230.

2. Articles 5, 9 and 11 Do Not Impose Any Obligation to Evaluate Industry Support In Assessment or Sunset Reviews

323. Mexico argues that the United States cannot maintain the antidumping duty order on cement because Commerce failed to evaluate industry support in the context of the assessment reviews and sunset review at issue in this case. Mexico is wrong. There is nothing in Articles 5, 9, or 11 that creates an obligation to do so.

a. Article 5.4 Limits Evaluation of Industry Support to the Investigation Phase of An Antidumping Proceeding

324. International customary rules of treaty interpretation dictate that the words of a treaty form the starting point for the process of interpretation. The text of Article 5 of the AD Agreement is thus the appropriate place to begin. Paragraphs 1 and 4 of Article 5 provide:

5.1 [A]n *investigation* to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

* * *

5.4 An *investigation* shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. (Footnotes omitted) (emphasis added).

325. By its explicit terms, Article 5.4⁵²² provides that prior to initiating an “investigation,” the investigating authority must examine whether producers accounting for a sufficient share of domestic production have expressed support for an application. As recognized by the panel in *US-DRAMs*, the term “investigation” means the investigative phase leading up to the final determination of the investigating authority.⁵²³ Thus, once the authority has conducted its examination of domestic industry support⁵²⁴ – during the investigation phase – and concluded

⁵²² Article 5 is entitled “*Initiation and Subsequent Investigation*.” There is nothing in Article 5 that suggests that the provisions of that article, including Article 5.4, apply to anything other than the investigation phase of an antidumping duty proceeding. Indeed, the text of Article 5.4 expressly states that the particular provision, like Article 5 in general, deals only with the investigation phase.

⁵²³ *US - DRAMs* (Panel), para. 6.48, n.494.

⁵²⁴ Article 4 defines the term “domestic industry” and sets forth a specific definition for so-called “regional industry” cases. See Article 4.1(ii) of the AD Agreement; see also Mexico First Submission, paras. 296-297. Mexico has not alleged any inconsistency with Article 4 that is independent of its claims with respect to Article 5. Because the original industry support determination is not inconsistent with Article 5, or any other provision of the Agreement, there is no inconsistency with Article 4. See *US - Section 129*, para. 6.133 (consequential claims

that the specified numerical thresholds have been met, it has satisfied its obligations under Article 5.4.⁵²⁵

326. The Appellate Body and previous panels have found that the application of Article 5 of the AD Agreement and the parallel provision in Article 11 of the SCM Agreement (both entitled “*Initiation and Subsequent Investigation*”)⁵²⁶ is limited to the investigation phase of an antidumping and countervailing duty proceeding, respectively. In *US - German Sunset*, for example, the Appellate Body considered whether the *de minimis* standard for a countervailing duty investigation and the evidentiary standards for self-initiation of a countervailing duty investigation also were applicable in sunset reviews. The Appellate Body concluded that they were not, in part based on its finding that “all” of the provisions of Article 11 “relate to the authorities’ initiation and conduct of a countervailing duty *investigation* ...”⁵²⁷

327. The panel in *US - Japan Sunset* reached a similar conclusion with regard to the evidentiary standards for self initiation of an antidumping investigation, which are in Article 5.6. In part on the basis of its textual analysis, the panel concluded that the provisions of Article 5 generally, and Article 5.6 in particular, do not apply to sunset reviews.⁵²⁸

328. The reasoning in these disputes regarding sunset reviews applies equally to assessment reviews. In other words, if Article 5.4 is now applicable in assessment and sunset reviews, as Mexico argues and contrary to the text and previous confirmations by panels and the Appellate, it would effectively read the Article's express limitation to investigations out of the Agreement.⁵²⁹

329. Mexico ignores the fact that there are fundamental differences between the investigation phase of an antidumping proceeding and reviews. As the panel in *US -Japan Sunset* recognized,

[i]f original investigations and reviews existed for the same purpose and served the same functions, it would appear to us illogical that the same obligations did not apply to both processes. However ... original investigations and reviews are different processes which serve distinct purposes. These considerations

rejected when main claims not successful).

⁵²⁵ See *US - Offset Act (Byrd Amendment) (AB)*, para. 282 (“If a sufficient number of domestic producers has ‘expressed support’ and the thresholds set out in Article[] 5.4 ... have therefore been met, the ‘application shall be considered to have been made by or on behalf of the domestic industry’. In such circumstances, an *investigation* may be initiated.”) (Emphasis added).

⁵²⁶ Article 5 of the AD Agreement and Article 11 of the SCM Agreement include parallel provisions on “*Initiation and Subsequent Investigation*,” although Article 11 includes one additional provision (Article 11.8) related to export through an intermediate country.

⁵²⁷ *US - German Sunset (AB)*, paras. 67 (emphasis in original) and 115.

⁵²⁸ *US - Japan Sunset (Panel)*, paras. 7.35-7.45, and note 43.

⁵²⁹ As the Appellate Body stated in *Korea - Dairy*, a treaty interpreter must “give meaning and effect to all the terms of a treaty” and is “not free to adopt a reading that would result in reducing whole clauses of paragraphs of a treaty to redundancy or inutility.” *Korea - Dairy (AB)*, para. 80 (citations omitted).

underlie, and are apparent in the text of the Antidumping Agreement. It is therefore unsurprising to us that the textual obligations applicable to the two are not identical.⁵³⁰

Given these fundamental differences, panels and the Appellate Body have consistently found that provisions in the Agreement with express limitations to investigations do not apply in reviews.⁵³¹

330. It is thus well-established that nothing in Article 5.4 in particular, or Article 5 in general, requires consideration of industry support beyond the investigation phase of an antidumping proceeding.⁵³²

b. Neither Articles 9 Nor 11 Imposes Industry Support Requirements

331. Although Mexico argues that the United States was required to satisfy the industry support requirements in the *Fifth Review*,⁵³³ *i.e.*, an assessment review under Article 9, it has made no claim that the failure to do so results in an independent violation of Article 9.⁵³⁴ Nevertheless, the United States notes that nothing in the text or context of Article 9 requires consideration of industry support. Furthermore, if the drafters of the Agreement had intended for Article 5.4 to apply in the context of Article 9 assessment reviews, one of the two provisions or articles would have cross-referenced the other.⁵³⁵

⁵³⁰ *US - Japan Sunset (Panel)*, para. 7.38.

⁵³¹ *See, e.g., US - Japan Sunset (AB)*, paras. 106-107; *US - Japan Sunset (Panel)*, paras. 7.35-7.45; and *US - German Sunset (AB)*, para. 68 and n.58.

⁵³² Mexico's reliance on negotiating history to support its industry support claims is misplaced. Mexico First Submission, paras. 316-24. First, resorting to negotiating history is appropriate only where the text is "ambiguous." *See Article 32 Vienna Convention. See also US - Japan Sunset (Panel)*, paras. 7.83-7.84 (discussing when recourse to negotiating history is appropriate). That is not the case where, as here, the text of Article 5.4 clearly states that it applies only to investigations. Second, the negotiating history actually contravenes Mexico's argument. Specifically, it shows that there were no numerical thresholds applicable in pre-WTO industry support determinations. As Mexico concedes, Article 5.4 had no equivalent in the 1979 Tokyo Round. Mexico First Submission, para. 318. Thus, Commerce's original industry support determination is not and was not subject to the obligations set forth in Article 5.4.

⁵³³ Mexico First Submission, para. 328-29.

⁵³⁴ Mexico has failed to allege any inconsistency with Article 9 that is independent of its claims with respect to Article 5. Because the original industry support determination is not inconsistent with Article 5, or any other provision of the Agreement, there is no possible inconsistency with Article 9. *See US - Section 129*, para. 6.133 (consequential claims rejected when main claims not successful). For the same reason, Mexico's claims under Articles 18.1, 18.3, 18.4, and Article XVI:4 of the GATT also fail. *See Section VI.I* for additional discussion.

⁵³⁵ *See US - German Sunset (AB)*, para. 69 ("[W]hen the negotiators ... intended that the disciplines set forth in one provision be applied in another context, they did so expressly. In light of the many express cross-references ..., we attach significance to the absence of any textual link ..."), and para. 109 (discussing the parallel provisions in the SCM Agreement, the Appellate Body concluded that "[t]he fact that the rules in Article 11 governing [initiation of an investigation] are not incorporated by reference into Article 21.3 suggests that they are not, *ipso facto*, applicable to sunset reviews"); *see also Japan Steel Sunset (AB)*, para. 7.27 (failure to include a cross-reference demonstrates that drafters did not intend to make a particular provision applicable) and note 39.

332. Mexico also argues that the United States should have cured its alleged “failure” to determine industry support at the time of the sunset review.⁵³⁶ Mexico fails to demonstrate, let alone argue, that Article 11 requires consideration of industry support. There is no mention of industry support in Article 11. Furthermore, there is no cross reference to Article 5.4 in Article 11, or vice versa. Thus, the text and context of Article 11 do not support Mexico’s argument.

c. Raising an Issue in a Review Does Not Bring That Issue Into the “Scope of Review”

333. Finally, Mexico notes that Mexican respondents repeatedly challenged Commerce’s industry support determination in subsequent assessment reviews.⁵³⁷ Mexico apparently believes that raising an issue in a review automatically attaches WTO obligations to that issue. According to Mexico, Commerce’s alleged failure to determine industry support “is subject to review under the Anti-Dumping Agreement because it was part of a pre-WTO measure that was included in the scope of a post-WTO review.”⁵³⁸

334. Merely making an argument to the authorities during a review does not mean that the authorities become subject to an otherwise inapplicable WTO obligation. A Member’s obligations are determined by the Agreement itself, not what a party in a particular antidumping proceeding asserts unilaterally are a Member’s WTO obligations.⁵³⁹

335. In conclusion, Mexico has failed to demonstrate that there is a WTO obligation to update a pre-WTO industry support determination in a post-WTO assessment or sunset review.

D. Commerce’s Determinations In Its Assessment Reviews Are Consistent With Obligations Under the AD Agreement

1. Commerce’s Determinations That Certain Sales Were Outside The Ordinary Course Of Trade Are Consistent With The AD Agreement

336. Mexico argues that Commerce acted inconsistently with various provisions of the AD Agreement when it determined in the fifth through ninth assessment reviews that CEMEX’s sales⁵⁴⁰ in the Mexican market of certain types of cement should be excluded from the determination of normal value on the grounds that they were outside the ordinary course of trade.⁵⁴¹ Mexico’s argument (a) disregards the requirements of the GATT 1994 and Article 2.1 of the AD Agreement with respect to the exclusion of sales outside the ordinary course of trade

⁵³⁶ Mexico First Submission, paras. 328-29.

⁵³⁷ Mexico First Submission, paras. 328-29.

⁵³⁸ Mexico First Submission, para. 328.

⁵³⁹ See, e.g., *India - Patent Protection (AB)*, para. 45.

⁵⁴⁰ The issue of sales outside the ordinary course of trade in the fifth through ninth reviews solely involved home market sales by CEMEX, not CDC/GCCC.

⁵⁴¹ Mexico First Submission, paras. 797-826.

and (b) misstates the facts underlying Commerce’s determinations of sales outside the ordinary course of trade at issue in this dispute and Commerce’s reasoning in making those determinations. Mexico’s claims are without foundation in the AD Agreement and should be dismissed. As demonstrated below, Commerce properly determined that home-market sales of Type II and Type V LA cement were indeed outside of the ordinary course of trade based on each review record, and therefore correctly excluded them from the calculation of normal value, in full compliance with Articles 2.1, 2.4, and 2.6 of the AD Agreement.⁵⁴²

- a. The GATT 1994 and Article 2.1 of the AD Agreement Require Authorities to Use Sales in the Ordinary Course of Trade As a Basis for Normal Value

337. Mexico correctly notes that Article 2.1 requires the determination of dumping to be made by comparing the normal value of the “like product” sold in the exporting country with “the export price of the product exported from one country to another.”⁵⁴³ As Mexico also correctly notes, Article 2.6 defines “the term ‘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.”⁵⁴⁴

338. Article 2.1 does not, however, require an investigating authority to base its price comparison on home market sales of the identical product sold in the domestic market of the exporting country if those sales are unsuitable for purposes of comparison. In fact, both the GATT 1994 and Article 2.1 explicitly state that normal value may be based only on sales in the exporting country that are made “in the ordinary course of trade.”

339. Article VI:1(a) of the GATT 1994 states: “For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another ... is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country” Article 2.1 of the AD Agreement provides: “For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into

⁵⁴² Mexico also claims that Commerce’s actions were inconsistent with Article 9.3 of the AD Agreement. Mexico First Submission, paras. 799-800, 803, 826. However, Mexico never establishes the basis for its reliance upon Article 9.3 of the AD Agreement or alleges any inconsistency with Article 9.3 that is independent of its claims with respect to Article 2. As demonstrated below, Commerce’s determinations are not inconsistent with any requirement of Article 2 and there is thus no inconsistency with Article 9.3.

In addition, Mexico claims that Commerce’s “reliance” on a WTO-inconsistent “margin likely to prevail” in the sunset review is inconsistent with Article 11.3. Mexico First Submission, paras. 825-826. Mexico misconstrues Commerce’s actions in the sunset review. Commerce reported to the ITC the “margin likely to prevail” if the order were revoked. As discussed in section VI.B of this submission, Commerce did not rely on the “margin likely to prevail” in making its likelihood determination. Nor was it obligated to do so under U.S. law or the AD Agreement. Thus, the Panel should reject Mexico’s Article 11.3 claim.

⁵⁴³ Mexico First Submission, para. 806.

⁵⁴⁴ Mexico First Submission, para. 809.

the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”

340. Thus, under the fundamental definition of dumping in both Article VI:1(a) and Article 2.1, the sales used to determine normal value must have been made “in the ordinary course of trade.” As the Appellate Body has recognized, “Article 2.1 of the *Anti-Dumping Agreement* provides that normal value – the price of the like product in the home market of the exporter or producer – must be established on the basis of sales made ‘in the ordinary course of trade.’ Thus, sales which are *not* made ‘in the ordinary course of trade’ must be excluded, by the investigating authorities, from the calculation of normal value.”⁵⁴⁵

341. The Appellate Body in *US - Hot-Rolled Steel* concluded that “[i]nvestigating authorities must exclude, from the calculation of normal value, *all* sales which are not made ‘in the ordinary course of trade.’”⁵⁴⁶ The Appellate Body correctly noted that the reason Article 2.1 requires such sales to be excluded from the calculation of normal value is “precisely to ensure that normal value is, indeed, the ‘normal’ price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with ‘normal’ commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating ‘normal’ value.”⁵⁴⁷

342. As the Appellate Body also observed in *US - Hot-Rolled Steel*, the AD Agreement “does not define the term ‘in the ordinary course of trade.’”⁵⁴⁸ Thus, “the *Anti-Dumping Agreement* affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not ‘in the ordinary course of trade’”⁵⁴⁹

343. This determination is necessarily case-specific and fact-dependent, and no single methodology is appropriate to analyze the panoply of different fact patterns that may indicate sales outside the ordinary course of trade.⁵⁵⁰ Ordinary course of trade determinations can only be made on a case-by-case basis taking into account the varied records of individual cases, differences in types of transactions, and differences in the practices and conditions normal to different producers and industries. As the Appellate Body found in *US - Hot-Rolled Steel*, “[i]n view of the many different types of transactions not ‘in the ordinary course of trade’ – some

⁵⁴⁵ *US - Hot-Rolled Steel (AB)*, para. 139 (emphasis in original).

⁵⁴⁶ *US - Hot-Rolled Steel (AB)*, para. 145 (emphasis in original).

⁵⁴⁷ *US - Hot-Rolled Steel (AB)*, para. 140.

⁵⁴⁸ *US - Hot-Rolled Steel (AB)*, para. 139.

⁵⁴⁹ *US - Hot-Rolled Steel (AB)*, para. 148. The Appellate Body noted, however, that such discretion “is not without limits.” *Id.*

⁵⁵⁰ The Appellate Body also noted that, although Article 2.2.1 provides a method for determining whether sales below cost are in the ordinary course of trade, “that provision does not purport to exhaust the range of methods for determining whether sales are ‘in the ordinary course of trade.’” *US - Hot-Rolled Steel (AB)*, para. 147. In other words, Article 2.2.1 is one specific example of how to implement the general rule found in Article 2.1, but is not a general rule itself.

including affiliated parties, others not; some including high prices, others low prices; some including prices below cost, others not – investigating authorities need not, under the *Anti-Dumping Agreement*, scrutinize, according to *identical* rules, *each and every* category of sale that is potentially not ‘in the ordinary course of trade.’”⁵⁵¹

344. The Appellate Body’s findings in *US - Hot-Rolled Steel* are consistent with the plain meaning of the words “ordinary course of trade.” The word “ordinary,” which is not defined in the AD Agreement, means “[b]elonging to or occurring in regular custom or practice; normal; customary, usual.”⁵⁵² The word “course,” in common usage, means the “[t]he continuous process (of time), succession (of events)” or the “[h]abitual or regular manner of procedure; custom, practice.”⁵⁵³ The word “trade” refers to the “[b]uying and selling or exchange of commodities for profit.”⁵⁵⁴ In other words, sales “in the ordinary course of trade” are those made in the usual operation of business, in a manner that is normal and customary over time. Plainly, in order to determine whether certain sales are made “in the ordinary course of trade,” an examining authority must engage in a case-specific assessment of the “normal” or “customary” manner in which sales have been made by the particular business at issue.

345. Such a determination must also must be based on consideration of all the relevant factors. Thus, in *US - Hot-Rolled Steel*, where the issue was the exclusion of sales to affiliated customers at non-arm’s length prices, the Appellate Body stated:

We note that determining whether a sales price is higher or lower than the “ordinary course” price is not simply a question of comparing prices. Price is merely one of the terms and conditions of a transaction. To determine whether the price is high or low, the price must be assessed in light of the other terms and conditions of the transaction. Thus, the volume of the sales transaction will affect whether a price is high or low. Or, the seller may undertake additional liability or responsibilities in some transactions, for instance for transport or insurance. These, and a number of other factors, may be expected to affect an assessment of the price.⁵⁵⁵

346. In sum, to determine whether certain sales distort normal value, it is necessary to carefully consider the conditions and practices surrounding the home-market sales at the relevant time. Article 2.1 specifies neither the facts to be examined, nor the precise method of examination, instead leaving this complex inquiry to the discretion of the investigating authority. Article 2.1 contains no further obligations regarding the ordinary course of trade determination

⁵⁵¹ *US - Hot-Rolled Steel (AB)*, para. 146 (emphasis in original).

⁵⁵² See The New Shorter Oxford English Dictionary (definition of “ordinary”) (Exhibit US-40). The New Shorter Oxford English Dictionary further defines “ordinary” as “[o]f common or everyday occurrence” and “[o]f the usual kind, not singular or exceptional; commonplace, mundane.”

⁵⁵³ The New Shorter Oxford English Dictionary (definition of “course”) (Exhibit US-41).

⁵⁵⁴ The New Shorter Oxford English Dictionary (definition of “trade”) (Exhibit US-42).

⁵⁵⁵ *US - Hot-Rolled Steel (AB)*, para. 142.

and the Panel should reject Mexico's requests to read into the Agreement obligations that are not there.⁵⁵⁶

b. U.S. Law Regarding Sales Outside the Ordinary Course of Trade Is Consistent With GATT 1994 and Article 2.1 of the AD Agreement

347. U.S. law addresses sales outside the ordinary course of trade in 19 U.S.C. 1677b(a)(1)(A). Like Article 2.1 of the AD Agreement, Section 1677b(a)(1)(A) defines normal value in terms of the price "in the exporting country, in the usual commercial quantities and in the ordinary course of trade" "Ordinary course of trade" is defined to mean "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind."⁵⁵⁷ Commerce has discretion to consider sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market.⁵⁵⁸

348. Under U.S. law, as under Article 2.1 of the AD Agreement, the purpose of the ordinary course of trade provision "is to prevent dumping margins from being based on sales which are not representative" of sales in the exporter's home market.⁵⁵⁹

349. Consistent with the Appellate Body's guidance in *US - Hot-Rolled Steel*, Commerce will "evaluat[e] sales in each review on 'an individual basis taking into account all of the relevant facts of each case.'"⁵⁶⁰ This means that Commerce "must evaluate not just 'one factor taken in isolation but rather all the circumstances particular to the sales in question.'"⁵⁶¹

c. Commerce's Determinations of Sales Outside the Ordinary Course of Trade in the Fifth Through Ninth Assessment Reviews

350. A full understanding of Commerce's determinations of sales outside the ordinary course of trade in the fifth to ninth assessment reviews requires consideration of (a) the underpinnings of those determinations in the significant changes CEMEX made with respect to its production and

⁵⁵⁶ In seeking to have this Panel establish obligations where none exist, Mexico would have this Panel create obligations to which the Members have not agreed. The Panel, however, may not interpret the AD Agreement in a way that adds to or diminishes the rights and obligations provided in that Agreement. See DSU, Articles 3.2 and 19.2.

⁵⁵⁷ 19 U.S.C. 1677(15) (Exhibit MEX-153).

⁵⁵⁸ See, generally, 19 C.F.R. 351.102 (definition of "ordinary course of trade") (Exhibit US-43).

⁵⁵⁹ *Thai Pineapple Public Co. v. United States*, 946 F. Supp. 11, 15 (CIT 1996) (Exhibit US-44).

⁵⁶⁰ *Fifth Review Final Results*, 62 FR at 17153 (Exhibit MEX-31), citing *Nachi-Fujikoshi Corp. v. United States*, 798 F. Supp. 716, 719 (CIT 1992).

⁵⁶¹ *Seventh Review Final Results*, 64 FR at 13156 (Exhibit MEX-70), quoting *Murata Mfg. Co. v. United States*, 820 F. Supp. 603, 607 (CIT 1992).

distribution in the home market of ASTM Type II and Type V cement⁵⁶² immediately after the imposition of the antidumping order; and (b) Commerce’s determination in the second review that CEMEX’s home market sales of Type II and Type V cement produced at Hermosillo, in far northwestern Mexico, were outside the ordinary course of trade.⁵⁶³ Commerce conducted a thorough verification of the information submitted by CEMEX with respect to this issue in the second review and issued a detailed report of its findings.⁵⁶⁴

351. During the periods covered by the fifth through ninth reviews, CEMEX’s plants located at Hermosillo (the Campana and Yaqui plants) accounted for all of CEMEX’s cement exports to the United States.⁵⁶⁵ As a result of Commerce’s determinations that home market sales from Hermosillo were outside the ordinary course of trade, all of CEMEX’s sales of products that were identical to the products CEMEX exported to the United States were excluded from the determination of normal value. Commerce therefore based normal value on ASTM Type I cement, a high-volume, general-purpose product. Type I cement was the most similar product in terms of physical characteristics to ASTM Type II and Type V cement.⁵⁶⁶

⁵⁶² All of the types of cement at issue in the fifth through ninth assessment reviews, whether sold in the United States or Mexico, were produced in accordance with standard specifications promulgated by the American Society for Testing and Materials (“ASTM”). See Exhibit MEX-8 (ASTM Designation C-150). Under the ASTM specifications, Type II and Type V are sulfate-resistant products (*i.e.*, they have properties that give the finished concrete a greater resistance to deterioration from sulfates). See Exhibit MEX-8 (ASTM Designation C-150). A product meeting the stricter specifications of Type V cement meets the less strict specifications for Type II and Type I cement and can be sold as Type II and Type I. Similarly, a product meeting Type II specifications can be sold as Type I (but not Type V). As demonstrated by the records of the fifth to ninth reviews, CEMEX in fact sold cement meeting Type V or Type V LA specifications as Type II or Type I cement.

⁵⁶³ The discussion in Mexico First Submission with respect to DOC’s determinations of sales outside the ordinary course of trade is confusing because it fails to clarify which ASTM type or types were involved in each assessment review. Although Mexico asserts that all the products at issue satisfied the ASTM specifications for Type V low-alkali (“LA”) cement, that assertion is not supported by the records of all of the assessment reviews. In fact, the information provided by CEMEX with respect to the type of cement found to be outside the ordinary course of trade varied from one review to the next. In the second review, the products at issue were identified by CEMEX as both ASTM Type II and ASTM Type V cement (but not the low-alkali versions of those products). *Second Review Final Results*, 58 FR at 47254-55 (Exhibit US-45). In the fifth review, CEMEX identified the product at issue as Type II cement. See *Fifth Review Final Results*, 62 FR at 17154 (Exhibit MEX-31). In the sixth review, Commerce made its determination of sales outside the ordinary course of trade with respect to Type V cement sold as Type II and Type V. See *Sixth Review Final Results*, 63 FR at 12778-79 (Exhibit MEX-51). In the seventh review, Commerce analyzed sales outside the ordinary course of trade with respect to Type V cement sold as Type I, Type II, and Type V. See *Seventh Review Final Results*, 64 FR at 13156-57 (Exhibit MEX-70). In the eighth review, Commerce examined CEMEX’s home market sales of cement produced as Type V and Type V LA, regardless of how the product was invoiced for sale to the customer. See *Eighth Review Final Results*, 65 FR 13943, and *Eighth Review Final Decision Memorandum*, at Comment 3 (Exhibit MEX-85). In the ninth review, the product at issue was Type V LA cement, regardless of how it was invoiced. See *Ninth Review Final Results*, 66 FR 14889, and *Ninth Review Final Decision Memorandum*, at Comment 2 (Exhibit MEX-97).

⁵⁶⁴ This report, dated July 20, 1993 (hereafter “*Second Review Verification Report*”), is part of the administrative record of each of the later reviews at issue in this dispute. See Exhibit US-46.

⁵⁶⁵ See also Mexico First Submission, para. 814 (“All of CEMEX’s exports to the United States are made by the two plants in Hermosillo, Mexico.”).

⁵⁶⁶ Commerce made an adjustment to normal value to account for differences in the physical characteristics of the products compared.

352. The changes that CEMEX implemented after the antidumping order was put in place created a highly restricted, niche market for sales of specialty cements produced at Hermosillo (identified by CEMEX in the second review as ASTM Type II and ASTM Type V cement) that made the conditions and practices for sales of such products very unusual compared with CEMEX's other Mexican sales. First, although CEMEX continued exporting Type II and Type V cement to the United States, it ceased exporting ASTM Type I cement.⁵⁶⁷ CEMEX did, however, continue to sell Type I cement to home market customers from numerous plants that were geographically dispersed throughout Mexico.

353. Second, prior to issuance of the antidumping duty order, CEMEX sold in Mexico substantial quantities of ASTM Type II cement as a general purpose cement, as it did ASTM Type I cement. After issuance of the order, however, CEMEX's volume of sales of Type II cement and number of customers for that product decreased significantly, as CEMEX restricted sales of Type II to customers who demonstrated a need for the specific properties of Type II.⁵⁶⁸

354. After issuance of the order, CEMEX also consolidated its production of Type II and Type V cement at Hermosillo, far from the major centers of Mexican cement demand in Mexico City and Guadalajara,⁵⁶⁹ and discontinued production of these types of cement at other plants.⁵⁷⁰ This consolidation of Type II and Type V production was contrary to CEMEX's normal practice with respect to sales of cement.⁵⁷¹ As CEMEX stated in the seventh review:

⁵⁶⁷ *Second Review Verification Report* at 6-7 (Exhibit US-46).

⁵⁶⁸ *Second Review Verification Report* at 15-16 (Exhibit US-46).

⁵⁶⁹ See Exhibit US-47 (map submitted by CEMEX showing that the demand for Type II cement in central Mexico is 1,220 miles from Hermosillo).

⁵⁷⁰ *Second Review Verification Report*, at 5-7 and 9 (Exhibit US-46). Record evidence demonstrated that, prior to the antidumping order, CEMEX produced Type II cement at 11 plants throughout Mexico. See Exhibit US-48 (exhibit submitted by U.S. domestic industry). Commerce expressly found in the second review that CEMEX made its "decision to produce Type II and Type V cement in the north of Mexico after issuance of the antidumping order" and that the decision to cease Type II production at other plants was made by September 24, 1990, after the issuance of the order. *Second Review Verification Report*, at 5, 8-9 (Exhibit US-46). CEMEX ceased exporting Type I cement to the United States within one or two days after the antidumping order, although it continued exporting Type II and Type V cement to the United States. *Id.* at 7.

⁵⁷¹ Even Mexico notes that "[b]ecause of the low value-to-weight ratio and the fungible character of cement, transportation costs are a significant limiting factor on its shipment distances" and that "cement is generally sold within an area relatively close to the producing plant." Mexico First Submission, paras. 73 & 814. As CEMEX acknowledged in the fifth assessment review, its cement plants are normally dispersed "throughout Mexico to minimize average shipping distances." *CEMEX Case Brief*, at 25 (November 5, 1996) (Exhibit US-49). See also Exhibit US-50 (CEMEX publications indicating its normal corporate strategy of locating its plants close to demand to lower shipping costs). CEMEX's practice is consistent with the practice prevailing in the Mexican cement industry. See Exhibit US-51 (submission by Canacem, the Mexican cement chamber, in ITC injury investigation stating that more than 95 percent of cement sold in Mexico is shipped within 150 miles of the plant and 50 percent is shipped within 70 miles of the plant); Exhibit US-52 (testimony of Federico Terrazas, Chairman of the Board of CEMEX's affiliate, CDC, in fifth review indicating that "the central rule of the cement market" is that transportation costs greatly limit the distance cement profitably can be shipped).

The locations of CEMEX’s cement plants tend to follow the basic distribution of its customer base... . CEMEX has a concentration of cement plants in the central Mexico City area. The reason for this goes back to the economics of the cement business. Cement is a bulk product that can be expensive to ship over long distances. Thus, if a cement producer can produce cement close to its customers, it is normally better off doing so since it will have lower freight costs in freighting the product to its customer.⁵⁷²

355. As a result of the changes in its production and distribution of Type II and Type V cement, CEMEX incurred tremendous increases in its freight cost for sales of those products.⁵⁷³ In addition, contrary to its practice prior to the order, CEMEX began absorbing the high freight cost on its now-long distance sales of Type II and Type V cement, rather than passing that cost on to its home market customers.⁵⁷⁴ The absorption of the increased cost of freight necessarily decreased CEMEX’s profit on sales of Type II and Type V cement.⁵⁷⁵

356. Based on evidence of these changes in CEMEX’s production and distribution of ASTM Type II and Type V cement after the imposition of the antidumping measure and other record evidence,⁵⁷⁶ Commerce in the second review concluded that sales of Type II and Type V cement were outside the ordinary course of trade based on the following factors:⁵⁷⁷

- Shipping arrangements for Types II and V cement were not ordinary. More than 95 percent of cement shipments in Mexico were made within a 150 mile radius of the production plant, yet CEMEX shipped its home market sales of Types II and V cement over considerably greater distances and absorbed the higher freight costs on these longer shipments.
- CEMEX’s profits on sales of Types II and V were not ordinary compared with its profits on sales of all cement types.

⁵⁷² CEMEX Submission (December 24, 1997) (Exhibit US-53).

⁵⁷³ Cement is a heavy product that is expensive to transport. Consequently, freight expense is very high in proportion to the value of the product (*i.e.*, cement has a low value-to-weight ratio). Because Commerce deducts freight in calculating normal value, 19 U.S.C. 1677b(a)(6)(B)(ii), CEMEX’s increase in freight cost would have drastically lowered CEMEX’s normal value based on CEMEX’s sales of Type II and Type V cement – the products that were identical to the products CEMEX sold to the United States – and thus would have significantly distorted the dumping margin. *See Second Review Verification Report*, at 4 (Exhibit US-46).

⁵⁷⁴ *See Second Review Final Results*, 58 FR at 47255 (Exhibit US-45); *Second Review Ordinary Course Of Trade Memorandum*, at 3-4 (Exhibit US-54).

⁵⁷⁵ *See Mexico First Submission*, para. 815 (“[B]ecause CEMEX shipped the product longer distances, CEMEX incurred freight and handling costs, which reduced its profits on these sales.”).

⁵⁷⁶ Mexico’s statement that Commerce “relied primarily” on the limited facts set forth in paragraph 814 of Mexico First Submission is not accurate.

⁵⁷⁷ *Second Review Final Results*, 58 FR at 47254 (Exhibit US-45).

- Types II and V cement were specialty cements sold to a “niche” market. These sales represented a minuscule percentage of CEMEX’s total sales of cement.
- CEMEX officials indicated that CEMEX retained customers of Types II and V because such sales promote CEMEX’s corporate image.⁵⁷⁸ Thus, sales of Types II and V had a promotional quality that was not evidenced in CEMEX’s sales of other cement types.
- CEMEX did not sell Type II and Type V cement in the home market until it began production for export in the mid-1980’s, despite the fact that a small domestic demand for such cement existed prior to that time.⁵⁷⁹

357. Having determined that CEMEX’s home market sales of the products that were identical to the cement CEMEX exported to the United States (ASTM Type II and Type V cement produced at Hermosillo) were outside the ordinary course of trade, Commerce excluded those sales in calculating normal value. Instead, it based normal value on CEMEX’s home market sales of the most similar product, ASTM Type I cement.⁵⁸⁰

358. Commerce thereafter reached the same conclusion with respect to sales outside the ordinary course of trade in the fifth, sixth, seventh, eighth, and ninth reviews that it did in the second review.⁵⁸¹ Although Commerce’s examination of this issue in each review was based on the evidentiary record of such review, Commerce noted that the evidence and the relevant factors on which it based its conclusions remained very similar to those in the second review.⁵⁸²

⁵⁷⁸ *Second Review Final Results*, 58 FR at 47254 (Exhibit US-45).

⁵⁷⁹ *See Second Review Verification Report*, at 6 (Exhibit US-46).

⁵⁸⁰ *Gray Portland Cement and Clinker from Mexico*, Results of Redetermination Pursuant To Court Remand, Court No. 93-10-00659 (February 1, 1996) (Exhibit US-55), at 3-6. The CIT and the United States Court of Appeals for the Federal Circuit affirmed Commerce’s ordinary course of trade determination and its use of Type I sales as the basis for normal value in all respects. *CEMEX, S.A. v. United States*, 19 CIT 587 (1995), *aff’d*, 133 F.3d 897 (Fed. Cir. 1998) (Exhibit US-56).

⁵⁸¹ Commerce made no analysis of sales outside the ordinary course of trade in the third and fourth assessment reviews because of CEMEX’s failure to cooperate in providing data on home market sales of Type I cement. As a result, Commerce relied on the best information otherwise available to determine CEMEX’s dumping margin. *Third Review Final Results*, 60 FR at 26866-69 (Exhibit US-57); *Fourth Review Final Results*, 62 FR at 17584-86 (Exhibit US-58). Commerce’s final results of the third and fourth reviews were affirmed by binational dispute resolution panels formed under article 1904 of the NAFTA. *Gray Portland Cement and Clinker from Mexico*, USA-95-1904-02 (NAFTA Sept. 13, 1996) (Exhibit US-59); *Gray Portland Cement and Clinker from Mexico*, USA-97-1904-02 (NAFTA Dec. 4, 1998) (Exhibit US-60). In the tenth review and subsequent reviews, Commerce made no finding of sales outside the ordinary course of trade with respect to CEMEX’s sales from Hermosillo. The issue was rendered moot in those reviews by Mexico’s shift from the ASTM specifications to a new Mexican classification system for cement products.

⁵⁸² *See Fifth Review Final Results*, 62 FR at 17154 (Exhibit MEX-31); *Sixth Review Final Results*, 63 FR at 12771 (Exhibit MEX-51); *Seventh Review Final Results*, 64 FR at 13157 (Exhibit MEX-70); *Eighth Review Ordinary Course of Trade Memorandum* (Exhibit US-61); *Ninth Review Ordinary Course of Trade Memorandum* (Exhibit US-62). Commerce’s determinations in the fifth and seventh reviews were affirmed by NAFTA binational panels, except that the panel in the seventh review remanded for Commerce to reconsider the portion of its

Although there are minor differences in the record evidence from one review to the next, Mexico fails to make any distinct arguments that are based on the individual factual records of the five different assessment reviews at issue. On this basis alone, the Panel should find that Mexico has failed to meet its burden of establishing a *prima facie* case.

d. Commerce’s Determinations Are Consistent with Article 2.1 of the AD Agreement

359. Mexico claims that Commerce’s determinations of sales outside the ordinary course of trade are inconsistent with Article 2.1 of the AD Agreement. This claim lacks merit. In particular, Mexico’s arguments are based upon misstatements of the rationale and the factors underlying Commerce’s determinations.⁵⁸³ In addition, Mexico makes assertions of fact that simply repeat allegations made by CEMEX in Commerce’s reviews without establishing the accuracy or relevance of such assertions.⁵⁸⁴ Viewed in light of the evidence and factors that Commerce actually relied upon, it is clear that Commerce acted consistently with Article 2.1 in determining that certain sales were outside the ordinary course of trade and that an unbiased and objective investigating authority could reach the same conclusion.

360. Contrary to both Commerce’s stated reasons for its determinations of sales outside the ordinary course of trade and Mexico’s admission that Commerce relied on a number of factors,⁵⁸⁵ Mexico alleges that Commerce effectively based its determinations on a single factor – low profit margins relative to other home market sales.⁵⁸⁶ Mexico incorrectly asserts that Commerce changed its position in the NAFTA binational panel review of the seventh review and somehow conceded that other ordinary course of trade factors – in particular, long-distance shipments, high

determination finding that Type V cement sold as Type I were outside the ordinary course of trade. Upon reconsideration, Commerce determined that such sales were within the ordinary course of trade under the factual circumstances presented in that review.

⁵⁸³ For example, Mexico asserts that Commerce “repeatedly determined” that CEMEX’s consolidation of production at Hermosillo was based on a “rational business decision.” Mexico First Submission, para. 815. To the contrary, Commerce accepted CEMEX’s asserted business justifications for the consolidation at Hermosillo only in the first review and only in the context of a different issue – whether CEMEX’s home market sales of Type II cement were made to a fictitious market. *First Review Final Results*, 58 FR at 25803-05 (Exhibit US-63). Even then, Commerce did not find that the consolidation of production resulted from a “rational business decision,” but instead merely “accept[ed] the business reasons offered by CEMEX” as justifying the consolidation “in the absence of information to rebut” them. *Id.*, 58 FR at 25805. In the second review, the domestic industry provided extensive information to rebut CEMEX’s alleged business reasons. In the second and later assessment reviews, Commerce did not make *any* findings with respect to the reasons for CEMEX’s consolidation of production at Hermosillo, because such findings were not relevant to the ordinary course of trade issue. See *Sixth Review Final Results*, 63 FR at 12772 (Exhibit MEX-51) (“A company may have sound business reasons for changing its methods of operation; but, if sales resulting from this new business practice are not normal for the company for a reasonable time prior to exportation, then they cannot be said to be within that company’s ordinary course of trade.”).

⁵⁸⁴ See Mexico First Submission, para. 815 (various assertions).

⁵⁸⁵ Mexico First Submission, note 793.

⁵⁸⁶ Mexico First Submission, para. 816.

freight costs, and handling charges – are simply expense-related factors that are reflected in profitability.⁵⁸⁷

361. Mexico’s assertion is factually incorrect and the legal arguments that flow from it are therefore also flawed. In its review of Commerce’s *Seventh Review Final Results*, the NAFTA binational panel *affirmed* Commerce’s determination that most of CEMEX’s sales of cement produced at Hermosillo (ASTM Type V cement sold as Type II and Type V) were outside the ordinary course of trade, including Commerce’s reliance on CEMEX’s shipping distances and high freight costs for such sales as factors supporting the determination.⁵⁸⁸ Thus, not only did Commerce *not* change its position with respect to such sales, it was never asked to do so by the panel.

362. With respect to Type V cement sold as Type I in the seventh review, Commerce based its determination of sales outside the ordinary course of trade on a different, although somewhat overlapping, set of factors than those on which it based its determination regarding Type V cement sold as Type II and Type V.⁵⁸⁹ Notably, the factor of long-distance shipments – the key factor with respect to Type V cement sold as Type II and Type V – was not present. The NAFTA binational panel required Commerce to reconsider its determination with respect to CEMEX’s Type V cement sold as Type I.

363. Upon reconsideration, Commerce found that, with the exception of the low volume of sales of Type V cement sold as Type I, none of the other factors supported a determination of sales outside the ordinary course of trade.⁵⁹⁰ Regarding CEMEX’s profit on such sales, Commerce concluded that it was comparable to CEMEX’s profit on sales of Type I cement (produced as Type I) and thus did not support a determination of sales outside the ordinary course of trade.⁵⁹¹

364. Contrary to Mexico’s suggestion, Commerce based its redetermination solely on the evidence and the factors relevant to sales of Type V cement sold as Type I in the seventh review. It did not make a blanket pronouncement applicable to every case that other factors, such as

⁵⁸⁷ Mexico First Submission, para. 816.

⁵⁸⁸ *Gray Portland Cement and Clinker from Mexico*, Secretariat File No. USA-MEX-99-1904-03, at 9-23 (May 30, 2002) (Exhibit US-64).

⁵⁸⁹ These factors were the following: “1) the sales volume of Type V cement sold as Type I cement was small in comparison to total sales of Type I cement; 2) the freight costs for Type V cement sold as Type I cement were different from the average freight costs of Type I cement; 3) there was a disparity in profitability between sales of Type I cement and sales of Type V cement sold as Type I cement; 4) the number and type of customers purchasing Type V cement sold as Type I cement were substantially different from customers purchasing Type I cement; 5) there were differences in handling charges between sales of Type I cement and sales of Type V cement sold as Type I cement.” *Seventh Review First Redetermination*, at 3 (May 27, 2002) (Exhibit US-65).

⁵⁹⁰ *Final Results of Redetermination Pursuant to NAFTA Panel, Gray Portland Cement and Clinker from Mexico*, at 6-17 (September 27, 2002) (Exhibit US-65).

⁵⁹¹ *Final Results of Redetermination Pursuant to NAFTA Panel, Gray Portland Cement and Clinker from Mexico*, at 14-15 (September 27, 2002) (Exhibit US-65).

freight and handling expenses, cannot be considered independently of profitability.⁵⁹² Rather, it observed that such expenses are related to profitability and that, under the circumstances presented with respect to sales of Type V cement sold as Type I in the seventh review, “the net effect of the differences in expenses is relatively small because the prices and profit ... are comparable to the prices and profit for Type I cement. Thus, we find that the differences that exist in the freight expenses, the handling charges, and rebates incurred on the two types of sales are not so great as to render the sales of Type V sold as Type I an inappropriate basis for comparison.”⁵⁹³

365. Even aside from its mischaracterization of Commerce’s reconsideration of the ordinary course of trade issue in the seventh review, Mexico’s arguments lack any foundation.⁵⁹⁴ Mexico first claims that Commerce’s reliance on the low profitability of sales from the Hermosillo plants is inconsistent with Article 2.2.1. That article provides that sales of the like product in the domestic market of the exporting country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated by investigating authorities “as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time.”

366. Mexico argues that the sales at issue were made at prices above cost and were profitable,⁵⁹⁵ and thus they could not be excluded as being outside the ordinary course of trade “by reason of price” under Article 2.2.1. Mexico contends further that, even if the sales had been made below cost, Commerce could not exclude them “automatically,” but only if the additional

⁵⁹² *Final Results of Redetermination Pursuant to NAFTA Panel, Gray Portland Cement and Clinker from Mexico*, at 15 (September 27, 2002) (“With regard to freight expenses, handling expenses, and rebates, we do not mean to imply that expenses can never be a consideration in an ordinary-course-of-trade determination.”) (Exhibit US-65).

⁵⁹³ *Final Results of Redetermination Pursuant to NAFTA Panel, Gray Portland Cement and Clinker from Mexico*, at 16 (September 27, 2002) (Exhibit US-65).

⁵⁹⁴ It is difficult to discern the point of Mexico’s argument in paragraph 818 of its first submission, in which it claims that neither U.S. law nor Commerce’s “practice provide[s] any measure of how much profit is ‘enough’ to qualify sales as in the OCT.” Because Commerce examines the issue of sales outside the ordinary course of trade on the basis of the evidence in each individual case and the factors relevant to the product and the industry, there cannot be any mechanical test for determining which sales are outside the ordinary course of trade. In particular, because Commerce examines profitability relative to the profit that is normal for sales in the exporter’s home market, it is neither possible nor appropriate for Commerce to establish any fixed standard applicable in all cases. Mexico also claims that Commerce’s ordinary course of trade determinations normally focus on the characteristics of the merchandise itself (*i.e.*, whether the products at issue consist of seconds or off-specification merchandise), rather than profitability. To the contrary, Commerce has examined the profitability of certain sales relative to other home market sales as a factor in its analysis of sales outside the ordinary course of trade in a number of cases. See *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 62 FR 36761, 36762 (1997); *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea*, 62 FR 18404, 18437 (1997); *Canned Pineapple Fruit from Thailand*, 60 FR 29553, 29563 (1995); *Certain Welded Carbon Steel Pipes and Tubes from India*, 56 FR 64753, 64755 (1991) (Exhibit US-66).

⁵⁹⁵ Mexico First Submission, para. 819.

criteria of Article 2.2.1 were satisfied.⁵⁹⁶ According to Mexico, because the sales at issue were profitable, they necessarily permitted the recovery of all costs within a reasonable period of time. Mexico argues that, if sales generate a positive level of profit, Commerce cannot exclude them under Article 2.2.1 on the basis that the profit on those sales was lower than the profit CEMEX earned on sales of a similar product.

367. In essence, Mexico argues that relative profitability can never be a factor for determining that sales are outside the ordinary course of trade unless the sales meet the criteria of Article 2.2.1 for exclusion as being below cost. Mexico is wrong. Article 2.2.1 is clear that below-cost sales are merely one category of sales that may be treated as being outside the ordinary course of trade, *i.e.*, they are a subset of the universe of possible sales that may be so excluded. Article 2.1 establishes the general rule that normal value must be based on sales made in the ordinary course of trade, but does not define which categories of sales may be excluded as being outside the ordinary course of trade. Article 2.2.1 provides that sales may be considered to be outside the ordinary course of trade “by reason of price” if they are sold below cost.⁵⁹⁷

368. The latter phrase makes clear that below-cost sales are merely one type of sale that may be excluded as being outside the ordinary course of trade (*i.e.*, sales that are outside the ordinary course of trade “by reason of price”). In the assessment reviews at issue in this dispute, neither the cost of the products under consideration, nor their price, was a factor in Commerce’s consideration of whether the sales were outside the ordinary course of trade.

369. As the Appellate Body acknowledged in *US - Hot-Rolled Steel*, many different categories of transactions may be outside the ordinary course of trade.⁵⁹⁸ Some such transactions “includ[e] prices below cost, others not.”⁵⁹⁹ There is simply no basis for concluding that the authorization in Article 2.2.1 to exclude below-cost sales somehow limits an investigating authority’s ability to consider relative profitability or any other factor in considering whether sales are outside the ordinary course of trade.

370. Referencing the Appellate Body report in *US - Hot-Rolled Steel*, Mexico also argues that, even if Commerce were to have the authority to exclude low-profit sales on the ground that they are outside the ordinary course of trade, Commerce misapplied Article 2.1 by not also excluding high-profit sales.⁶⁰⁰ Once again, Mexico’s argument erroneously assumes that the sole consideration in Commerce’s determinations was profit. As discussed above, however, Commerce’s determinations were based on an evaluation of all of the relevant factors relating to cement sales from the Hermosillo plants – particularly CEMEX’s long-distance shipments and high freight costs. Relative profitability was not even critical to its finding that the sales were outside the ordinary course of trade. Mexico does not attempt to explain what relevance or

⁵⁹⁶ Mexico First Submission, para. 819.

⁵⁹⁷ See Articles 2.1 and 2.2.1 of the AD Agreement.

⁵⁹⁸ *US - Hot-Rolled Steel (AB)*, para. 146.

⁵⁹⁹ *US - Hot-Rolled Steel (AB)*, para. 146.

⁶⁰⁰ *US - Hot-Rolled Steel (AB)*, paras. 820-822.

probative value there would be in examining high-profit sales under the circumstances presented or what such an examination would contribute to Commerce's consideration of this issue.

371. The Appellate Body's findings in *US - Hot-Rolled Steel* do not support the argument that Mexico makes because the facts at issue in that dispute were entirely different from those in the instant dispute. *US - Hot-Rolled Steel* involved a test that Commerce had applied for determining whether to exclude an exporter's sales to affiliated home market customers as being outside the ordinary course of trade on the ground that they were not made at arm's length prices. In that situation, where Commerce's assessment of sales outside the ordinary course of trade was based on a single criterion related to price, the Appellate Body concluded that it was WTO-inconsistent to exclude only sales that were made at unusually low prices compared with the average price at which sales were made to unaffiliated parties without also excluding sales that were made at unusually high prices.⁶⁰¹ In this dispute, Commerce's assessment of whether sales were outside the ordinary course of trade did not revolve around a single, price-oriented factor. Accordingly, the type of analysis discussed in *US - Hot-Rolled Steel (AB)* is neither appropriate nor relevant.

372. Lastly, Mexico argues that Commerce did not explain why it was appropriate to compare the profit on CEMEX's sales of ASTM Type V LA cement with the profit on CEMEX's sales of ASTM Type I cement for purposes of determining whether the former sales were outside the ordinary course of trade.⁶⁰² The records of Commerce's assessment reviews, however, establish that Type I cement is a general purpose cement that CEMEX sold in high volumes in Mexico.⁶⁰³ Thus, CEMEX's sales of Type I cement reflect the "normal" conditions and practices under which CEMEX sells cement in Mexico. Moreover, as Commerce found, ASTM Type I cement is the closest product in terms of physical characteristics to the cement CEMEX produced at Hermosillo. Finally, there were no sales of any other cement type for which Commerce had sufficient record evidence to use in establishing the normal conditions and practices for CEMEX's home market sales.⁶⁰⁴

e. Commerce's Determinations of Sales Outside the Ordinary Course of Trade Do Not Implicate the Other Provisions of the AD Agreement Cited by Mexico

⁶⁰¹ *US - Hot-Rolled Steel (AB)*, paras. 131-158.

⁶⁰² See Mexico First Submission, para. 823.

⁶⁰³ See Mexico First Submission, para. 794 ("In Mexico, the more generic Type I cement is still in the greatest demand.").

⁶⁰⁴ During the assessment reviews at issue in this dispute, CEMEX produced some or all of the following products for sale in Mexico: ASTM Type I, ASTM Type II and Type II LA, ASTM Type V and Type V LA, and pozzolanic cement (a blend of gray portland cement and a naturally occurring mineral called pozzolan). Because the other cement types were under consideration for exclusion as outside the ordinary course of trade, only Type I cement and pozzolanic cement were potentially available for comparison. Commerce, however, at the request of CEMEX, did not require CEMEX to report data on its sales of pozzolanic cement. Thus, the only product for which Commerce had sufficient information on which to base a comparison was Type I.

373. In addition to Article 2.1, Mexico relies upon several other provisions of the AD Agreement, none of which are relevant to the issues Mexico raises. For example, Mexico claims that Commerce’s determinations regarding sales outside the ordinary course of trade are inconsistent with the obligation to make a “fair comparison” between the export price and the normal value as set forth in Article 2.4.⁶⁰⁵ Mexico’s reliance on Article 2.4 is misplaced, however, because the issue Mexico raises with respect to Commerce’s exclusion of sales as outside the ordinary course of trade in determining normal value does not involve a comparison of export price and normal value. Rather, it relates solely to the establishment of normal value.

374. As the panel in *Egypt - Rebar* reasoned, “Article 2.4, on its face, refers to the *comparison* of export price and normal value, i.e., the calculation of the dumping margin, and in particular, requires that such a comparison shall be ‘fair.’ A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions), but with the nature of the comparison of export price and normal value.”⁶⁰⁶

375. Article 2.6 is also irrelevant to the issue Mexico raises. As discussed above, the determination of dumping is to be made by comparing the price of the “like product” with “the export price of the product exported from one country to another.”⁶⁰⁷ The “like product” is defined as “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.”⁶⁰⁸ Mexico argues that Commerce may not, consistently with Article 2.6, base normal value on home market sales of similar, but non-identical merchandise if there are sales in the home market of identical merchandise.⁶⁰⁹ Mexico concedes, however, that Article 2.6 permits Commerce to base normal value on sales of similar merchandise if there are either no home market sales of identical merchandise or if all the sales of identical merchandise are outside the ordinary course of trade.⁶¹⁰

376. Thus, the obligations under Article 2.6 must be assessed in light of the obligations under Article 2.1 that investigating authorities include in the normal value determination only sales that are in the ordinary course of trade. If all home market sales of identical merchandise are outside the ordinary course of trade – as is the case here – Commerce has no choice but to disregard those sales and base its price comparison on sales of similar merchandise. Consequently, the issue of ordinary course of trade is governed by Article 2.1, and Article 2.6 is not relevant.

⁶⁰⁵ Mexico First Submission, paras. 808-810, 824.

⁶⁰⁶ *Egypt - Rebar (Panel)*, para. 7.333 (emphasis in original).

⁶⁰⁷ AD Agreement, Art. 2.1.

⁶⁰⁸ AD Agreement, Art. 2.6.

⁶⁰⁹ Mexico First Submission, paras. 809-812.

⁶¹⁰ Mexico First Submission, para. 812.

377. In sum, there is simply no basis for Mexico’s claims that Commerce acted inconsistently with the AD Agreement when it determined in the fifth through ninth assessment reviews that CEMEX’s home market sales of certain products were outside the ordinary course of trade.

2. Commerce’s Comparison of Sales of Cement Sold in Bulk With Sales of Bagged Cement of the Same or Similar Type Is Consistent With the AD Agreement

378. Mexico argues that Commerce acted inconsistently with Articles 2.1, 2.4, and 2.6 of the AD Agreement when, in the fifth through ninth reviews, it disregarded the packaged form in which cement was sold in determining the “like product” to which subject merchandise would be compared to calculate dumping margins.⁶¹¹ Mexico contends that Commerce was obligated to compare cement sold in bags with other cement sold in bags and to compare cement sold in bulk with other cement sold in bulk. Mexico’s claims are without merit.

379. As demonstrated below, Commerce complied fully with Articles 2.1 and 2.6 of the AD Agreement by calculating normal value on the basis of sales of cement of the same or similar type, whether it was sold in bagged or bulk form, and making an adjustment for any differences in packing costs.⁶¹² Therefore, Mexico’s claims based on these provisions are unfounded. Further, as Article 2.4 establishes no independent obligations regarding the product that can be considered “like” the subject merchandise, Mexico’s claim based on the “fair comparison” requirement of Article 2.4 also fails. Contrary to Mexico’s assertions, Commerce satisfied all obligations under Article 2.4 by making adjustments for various differences in its comparisons, including any differences in packing costs.

a. Commerce’s Use of Sales Of The Same or Similar Type of Cement, Whether In Bagged or Bulk Form, As the “Like Product” For Purposes of Establishing Normal Value Is Consistent With Articles 2.1 and 2.6

⁶¹¹ Mexico First Submission, paras. 827-850. CEMEX had no U.S. sales of bagged cement during the fifth through ninth reviews and CDC only made sales of bagged cement to the U.S. market beginning in the seventh review. See Mexico First Submission, paras. 831-832. Therefore, the great majority of the comparisons of which Mexico complains are between sales of cement sold in bulk in the United States and sales of cement sold in bulk in Mexico. See Mexico First Submission, para. 835 (objecting to the comparison of bagged and bulk sales in Mexico to bulk sales in the United States).

⁶¹² Mexico also claims that Commerce’s actions were inconsistent with Article 9.3 of the AD Agreement. Mexico First Submission, paras. 799-800, 803, 851, 859. However, Mexico never establishes the basis for its reliance upon Article 9.3 of the AD Agreement or alleges any inconsistency with Article 9.3 that is independent of its claims with respect to Article 2. Because, as demonstrated below, Commerce’s determinations are not inconsistent with any requirement of Article 2, there is no possible inconsistency with Article 9.3.

In addition, Mexico claims that Commerce’s “reliance” on a WTO-inconsistent “margin likely to prevail” in the sunset review is inconsistent with Article 11.3. Mexico First Submission, paras. 850, 859. Mexico misconstrues Commerce’s actions in the sunset review. Commerce reported to the ITC the “margin likely to prevail” if the order were revoked. As discussed in Section VI.B, Commerce did not rely on the “margin likely to prevail” in making its likelihood determination. Nor was it obligated to do so under U.S. law or the AD Agreement. Thus, the Panel should reject Mexico’s Article 11.3 claim.

380. The heart of Mexico’s claim appears to be that, under Articles 2.1 and 2.6 of the AD Agreement, Commerce was under an obligation to consider cement of the same or similar type sold in the U.S. and Mexican markets *not* to be “like products” if they were packaged differently when sold.⁶¹³ Mexico is wrong.

381. Article 2.1 provides that “[f]or the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”⁶¹⁴

382. 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.”⁶¹⁵

383. 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, if no identical product exists, has characteristics closely resembling those of the product under consideration. The product thus identified as the “like product” is to be used in the calculation of normal value. The “product” under consideration in the instant dispute is the cement itself, not the cement plus any packaging in which it happened to be sold.⁶¹⁶ Therefore, in determining whether there was a “product” that was identical or otherwise comparable, Commerce’s focus was properly on the cement itself, not any packaging.

384. Mexico’s argument simply assumes that packaging is a “characteristic” of cement within the meaning of Article 2.6. Mexico offers no textual support for its arguments, nor is there any. There is nothing in Article 2.6 to suggest that the phrase “alike in all respects” must be construed to encompass packaging, rather than the features of the product itself, in the determination of

⁶¹³ Mexico First Submission, para. 844 (“A WTO-consistent calculation would have compared only bag cement sales made in the U.S. with bag cement sales made in the home market and bulk cement sales made in the U.S. with bulk cement sales made in the home market.”)

⁶¹⁴ As noted by the Appellate Body in *EC - Bed Linen*, once products sold in the exporting country are identified as “like products,” they may be compared with the imported product under consideration. *EC - Bed Linen (AB)*, para. 58. The panel in *US - Softwood Lumber AD Final* also confirmed that:

[T]he “like product,” for purposes of the dumping determination, is the product which is destined for consumption in the exporting country. The “like product” is therefore to be compared with the allegedly dumped product, which is generally referred to in the AD Agreement as the “product under consideration.”

US - Softwood Lumber AD Final (Panel), paras. 7.152-153.

⁶¹⁵ U.S. law is consistent with Article 2.6 in requiring Commerce to define the like product sold in the exporting country as merchandise identical to that sold in the United States or, in the absence of such merchandise, the most similar merchandise. See 19 U.S.C. 1677(16) (Exhibit MEX-153).

⁶¹⁶ See, e.g., *Sixth Review Final Results*, 63 FR 12764 (Exhibit MEX-51) (stating in the “Scope of the Review” that “[t]he products covered by this review include gray portland cement and clinker.”).

whether products are identical. The phrase “characteristics closely resembling those of the product under consideration” is even more significant. The ordinary definition of the word “characteristic” is “a distinctive mark, a distinguishing trait, peculiarity, or quality.”⁶¹⁷ This language indicates that the presence or absence of packaging is ordinarily not a “characteristic” of a product, because packaging normally is not intrinsic to the product itself and thus is not a “distinctive” or “distinguishing” feature or “quality” of the product.⁶¹⁸

385. Because Mexico fails to show any inconsistency between Commerce’s treatment of bagged and bulk forms of cement and the requirements of Articles 2.1 or 2.6 of the AD Agreement, the Panel’s review is limited to an examination of Commerce’s factual determinations pursuant to Article 17.6(I).⁶¹⁹

386. The only question before the Panel, therefore, is whether, based on the facts of the challenged reviews, an unbiased and objective investigating authority could have determined that similar types of cement are “like products” even if some of the cement is sold in bulk and other cement is placed in a bag prior to sale. As demonstrated below, Commerce properly established the facts and its evaluation of those facts was unbiased and objective, as required under the AD Agreement.

387. During the fifth through ninth reviews, cement was sold in the United States and Mexico in accordance with standard specifications established by the American Society for Testing and Materials (“ASTM”).⁶²⁰ Consistent with its approach beginning in the original antidumping investigation, Commerce matched (*i.e.*, compared for purposes of determining the dumping margin) cement sold in the United States with cement sold in Mexico by ASTM type.⁶²¹ No

⁶¹⁷ The New Shorter Oxford English Dictionary (definition of “characteristic”) (Exhibit US-67).

⁶¹⁸ In certain limited instances, as Commerce has recognized, packing can be an intrinsic part of a product. *See Fresh Atlantic Salmon from Chile*, 63 Fed. Reg. 31411 (1998), which is cited in the *Seventh Review First Redetermination*, at 27 (Exhibit US-65). In that case, vacuum-packed fillets and regular fillets were treated as separate products because vacuum packing was an extra processing step that inherently altered the characteristics of the product, *i.e.*, it doubled the shelf life, both through the packing itself and the addition of ethyl alcohol to lower the bacteria count). This is not the case in the instant dispute. Cement of the same or similar type is not intrinsically altered in any way by the packaging in which it is sold.

⁶¹⁹ *EC - Cast Iron Fittings (Panel)*, para. 7.151 (“We therefore find that Brazil has not established that the European Communities, having defined the ‘like product’ as it did, acted inconsistently with Articles 2.2 and 2.2.2 ...”).

⁶²⁰ *See* ASTM Designation C-150 (*ASTM Standard Specification for Portland Cement*) (Exhibit MEX-8). The cement products at issue in Commerce’s determinations of the like product were ASTM Type I, a general purpose cement for use when the special characteristics of other ASTM types are not required, and ASTM Types II and V, which are cements intended for use in environments requiring a resistance to sulfates.

⁶²¹ *See Ninth Review Final Decision Memorandum*, at Comment 9 (“The Department has a longstanding practice of developing a model-match methodology in the early stages of each proceeding. In this respect, the Department, in consultation with the parties, selects commercially relevant product characteristics based on physical characteristics, purposes for which used, and commercial value Since the LTFV investigation in this case, the Department has selected the foreign like product based upon ASTM specifications because all parties have acknowledged the commercial significance of these specifications.”) (Exhibit MEX-97).

party objected to this approach of basing the determination of the like product on an objective and well accepted industry standard.

388. Commerce first attempted to match cement sold in the United States with cement sold in Mexico of the identical type. If no identical match was possible, Commerce matched the U.S. product with the most similar type sold in Mexico.⁶²² It is only once the appropriate cement type sold in the home market was chosen as the like product that the issue arose whether to further differentiate comparison products by form of presentation (*i.e.*, whether bulk cement should be matched only with bulk cement and bagged cement only with bagged cement). In the fifth through ninth reviews, Commerce consistently matched cement sold in the United States with the like product sold in Mexico regardless of whether it was sold in bulk or in bags.⁶²³

389. In sum, given the facts of each of the assessment reviews, Commerce's decision to treat bulk and bagged forms of the same or similar type cement as a single like product clearly was based on properly established facts that Commerce evaluated in an unbiased and objective manner. In each review, Commerce fully reviewed the information and argument provided by the parties and explained why bulk and bagged cement should not be distinguished for matching purposes.

390. As Commerce explained in the ninth review, the “presentation or packaging of the merchandise merely dictates the form in which the merchandise is sold (*e.g.*, wrapped or sealed). It does not affect the constitution or component material of the product in question.”⁶²⁴ Commerce further noted, in the seventh review, that “bags are not ‘an integral part of the

⁶²² For example, in the reviews at issue, Commerce matched Mexican sales of ASTM Type I cement with U.S. sales of ASTM Types II and V cement as “similar” products. Commerce did so because sales of identical merchandise (*i.e.*, ASTM Types II and V) were found to be outside the ordinary course of trade and therefore could not be considered for product matching purposes.

⁶²³ See *Fifth Review Final Results*, 62 FR 17148, 17165 (Exhibit MEX-31); *Sixth Review Final Results*, 63 FR 12764, 12777 (Exhibit MEX-51); *Seventh Review Final Results*, 64 FR 13148, 13166 (Exhibit MEX-70); *Eighth Review Final Decision Memorandum*, at Comment 12 (Exhibit MEX-85) (“we matched the sales of subject merchandise to the entire universe of Type I sales, including bulk and bagged cement”) (Exhibit MEX-85); *Ninth Review Final Decision Memorandum*, at Comment 6 (same finding) (Exhibit MEX-97).

Because of subsequent NAFTA binational panel review, Commerce published amended final results of the fifth review in which it revised its calculations to compare U.S. sales of bulk cement only with home market sales of bulk cement. See *Fifth Review Amended Final Results* (MEX-37). Mexico argues that the findings of the NAFTA panel support Mexico's position. See Mexico First Submission, paras. 845, 850. Mexico's reliance on the NAFTA panel findings, however, is misplaced. In this dispute, Mexico challenges the consistency of Commerce's actions with the *AD Agreement*. As conceded by Mexico, the NAFTA panel was charged with reviewing whether Commerce's actions were consistent with *U.S. law*. Mexico First Submission, para. 845. Thus, the conclusions of the NAFTA panel have no application to this dispute. In any event, the United States notes that the findings of the NAFTA panel in the fifth review are directly contrary to the findings of a NAFTA panel reviewing Commerce's seventh review final results, which examined the same issue as the NAFTA panel in the fifth review and upheld Commerce's treatment of bulk and bagged cement.

⁶²⁴ *Ninth Review Final Decision Memorandum*, at Comment 9 (Exhibit Mex-97).

product’ but, rather, incidental to shipment.”⁶²⁵ The mere addition of packaging does not make bagged cement not “like” bulk cement. Commerce explained that, for these reasons, it did “not normally consider packaging as part of the component material of either the subject merchandise or foreign like product.”⁶²⁶

391. Mexico has failed to demonstrate that Commerce’s analysis and explanation are inadequate or that its decision to define the “like product” without regard to the packaged form in which the cement is sold is inconsistent with Articles 2.1. and 2.6.⁶²⁷ Thus, Mexico’s claims on the basis of those provisions must fail.

b. Article 2.4 Does Not Set Out Any Independent Obligations Regarding the Selection of the “Like Product”

392. Mexico also argues that in matching the U.S. product with the like product sold in Mexico, Commerce “ignored” differences affecting price comparability between cement sold in bags and cement sold in bulk contrary to the “fair comparison” requirement of Article 2.4 of the AD Agreement.⁶²⁸ Specifically, Mexico contends that bulk cement is sold at lower prices than bagged cement and that the comparison of bulk and bagged forms of cement is therefore

⁶²⁵ See *Seventh Review First Redetermination*, at 27 (quoting *Fresh Salmon from Chile*, 63 FR 31411, 31415 (1998) (Exhibit US-65)).

⁶²⁶ *Ninth Review Final Decision Memorandum*, at Comment 6 (the use of a bag “does not alter the material components of the merchandise”) (Exhibit Mex-97).

⁶²⁷ Mexico’s own interpretation of its obligations under the AD Agreement supports the conclusion that the United States acted properly in not treating packaging as a criterion in matching types of cement. In administering its own antidumping law, Mexico has recognized that differences in packaging between export sales and home market sales do not make them unsuitable for comparison, provided that an adjustment for differences in packaging costs is made. In a recent final determination regarding *Hydrogen Peroxide from the United States*, Mexico’s investigating authority (the Ministry of the Economy or “SEDECO”) addressed the issue of whether the dumping margin should be calculated separately for sales of hydrogen peroxide in small containers (retail sales) and in drums (wholesale). SEDECO adopted a methodology for matching products that did not take packaging into account. Instead, it compared all sales into Mexico with all home market sales, irrespective of whether they involved sales of hydrogen peroxide in small containers or drums, and calculated the dumping margin by comparing the weighted average home market price, net of the cost of packaging in small containers or drums, with the weighted average export price, net of such packaging costs. SEDECO justified its approach on the grounds that packaging has no impact upon the characteristics of the product being sold. In particular, for purposes of calculating the dumping margin, SEDECO “considered the product code information provided by respondents, and defined the product types involved by eliminating the digits [in the product codes] that correspond to concentration and *packing* ... given that these elements do not make any difference in the investigated product.” See *Hydrogen Peroxide from the United States*, 42 *Diario Oficial* (18 August 2004), para. 84 (emphasis added) (Exhibit US-68).

⁶²⁸ Mexico First Submission, para. 837.

inconsistent with Article 2.4.⁶²⁹ In essence, Mexico is arguing that observed differences in price are a factor that must be considered in determining whether products are “like.”

393. Article 2.4 does not, however, support Mexico’s claim. Article 2.4 provides that a “fair comparison shall be made between the export price and the normal value.” It does not set out obligations regarding the selection of the like product. As recognized by the panel in *Egypt - Rebar*:

Article 2.4, on its face, refers to the *comparison* of export price and normal value, i.e., the calculation of the dumping margin, and in particular, requires that such a comparison shall be “fair.” A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions), but with the nature of the comparison of export price and normal value.⁶³⁰

394. Article 2.4 provides that a “due allowance” shall be made for differences that affect “price comparability.” It does not state, as Mexico suggests, that a price comparison must be undertaken and considered in defining the like product. Instead, it merely requires that adjustments to price be made with respect to export price and normal value for “differences which affect price comparability, including the differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which also are demonstrated to affect price comparability.” Mexico’s claim based on Article 2.4 is therefore misplaced.

395. This is further confirmed if one considers the purpose of Article 2.4. Article 2.4 has a specific, limited role in the scheme laid out by Article 2. It is intended to ensure (as nearly as possible) an “apples-to-apples” comparison of prices on the same basis (*i.e.*, normally the ex-factory price).⁶³¹ It requires investigating authorities, once they have (1) identified the comparison foreign market, (2) determined that there are sufficient, usable sales in that market to permit a proper comparison, and (3) *defined the like product* in accordance with the other

⁶²⁹ Mexico fails to acknowledge that Commerce compared bulk and bagged forms of cement regardless of whether the result increased or decreased the dumping margin. In the seventh to eleventh reviews, GCCC/CDC sold bagged as well as bulk cement in the United States. Assuming that the bagged cement sold in the United States was higher priced than bulk cement, as Mexico alleges, comparing the prices of bagged U.S. sales with the weighted-average normal value of both bulk and bagged sales in Mexico would have served to reduce the dumping margin. Thus, Commerce maintained a consistent and even-handed practice. *See US - Hot-Rolled Steel (AB)*, paras. 148 (noting in the context of a determination of sales outside the ordinary course of trade that an investigating authority should exercise its discretion “in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation”).

⁶³⁰ *See Egypt - Rebar (Panel)*, para. 7.333.

⁶³¹ *US - Hot-Rolled Steel (AB)*, para. 170 (recognizing that making the allowances required under Article 2.4 should lead the investigating authority to arrive at the ex-factory price of the like product that allows a fair comparison).

provisions of Article 2, to then make appropriate adjustments to the prices of the comparison products to account for all differences that affect price comparability. Thus, the “fair comparison” language of Article 2.4 relates to an analysis that takes place *subsequent* to the determination of the like product under Article 2.6. Only after the like product selection is made does Article 2.4 come into play to ensure that an investigating authority makes appropriate allowances so that export price and normal value are compared on an “apples-to-apples” basis.⁶³²

396. That the price allowances required by Article 2.4 must be made subsequent to the selection of the like product is further confirmed by the fact that Article 2.4 requires a fair comparison “between the export price and the normal value.” Of necessity, no normal value is calculated until the investigating authority first determines the like product sold in the exporting country. Thus, the price allowances made for differences that affect price comparability are to be made only once the like product is selected.

397. Mexico has argued that Commerce should have made a price adjustment to account for “differences which affect price comparability” within the meaning of Article 2.4. Instead, Mexico argues that the Panel should determine that Commerce improperly disregarded packaging form in deciding which products to compare.⁶³³ As discussed above, the “like product” determination is governed by Article 2.6, not by Article 2.4.

398. Further, Mexico’s argument that Commerce “ignore[d] differences affecting price comparability, including differences in the conditions of sale and physical differences between bag and bulk cement,”⁶³⁴ is factually incorrect. Specifically, Commerce adjusted for the conditions of sale (*i.e.*, the fact that some sales were in bulk and some sales were in bag) by making adjustments for the cost of packaging.⁶³⁵ Commerce also made a “difference in merchandise” (“difmer”) adjustment to account for the differences in physical characteristics

⁶³² See *Argentina - Floor Tiles (Panel)*, para. 6.113 (stating that Article 2.4 requires “at a minimum that the authority has to evaluate identified differences in physical characteristics to see whether an adjustment is required to maintain price comparability and to ensure a fair comparison between normal value and export price ..., and to adjust where necessary.”).

⁶³³ Mexico First Submission, paras. 842-843.

⁶³⁴ Mexico First Submission, para. 837.

⁶³⁵ United States law provides for an adjustment to normal value to account for differences in the costs of packing the U.S. and home market products. See 19 U.S.C. 1677b(a)(6)(A) and (B)(i) (Exhibit MEX-2). See, e.g., *Fifth Review Final Results*, 62 FR at 17165 (“The Department has included the entire universe of Type I sales in its calculation of normal value because bulk and bagged sales constitute identical merchandise. The only difference between these products is the packaging; therefore, the Department has made an adjustment for packaging differences.”) (Exhibit MEX-31); *Sixth Review Final Results*, 63 FR at 12777 (same) (Exhibit MEX-51); *Seventh Review Final Results*, 64 FR at 13166 (“We agree with the petitioner and have included all Type I sales, bulk and bagged, in the calculation of NV. The only difference between these products is the packaging; therefore, we have made an adjustment downward to account for packaging differences.”) (Exhibit MEX-70).

when non-identical products were matched.⁶³⁶ Thus, Commerce conformed to the requirements of Article 2.4.

399. The alleged differences between types of customers and conditions of sale between bagged and bulk cement described in Mexico’s first submission⁶³⁷ were examined in great detail by Commerce and were found not to be borne out by the facts. In its redetermination in the seventh review on remand from a NAFTA panel, for example, Commerce recognized that both bagged and bulk cement were sold to “resellers, ready-mixers, industrial end-users, government agency end-users, private contractor end-users, and employee end-users.”⁶³⁸ Thus, contrary to Mexico’s assertion that there were different types of customers for bagged and bulk cement, every type of customer to which cement was sold in the home market “bought both bagged and bulk cement.”⁶³⁹ Contrary to Mexico’s allegations, Commerce’s examination also revealed that the prices for cement sold in bags and cement sold in bulk overlapped significantly and that bagged and bulk cement were “approximately equal in commercial value.”⁶⁴⁰

400. In sum, Mexico has failed to demonstrate that Commerce acted inconsistently with Article 2.4 by determining that the “like product” should be identified without regard to differences in the packaged form in which cement was sold. Moreover, by making adjustment for all differences affecting price comparability, including differences in packing costs, Commerce complied fully with the obligations under Article 2.4.

3. The Text of the AD Agreement Expressly Limits the Mandatory Application of Article 2.4.2 to the Investigation Phase of Antidumping Proceedings

a. Mexico Bears the Burden of Proving Its Claims

401. In its first written submission, Mexico argues that Commerce calculated dumping margins in the Fifth to Eleventh assessment reviews in a manner inconsistent with the AD Agreement. Mexico asserts that the Commerce methodology for calculating dumping margins in these Article 9 assessment proceedings (“administrative reviews” in U.S. terminology) was inconsistent with Articles 2.3, 2.4.2, 9.3 and 11.3 of the Agreement. In particular, Mexico argues that Commerce improperly calculated dumping margins by comparing weighted average normal values with individual export prices and that this calculation is contrary to Article 2.4.2. Mexico

⁶³⁶ See, e.g., *Eighth Review Final Decision Memorandum*, at Comment 13 (“We determined that there are differences in the physical characteristics of cement produced as Type I and Type V LA and, therefore, find that a DIFMER adjustment is appropriate.”) (Exhibit MEX-85). See also *Ninth Review Final Decision Memorandum*, at Comment 10 (“For these final results of review we have calculated the difmer adjustment based on the difference in the direct materials cost for Type II LA and Type I cement produced at the Valles plant.”) (Exhibit MEX-97).

⁶³⁷ Mexico First Submission, paras. 840-41.

⁶³⁸ *Seventh Review First Redetermination*, at 27 (Exhibit US-65).

⁶³⁹ *Seventh Review First Redetermination*, at 27 (Exhibit US-65).

⁶⁴⁰ *Seventh Review First Redetermination*, at 28-29 (Exhibit US-65). See also *Eighth Review Final Decision Memorandum*, at Comment 12 (Exhibit MEX-85); *Ninth Review Final Decision Memorandum*, at Comment 9 (Exhibit MEX-97).

argues, moreover, that Commerce improperly “zeroed” negative margins in those comparisons when calculating dumping margins for assessment purposes in the Fifth through Eleventh administrative reviews.

402. As noted above, Mexico, as the complaining party, bears the burden of proving its claims. For the reasons discussed below, Mexico has failed to meet this burden.

b. The Text of the AD Agreement Expressly Limits the Mandatory Application of Article 2.4.2 to the Investigation Phase of Antidumping Proceedings

403. Mexico argues that Article 9 of the AD Agreement “incorporates the whole of Article 2 without limitation” and thereby requires the administering authority to apply Article 2.4.2 when assessing dumping duties in assessment proceedings.⁶⁴¹ Mexico asserts that Commerce failed to comply with its obligations under Article 2.4.2 when it assessed antidumping duties using a monthly average-to-transaction methodology without first finding “a pattern of export prices which differ significantly among different purchasers, regions, or time periods.”⁶⁴² In addition, Mexico argues, this methodology was WTO-inconsistent because it treated “negative margins” in a manner inconsistent with Article 2.4.2. Finally, Mexico asserts that the weighted average-to-transaction anti-dumping margin calculation methodology set forth in the U.S. statute and regulations that govern administrative reviews, as well as the treatment under U.S. law of so-called “negative margins” in administrative reviews, are WTO-inconsistent as such with Article 2.4.2.⁶⁴³

404. Contrary to Mexico’s assertions, the U.S. statute and regulations that govern administrative reviews and the assessment calculation methodology applied by Commerce in the Fifth through Eleventh administrative reviews are entirely WTO-consistent. All of Mexico’s arguments are predicated on the applicability of Article 2.4.2 to Article 9 assessment proceedings. But the express terms of Article 2.4.2 limit its application to the *investigation phase* of an antidumping proceeding. Nothing in the text of Article 2.4.2 or Article 9 makes Article 2.4.2 applicable in assessment proceedings, and Mexico’s claims must therefore fail. The extent to which Mexico improperly reads Article 2.4.2 into the text of Article 9 is addressed in the next sections.

i. *The Express Terms of Article 2.4.2 Limit Its Mandatory Application to the Investigation Phase of Antidumping Proceedings*

405. A Member’s assessment of antidumping duties is subject to Article 9 of the AD Agreement. Mexico argues, however, that the assessment calculation methodology at issue in

⁶⁴¹ Mexico First Submission, paras. 851, 852.

⁶⁴² Mexico First Submission, paras. 853, 857.

⁶⁴³ Mexico First Submission, para. 880, 884.

this dispute is governed by Article 2.4.2 of the AD Agreement. Contrary to Mexico's assertion, the express terms of Article 2.4.2 limit its application to the “investigation phase” of a proceeding.⁶⁴⁴ Mexico ignores the plain language of Article 2.4.2 and improperly seeks to expand it to other proceedings.

406. Article 2.4.2 provides:

Subject to the provisions governing fair comparison in paragraph 4 of this Article, the existence of margins of dumping *during the investigation phase* shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis. (emphasis added).

407. Given the ordinary meaning⁶⁴⁵ of the term “in the investigation phase” of Article 2.4.2, there is no support in the Agreement for Mexico’s proposition that Article 2.4.2 applies in an Article 9 assessment proceeding. The Appellate Body and panels have recognized that the application of Article 2.4.2 is limited to the investigation phase of antidumping proceedings. The panel in *Argentina - Poultry*, for example, found that:

Article 2.4.2, uniquely among the provisions of Article 2, relates to *only* the establishment of the margin of dumping “during the investigation phase.” (emphasis added).⁶⁴⁶

408. Mexico can point to no textual basis in the AD Agreement for the Panel to disregard the express limitation in Article 2.4.2 to the investigation phase.⁶⁴⁷ Further, the limited application of Article 2.4.2 to the investigation phase is consistent with the divergent functions of investigations and other proceedings under the AD Agreement. For example, the Appellate Body has already recognized that investigations and other proceedings under the AD Agreement serve different purposes and have different functions, and therefore are subject to different obligations

⁶⁴⁴ It is undisputed in this case that U.S. assessment proceedings are governed by Article 9 of the AD Agreement.

⁶⁴⁵ The Appellate Body has recognized that Article 31 of the *Vienna Convention* reflects a customary rule of interpretation of public international law. Article 31(1) provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the *terms of the treaty* in their context and in the light of its object and purpose.” (Emphasis added.) In applying this rule, the Appellate Body has cautioned that an interpreter is limited to the words and concepts used in the treaty, and that the principles of interpretation set out in Article 31 “neither require nor condone the imputation into a treaty of words that are not there[.]” *India Patent Protection (AB)*, para. 45.

⁶⁴⁶ *Argentina -- Poultry (Panel)*, para. 7.357.

⁶⁴⁷ While Mexico asserts that the U.S. margin calculation methodology in the assessment proceeding is inconsistent with Article 2.4, nowhere does Mexico explain how this is so, other than by repeated reference to the inapplicable Article 2.4.2. See Mexico First Submission, para. 851-860.

under the Agreement.⁶⁴⁸ In *US-Japan Sunset*, the Appellate Body considered investigations and sunset reviews; the Appellate Body’s reasoning is equally applicable to investigations and assessment proceedings. The function of an investigation, *inter alia*, is to determine whether dumping exists above *de minimis* levels in order to comply with Article 5.8; in contrast, the purpose of an assessment proceeding under Article 9 is to determine the antidumping duties to be assessed, as appropriate, on individual entries of subject merchandise for which the existence of injurious dumping during the investigation phase has already been established.

409. In light of the fundamental differences between investigations and other segments of antidumping proceedings under the AD Agreement, panels and the Appellate Body have consistently found that provisions in the Agreement with express limitations to investigations are in fact limited to the original investigation phase of a proceeding. Just recently, in evaluating whether restrictions on cumulation in investigations were equally applicable to sunset reviews, the Appellate Body noted that Article 3.3 – like Article 2.4.2 – “plainly speaks to *anti-dumping investigations* It makes no mention of injury analyses undertaken in any proceeding other than original investigations [T]he text of Article 3.3 plainly limits its applicability to original investigations.”⁶⁴⁹ The Appellate Body’s conclusion confirms the approach taken by prior panels. For example, the panel in *US – Japan Sunset* correctly found that Article 11 of the SCM Agreement – the parallel provision to Article 5 of the AD Agreement – is limited to “investigations.”⁶⁵⁰ Similarly, the *US – DRAMs* panel found that the term “investigation” means “the investigative phase leading up to the final determination of the investigating authority.”⁶⁵¹

410. Requiring the application of Article 2.4.2 to Article 9 assessment proceedings would read Article 2.4.2’s express limitation to investigations out of the Agreement. This approach would be inconsistent with the principle that all the terms of an agreement must have meaning. Mexico’s interpretation of Article 2.4.2 would render the express distinction made in Article 2.4.2 between the investigation phase and other portions of a proceeding without meaning.

ii. *Article 9 Does Not Incorporate Article 2.4.2*

411. While Article 2.4.2 sets forth obligations for the calculation of a dumping margin in investigations, Article 9 sets forth obligations for the calculation of the assessment rate – the amount of the duty actually owing. Mexico’s argument that the assessment calculation methodology in the Fifth through Eleventh administrative reviews is inconsistent with Article 9

⁶⁴⁸ See, e.g., *US – Japan Sunset (AB)*, para. 87.

⁶⁴⁹ *US – Argentina Sunset (AB)*, paras. 294, 301.

⁶⁵⁰ *US – Japan Sunset (Panel)*, para. 8.57, n. 293.

⁶⁵¹ *US – DRAMs (Panel)*, para. 6.87, footnote 519, discussing Article 5 of the AD Agreement. In this regard, it should be noted that Article 18.3 of the AD Agreement, which is a transition rule, also distinguishes between “investigations” and “reviews of existing measures.” In *Brazil - Desiccated Coconut (AB)*, the Appellate Body specifically recognized this distinction between the initial investigation and the post-investigation or review phase. *Brazil - Desiccated Coconut (AB)*, p. 9 (noting that the imposition of “definitive” duties (an “order” in U.S. parlance) ends the investigative phase); see, also, *US-Hot-Rolled Steel (AB)*, paras. 53, 61 (distinguishing between Article 21.2 administrative reviews and the original determination in an investigation).

is predicated on the erroneous theory that Article 2.4.2 is applicable to Article 9 assessment proceedings. Mexico argues that “Article 9 incorporates the whole of Article 2 without limitation,” including Article 2.4.2.⁶⁵² Mexico bases its argument on Article 9.3, which provides that:

The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

412. Mexico interprets Article 9.3 to mean that all the provisions of Article 2 – including Article 2.4.2 – are “directly applicable in the context of a U.S. administrative review.”⁶⁵³ As discussed above, however, Article 2.4.2 by its own terms is limited to the investigation phase. The general reference to Article 2 includes any limitations found in the text of Article 2 – such as the express limitation on the applicability of Article 2.4.2 to investigations. Mexico’s argument has already been rejected by the panel in *Argentina - Poultry*:

Article 9.3 does not refer to the margin of dumping established “under Article 2.4.2,” but to the margin of dumping established “under Article 2.” In our view, this means simply that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2. This is entirely consistent with the introductory clause of Article 2, which sets forth a definition of dumping “for the purpose of this Agreement” In fact, it would not be possible to establish a margin of dumping without reference to the various elements of Article 2. For example, it would not be possible to establish a margin of dumping without determining normal value, as provided in Article 2.2, or without making relevant adjustments to ensure a fair comparison, as provided in Article 2.4.⁶⁵⁴

413. As noted above, that panel went on to conclude that Article 2.4.2 is limited to the “investigation phase.”⁶⁵⁵ The context of Article 9 also demonstrates that Article 2.4.2 applies only to investigations. Recognizing that Article 2.4.2 is expressly limited to investigations, if the drafters had intended Article 2.4.2 to apply to Article 9, Article 9 would have so specified.

⁶⁵² Mexico First Submission, para. 851.

⁶⁵³ Mexico First Submission, para. 851.

⁶⁵⁴ *Argentina - Poultry (Panel)*, para. 7.357. In that case, Brazil – like Mexico here – argued that because Article 9.3 refers to the margin of dumping “as established under Article 2”, and because the provision of Article 2 governing the establishment of a margin of dumping is Article 2.4.2, which refers to the “investigation phase”, the margin of dumping relevant for the purpose of Article 9.3 is that established “during the investigation phase.”

⁶⁵⁵ *Argentina - Poultry (Panel)*, para. 7.357.

414. In fact, while Article 9 recognizes that Members have diverse antidumping duty assessment systems, the AD Agreement contains no specific language addressing the comparison methodologies to be applied in assessment proceedings. As the panel found in *Argentina - Poultry*:

[N]othing in the AD Agreement explicitly identifies the form that anti-dumping duties must take. . . As the title of Article 9 of the *AD Agreement* suggests, Article 9.3 is a provision concerning the imposition and collection of anti-dumping duties. Article 9.3 provides that a duty may not be collected in excess of the margin of dumping as established under Article 2. The modalities for ensuring compliance with this obligation are set forth in sub-paragraphs 1, 2 and 3 of Article 9.3, each of which addresses duty assessment and the reimbursement of excess duties. The primary focus of Article 9.3, read together with sub-paragraphs 1-3, is to ensure that final anti-dumping duties shall not be assessed in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected.⁶⁵⁶

415. Further support for the inapplicability of Article 2.4.2 in Article 9 assessment proceedings can be found in the text of Article 9.4. Article 9.4(ii) establishes the maximum antidumping duty to be applied to exporters and producers not individually examined. Article 9.4(ii) expressly provides, without qualification, for the calculation of dumping margins in the assessment phase on the basis of a comparison of weighted average normal values and individual export prices:

where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, [as] the difference between the weighted average normal value of selected exporters or producers and the export prices of exporters or producers not individually examined.

In contrast, Article 2.4.2 limits the use of comparison of weighted average normal values to individual export prices in the investigation phase to instances of “targeted dumping.”

416. The text of Article 9.4(ii) therefore further undermines Mexico’s assertion that, in the Fifth through Eleventh administrative reviews, Commerce was required, before comparing a weighted average normal value to individual export prices, to find “a pattern of export prices which differ significantly among different purchases, regions or time period” in accordance with Article 2.4.2.⁶⁵⁷

⁶⁵⁶ *Argentina - Poultry (Panel)*, para. 7.355.

⁶⁵⁷ Mexico First Submission, para. 857.

417. In sum, Mexico’s argument that Commerce erred in not applying the investigation phase margin calculation methodologies set forth in Article 2.4.2 must fail. There is no textual basis in the AD Agreement for Mexico’s assertion that Article 9.3 requires the application of Article 2.4.2 in assessment proceedings. On the contrary, as the Panel in *Argentina – Poultry* correctly found, Article 9.3’s reference to Article 2 does not include Article 2.4.2 which, by its own terms, is limited to “the investigation phase.”

iii. *Article 9 of the Agreement Does Not Prohibit the Administering Authority from Using Weighted Average to Individual Comparisons or From Declining to Offset Dumped Transactions with Non-Dumped Transactions in Assessment Proceedings.*

418. Mexico argues that Commerce’s use of weighted-average-to-individual comparisons and its failure to offset dumped transactions with non-dumped transactions is impermissible under Article 2.4.2 of the Agreement. Because Mexico’s argument is predicated on the applicability of Article 2.4.2 to assessment proceedings,⁶⁵⁸ and because Article 2.4.2 does not apply to Article 9 assessment proceedings, Mexico’s claims must fail.

419. First, Mexico argues that a weighted-average to transaction comparison methodology is permissible only if the conditions in Article 2.4.2 are met.⁶⁵⁹ However, as noted above, not only does Article 2.4.2 not apply in assessment proceedings under Article 9, but Article 9.4 itself anticipates that Members may use a weighted-average to transaction comparison methodology. Therefore, Mexico’s argument is erroneous.

420. Second, Mexico argues that Commerce engaged in “zeroing” as was found inconsistent with Article 2.4.2 in *EC-Bed Linen*, *EC-Cast Iron Fittings*, and *US-Softwood Lumber AD Final*. However, “zeroing” as evaluated in those reports arises only in the investigation phase of an antidumping proceeding under Article 2.4.2 where, for multiple sub-groups of subject merchandise, weighted-average normal values are compared to weighted-average export prices (“multiple averaging”),⁶⁶⁰ and a negative margin for a sub-group is set at zero. By contrast, this dispute involves assessment proceedings, and the United States does not engage in multiple averaging in assessment proceedings. More specifically, in the administrative reviews at issue in this dispute, the United States calculated and assessed dumping margins on the basis of comparisons of monthly weighted-average normal values *with individual export prices*.⁶⁶¹ Therefore, no multiple averaging occurred.

⁶⁵⁸ Mexico First Submission, paras. 868-870.

⁶⁵⁹ Mexico First Submission, paras. 855-856.

⁶⁶⁰ See *US - Softwood Lumber AD Final (Panel)*, para. 7.200 (“[I]n practice, the issue of zeroing arises in the context of the weighted average-to-weighted average methodology only when the investigating authority engages in so-called multiple averaging”); *US - Softwood Lumber AD Final (AB)*, para 64 (“Zeroing occurs only at the stage of aggregation of the results of the sub-groups in order to establish an overall margin of dumping for the product under investigation as a whole”).

⁶⁶¹ Mexico First Submission, para. 858.

421. For this reason, Mexico’s references to *EC – Bed Linen*, *US-Softwood Lumber AD Final*, and *EC-Cast Iron Fittings* are inapposite.

422. Mexico has also failed to establish that the United States was required under the AD Agreement to use a weighted-average to weighted-average comparison or to offset negative dumping margins with positive dumping margins in Fifth through Eleventh administrative reviews. Mexico’s argument that the AD Agreement requires such a methodology is predicated entirely on the false assertion that Article 2.4.2 applies to assessment proceedings. But Article 2.4.2 does not apply, and Mexico fails, as it must, to point to any language in the Agreement to suggest that the administering authority is required to offset negative margins in assessment proceedings.

iv. *The U.S. Statute and Regulations Governing Margin Calculations In Administrative Reviews Are Not Inconsistent with the AD Agreement and Are Not Inconsistent With Article VI of GATT 1994*

423. Mexico argues that the U.S. antidumping statute governing the calculation of antidumping margins in administrative reviews, section 771(35) of the Tariff Act of 1930, as amended,⁶⁶² and the U.S. regulations, 19 C.F.R. 351.414, are inconsistent as such with Articles 2.1, 2.4, 2.4.2, 9.3 and 11.3 of the Antidumping Agreement and Article VI of GATT 1994.⁶⁶³

424. At the outset, we note that Mexico has provided no analysis as to why the cited statutory provisions mandate WTO-inconsistent action. Indeed, Mexico simply states that the statutory provisions “permit” zeroing.⁶⁶⁴ The mandatory/discretionary test is well-established and has been consistently applied in GATT and WTO dispute settlement proceedings.⁶⁶⁵ Because panels may not presume bad faith on the part of Members,⁶⁶⁶ if a Member has discretion to act in a WTO-consistent manner, it may not be presumed that the Member will exercise that discretion in bad faith. The test accords with the presumption in many Members’ legal systems against conflicts in the interpretation of laws and treaty provisions.⁶⁶⁷

⁶⁶² Codified at 19 U.S.C. section 1677f-1(d)(1)(B) (Exhibit US-69).

⁶⁶³ Mexico First Submission, para 858.

⁶⁶⁴ Mexico First Submission, para. 890.

⁶⁶⁵ *US-German Sunset (AB)*, paras. 156-57; *US-Section 129(c)(1) of the Uruguay Round Agreements Act (Panel)*, adopted Aug. 30, 2002, paras. 6.22-6.23.

⁶⁶⁶ *Brazil-Aircraft (AB)*, para. 114.

⁶⁶⁷ 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 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).

425. Not only has Mexico failed to allege that the statute mandates WTO-inconsistent action, but Mexico would be unable to substantiate such an allegation even if made. The United States Court of Appeals for the Federal Circuit has ruled that the Tariff Act does *not* require zeroing.⁶⁶⁸ The Supreme Court of the United States has declined to hear the appeal, and therefore the ruling of the CAFC is, as a matter of U.S. law, final. Thus, as a matter of law in the United States, the Tariff Act does not mandate zeroing, and Mexico cannot argue otherwise.⁶⁶⁹ In *US – German Sunset*, the Appellate Body explained, “[t]he party asserting that another party’s municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.”⁶⁷⁰ It would be impossible for Mexico to introduce evidence as to the scope and meaning of the cited statutory provisions contrary to what the CAFC has conclusively found.

426. With respect to the regulations, Mexico offers no analysis or arguments whatsoever. Even under the most generous reading, this cannot suffice to meet Mexico’s burden to establish a *prima facie* case.

427. Finally, even if Mexico had advanced arguments as to why the statute and regulations mandate WTO-inconsistent action, those arguments would have to fail for the same reason Mexico’s arguments against the application of zeroing in these particular administrative reviews must fail: Article 2.4.2 does not apply to Article 9 administrative reviews, and the Agreement does not mandate the use of multiple averaging or any particular methodology in assessment proceedings.⁶⁷¹

4. The Levying of Antidumping Duties on Nationwide Imports of Cement From Mexico is Consistent With Article 4.2 of the AD Agreement

428. At the conclusion of each assessment review of the antidumping duty order on cement from Mexico, Commerce determined the rate of antidumping duties to be assessed (*i.e.*, levied) on imports during the period covered by the review.⁶⁷² It then issued instructions to Customs to

⁶⁶⁸ It is well established under U.S. law that the antidumping statute does not require a particular treatment of negative margins by Commerce. The Court of Appeals for the Federal Circuit found in *Timken Co. v. United States*, 354 F. 3d 1334 (Fed. Cir. 2004) (*cert. denied*) that the antidumping statutes do not imply or require zeroing (Exhibit US-70).

⁶⁶⁹ This U.S. legal question is, from the standpoint of this WTO dispute, a factual question. See *India - Patent Protection*, paras. 65-71 (citing *Certain German Interests in Polish Upper Silesia*, [1926], PCIJ Rep., Series A, No. 7, p. 19. “From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures.”).

⁶⁷⁰ *US – German Sunset (AB)*, para. 157.

⁶⁷¹ *Argentina - Poultry (Panel)*, para. 7.355.

⁶⁷² 19 U.S.C. 1675(a)(1) (Exhibit MEX-4); 19 CFR 351.212 (1998) (the regulation has remained unchanged through the assessment reviews) (Exhibit US-1).

finally assess such duties at the determined rate.⁶⁷³ U.S. law generally requires that such duties be assessed at uniform rates nationwide.⁶⁷⁴

429. Mexico argues that the United States breached its obligations under Article 4.2 by levying antidumping duties on imports of cement from Mexico that were consigned for final consumption outside the U.S. southern tier states.⁶⁷⁵ Mexico is wrong. When an investigating authority makes a finding that a “regional industry” exists pursuant to Article 4.1(ii),⁶⁷⁶ Article 4.2 of the AD Agreement requires that antidumping duties be assessed on a regional basis *except* in certain circumstances in which a Member’s constitutional law does not permit the levying of duties on such a basis.⁶⁷⁷ As demonstrated below, the United States imposed antidumping duties on cement from Mexico consistently with the exception in Article 4.2.⁶⁷⁸

⁶⁷³ 19 CFR 351.212(b) (Exhibit US-1).

⁶⁷⁴ The U.S. antidumping law requires that Commerce’s determination in an assessment review “shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties.” 19 U.S.C. 1675(a)(2)(c) (Exhibit MEX-4). *See Imbert Imports, Inc. v. United States*, 475 F.2d 1189, 1192 (C.C.P.A. 1973), *aff’d* 475 F.2d 1189, 1192 (C.C.P.A. 1973) (holding that the U.S. statute requires the assessment of antidumping duties on a uniform basis at all U.S. ports) (Exhibit US-71).

⁶⁷⁵ Mexico First Submission, paras. 901-30.

⁶⁷⁶ Article 4.1(ii) of the AD Agreement permits a Member under specified circumstances to divide its territory into two or more competitive markets and treat the producers within each market as a separate domestic industry for purposes of determining whether the industry is injured by reason of dumped imports. In the original 1989-1990 injury investigation, the ITC determined it was appropriate to assess injury with respect to a regional, rather than a national industry. It defined the regional industry as consisting of domestic cement producers located in U.S. southern tier states from California to Florida (the “Southern Tier region”).

⁶⁷⁷ Article 4.2 provides:

When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if (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 adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

⁶⁷⁸ The Uruguay Round Agreements Act (“URAA”) conformed U.S. law to the requirements of Article 4.2 with respect to investigations initiated on or after January 1, 1995. The statute provides: “In an investigation in which the Commission makes a regional industry determination under section 1677(4)(C) of this title, the administering authority shall, to the maximum extent possible, direct that duties be assessed only on the subject merchandise of the specific exporters or producers that exported the subject merchandise for sale in the region concerned during the period of investigation.” 19 U.S.C. 1673e(d)(1)(Exhibit US-9). Section 1673e(d)(2) makes an exception for new exporters and producers that exported the subject merchandise for sale in the region concerned after publication of the antidumping duty order. *See also* 19 CFR 351.212(f) (providing procedures for obtaining an exception from assessment of antidumping duties for the merchandise of an exporter that did not export for sale in the region during or after the period covered by Commerce’s investigation) (Exhibit US-1).

Despite the fact that all of the assessment reviews at issue were conducted since the AD Agreement became effective, Mexico attempts to establish that the U.S. levying of antidumping duties on imports from Mexico prior to the Uruguay Round was inconsistent with Article 4.2 of the former Tokyo Round AD Code, which contained provisions similar to Article 4.2 of the AD Agreement. Mexico First Submission, paras. 908, 920-923. The AD Code has been superseded by the AD Agreement and no longer has any force or effect.

a. The United States Constitution Requires the Uniform Levying of Antidumping Duties at Every U.S. Port of Entry

430. The question of whether the United States may rely upon the exception in Article 4.2 to levy duties on all imports of cement from Mexico necessarily requires the Panel to determine, first, whether Mexico has made a *prima facie* case that the United States has misconstrued the requirements of its own Constitution.⁶⁷⁹ As demonstrated below, Mexico has made no such demonstration. In fact, the Uniformity Clause and Port Preference Clause of the U.S. Constitution require the uniform levying of antidumping duties at every U.S. port of entry.

431. The Uniformity Clause provides: “[t]he Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”⁶⁸⁰ The Uniformity Clause has been interpreted by U.S. courts to require that duties be levied uniformly throughout the United States.⁶⁸¹ Therefore, the levying of duties on a regional basis is prohibited under this clause.

432. The Port Preference Clause provides: “No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”⁶⁸² The Court of Appeals for the Federal Circuit has stated that the Port Preference Clause prohibits “intentional, effectual preference of the ports of one state over ports of another state, advantaging certain states’ ports by disadvantaging other states’ ports.”⁶⁸³

⁶⁷⁹ As explained by the Appellate Body in *India - Patent Protection*, a panel does not interpret domestic law “as such,” but may examine domestic law “solely for the purpose of determining whether [a Member has] met its obligations.” *India - Patent Protection (AB)*, para. 66. In *US - 1916 Act*, the panel, citing *India - Patent Protection*, stated: “A panel may analyze the operation of the domestic legislation and determine whether the description of the functioning of the law, as made by the respondent, is consistent with the legal structure of that Member. This way, it will be able to determine whether or not the law as applied is in conformity with the obligations of the Member concerned under the WTO Agreement.” *US - 1916 Act (Panel)*, para. 6.51.

⁶⁸⁰ U.S. CONST., art. I, § 8, cl. 1 (Exhibit US-72).

⁶⁸¹ In *Imbert Imports, Inc. v. United States*, 331 F. Supp. 1400, 1406 (Cust. Ct. 1971), aff’d 475 F.2d 1189, 1192 (C.C.P.A. 1973) (Exhibit US-71) the plaintiff objected to antidumping duties being imposed in both Puerto Rico and New York. The Court stated in dicta that “under the Constitution the assessment of duties must be uniform throughout the United States.” The Supreme Court of the United States, in a case involving whether a tax exempting Alaskan oil as defined in terms of its geographic boundaries violated the Uniformity Clause’s requirements, stated that, “[w]e cannot say that when Congress uses geographic terms to identify the same subject, the classification is invalidated But where Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination.” *United States v. Ptasynski*, 462 U.S. 74, 84-85 (1983) (Exhibit US-73).

⁶⁸² U.S. CONST., art. I, § 9, cl. 6 (Exhibit US-72).

⁶⁸³ *Thomson Multimedia Inc. v. United States*, 340 F.3d 1355, 1365 (Fed. Cir. 2003) (Exhibit US-74).

433. The U.S. federal courts consistently have held that the Uniformity Clause requires the uniform levying of duties, including antidumping duties, at the ports of different U.S. states.⁶⁸⁴ Thus, the text of the U.S. Constitution as well as the interpretations thereof by U.S. courts confirm that levying duties on a regional basis is impermissible. Accordingly, Commerce has no legal authority under the U.S. Constitution to apply differing duties on merchandise covered by an antidumping order depending on whether it is entered for sale within a particular geographic region.⁶⁸⁵

434. Mexico argues that the United States “has never asserted” that the levying of duties only with respect to entries into the region would violate the Constitution.⁶⁸⁶ That is simply incorrect. This constitutional requirement was explicitly acknowledged by the U.S. Administration and Congress in implementing Article 4.2 of the AD Agreement in the URAA.⁶⁸⁷ In effect, Mexico makes the surprising – and incorrect – argument that the United States misconstrued its own Constitution in negotiating the provision at issue in the Tokyo Round and Uruguay Round.

435. The negotiating history provides further support regarding the U.S. constitutional mandates. As Mexico acknowledges,⁶⁸⁸ the obligations found in Article 4.2 of the AD Agreement first appeared in Article 4.2 of the Tokyo Round AD Code. Given the strictures of the Port Preference Clause and Uniformity Clause, the United States negotiated in the Tokyo Round for the inclusion of the exception for countries in which there exists a constitutional prohibition against levying duties only on products imported for consumption within a

⁶⁸⁴ See *Amorient Petroleum Co. v. United States*, 607 F. Supp. 1484, 1489 (CIT 1985) (“If this court were to adopt the interpretation or view of the law urged by the plaintiff, the result would be that similar imports could be assessed different duties at different ports of the United States. This result would be in direct conflict with the constitutional mandate of national uniformity of the customs laws of the United States.”) (Exhibit US-75).

⁶⁸⁵ United States law complies with this constitutional directive, because it permits an exemption for *all* imports from specific foreign producers or exporters that did not export for sale in the region during the period of investigation. Conversely, *all* imports from producers or exporters that exported for sale in the region are subject to the assessment of duties, regardless of the place of entry or sale in the United States. See 19 U.S.C. 1673e(d)(1) (Exhibit US-9).

⁶⁸⁶ Mexico First Submission, para. 917.

⁶⁸⁷ Explaining Article 4 of the AD Agreement, the SAA notes that “[i]f the constitution of a WTO member, *such as the U.S. Constitution*, does not permit the levying of duties only on imported merchandise consigned for final consumption to the region in question, duties may be levied on a nation-wide basis only if: (1) the national authorities give exporters to the region an opportunity to enter into suspension agreements” SAA at 811 (emphasis added) (Exhibit US-76). The legislative history of the URAA states that, “[t]he United States Constitution does not allow differential duty treatment based on ports”. S. Rep. No. 103-412, p. 41 (Exhibit US-77). Thus, the legislative history behind the United States statute specifically recognizes the prohibition under the U.S. Constitution.

⁶⁸⁸ Mexico First Submission, para. 902.

particular region.⁶⁸⁹ This negotiating history confirms that there is such a constitutional prohibition on regional assessment in the United States.

b. The Remaining Conditions Under Article 4.2 for Nationwide Assessment Have Been Satisfied

436. Under Article 4.2, where a Member has a constitutional prohibition on levying duties on a regional basis – as is the case here – the Member may levy antidumping duties without regard to regional limitation if the following 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 adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.” As discussed below, both of these conditions are satisfied with respect to the U.S. antidumping order on cement from Mexico.

i. *The Conditions of Clause (a) are Satisfied*

437. Consistent with Clause (a), Mexican exporters “have been given an opportunity to cease exporting to the area concerned or otherwise give assurances pursuant to Article 8.”⁶⁹⁰ Mexico complains that its exporters lacked the opportunity for an undertaking as contemplated by Article 8 because, at the time of the original antidumping investigation in 1989-1990, the United States had no law specifically implementing Article 4.2 of the Tokyo Round AD Code. As a preliminary matter, under Article 18.3 of the AD Agreement, the obligations of Clause (a) cannot be applied retroactively to a pre-WTO investigation. Nonetheless, the Mexican exporters in this dispute *did* have every opportunity under the U.S. law then-applicable to obtain an undertaking.

438. The Mexican cement investigation was completed in 1990.⁶⁹¹ U.S. law provided Commerce with the authority to enter into undertakings with foreign exporters at the time of the

⁶⁸⁹ See *List of Priority Issues in the Anti-Dumping Field: Submissions by Governments, Addendum*, GATT Doc. No. COM.AD/W/81/Add 2, at 41-43 (U.S. paper submitted during the Tokyo Round negotiations discussing the U.S. constitutional requirement that antidumping duties be assessed on a uniform, country-wide basis) (Exhibit US-78); *MTN Studies: 6, Part 1: Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, U.S. International Trade Commission Inv. No. 332-101, CP 96-27, at 162 (Aug. 1979) (Exhibit US-79). GCCC and its predecessor, CDC, conceded in the assessment reviews that the U.S. position in negotiating the regional industry provision of the Tokyo Round AD Code “appears” to have been influenced by the *Imbert* court’s holding. See, e.g., Case Brief of Cementos de Chihuahua (October 10, 2000), at 48 n. 95 (Exhibit US-80).

⁶⁹⁰ Article 8 discusses price undertakings (“suspension agreements” in U.S. parlance). See also 19 U.S.C. 1673c(m) (Exhibit US-81).

⁶⁹¹ At the time of the original antidumping investigation, U.S. obligations with respect to undertakings were governed by Article 7 of the Tokyo Round AD Code, which, like Article 8 of the AD Agreement, contained provisions that permitted undertakings prior to the conclusion of an investigation. See e.g. Article 7.1 of the Tokyo Round Code, which explicitly referred to suspending or terminating an antidumping proceeding without the imposition of provisional measures or antidumping duties upon receipt price undertakings, and Article 7.3, which referred to completion of an investigation of injury despite the existence of undertakings if the exporter so desired or the authorities so decided.

cement investigation.⁶⁹² Neither Article 8 of the AD Agreement, nor Article 7 of the AD Code, imposes an obligation upon the authority to provide exporters the opportunity for an undertaking in later assessment reviews.

439. As explained above, Article 4.2 (a) of the AD Agreement requires that exporters “shall have been given an opportunity” to obtain an undertaking. The ordinary meaning of “opportunity” is “a time or condition favorable for a particular action or aim; occasion, chance.”⁶⁹³ Thus, under Article 4.2(a), to the extent that there was a time or chance for Mexican producers to enter into an undertaking – as there was here – Commerce gave Mexican producers an “opportunity” to enter into an undertaking within the meaning of Article 4.2(a). Accordingly, U.S. law provides exporters in regional industry investigations with the opportunity to enter into suspension agreements, either during the investigation or within sixty days of the publication of the order.⁶⁹⁴ This mechanism effectuates Article 4.2’s requirements to provide an opportunity for exporters to cease dumping or otherwise give assurances.⁶⁹⁵

440. Mexico’s contention that the United States should have enacted a “transition rule” allowing exporters the opportunity for price undertakings in assessment reviews of antidumping

⁶⁹² See 19 U.S.C. 1673c(b)-(f) (1991) (Exhibit US-81). Despite the existence of an opportunity to obtain an undertaking, no Mexican exporter came forward to seek an undertaking. Mexico has established no factual basis for suggesting that any Mexican exporter was denied an opportunity to seek an undertaking. Notably, Commerce accepted antidumping and countervailing duty undertakings with respect to cement imports from Venezuela in February and March 1992. *Gray Portland Cement and Clinker from Venezuela*, 57 FR 6706 (February 27, 1992); *Gray Portland Cement and Clinker from Venezuela*, 57 FR 9242 (March 17, 1992) (Exhibit US-82).

⁶⁹³ *The New Shorter Oxford English Dictionary* (definition of “opportunity”) (Exhibit US- 83).

⁶⁹⁴ The URAA amended U.S. law to create, *inter alia*, 19 U.S.C. 1673c(m), which provides that “[i]f the Commission makes a regional industry determination under section 1677(4)(C) of this title, the administering authority shall offer exporters of the subject merchandise who account for substantially all exports of that merchandise for sale in the region concerned the opportunity to enter into an agreement ... if the Commission makes a regional industry determination ... [the] agreement ... may be accepted within 60 days after the antidumping order is published” (Exhibit US-81).

⁶⁹⁵ The requirement in Article 4.2(a) that Members provide foreign exporters with the opportunity to obtain an undertaking is not without limitation. Article 4.2(a) cross-references Article 8 of the AD Agreement, which, as Mexico apparently concedes, contemplates that an undertaking will be available under limited circumstances. Article 8 authorizes Members to accept price undertakings and also imposes certain disciplines on their use. For example, Article 8.2 obligates Members to make preliminary determinations of dumping and injury before seeking or accepting a price undertaking. Further, Article 8.4 allows the investigation of dumping and injury to be completed despite the existence of a price undertaking if the exporter so desires or the national investigating authorities so decide. At the same time, Article 8.5 makes clear that investigating authorities may not *require* exporters to enter into price undertakings. Similarly, Article 8.3 provides that the investigating authority need not accept price undertakings in a broad range of circumstances, such as where the acceptance would be “impractical” or for reasons of “general policy.” In short, although Members have the authority under certain circumstances to accept price undertakings pursuant to Article 8, they are also expressly left with discretion to decide whether and when to accept them. The obligation in Article 4.2 that exporters be given “an opportunity” to give certain assurances under Article 8 is satisfied under U.S. law. Consistent with Article 8.2, U.S. law provides an opportunity for the acceptance of undertakings during the investigation phase. See 19 U.S.C. 1673c(b)-(f) (providing that Commerce may suspend an ongoing investigation based on agreement by the exporters to eliminate sales at less than fair value, cease exports of the merchandise in question, or eliminate the injurious effect of the imports) (Exhibit US-81).

orders that predated the URAA has no foundation in the AD Agreement.⁶⁹⁶ The existence of transition rules in U.S. law to address specific requirements of the AD and SCM Agreements regarding outstanding orders does not establish a general obligation to apply provisions retroactively. In both examples cited by Mexico, the United States enacted transition rules to implement explicit substantive requirements of WTO agreements regarding outstanding antidumping and countervailing duty orders.⁶⁹⁷ There are no similar provisions in the AD Agreement requiring an investigating authority to give an exporter the opportunity for a price undertaking years after the completion of an investigation and the imposition of a definitive antidumping measure.

441. In sum, consistent with Article 4.2(a) Mexican exporters were afforded the opportunity to obtain an undertaking. As explained above, although Article 8 authorizes authorities to accept price undertakings, they are given discretion to determine the circumstances under which they will accept such undertakings. More importantly, and contrary to Mexico's assertions, neither provision obliges authorities to offer undertakings in the context of assessment reviews.

ii. *The Conditions of Clause (b) Are Satisfied*

442. Clause (b) of Article 4.2 limits the exemption from regional assessment to circumstances in which “duties cannot be levied only on products of specific producers which supply the area in question”). That condition is also met in this case. Under clause (b), if it were possible for the United States to levy duties on the imports of specific Mexican producers that supply the Southern Tier region, then the United States would be obligated not to levy duties on the imports of other Mexican producers that do not supply the region.

443. The evidence in Commerce's assessment reviews shows that both CEMEX and CDC/GCCC – the only two exporters of cement from Mexico since the imposition of the antidumping order – exported for sale in the Southern Tier region both before and after the

⁶⁹⁶ Mexico First Submission, paras. 924-925.

⁶⁹⁷ See Mexico First Submission, para. 924. In the first example, the United States enacted a transition rule requiring Commerce and the ITC to conduct five-year “sunset” reviews of existing antidumping duty orders. Article 18.3.2 of the AD Agreement, however, provides that, “[f]or the purposes of paragraph 3 of Article 11” (which imposes the requirement for sunset reviews) “existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement” Thus, the United States was obligated by Article 18.3.2 to apply the requirements of Article 11.3 to outstanding orders. In the second example, the United States enacted a transition rule allowing an injury investigation in circumstances where a countervailing duty order had been issued under prior law without a determination of injury by reason of the subsidized imports. 19 U.S.C. 1675b (Exhibit US-84). As explained in the SAA, prior law extended the “injury test” only to countries that were signatories to the Tokyo Round Subsidies Code or agreements providing similar rights and obligations. Under the SCM Agreement, however, *all* Members are entitled to an injury test, requiring the repeal of past U.S. law and a transition rule to make existing countervailing duty orders that were issued without an injury determination consistent with the obligations under the WTO Agreement. See H. Doc. 103-316, Vol. 1, at 911 923-24, & 942-45 (Exhibit US-85).

order.⁶⁹⁸ Thus, the only exporters subject to duties supply the region. Because there are no Mexican exporters that supplied only areas of the United States outside the Southern Tier region, it is not possible to apply the type of exporter-specific duty exemption contemplated in clause (b). Consequently, the United States properly applied such duties to all imports of cement from Mexico.

c. U.S. Law is Not Inconsistent With Article 4.2

444. Mexico claims that, by enacting URAA provisions to implement the requirements of Article 4.2,⁶⁹⁹ the United States has demonstrated that it is able to levy antidumping duties on less than a national basis.⁷⁰⁰ While it is true that the U.S. statute permits the levying of duties on fewer than all the imports covered by an antidumping order, it does so on an exporter-specific basis, consistent with clause (b) of Article 4.2.⁷⁰¹ It does not, as Mexico alleges, permit levying of duties on a regional basis (*i.e.* to discriminate between imports of the same exporter that are sent to different regions).

445. In this way, the statute is consistent with the limitations of the U.S. Constitution by ensuring that, with respect to the merchandise of each such producer, duties are assessed equally under all circumstances. The statute is also consistent with Article 4.2, because it exempts, where possible, all merchandise of exporters that export for sale entirely outside the region. Significantly, because CEMEX and CDC/GCCC both exported for sale in the Southern Tier region, neither qualifies under either the statute or Article 4.2 for exemption from antidumping duties.

446. Mexico also argues that the U.S. statute creates a distinction between two groups of exporters – those that export for sale in the region, which are subject to antidumping duties, and those that export for sale only outside the region, which are not subject to antidumping duties.⁷⁰² According to Mexico, the statute does not comply with Article 4.2 because it does not also exempt exporters that export for sale *both* into and outside of the region from duties on their sales that are made outside the region.

447. Mexico’s argument fails because the same is true of Article 4.2, which refers to levying duties “only on products of specific producers which supply the area in question.” Article 4.2

⁶⁹⁸ There is no evidence that CEMEX ever imported any cement into the United States for sale outside the Southern Tier region. During the fifth to eleventh assessment reviews, CDC/GCCC imported most, but not all, of its cement for sale in the Southern Tier region. *See* Mexico First Submission, para. 910.

⁶⁹⁹ 19 U.S.C. 1673e(d) (“In an investigation in which the Commission makes a regional industry determination . . . the administering authority shall, to the maximum extent possible, direct that duties be assessed only on the subject merchandise of the specific exporters or producers that exported the subject merchandise for sale in the region concerned during the period of investigation.”)

⁷⁰⁰ Mexico First Submission, para. 927, citing 19 U.S.C. 1673 (Exhibit MEX-178); 19 CFR 351.212(f) (Exhibit US-1).

⁷⁰¹ For the reasons explained above, that provision cannot be applied under the facts of this case.

⁷⁰² Mexico First Submission, n.861.

does not exclude any products of such producers that are exported for sale outside the region. Thus, as long as a producer exports for sale in the region, nothing in Article 4.2 requires the United States to exempt that producer’s merchandise sold outside the region from the levying of duties.⁷⁰³

448. For the reasons discussed above, Mexico’s claims under AD Agreement Article 4.2 regarding the U.S. levying of duties on all nationwide imports of cement from Mexico are without merit and should be dismissed.

5. Commerce Has Changed Its “Arm’s Length” Test

449. In determining whether comparison market sales between affiliated parties are in the ordinary course of trade, Commerce considers whether such sales are at “arm’s length”.⁷⁰⁴ In its first submission, Mexico alleges that the United States failed to comply with Article 2.1 of the AD Agreement by applying the so-called “arm’s length” test in the fifth through eleventh reviews.⁷⁰⁵ As Mexico acknowledges, however, Commerce has eliminated the test about which Mexico complains.⁷⁰⁶

6. Commerce’s Adjustments To Price To Account for Differences in Physical Characteristics Are Consistent With the AD Agreement

450. In the fifth through eighth reviews, Commerce made adjustments to price to account for differences in the physical characteristics (“difmer” adjustments in U.S. parlance) of the cement it compared to calculate dumping margins. Mexico claims that those adjustments are

⁷⁰³ Mexico further complains that the U.S. statute is inconsistent with Article 4.2 because it requires the levying of duties on the merchandise of “specific exporters or producers that exported the subject merchandise for sale in the region concerned *during the period of investigation*.” Mexico First Submission, n.861 (emphasis added). Because the antidumping investigation and the assessment of duties resulting from an assessment review are temporally separated under U.S. law, Mexico claims that the statute is deficient in not providing a “transition rule” allowing Mexican exporters of merchandise covered by a pre-URAA antidumping order to qualify for an exemption from duties. As discussed above, however, both CEMEX and CDC/GCCC export for sale in the Southern Tier region and therefore would not qualify for the exemption even if it were made.

⁷⁰⁴ For sales by the exporter or producer to an affiliate to be included in the normal value calculation, those sales prices must fall, on average, within a defined range, or band, around sales prices of the same or comparable merchandise sold by that exporter or producer to all unaffiliated customers.

⁷⁰⁵ Mexico First Submission, paras. 931-44.

⁷⁰⁶ Mexico First Submission, paras. 941-42. Specifically, in November 2002, Commerce changed its arm’s length test in connection with the DSB’s findings in *US - Hot-Rolled Steel* and has been applying the new test since that time. *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186 (November 15, 2002) (Exhibit MEX-181). The new arm’s length test has been applied in all investigations and reviews initiated on or after November 23, 2002. 67 FR at 69197 (Exhibit MEX-181). As the seven assessment reviews at issue in this dispute were initiated and, with one exception, completed prior to November 2002, the new arm’s length test was not applied in those reviews. (The *Eleventh Review* was completed in January 2003 (Exhibit MEX-110).)

inconsistent with Articles 2.1, 2.4, 6.13, and Annex II of the AD Agreement.⁷⁰⁷ As demonstrated below, however, Commerce properly made a difmer adjustment to normal value when comparing the prices of products with different physical characteristics sold in the United States and the home market. Commerce’s difmer adjustments are based on a proper establishment of the facts and an unbiased and objective evaluation of those facts in each of the assessment reviews at issue.

a. Article 2.4 Provides for Adjustments to Price to Account for Differences in Physical Characteristics

451. Article 2.4 requires that, in comparisons of products for dumping purposes, due allowance be made for certain “differences” that affect price comparability. Differences in “physical characteristics” are among the explicitly enumerated “differences” that affect price comparability:

Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

Under Article 2.4, such due allowance is to be made in “each case, on its merits”.

452. In the fifth through the eighth reviews, Commerce compared export sales of ASTM Type V cement with home market sales of ASTM Type I cement. Commerce found that there were physical differences between Type V and Type I cements and therefore made an adjustment to account for those physical differences.

453. Mexico contends that the AD Agreement precludes Commerce from making any difmer adjustments under the circumstances of the instant case (*i.e.*, when comparing Mexican home market sales of Type I cement to U.S. sales of Type V⁷⁰⁸ cement). Although Mexico concedes

⁷⁰⁷ Mexico First Submission, paras. 945-970. Mexico also claims that Commerce’s actions were inconsistent with Article 9.3 of the AD Agreement. Mexico First Submission, paras. 799-800, 803, 945 (header). However, Mexico never establishes the basis for its reliance upon Article 9.3 of the AD Agreement or alleges any inconsistency with Article 9.3 that is independent of its claims with respect to Article 2. As demonstrated below, Commerce’s determinations are not inconsistent with any requirement of Article 2 and there is, thus, no inconsistency with Article 9.3.

In addition, Mexico claims that Commerce’s “reliance” on a WTO-inconsistent “margin likely to prevail” in the sunset review is inconsistent with Article 11.3. Mexico First Submission, paras. 965, 970. Mexico misconstrues Commerce’s actions in the sunset review. Commerce reported to the ITC the “margin likely to prevail” if the order were revoked. As discussed in Section VI.B, Commerce did not rely on the “margin likely to prevail” in making its likelihood determination. Nor was it obligated to do so under U.S. law or the AD Agreement. Thus, the Panel should reject Mexico’s Article 11.3 claim.

⁷⁰⁸ Although Mexico mentions only U.S. sales of Type V cement, in the fifth and sixth reviews, CEMEX also had U.S. sales of Type II cement. See *Fifth Review Preliminary Results*, 61 FR at 51677 (Exhibit MEX-26); *Sixth Review Final Results*, 63 FR at 12767 (Exhibit MEX-51).

that there are differences in the physical characteristics of Type V and Type I cements,⁷⁰⁹ Mexico argues that physical differences either do not result in “cost” differences⁷¹⁰ or, to the extent cost differences exist, the differences in cost are due to differing efficiencies among production plants.⁷¹¹

454. Mexico’s reliance on the absence of “cost” differences is misplaced. As discussed below, the record establishes that cost differences *do* exist.

455. As also discussed below, Commerce properly made difmer adjustments because it found that there were physical differences between Type V cement sold in the United States and Type I cement sold in the home market.

b. Commerce Properly Made Adjustments to Account for Differences in Physical Characteristics

456. Mexico challenges Commerce’s difmer adjustments in the fifth through eighth assessment reviews. Mexico’s arguments fail to distinguish and address the factual bases for the determinations made by Commerce in each of the four reviews at issue. Thus, Mexico has failed to meet its burden of demonstrating that Commerce could not reasonably have made a difmer adjustment under the facts in each review.

i. *The Facts In Each Review Demonstrate That Type V Cement and Type I Cement Have Different Physical Characteristics*

457. At the outset of each assessment review, Commerce requested that the Mexican respondents list the products they produced and describe any differences and/or similarities in the physical characteristics of the products.⁷¹² The Mexican respondents reported that they produced

⁷⁰⁹ Mexico First Submission, para. 945. Although Mexico concedes in paragraph 945 that there are “physical differences” in the export and home market products that Commerce compared, it makes the contradictory assertion that Commerce “improperly applied a ‘difmer’ to physically identical products” Mexico First Submission, para. 948. As Mexico provides no evidence or argument demonstrating that these products are identical, the Panel should disregard Mexico’s unsubstantiated assertion.

⁷¹⁰ Mexico First Submission, para. 945. Mexico asserts that “CEMEX’s Type I plants produce their Type I cement by using their local limestone clay feedstock, in the same way that the Yaqui and Campana plants produce Type V LA cement using their local limestone clay feedstocks. The cost of the limestone-clay feedstock at all CEMEX plants is virtually zero, and reflects the costs of moving the limestone and clay from their local quarries to the CEMEX plant close by.” Mexico First Submission, para. 953. Mexico does not explain why this means there are no cost differences whatsoever between the export product and the home market product. Moreover, Mexico cites no evidence in the records of any of the reviews at issue to support its assertions regarding the use of “local limestone clay feedstock” in producing either product or the cost of such feedstock being ‘virtually zero.’”

⁷¹¹ Mexico First Submission, para. 945.

⁷¹² See e.g., *Sixth Review CEMEX Questionnaire* (September 23, 1996) (Exhibit US -86); see also, *Eighth Review CEMEX/CDC Questionnaire* (September 29, 1998) at Section A, Question 7 (Exhibit US-87).

cement based on ASTM standards.⁷¹³ The ASTM standards provide detailed physical and chemical specifications for different types of cement.

458. The Mexican respondents submitted the ASTM standards as part of their questionnaire responses.⁷¹⁴ Those standards indicate that Type V cement is produced to more demanding specifications than Type I, a general purpose cement used when the special attributes of other cement types are not needed.⁷¹⁵ Type V cement can be used in place of Type I cement, but Type I cement cannot be used for projects which require Type V cement specifications.⁷¹⁶ The primary – but by no means only – difference between Type I and Type V cement is that the ASTM specifications strictly limit the amount of tricalcium aluminate in Type V cement.⁷¹⁷ There are no limits on the tricalcium aluminate content of Type I.⁷¹⁸ Based on these facts, Commerce found that Type I and Type V cements had different physical characteristics.⁷¹⁹ Mexico, in fact, concedes that Type I and Type V cements are physically different.⁷²⁰

ii. *Commerce Made Difmer Adjustments in the Fifth and Eighth Reviews Based on the Data Submitted by the Mexican Respondents*

459. As an initial matter, Mexico's arguments are inapplicable with respect to the difmer adjustment made by Commerce in the fifth review. As discussed above, Mexico is challenging Commerce's use of a difmer adjustment when making comparisons of home-market sales of Type I cement with U.S. sales of Type V cement. The difmer adjustment in the fifth review, however, was made for comparisons of Type I cement sales in the home-market and Type II cement sales in the U.S. market. The Mexican respondents did not report any sales of Type V cement to the United States during the fifth review period. As a result, there was no issue concerning a difmer for comparisons of Type I and Type V cement in the fifth review. Moreover, the fifth review difmer adjustment for comparisons of Type I and Type II cement was based on data submitted by the Mexican respondents.

⁷¹³ U.S. producers also produced cement based on ASTM standards.

⁷¹⁴ See e.g., *Eighth Review CDC Questionnaire Response* (November 12, 1998) at Exhibit A32 (Exhibit US-88); *Sixth Review CEMEX Questionnaire Response* (February 14, 1997) at 36 and Exhibit D-11 (Exhibit US-89).

⁷¹⁵ *Eighth Review CDC Questionnaire Response* (November 12, 1998) at Exhibit A32 (Translation of Mexican Standards Section 4. Classification "Type I. - Common. - For general use in concrete buildings when they don't require the special attributes of Types II, III, IV, and V.") (Exhibit US-88).

⁷¹⁶ *Eighth Review CDC Questionnaire Response* (November 12, 1998) at Exhibit A32 (Translation of Mexican Standards Section 4. Classification "Type I. - Common. - For general use in concrete buildings when they don't require the special attributes of Types II, III, IV, and V.") (Exhibit US-88).

⁷¹⁷ *Eighth Review CEMEX Questionnaire Response* (November 13, 1998) at Exhibit A20 (Exhibit US-90).

⁷¹⁸ *Eighth Review CDC Questionnaire Response* (November 12, 1998) at Exhibit A32 (Exhibit US-88).

⁷¹⁹ *Fifth Review Final Results*, 62 FR at 17159 (Exhibit MEX-31); *Sixth Review Final Results*, 63 FR at 12779 (Exhibit MEX-51); *Seventh Review Final Results*, 64 FR at 13158 (Exhibit MEX-70); and *Eighth Review Final Decision Memorandum*, at Comment 13 (Exhibit MEX-85).

⁷²⁰ See Mexico First Submission, paras. 943, 952, 954.

460. In the fifth review, Commerce made difmer adjustments to account for the physical differences between home market sales of Type I cement and U.S. sales of Type II cement.⁷²¹ Commerce calculated the amount of the difmer adjustment based on differences in CEMEX's cost of producing the Type I cement and Type II cement at one plant, the Yaqui plant.⁷²² Because the cost data for both types of cement came from the *same* plant, Commerce was satisfied that the cost differences were attributable to the differences in physical characteristics, not to differences in plant efficiencies.⁷²³

461. In the eighth review, Commerce made difmer adjustments to account for the physical differences between home market sales of Type I cement and U.S. sales of Type V cement.⁷²⁴ Commerce calculated the amount of the difmer adjustment based on differences in CEMEX's cost of producing the Type I cement and Type V cement at one plant, the Hidalgo plant.⁷²⁵ As in the fifth review, because the cost data on both types of cement came from the *same* plant, Commerce was satisfied that the cost differences were attributable to the differences in physical characteristics.⁷²⁶

462. Thus, in both the fifth and eighth reviews, the record evidence reflects that Commerce properly made difmer adjustments to account for differences in physical characteristics between different types of cement sold in the home market and U.S. market. In making those adjustments, Commerce did not, as Mexico argues, compare costs between different facilities.⁷²⁷ Moreover, regardless of whether "cost" differences are used to make the adjustment for physical differences or, as Mexico argues, are relevant in determining whether to adjust for physical differences, Commerce's findings in the fifth and eighth reviews take both considerations into account. In sum, Mexico has failed to demonstrate that Commerce's determinations to make difmer adjustments in the fifth and eighth reviews are WTO-inconsistent.

iii. *Commerce Made Difmer Adjustments in the Sixth and Seventh Reviews on the Basis of the Facts Available*

463. Article 6.8 of the AD Agreement provides that authorities may make a decision on the basis of the "facts available" when an "interested party refuses access to, or otherwise does not

⁷²¹ See *Fifth Review Preliminary Results*, 61 FR at 51677 (Exhibit MEX-26).

⁷²² *Fifth Review Final Results*, 62 FR at 17159 (Exhibit MEX-31); see also *Fifth Review CEMEX Questionnaire Response* (December 8, 1995), at A-13; 15 (establishing that there are significant differences in physical characteristics between Type I cement and Type II cement) (Exhibit US-91).

⁷²³ *Fifth Review Final Results*, 62 FR at 17159 (Exhibit MEX-31). This decision was subsequently upheld by a NAFTA Panel. *Fifth Review NAFTA Panel Decision*, at 132-148 (Exhibit US-92).

⁷²⁴ *Eighth Review Final Decision Memorandum*, at Commerce 13 (Exhibit MEX-85); see also *Eighth Review CEMEX Questionnaire Response* (November 13, 1998) at A-28, A-29 and Exhibits A18 and A23 (establishing that there are significant differences in physical characteristics between Type I cement and Type II cement) (Exhibit US-90).

⁷²⁵ *Eighth Review Final Decision Memorandum*, at Comment 13 (Exhibit MEX-85).

⁷²⁶ *Eighth Review Final Decision Memorandum*, at Commerce 13 (Exhibit MEX-85).

⁷²⁷ Mexico First Submission, para. 954.

provide necessary information within a reasonable period of time or significantly impedes” a review. Mexico merely asserts – without reference to any specific evidence or findings – that CEMEX cooperated to the best of its abilities to provide requested information.⁷²⁸ Mexico’s unsupported assertion is contradicted by the record evidence.

464. During the course of the sixth review, Commerce repeatedly asked CEMEX to provide information regarding the kinds of cement produced at each plant during the sixth review period. That information was either not supplied or, when it was supplied, the information kept changing.⁷²⁹ Further, when Commerce attempted to verify the data CEMEX reported concerning the types of cement that were produced at each of CEMEX’s plants, as well as CEMEX’s reported difmer data, Commerce found that CEMEX had reported incorrect data.⁷³⁰ Moreover, Commerce found still more problems with the reported data when it verified CEMEX’s questionnaire responses at CEMEX’s corporate offices and the Yaqui plant.⁷³¹

465. After issuing a preliminary determination and receiving comments from the parties, Commerce issued the *Sixth Review Final Results*.⁷³² Commerce made the following findings: (1) CEMEX had not reported its difmer information based solely on differences in physical characteristics as requested, (2) due to the discovery of the misreporting of the production data at certain plants, CEMEX’s difmer data was not an appropriate basis for making the difmer adjustment, (3) given the late date of the discovery of the misreporting, Commerce did not have time to request and verify alternative difmer information, and (4) CEMEX had not been cooperative with regard to providing the difmer information.⁷³³ As a consequence, Commerce

⁷²⁸ Mexico First Submission, paras. 961-962.

⁷²⁹ On October 24, 1996, in response to Commerce’s questionnaire, CEMEX reported sales of Type I, Type II and Type V cement. *See generally, Sixth Review CEMEX Questionnaire Response* (October 23, 1996) (Exhibit US-93). It was unclear from CEMEX’s questionnaire response which kinds of cement were produced at each plant during the sixth period of review. Therefore, Commerce specifically asked CEMEX in a supplemental questionnaire to “[p]rovide a list of the cement types produced by each plant” *Sixth Review Supplemental Questionnaire* (December, 24, 1996) at 3, question 11 (Exhibit US-94). CEMEX responded to the supplemental questions on January 30, 1997, providing information on production at the Yaqui and Campana plants. *Sixth Review CEMEX Supplemental Questionnaire Response* (January 30, 1997) at 7 and Exhibit SA-7 (Exhibit US-95). On February 14, 1997, CEMEX provided its cost data and requested that Commerce make a difmer adjustment based on the differences in the cost for the production of Type I and Type II cement. *Sixth Review CEMEX Questionnaire Response* (February 14, 1997) at 42 (Exhibit US-89). On March 7, 1997, Commerce issued another supplemental questionnaire to CEMEX. *Sixth Review Supplemental Questionnaire*, (March 10, 1997) (Exhibit US-96). In that questionnaire Commerce once again asked for a list of the types of cement sold at each plant. *Sixth Review Supplemental Questionnaire*, (March 10, 1997) at 1-2, question 8 (Exhibit US-96). On April 8, 1997, CEMEX responded to the March 7 supplemental questionnaire and provided an updated list of the types of cement produced at each plant. CEMEX also clarified that the Campana plant produced and sold Type V and Type II cement and that “[t]he cements produced and sold at Yaqui were Type I, Type II and pozzalonic cement.” *Sixth Review CEMEX Supplemental Questionnaire Response* (April 8, 1997) at 5 and Exhibit SSA-5 (Exhibit US-97).

⁷³⁰ *Sixth Review CEMEX Cost Verification Report* (July 21, 1997) at 14-15 (Exhibit US-98).

⁷³¹ *Sixth Review CEMEX Home Market Sales Verification Report* (July 21, 1997) (Exhibit US-99).

⁷³² *Sixth Review Final Results*, 63 FR 12764 (March 16, 1998) (Exhibit MEX-51).

⁷³³ *Sixth Review Final Results*, 63 FR at 12778-12779 (Exhibit MEX-51).

relied on “facts available” in making the difmer adjustment.⁷³⁴ Mexico suggests – again without any reference to record evidence – that CEMEX had difficulty supplying requested information.⁷³⁵ As discussed above, however, the record indicates that CEMEX failed to report some data and misreported other data.

466. Similarly, during the course of the seventh review, Commerce repeatedly asked CEMEX to supply difmer data. CEMEX failed to do so. In its final results, Commerce made the following findings: (1) the record indicated that there were differences in the physical characteristics of Type I and Type V cement warranting a difmer adjustment; (2) CEMEX failed, despite being asked on several occasions, to provide information regarding process or production differences that were attributable to the differences in physical characteristics from which Commerce could calculate a difmer adjustment; and (3) CEMEX offered conflicting information several times. As a result, Commerce relied on “facts available” in making the difmer adjustment.⁷³⁶ Under these circumstances, Commerce’s determination to resort to facts available was consistent with Article 6.8 and Annex II.

467. In sum, consistent with the AD Agreement, Commerce properly determined to make difmer adjustments to account for differences in physical characteristics. Those determinations were based on a proper establishment of the facts and an unbiased and objective evaluation of those facts in each of the assessment reviews at issue. The Panel should reject Mexico’s claims to the contrary.

7. Commerce’s Calculation of a Single Margin of Dumping for the Affiliated Companies, CEMEX and CDC, Is Consistent with the AD Agreement

468. Mexico argues that Commerce acted inconsistently with Articles 2.1, 2.2, 2.4, 6.8, and 6.10 of the AD Agreement when it determined in the fifth through eleventh administrative reviews to “collapse” affiliated producers, CEMEX and CDC, and calculate a single margin for the two companies.⁷³⁷ Mexico relies primarily upon Article 6.10 of the AD Agreement for its

⁷³⁴ *Sixth Review Final Results*, 63 FR at 12778-12779 (Exhibit MEX-51).

⁷³⁵ Mexico First Submission, para. 969. In the same paragraph, Mexico alleges that Commerce in the seventh review “requested information for two cement types at the same plant that were not made at that same plant” and that the “information did not exist, and CEMEX explained why it did not exist.” Mexico provides no citation to the record of the seventh review to support its claim that Commerce requested non-existent information and that CEMEX explained why it did not exist.

⁷³⁶ *Seventh Review Final Results*, 64 FR at 13158-13158 (Exhibit MEX-70). Significantly, in the seventh review, as a result of a remand from a NAFTA panel, Commerce ultimately matched sales of “identical” products in the home and U.S. markets. Because there were no differences in the physical characteristics of the products, the issue of difmer adjustment did not arise in the amended final results. See *Seventh Review Amended Final Results* (Exhibit MEX-72).

⁷³⁷ Mexico First Submission, paras. 971-994. Mexico also claims that Commerce’s actions were inconsistent with Article 9.3 of the AD Agreement. Mexico First Submission, paras. 799-800, 803, 994. However, Mexico never establishes the basis for its reliance upon Article 9.3 of the AD Agreement or alleges any inconsistency with Article 9.3 that is independent of its claims with respect to Article 2. As demonstrated below, Commerce’s determinations are not inconsistent with any requirement of Article 2 and there is, thus, no

allegations that the decision to treat these two companies as a single “producer/exporter” is inconsistent with the AD Agreement. According to Mexico, this decision is WTO-inconsistent because CEMEX and CDC are two independent companies.⁷³⁸ As discussed below, this argument disregards the actual text of Article 6.10 and mischaracterizes the obligations in the AD Agreement. In addition, Mexico’s allegation contradicts the substantial evidence on the records of the fifth through eleventh assessment reviews regarding the intertwined nature of CEMEX and CDC’s operations that support Commerce’s decision to treat CEMEX/CDC as a single economic enterprise.⁷³⁹ For these reasons, Mexico’s claim regarding Commerce’s decision to “collapse” CEMEX and CDC must fail.

- a. Article 6.10 Does Not Require Investigating Authorities to Determine Separate Dumping Margins for Each Legal Entity in a Single Economic Entity

469. Article 6.10 of the AD Agreement states, in relevant part:

The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation.

470. The remainder of Article 6.10 provides for an exception to this “rule” to permit assigning an individual margin to a smaller group of selected exporters or producers when “the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable.” Contrary to Mexico’s assertions, Commerce did not base its decision to give these two companies a common dumping margin on the exception in Article 6.10.⁷⁴⁰ The basis for the determination is Commerce’s finding that these two companies constitute, for antidumping purposes, a single economic entity, *i.e.*, a single “exporter or producer” within the meaning of Article 6.10 of the AD Agreement.

471. Article 6.10 refers to the calculation of a separate dumping margin for each known “exporter or producer,” not each known *legal entity* that produced or exported subject

inconsistency with Article 9.3.

In addition, Mexico claims that Commerce’s “reliance” on a WTO-inconsistent “margin likely to prevail” in the sunset review is inconsistent with Article 11.3. Mexico First Submission, para. 994. Mexico misconstrues Commerce’s actions in the sunset review. Commerce reported to the ITC the “margin likely to prevail” if the order were revoked. As discussed in Section VI.B, Commerce did not rely on the “margin likely to prevail” in making its likelihood determination. Nor was it obligated to do so under U.S. law or the AD Agreement. Thus, the Panel should reject Mexico’s Article 11.3 claim.

⁷³⁸ Mexico First Submission, paras. 971-985.

⁷³⁹ Mexico also appears to claim that Commerce’s collapsing regulation (19 CFR 351.401(f)) is inconsistent with Article 6.10 of the AD Agreement. *See* Mexico First Submission, para. 980. As discussed in Section IV, this claim was not included in Mexico’s panel request and is therefore not within the Panel’s terms of reference. Nonetheless, the United States has demonstrated above that, even if the claim is addressed on the merits, it is baseless.

⁷⁴⁰ Mexico First Submission, para. 972, 975-977.

merchandise. The question for the Panel, therefore, is whether the phrase “exporter or producer” may encompass separate legal entities which act in consort as a single entity for purposes of production or exportation of the subject merchandise.

472. The AD Agreement does not define either “exporter” or “producer.” Thus, nothing in the Agreement requires that the concept of “exporter” or “producer” must necessarily be delimited in terms of corporate structure rather than in terms of commercial practice. The ordinary meanings of the terms “exporter” and “producer” also do not indicate that they must be comprised of a single legal or corporate entity.⁷⁴¹

473. As the Appellate Body recognized,

[W]here the parties to a transaction have common ownership, although they are legally distinct persons, usual commercial principles might not be respected between them. Instead of a sale between these parties being a transfer of goods between two enterprises which are economically independent, transacted at market prices, the sale effectively involves a transfer of goods within a single economic enterprise. In that situation, there is reason to suppose that the sales price might be fixed according to criteria which are not those of the marketplace. The sales transaction might be used as a vehicle for transferring resources with the single economic enterprise. Thus, the sales price may be lower ... [or] higher than the “ordinary course” price, if the purpose is to shift resources There are many reasons related to corporate law and strategy, and to fiscal law, which may lead to resources being allocated ... within a single economic enterprise.⁷⁴²

474. In other words, the Appellate Body has recognized that, although affiliated parties may retain separate legal identities, that fact does not resolve the issue of whether prices between those parties are at arm's length – to use the Appellate Body's terminology, whether the parties are “economically independent.” By the same logic the facts of a particular case may reveal that the operations of two or more affiliated parties are so closely intertwined that they effectively constitute a single economic entity. Beyond simple affiliation in which prices between the two entities may be disregarded in appropriate circumstances, in such cases the parties should be treated as a single “exporter” or “producer” within the meaning of Article 6.10 of the AD Agreement. Commerce's determinations to treat CEMEX and CDC as a single enterprise are therefore consistent with Article 6.10.

475. Indeed, if Members were not permitted to treat multiple legal entities that comprise a single economic entity as a single “exporter or producer” for antidumping purposes, such economic entities could circumvent the disciplines of the Agreement by compartmentalizing comparable production and sales of merchandise within separately incorporated units. Consider,

⁷⁴¹ See The New Shorter Oxford English Dictionary (definitions of “exporter” and “producer”) (Exhibit US-100).

⁷⁴² *US - Hot-Rolled Steel (AB)*, para. 141.

for example, a parent company with four factories, each separately incorporated and wholly-owned. Although there are five distinct legal entities, production and export of the subject merchandise is conducted by the corporate family as a whole, *i.e.*, there is a single “exporter or producer.” When legally-separate companies in fact operate as a single economic entity with respect to production and sales of the subject merchandise, nothing in the ordinary meaning of the text of Article 6.10, the context, or the object and purpose of the Agreement precludes a Member from applying a functional definition and treating the single economic entity as a single “exporter or producer”.

476. “Collapsing” is the term used in U.S. law for a finding that related companies that constitute a single economic entity, *i.e.*, a single exporter or producer that such term should receive a single exporter-specific rate based on the data for the enterprise as a whole. The rationale for collapsing is that the affiliated producers’ operations are sufficiently intertwined that, absent a single rate for the enterprise, the individual entities could undermine the remedy by manipulating pricing and production decisions within the enterprise. Whether two related but separate legal entities function as a single economic enterprise is a question of fact that can only be determined on a case-by-case basis. As discussed below, the facts in the reviews at issue here support Commerce’s decision to collapse CEMEX and CDC. Thus, the Panel should find that Commerce’s determinations are not inconsistent with Article 6.10 of the AD Agreement.

477. Mexico also asserts that by calculating a margin applicable to both CEMEX and CDC, Commerce failed to apply the general rule in Article 6.10.⁷⁴³ Article 6.10, however, does not address calculation of margins. Rather, Article 6.10 merely requires, as a general rule, examination of all known exporters or producers in an investigation.⁷⁴⁴

478. Mexico is confusing the issue whether a separate margin is required for each exporter or producer with the issue of what constitutes an exporter- or producer-specific margin. In particular, Mexico’s reference to the panel reports in *Argentina - Floor Tiles*, *EC - Bed Linen*, and *Argentina - Poultry* as supporting its position appears to be misplaced.⁷⁴⁵ The panels in *Argentina - Floor Tiles*, *EC - Bed Linen*, and *Argentina - Poultry*, were considering the authorities’ decisions, in investigations, not to determine *any* individual margins for specific exporters/producers.⁷⁴⁶ The question of what constitutes an individual exporter or producer was not before the panels in those disputes.

479. The United States agrees that, except as provided in the second sentence of Article 6.10, Members must calculate an individual margin for each known exporter or producer. However,

⁷⁴³ Mexico First Submission, para. 974.

⁷⁴⁴ See *US - Japan Sunset (AB)*, para. 154 (The “reference in [the first sentence of Article 6.10] to ‘the product under investigation’ suggests that it is primarily directed to original investigations.”).

⁷⁴⁵ Mexico First Submission, paras. 974-76.

⁷⁴⁶ See *Argentina - Floor Tiles*, paras. 6.86-6.100 (authority had determined dumping margins for different sizes of the product), *EC - Bed Linen (21.5 - India) (Panel)*, paras. 6.135-136 (involving “unexamined” producers for whom authority had not calculated dumping margins), and *Argentina - Poultry (Panel)*, paras. 7.212-7.217 (authority had assigned “all others” rate to two exporters).

neither the text of the AD Agreement, nor the reports cited by Mexico to support the proposition that Commerce’s determination to treat the single economic entity, CEMEX/CDC, as a single “exporter or producer” is inconsistent with Article 6.10. Additionally, because Mexico fails to establish its claims under Articles 2.1, 2.2, 2.4, 6.8 of the AD Agreement, which appear in any event to be premised upon a breach of Article 6.10, these claims also lack merit and should all be dismissed.⁷⁴⁷

b. Commerce Reasonably Determined, Based upon the Facts in Each Review, That CEMEX and CDC Operated as a Single Economic Entity with Respect to Production and Sales of the Subject Merchandise

480. In the fifth through eleventh assessment reviews, Commerce determined to “collapse” CEMEX and CDC, thereby treating them as a single economic entity and calculating a margin of dumping for that entity. Given the evidentiary record in each of the reviews at issue, Commerce’s determinations to do so were reasonable. Mexico has failed to demonstrate otherwise.

481. In each of the assessment reviews at issue, Commerce examined the information and argument provided by the parties and gave an explanation of why it was appropriate to collapse CEMEX and CDC given their relationship and their business operations.⁷⁴⁸ Specifically, the facts demonstrate that CEMEX and CDC were not only affiliated, but that CEMEX in fact owned, directly and indirectly, a large percentage of CDC. CEMEX managers and directors also sat on the board of directors for CDC and its affiliated companies.⁷⁴⁹ The evidence also showed that CEMEX had significant input with respect to the design and construction of CDC’s Samalayuca manufacturing plant.⁷⁵⁰ These facts indicated that CEMEX and CDC are closely

⁷⁴⁷ Mexico First Submission, paras. 992 and 994.

⁷⁴⁸ In each individual assessment review, Commerce considered the factual bases for treating CEMEX and CDC as a single entity and concluded, based on the record evidence, that treatment of CEMEX and CDC as a single entity was appropriate. *Fifth Review Final Results*, 62 FR at 17154-17155 and *Fifth Review Final Decision Memorandum*, at Comment 4 (MEX-31), *Sixth Review Final Results*, 63 FR at 12773-12774 and *Sixth Review Final Decision Memorandum*, at Comment 7 (MEX-51); *Seventh Review Preliminary Results*, 63 FR at 48472 (MEX-63); *Seventh Review Final Results*, 64 FR at 13150-13152 and *Seventh Review Final Decision Memorandum*, at Comment 2 (MEX-70); *Eighth Review Preliminary Results*, 64 FR at 48779 (noting that a NAFTA panel had upheld Commerce’s decision in the 1994-1995 review to collapse CEMEX and CDC) (MEX-78); *Eighth Review Final Results*, 65 FR 13943 and *Eighth Review Final Decision Memorandum*, at Comment 11 (MEX-85); *Ninth Review Preliminary Results*, 65 FR at 54221 (MEX-93); *Ninth Review Final Results*, 66 FR 14889 and *Ninth Review Final Decision Memorandum*, at Comment 12 (MEX-97); *Tenth Review Preliminary Results*, 66 FR at 47633 (collapsing CEMEX and GCCC) (Exhibit MEX-102); *Tenth Review Final Results*, 67 FR 12518 (MEX-105); *Eleventh Review Preliminary Results*, 67 FR at 57380 (MEX-107); *Eleventh Review Final Results*, 68 FR 1816 (MEX-110); *Commerce Sunset Review Final Results*, 65 FR 41049 (MEX-135).

⁷⁴⁹ See *Fifth Review Collapsing Memorandum*; *Sixth Review Collapsing Memorandum*; *Seventh Review Collapsing Memorandum*; *Eight Review Collapsing Memorandum*; *Ninth Review Collapsing Memorandum*; *Tenth Review Collapsing Memorandum*; *Eleventh Review Collapsing Memorandum* (Exhibit US-101).

⁷⁵⁰ *Sixth Review Collapsing Memorandum*, at 3 (Exhibit US-101). At verification, CEMEX and CDC’s company officials informed Commerce that CEMEX served as a consultant for CDC’s plant design and production and was responsible for making all the engineering decisions. CEMEX officials stated that CEMEX provided such

affiliated and do not operate independently, but rather as a single economic entity. Moreover, the facts indicated that, unless the single economic entity were treated as a single exporter/producer and given a single rate, there was significant potential for manipulation to evade the disciplines of the AD Agreement. Specifically, CEMEX's ownership interests and board positions gave it the potential to affect CDC's pricing and production decisions. Also, CDC and CEMEX both manufactured gray cement – a fungible product – and had similar production processes and facilities. Thus, shifts in production from one company to the other to compartmentalize production for U.S. market would not require substantial retooling and could easily be achieved.⁷⁵¹ Based on the totality of the evidence, therefore, Commerce reasonably determined that the facts warranted treating CEMEX and CDC as a single exporter/producer for purposes of calculating the dumping margin.

482. Mexico argues that the concept of affiliation or “related” parties only has implications for the definition of domestic industry in Article 4.1.⁷⁵² Mexico is incorrect. The concept of affiliated or related parties has implications for a number of provisions in the AD Agreement, such as Article 2.3⁷⁵³ and Article 2.2.⁷⁵⁴ In addition, the concept of affiliated or related parties appears explicitly in Article 9.5, which provides for so-called “new shipper” reviews.⁷⁵⁵

483. Mexico also argues that, even if the concept of affiliation applies beyond the definition of domestic industry, affiliation should be defined as set forth in footnote 11. There is no basis for this contention. Moreover, the definition in footnote 11 by its own terms is explicitly limited to paragraph 4.1. Thus, the definition in footnote 11 cannot apply in other sections of the AD Agreement, as Mexico suggests. In addition, however, there is nothing in the ordinary meaning of the term “exporter” or “producer” that suggests that a single “exporter or producer” can only be comprised of entities that are affiliated within the meaning of footnote 11.

484. Mexico also argues that, because CEMEX and CDC are “separate and distinct companies,” they cannot “manipulate each others pricing and production decisions.”⁷⁵⁶ However, the two pieces of “evidence” that Mexico purports to offer fail to support these assertions.

services to CDC due to its “ownership relationship.” *Id.*

⁷⁵¹ *Id.*

⁷⁵² Mexico First Submission, para. 981.

⁷⁵³ Article 2.3 of the AD Agreement permits the calculation of a “constructed” export price “where it appears to the authorities” that the export price is unreliable “because of association or compensatory arrangement” between the exporter and importer or a third party. Thus, Article 2.3 contemplates that the mere fact of an “association” between parties may signal that the price between them is “unreliable”.

⁷⁵⁴ In analyzing Article 2.2 and whether sales in the home market were in the ordinary course of trade, the Appellate Body recognized that affiliation between companies could effect pricing which would distort normal value. *See US - Hot-Rolled Steel (AB)*, paras. 143-145.

⁷⁵⁵ Specifically, Article 9.5 obligates authorities to conduct a review to determine an individual dumping margin for an exporter/producer who did not export during the investigation – unless the exporter/producer is “related” to any of the exporters/producers who are already subject to the antidumping duties on the product. In other words, an exporter/producer “related” to exporters/producers already subject to duties is not a “new” or distinct entity.

⁷⁵⁶ Mexico First Submission, para. 991.

Specifically, Mexico cites to testimony from the President of CDC dating back to the fifth review⁷⁵⁷ and a provision of Mexican law precluding board member participation in decisions where a conflict of interest would arise.⁷⁵⁸ However, the ability to affect the pricing and production decision of another company, as between two affiliated companies, does not necessarily mean that there is a conflict of interest. To the contrary, the fact that CEMEX's management and directors sit on the boards of CDC and its affiliates is consistent with the conclusion that they operate as a single economic entity with common interests, not conflicts of interest.

485. In sum, Commerce properly established the facts and its evaluation of those facts was unbiased and objective as required under the Agreement. Mexico has failed to demonstrate otherwise. The Panel should therefore reject Mexico's claims that Commerce's determination to treat CEMEX and CDC as a single economic entity is inconsistent with Articles 2.1, 2.2, 2.4, or 6.10 of the AD Agreement.

8. Duty Absorption Findings Are Not WTO-Inconsistent, Either As Such or As Applied

486. Where the product exported is sold in the United States through an importer affiliated with the exporter or producer, Commerce will, under specific circumstances, make findings as to whether antidumping duties have been "absorbed" by the affiliated importer. Mexico argues that these duty absorption findings are inconsistent with various obligations under Articles 2, 6, and 11 of the AD Agreement, as such and as applied.⁷⁵⁹ Contrary to Mexico's allegations, however, Commerce's duty absorption findings do not establish an amount of duty that exceeds the margin of dumping.⁷⁶⁰ Moreover, interested parties have – and, in the relevant assessment reviews, had – an opportunity to present evidence and argument on duty absorption.

a. Duty Absorption Findings and the "Margin Likely to Prevail" Are Not Part of a Determination of Dumping

⁷⁵⁷ Mexico First Submission, para. 991, notes 908 & 910.

⁷⁵⁸ Mexico First Submission, para. 991, n. 909.

⁷⁵⁹ Mexico First Submission, paras. 697-729, 995-1039. Mexico addresses duty absorption in two separate sections of its submission. Because Mexico's arguments overlap or are repetitive, the United States has addressed Mexico's claims related to duty absorption primarily in this one section. See also Section VI.B, which briefly addresses Mexico's claim related to duty absorption as it relates to the "margin likely to prevail" reported by Commerce to the ITC. See also Section VI.A.

⁷⁶⁰ Mexico also claims that Commerce's actions were inconsistent with Article 9.3 of the AD Agreement. Mexico First Submission, paras. 799-800, 803, 1039. However, Mexico never establishes the basis for its reliance upon Article 9.3 of the AD Agreement or alleges any inconsistency with Article 9.3 that is independent of its claims with respect to Article 2. Because, as demonstrated below, Commerce's determinations are not inconsistent with any requirement of Article 2, there is no possible inconsistency with Article 9.3.

487. Under U.S. law, if requested, Commerce conducts a duty absorption inquiry during an assessment review initiated two or four years after publication of the order.⁷⁶¹ Commerce makes a duty absorption inquiry to determine whether a U.S. importer affiliated with the exporter or producer⁷⁶² has paid the antidumping duties without passing them on to its unaffiliated U.S. customers in the form of higher prices. Unless there is evidence that the importer has passed on the duties in this way, Commerce will make a finding of duty absorption in that assessment review.

488. Commerce made a duty absorption finding in the eighth review of the antidumping duty order on cement from Mexico.⁷⁶³ Commerce used this duty absorption finding in its sunset review to adjust the “margin likely to prevail” (referred to by Mexico as the “likely dumping margin”) reported to the ITC.⁷⁶⁴ Mexico argues that, in so doing, Commerce “increas[ed] the likely dumping margin to a rate that exceeds the rate that would otherwise be calculated under Article 2”. According to Mexico, this is inconsistent with both Articles 2 and 11 of the AD Agreement.⁷⁶⁵ Mexico misconstrues both the use of duty absorption findings and the function of the “margin likely to prevail”.

489. As previously explained, in making its sunset determination of likelihood of continuation or recurrence of dumping, Commerce considers the behavior of exporters since the imposition of the order, including evidence of continued dumping and changes in import volumes. If Commerce makes an affirmative likelihood determination, it will inform the ITC of its determination. Commerce also will report to the ITC a “margin likely to prevail”.⁷⁶⁶ Contrary to Mexico’s repeated assertions, Commerce does not rely on the “margin likely to prevail” in its likelihood determination.⁷⁶⁷

490. In a sunset review, Commerce may adjust the “margin likely to prevail” that it reports to the ITC to account for any duty absorption findings. However, contrary to Mexico’s assertions,

⁷⁶¹ 19 U.S.C. 1675(a)(4) (Exhibit MEX-4). 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 of the WTO’s entry 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.

⁷⁶² Duty absorption is not an issue where the sales are from 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.

⁷⁶³ *Eighth Review Final Results*, 65 FR at 13943 (Exhibit MEX-85).

⁷⁶⁴ *Commerce Sunset Review Final Decision Memorandum*, at Comments 5-9 (Exhibit MEX-135).

⁷⁶⁵ Mexico First Submission, paras. 703, 734-36, 737-44, 1011-1013, 1033-1039.

⁷⁶⁶ *See* Section VI.B.

⁷⁶⁷ As previously explained, the ITC conducts a sunset review to consider whether revocation of the order would be likely to lead to continuation or recurrence of material injury. If Commerce makes a negative likelihood determination, the ITC will terminate its sunset review and Commerce will revoke the order.

the “margin likely to prevail” is not a “determination of dumping” under Article 2. It has no impact whatsoever on the amount of duty imposed, collected, or assessed.

491. Commerce makes a “determination of dumping” only in the context of the investigation and subsequent assessment reviews – not in a sunset review. In the investigation and assessment reviews, Commerce calculates a margin of dumping in accordance with Article 2 on the basis of which duties are imposed, collected, and assessed. Duty absorption findings – which can only be made in assessment reviews – are *not* used to calculate a margin of dumping for duty imposition, collection, and assessment purposes.⁷⁶⁸

492. The sole purpose of any duty absorption finding is for possible use in determining the “margin likely to prevail” that is reported to the ITC. The “margin likely to prevail” in a sunset review is *not* a calculated margin that is used for the imposition, collection, or assessment of duties. Thus, contrary to Mexico’s claim, Commerce’s duty absorption findings, either alone or as incorporated into the “margin likely to prevail”, do not establish an amount of duty that exceeds the margin of dumping established under Article 2. Thus, Mexico has failed to demonstrate any as such or as applied inconsistency with Articles 2 and 11.

b. Parties Have and, In The Relevant Assessment Reviews, Had A Full Opportunity To Present Evidence and Argument Regarding Duty Absorption

493. Articles 6.1 and 6.2 provide that interested parties shall have the right to present evidence and argument and a full opportunity for the defense of their interests. Mexico alleges an inconsistency with these provisions, as well as Articles 11.3 and 11.4, because, according to Mexico, parties are – and were in the review at issue – denied the opportunity to present evidence and defend their interests in a sunset review with respect to duty absorption findings considered by Commerce in selecting a “margin likely to prevail”.⁷⁶⁹ Mexico misconstrues when and how duty absorption findings are made. As demonstrated below, parties are – and, in the review at issue, were – not denied the opportunity to present evidence and argument on duty absorption.

494. Duty absorption findings are not made in sunset reviews. As discussed above, Commerce only makes duty absorption findings in the context of certain assessment reviews. In the course of these assessment reviews, parties have full opportunity to argue and present evidence that Commerce takes into account in making its duty absorption findings. Mexico has not contested the fact that parties have this opportunity in assessment reviews. In fact, Commerce provided

⁷⁶⁸ Where Commerce finds duty absorption in an assessment review, Commerce merely states the finding; the finding has no impact on the calculation of the margin of dumping. *See, e.g., Eighth Review Final Results*, 65 FR at 13943 (Exhibit MEX-85).

⁷⁶⁹ Mexico First Submission, paras. 705-711, 1014-1025.

Mexican respondents with this opportunity in the sixth and eighth reviews at issue in this case and Mexico concedes as much.⁷⁷⁰

495. Mexico also argues that Commerce sets an unreasonable evidentiary standard for duty absorption inconsistent with Article 6.2.⁷⁷¹ According to Mexico, Commerce’s evidentiary standard is unreasonable because it is “not commercially practical” for the customer to accept the liability for paying antidumping duties.⁷⁷² Mexico’s argument – that, it is “commercially practical” for affiliated importers to absorb duties and therefore it is unreasonable for Commerce to request evidence that duties are not being absorbed in order to make a negative duty absorption finding – is simply illogical. Articles 6.1 and 6.2 ensure that interested parties have the right to present evidence and argument and have a full opportunity for the defense of their interests. Mexico has failed to demonstrate that Commerce does not provide such opportunities.

496. Mexico also argues that Commerce’s duty absorption findings are inconsistent with Articles 6.1, 6.2, and 6.9 because parties had no opportunity in the sunset review to defend their interests and no notice of the essential facts.⁷⁷³ Contrary to Mexico’s assertions, interested parties, including Mexican respondents, were on notice and had ample opportunity to comment on adjustment to the margin likely to prevail to account for duty absorption findings.

497. As Mexico acknowledges, U.S. law instructs Commerce to make duty absorption findings in assessment reviews upon request.⁷⁷⁴ In both the sixth and eighth assessment reviews, domestic interested parties made such requests. These requests were served on the Mexican respondents’ representatives.⁷⁷⁵ Moreover, U.S. law instructs Commerce to report to the ITC a “margin likely to prevail” as well as Commerce’s findings concerning duty absorption.⁷⁷⁶ Thus, interested parties, including Mexican respondents, were well aware that Commerce would make such findings and report those findings to the ITC.

498. Mexico’s allegation that Commerce’s “sunset review *final* determination ... proved to be the *first* indication to the parties that the Department intended to rely on its duty absorption finding from the eighth administrative review” is contrary to the record evidence.⁷⁷⁷ In discussing duty absorption findings in its preliminary sunset results, Commerce stated that if the

⁷⁷⁰ 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).

⁷⁷¹ Mexico First Submission, paras. 709-710, 721-723, 1026-1030.

⁷⁷² Mexico First Submission, paras. 710, 723.

⁷⁷³ Mexico First Submission, paras. 709, 724-729, 1014-1025.

⁷⁷⁴ Mexico First Submission, paras. 698, 999-1000.

⁷⁷⁵ See *Eight Review Petitioners’ Duty Absorption Inquiry Request* (October 21, 1998) (Exhibit US-103); *Sixth Review Petitioners’ Duty Absorption Inquiry Request* (September 30, 1996) (Exhibit US-104).

⁷⁷⁶ 19 U.S.C. 1675a(c)(3) (Exhibit MEX-5); 19 U.S.C. 1675(a)(4) (Exhibit MEX-4); see also Mexico First Submission, paras. 698, 1001. As discussed above, Mexico concedes that it had the opportunity to provide evidence and argument on duty absorption in the eighth assessment review.

⁷⁷⁷ Mexico First Submission, para. 726 (emphasis in original).

results of the eighth review, which was pending during the sunset review, became available prior to the deadline for case briefs in the sunset review, the “interested parties are invited to comment on the use of the final results of the current [eighth] review to the instant review in their respective case briefs.”⁷⁷⁸ Not only were the interested parties on notice that the duty absorption findings in the eighth review could be used in the final results of the sunset review, the parties were invited to comment on the use of the findings in their sunset review case briefs.

499. In sum, U.S. law provides that interested parties have the opportunity to present evidence and argument concerning duty absorption during the sunset review. Further, the record of the Commerce sunset review at issue reflects that the parties therein had such an opportunity. In fact, they did so in their substantive responses to the notice of initiation.⁷⁷⁹ They also did so their case and rebuttal briefs in response to Commerce’s preliminary sunset results.⁷⁸⁰ For these reasons, the Panel also should dismiss Mexico’s claims under Articles 6.1, 6.2, and 6.9.

E. The ITC’s Decision Not to Initiate a Changed Circumstances Review Is Consistent With Articles 4, 6, and 11 of the AD Agreement

1. Factual Background

500. CEMEX filed its petition to institute a changed circumstances review on September 19, 2001, less than a year after the conclusion of the ITC’s sunset review. The only “changed circumstance” alleged in CEMEX’s petition was the fact that it had completed its acquisition of U.S. cement producer Southdown. At the time of the ITC’s determination in the sunset review, the Southdown acquisition was unconsummated and only recently announced.

501. In its petition seeking the changed circumstances review, CEMEX contended that, given the size of its investment in the United States, it would be “economically irrational” for it to export cement from Mexico in such a manner as to adversely affect its U.S. cement operations.

502. Despite this claim, CEMEX provided no evidence that there had been any changes since the Southdown acquisition in the volume or price of imports from Mexico or in any of the competitive conditions in the Southern Tier regional market. In fact, CEMEX provided no data on subject imports into the U.S. market since the acquisition. Instead, CEMEX attempted to document with economic discussions or forecasts why CEMEX *would have* a strong disincentive to import and price in an injurious manner if the order were revoked. CEMEX relied entirely on

⁷⁷⁸ *Commerce Preliminary Sunset Decision Memorandum*, at 15-16, n.40 (Exhibit MEX-132). The *Eighth Review Final Results* were issued on March 15, 2000 (Exhibit MEX-85); case briefs in the sunset review were filed on April 10, 2000. See *Commerce Sunset Final Results*, 65 FR at 41050 (Exhibit MEX-135).

⁷⁷⁹ See, e.g., *CDC Substantive Response*, at 10-12 (Exhibit US-30); *CEMEX Substantive Response*, at 7-9 (Exhibit US-29).

⁷⁸⁰ See, e.g., *STCC Case Brief*, at 8-9 (Exhibit US-35); *CEMEX Case Brief*, at 2-7 (Exhibit US-36); *CEMEX Rebuttal Brief*, at p. 4-5 (Exhibit US-105).

unsubstantiated allegations regarding its likely *future* actions and *future* changes in U.S. and Southern Tier market conditions.

503. The ITC published a notice requesting written comments “concerning whether the alleged changed circumstances, brought about by CEMEX’s acquisition of Southdown, were sufficient to warrant institution of a review investigation.”⁷⁸¹ In response, comments were filed in opposition to CEMEX’s petition by domestic cement producers and labor unions. Comments in support of the petition were filed by two other Mexican cement producers, GCCC and Cementos Apasco, and by various public officials in the United States, including several members of Congress.

504. The ITC dismissed CEMEX’s request for a review and provided a detailed explanation of its reasons.

2. The ITC’s Decision Was Consistent With Article 11 Of The AD Agreement

- a. Mexico’s Article 11 Claim Should Be Analysed Only With Respect to U.S. Compliance With Article 11.2 as Article 11.1 Does Not Set Out Additional Obligations for Members.

505. Mexico contends that the ITC’s decision not to initiate a changed circumstances review is inconsistent with Articles 11.1 and 11.2 of the AD Agreement. Article 11.1, however, simply provides a general principle that is further elaborated on in Articles 11.2 and 11.3.

506. In *EC - Cast Iron Fittings*, the panel explained that Article 11.2 provides a “review mechanism to ensure that Members comply with the rule contained in Article 11.1.” 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*, “it 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.”⁷⁸²

507. Thus, Mexico’s claims under Article 11 of the AD Agreement should be analysed only with respect to U.S. compliance with Article 11.2. Article 11.2 states that “[t]he authorities shall review the need for the continued imposition of the duty, *where warranted*, ...upon request by any interested party which submits *positive information substantiating the need for a review*.” (Emphasis added). Thus, an investigating authority is obligated to conduct a review only where two conditions are satisfied: (1) the review is warranted; and (2) an interested party submits “positive information substantiating the need for a review.”

⁷⁸¹ *Request for Comments Concerning the Institution of a Section 751(b) Review Investigation; Gray Portland Cement and Cement Clinker from Mexico*, 66 FR 51685 (October 10, 2001) (Exhibit MEX-137).

⁷⁸² *EC-Cast Iron Fittings (Panel)*, paras. 7.113.

b. Article 11.2 Provides No Specific Guidance As to When a Review is “Warranted” and What Constitutes “Positive Information Substantiating the Need for a Review”

508. Article 11.2 provides no specific guidance regarding when a review of the continued imposition of an antidumping measure is “warranted” or what constitutes “positive information” substantiating the need for a review. Thus, Members are free to determine under their own laws and procedures the conditions under which a review will be conducted. In particular, contrary to Mexico’s argument,⁷⁸³ nothing in Article 11.2 prohibits an investigating authority from relying on criteria that elaborate on the basic criteria of Article 11.2 when determining whether a review is warranted, as the ITC did in this case.

509. The ITC noted that it assesses whether to institute a changed circumstances review based on its long-standing practice of assessing whether (1) there have been significant changed circumstances from those in existence at the time of the original investigation; (2) the changed circumstances are not the natural and direct result of the imposition of the antidumping duty order; and (3) the changed circumstances are such as to warrant a full review.⁷⁸⁴

c. The Question for the ITC at the Initial Stage is Whether a Change in Circumstances *Has Occurred*

510. In determining at the initial stage whether a review is warranted, the ITC asks whether it reasonably appears that a change in circumstances involving import patterns and market conditions *has occurred*.⁷⁸⁵ At this initial stage, the ITC considers the time period from imposition/review of the order to the present so as to determine whether significant changed circumstances have occurred which may warrant review on its merits of the need for the outstanding measure.

511. Mexico’s arguments are based on the incorrect presumption that the question at the initial stage is prospective; that is, that the ITC should have based its determination on the mere allegation of CEMEX’s intent rather than actual evidence (which in this case contradicted those allegations).

⁷⁸³ Mexico First Submission, paras. 773-776.

⁷⁸⁴ See *Changed Circumstances Dismissal Notice*, 66 FR at 65741 (Exhibit MEX-138).

⁷⁸⁵ The U.S. Court of International Trade, which provides the first level of domestic legal review of ITC decisions, has explained the ITC’s initial stage decision as follows:

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.

Avesta AB v. United States, 689 F. Supp. 1173, 1181 (CIT 1988). (Exhibit MEX-6).

512. The question at the initial stage, however, is not whether a change in circumstances will occur or whether subject imports would be likely to lead to continuation or recurrence of material injury to the domestic industry if the order was revoked. Rather, the party seeking a changed circumstances review has the burden of persuading the ITC with specific facts that a change has occurred that would warrant going forward with a full review investigation. It is only if a change in circumstances has occurred and a review is warranted that the ITC conducts a prospective analysis of whether revocation of the measure would be likely to lead to continuation or recurrence of material injury to the domestic industry.

d. CEMEX’s Petition Failed to Show That a Review Was Warranted or to Provide Positive Information Substantiating the Need For a Review

513. Given the information presented by CEMEX and other interested parties, and the information that it gathered itself, the ITC found that CEMEX had not provided positive information substantiating the need for a review, and that a review was not warranted. Mexico has not demonstrated the contrary and simply disagrees with the ITC’s conclusions. Significantly, Mexico addresses this issue as if it were sufficient for CEMEX merely to allege changes since the ITC’s *Sunset Review Determination* and disregard the requirement to present positive evidence of the alleged change for a review to be *warranted*. The information submitted by an interested party must *substantiate* the need for a review, and not merely assume a review is warranted, and address the merits of whether revocation would be likely to lead to continuation or recurrence of material injury.

514. The ITC examined the information provided by CEMEX, as well as other information that it collected on its own initiative and received from other interested parties, in light of the three criteria outlined above.

515. The ITC noted that “[t]he alleged changed circumstance consists of CEMEX’s acquisition of U.S. cement producer, Southdown, Inc. CEMEX alleges that the acquisition, which was finalized on November 16, 2000, ‘eliminates any perceived incentive for CEMEX to import cement from Mexico into the Southern Tier in quantities or at prices that would cause material injury’”⁷⁸⁶ to Southern Tier cement producers. The ITC reasonably concluded, however, that CEMEX had failed to provide sufficient evidence to demonstrate the existence of significant changed circumstances.

516. The ITC found that CEMEX did not submit any facts to substantiate its claim that as a result of the acquisition its economic self-interest precluded it from harming the Southern Tier cement industry. It noted that CEMEX’s increase in regional market share resulting from the acquisition alone did “not demonstrate a change without evidence of an actual change in imports or ability to supply imports, prices, or competitive conditions in the industry.” It further noted that CEMEX did not present “adequate and specific facts, such as the volume and value of imports from Mexico since the acquisition, that would provide support for its claims and

⁷⁸⁶ *Changed Circumstances Dismissal Notice*, 66 FR at 65741 (Exhibit MEX-138).

allegations that the acquisition prevents it from engaging ‘in import practices that undermine the pricing structure of its Southern Tier (and U.S.) markets.’⁷⁸⁷

517. In the absence of any information from CEMEX on import volumes and prices, the ITC gathered this information itself. It found that “U.S. imports of cement from Mexico have not fallen or even remained steady, but have instead increased since CEMEX’s acquisition of Southdown in November 2000. The volume of imports of Mexican cement was 29.2 percent higher for the January-September 2001 period compared with the same period in 2000. Moreover, the unit values of imports of cement from Mexico have declined since the acquisition.”⁷⁸⁸ As the ITC observed, “[n]either the increases in volume nor declines in value of imports of Mexican cement provide evidence of a change in importing strategy by CEMEX resulting from the acquisition that would warrant a full review to consider the issue of revocation. In not presenting adequate facts to demonstrate a sufficient change in circumstances, CEMEX has not met its burden at the initial stage.”⁷⁸⁹

518. Contrary to Mexico’s assertion that the ITC “ignored or improperly discounted the information” supplied by CEMEX,⁷⁹⁰ the ITC fully considered CEMEX’s allegation that the Southdown acquisition so fundamentally altered CEMEX’s interests with respect to the Southern Tier market that it had no incentive to import cement from Mexico in the future in such a manner as to injure Southern Tier producers. The ITC, however, expressly found that this allegation was unsupported by any evidence of a change in importing behavior since the acquisition. It further noted: “CEMEX has made various allegations but provided virtually no evidence, and certainly not adequate facts, to support its claim that the acquisition of Southdown is a changed circumstance sufficient to warrant review of the order. Moreover, the available Commerce import data provide clear and convincing contrary evidence that imports of cement from Mexico have increased, and their value has declined, since the acquisition.”⁷⁹¹

519. The ITC also found that CEMEX failed to meet its burden of providing sufficient evidence to satisfy the criterion that the alleged changed circumstances not be the natural and direct result of the imposition of the antidumping order. It observed that “CEMEX has not made it clear why the Commission should not find that a shift of production to the U.S. market would be anything other than the natural consequence of the outstanding antidumping duty order.”⁷⁹²

⁷⁸⁷ *Changed Circumstances Dismissal Notice*, 66 FR at 65741 (Exhibit MEX-138).

⁷⁸⁸ See *Changed Circumstances Dismissal Notice*, 66 FR at 65741 (Exhibit MEX-138) and Southern-Tier Imports from Mexico Tables 1 and 2 (Exhibit US – 106). In yet another attempt to confuse the issue before the ITC at the initial stage, and before this Panel, Mexico challenges the ITC’s consideration of the available unit value data. Mexico First Submission, para. 780. But Mexico fails to recognize that: (1) the initial stage is a screening process to determine if a change exists and in which the factors considered in a full review do not apply; and (2) the requester, CEMEX, had the burden of persuading the ITC through submission of specific and adequate facts, i.e., actual data such as changes in prices or unit values rather than projection of price trends, that the alleged change had occurred.

⁷⁸⁹ *Changed Circumstances Dismissal Notice*, 66 FR at 65741 (Exhibit MEX-138).

⁷⁹⁰ Mexico First Submission, para. 764.

⁷⁹¹ *Changed Circumstances Dismissal Notice*, 66 FR at 65741 (Exhibit MEX-138).

⁷⁹² *Changed Circumstances Dismissal Notice*, 66 FR at 65741 (Exhibit MEX-138).

520. Thus, based on its analysis of all the information presented, the ITC concluded that CEMEX did not present sufficient facts that, “when weighed against the other facts presented, would convince a reasonable decision-maker that a full investigation is necessary.”⁷⁹³ Apart from its predictions regarding the potential future impact of the acquisition, CEMEX submitted no positive evidence that a review was justified. It is clear that an objective and unbiased investigating authority could reach the same conclusion as the ITC under these circumstances.

- e. The Three Criteria Used By the ITC to Assess Whether the Conditions Set Forth in Article 11.2 Have Been Satisfied Are Consistent With the AD Agreement.

521. Mexico’s suggestion that the three criteria used by the ITC to assess whether a changed circumstances review is warranted are inconsistent with Article 11.2 of the AD Agreement⁷⁹⁴ is without merit. As noted above, the ITC asks whether (1) there have been significant changed circumstances from those in existence at the time of the original investigation; (2) the changed circumstances are not the natural and direct result of the imposition of the antidumping duty order; and (3) the changed circumstances are such as to warrant a full review.

522. The ITC’s three criteria merely provide further amplification of the requirements of Article 11.2 that the interested party establish that a review is warranted based on positive information substantiating the need for a review. As to the first criterion, it is simply basic that the petition demonstrate the existence of significant changed circumstances since the original investigation or the last review. Without such a change, there would be no purpose in revisiting the original injury determination or last review.

523. For the same reason – as to the second criterion – a showing that the changed circumstances are not the natural and direct result of the imposition of the antidumping order is essential. For example, the mere fact that imports declined after the order or that a respondent acquired production facilities in the importing country does not in-and- of-itself demonstrate that the continued imposition of duties is not necessary. Mexico’s assertion that “the requesting party must overcome a presumption” that any changes are the natural result of the order is simply wrong.⁷⁹⁵

524. The third criterion is merely an elaboration of the first. The ITC asks whether the changed circumstances, allegedly indicating that revocation of the order would not be likely to lead to continuation or recurrence of material injury, warrant full investigation. Mexico argues that:

[i]n defining whether changed circumstances indicate the domestic industry would not be materially injured should the order be

⁷⁹³ *Changed Circumstances Dismissal Notice*, 66 FR at 65741 (Exhibit MEX-138).

⁷⁹⁴ Mexico First Submission, para. 774.

⁷⁹⁵ See Mexico First Submission, para. 776.

revoked, thereby warranting a full review, the party must basically establish at the outset what should be established only during a full review.⁷⁹⁶

Mexico simply misreads this criterion. It does not ask “whether changed circumstances indicate the domestic industry would not be materially injured should the order be revoked.” Rather, it asks *whether the changed circumstances*, allegedly indicating that revocation of the order would not be likely to lead to continuation or recurrence of material injury, *warrant full investigation*.

525. Contrary to Mexico’s suggestion, none of these three requirements limits the positive information relevant to determining whether to institute a review or obligates the petitioning party to establish at the outset all the information necessary to prove that the order should be revoked.⁷⁹⁷ Rather, they ensure that, consistent with Article 11.2, the petitioning party provides “positive information substantiating the need for a review,” and that a review is undertaken only if warranted.

3. Mexico Has Not Demonstrated Any Inconsistency With Article 4.1(ii) Of The AD Agreement

526. Mexico claims that the ITC’s decision not to grant a changed circumstances review was inconsistent with Article 4.1(ii) of the AD Agreement because “exceptional circumstances” no longer exist to justify an injury determination on a regional industry basis.⁷⁹⁸ Mexico’s claim is anything but clear. Mexico argues that the alleged change in circumstances brought about by CEMEX’s acquisition of Southdown “changed the information contained in the record” of the sunset review with respect to the definition of the regional industry and that the “regional industry definition was even more inappropriate as a result of the CEMEX acquisition of Southdown.”

527. Whatever Mexico intends by this vague argument, it is derived entirely from Mexico’s claim under Article 11.2 that the ITC was obligated to initiate a new review to evaluate whether injury would indeed continue or recur under the alleged changed circumstances. Consequently, the United States refers the Panel to its response above to Mexico’s claim under Article 11.2.

4. Article 6 Of The AD Agreement Is Not Applicable To The Decision Whether To Initiate A Review Under Article 11 Of The AD Agreement

528. Mexico claims that the ITC’s refusal to initiate a changed circumstances review is inconsistent with Article 6 of the AD Agreement. Article 6, however, is not applicable to a determination by an investigating authority whether *to initiate* a review under Article 11 of the AD Agreement.

⁷⁹⁶ Mexico First Submission, para 776.

⁷⁹⁷ Mexico First Submission, para. 776.

⁷⁹⁸ Mexico First Submission, paras. 786-789.

529. Article 11 of the AD Agreement provides for the review of existing antidumping measures, and Article 11.4 specifically states that “[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article.”⁷⁹⁹ However, the text of Article 6 makes it clear that it only applies *after* an investigation has been initiated, not to the decision whether to initiate the investigation. For example, Articles 6.1 and 6.4 use the phrase “in an anti-dumping investigation.” Similarly, Article 6.2 uses the phrase “[t]hroughout the anti-dumping investigation.”

530. Moreover, the application of Article 6 to initiations of changed circumstances reviews would lead to absurd results. For example, would an authority have the right -- or be obligated -- to issue questionnaires to all interested parties prior to initiation? Is the authority required to hold hearings and solicit input from all interested parties, including industrial users, prior to initiating a review?

531. Because Article 6 of the AD Agreement does not apply to the initiation of a review under Article 11, the Panel should dismiss Mexico’s claims under Article 6.

532. Moreover, Mexico’s Article 6 argument hinges on the ITC’s use of public import data in its dismissal of CEMEX’s petition. Article 11.2 provides for reviews at the initiative of investigating authorities or “upon request by any interested party which submits positive information substantiating the need for a review.” It is thus clear that an interested party seeking an Article 11.2 review bears a certain evidentiary burden. The Appellate Body has explained that “positive evidence” – which is akin to “positive information” – is evidence that “must be of an affirmative, objective and verifiable character, and that it must be credible.”⁸⁰⁰ Moreover, by the terms of Article 11.2 itself, the information must “substantiate the need for a review.”⁸⁰¹

533. CEMEX did not submit positive information substantiating the need for a review. CEMEX’s petition failed to show that the acquisition of Southdown had resulted in a change in importing patterns and behavior. CEMEX having failed to affirmatively supply such

⁷⁹⁹ Article 5 of the AD Agreement sets out obligations relating to the initiation of investigations. However, nothing in Article 11 applies the initiation requirements of Article 5 to reviews. The absence of any cross-reference extending the obligations of Article 5 of the AD Agreement to reviews reflects the simple fact that the negotiators chose not to apply the disciplines of Article 5 to the initiation of reviews. Had the drafters of the AD Agreement intended to make the initiation of reviews subject to the requirements of Article 5, they would have made that clear by way of a cross-reference. The United States notes that in *US-Argentina Sunset*, the Appellate Body (at paras. 278 and 280) relied in part on the absence of any cross-references for its finding that the provisions of Article 3 of the AD Agreement do not apply to reviews under Article 11.3.

⁸⁰⁰ *US-Hot-Rolled Steel (AB)*, para. 192.

⁸⁰¹ The word “substantiate” is defined as: “1. Give substance or substantial existence to, to make real or substantial. 2. Give solidity to, make firm, strengthen. 3. Give substantial form to, embody. 4. Prove the truth of; demonstrate or verify by evidence; give good grounds for.” *New Shorter Oxford English Dictionary*, p. 3124. (Exhibit US-24).

information, Mexico can hardly complain about the fact that the ITC developed this relevant data on its own initiative.

F. The U.S. Retrospective Antidumping Duty Assessment System is Consistent With Obligations Under the AD Agreement

534. Mexico argues that the U.S. retrospective antidumping duty assessment system is inconsistent with various provisions of the AD Agreement because final antidumping duties are not assessed until a period after entry of the subject imports and because such duties may be higher than the estimated duties paid at the time of entry.⁸⁰² In so doing, Mexico is essentially challenging the very nature and validity of retrospective antidumping duty assessment systems. As demonstrated below, Mexico’s claims are entirely without basis. The AD Agreement expressly recognizes that Members may use either retrospective or prospective antidumping duty assessment systems.⁸⁰³ Therefore, Mexico’s argument that assessment on a retrospective basis is WTO-inconsistent is contradicted by the text of the Agreement itself. Further, Mexico fails to establish that the U.S. retrospective antidumping duty assessment system is inconsistent with any WTO provision.

1. Overview of the U.S. Retrospective Antidumping Duty Assessment System

535. Pursuant to the U.S. retrospective duty assessment system, liability for payment of antidumping duties attaches at the time that the merchandise subject to a preliminary or final antidumping or countervailing duty measure enters the United States.⁸⁰⁴ When such measures have been put into place, the United States requires that a security⁸⁰⁵ be provided to U.S. Customs and Border Protection (“Customs”) at the time of entry. Determination of the actual duty amount is delayed for one year. Each year, following the anniversary month of the measure, final duty liability is determined either through an assessment review (“administrative review” in U.S. parlance) or, if no review is requested, under “automatic assessment” procedures.⁸⁰⁶ In the case of a review, each subject entry during the period of review (*i.e.*, the previous year) is compared to a weighted-average normal value to determine whether that entry was sold below normal value. This comparison establishes the amount of antidumping duties, if any, for that

⁸⁰² Mexico First Submission, paras. 1040-1089.

⁸⁰³ A system for assessing the amount of the duty on a retrospective basis also is expressly contemplated under the SCM Agreement. *See* footnote 52 of the SCM Agreement.

⁸⁰⁴ The only exception applies with respect to entries made up to 90 days prior to a preliminary determination in an investigation. Article 10 of the AD Agreement (and Article 20 of the SCM Agreement) contains specific provisions permitting retroactive application of an antidumping measure to these entries when certain conditions have been met. This possibility of retroactive application of antidumping duties to merchandise that enters the United States prior to a preliminary determination is not at issue in this case.

⁸⁰⁵ If the entry occurs during an antidumping duty investigation, after preliminary determinations of injury and dumping and prior to an antidumping duty order, the United States typically permits the security to take the form of cash deposits or bonds, at the preference of the importer. After an order is issued, the security must be in the form of cash deposits.

⁸⁰⁶ 19 CFR 351.212(c) (Exhibit US-1); 19 U.S.C. 1675 (Exhibit MEX-4).

entry. Once the total amount of duties for all entries in the period of review is determined, that amount is assessed on an importer-specific basis.

536. At the conclusion of the assessment review, Commerce instructs Customs to assess definitive antidumping duties in accordance with its final results of review.⁸⁰⁷ To the extent that the definitive duties owed are less than the amount of the cash deposits paid as security, any excess plus interest is returned to the importer. To the extent that the definitive liability is greater than the cash deposits, the importer must pay that additional amount plus interest.⁸⁰⁸

537. The assessment of final duties on a retrospective basis is expressly provided for in Article 9.3.1 of the AD Agreement which sets out certain obligations that apply “[w]hen the amount of the anti-dumping duty is assessed on a *retrospective* basis” Although Mexico acknowledges that Article 9.3 establishes rules for retrospective assessment,⁸⁰⁹ Mexico then takes the directly contrary position that retrospective assessment is inconsistent with that provision. There is simply no way to reconcile Mexico’s argument with the text of Article 9.3.⁸¹⁰ As discussed below, Mexico fails to make any *prima facie* case of inconsistency with respect to the U.S. retrospective antidumping duty assessment system.

2. Article 9 and the GATT 1994 Do Not Require Members Using Retrospective Systems to Under-Collect Assessed Duties

538. Mexico complains that, under the U.S. retrospective antidumping duty assessment system, the United States asks importers to correct for any underpayment of duties in cases where the final assessed duties are higher than the estimated duties deposited at the time of entry. According to Mexico, under Article 9 and the GATT 1994, the United States is *precluded* from collecting duties in the full amount of dumping found in its Article 9 assessment review in these circumstances.⁸¹¹ Mexico is wrong.

⁸⁰⁷ 19 U.S.C. 1675(a)(3)(B) (Exhibit MEX-4).

⁸⁰⁸ 19 U.S.C. 1677g (Exhibit US-2). *See also US - Section 129 (Panel)*, paras. 2.7-2.8 (describing the U.S. system). Consistent with Article 10.3 of the AD Agreement, U.S. law provides that final liability for payment of antidumping duties with respect to entries during the period in which provisional measures are in effect is capped at the amount of the provisional duty paid or payable. *See* 19 U.S.C. 1673f(a) (Exhibit US-3).

⁸⁰⁹ Mexico First Submission, para. 1070.

⁸¹⁰ As the Appellate Body has explained, a treaty interpreter must “give meaning and effect to all the terms of a treaty” and is “not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.” *Korea - Dairy (AB)*, para. 80 (citations omitted). Assessing duties on a retrospective basis also is discussed elsewhere in the AD Agreement. In particular, note 22 in Article 11 provides that “[w]hen the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.” *See also* note 52 in Article 21 of the SCM Agreement which contains similar language with regard to countervailing duties.

⁸¹¹ Mexico First Submission, paras. 1071, 1073. The U.S. retrospective antidumping duty assessment system, as such, does not violate the chapeau of Article 9.3, because the system specifically ensures through the calculation of actual dumping margins that the amount of antidumping duties does not exceed the actual antidumping margin for particular periods.

539. Nothing in the text of Article 9 requires that a Member collect *less* than the full amount of the dumping margin under any circumstances. Article 9.1 provides that Members have the discretion to collect either the full amount of the duty or some lesser duty.⁸¹² Moreover, Article 9.3 provides that the antidumping duty shall not exceed the dumping found to exist.⁸¹³

540. Under the U.S. retrospective antidumping duty assessment system, Customs collects a deposit, not the final duty, at the time of entry. The final duty levied is based on the amount of dumping actually found to exist, consistent with Article 9.3 of the Agreement. The retrospective system therefore does *not* result in the collection of duties in excess of the dumping actually found to exist.

541. Mexico posits, however, that because Article 9.3.1 discusses refunds but not underpayments, Members that assess antidumping duties on a retrospective basis are implicitly precluded from collecting more than the amount deposited, regardless of the level of dumping actually found to exist.⁸¹⁴ Article 9.3.1 establishes a requirement for Members to refund overpayments. That requirement is consistent with the obligation in the chapeau to Article 9.3 not to assess duties in excess of the dumping determined to exist. Because Members are not permitted to retain excess dumping duties, Article 9.3.1 requires refunds. In contrast, Article 9.1 leaves it to the discretion of each investigating authority whether to require payment of the full amount of the duty or to accept some lesser amount (*i.e.*, accept underpayment). It is therefore unnecessary for Article 9.3.1 to address underpayment as well. Moreover, because the decision to collect a lesser duty is entirely discretionary, it would have been contradictory for the drafters to have included in Article 9.3.1 a provision parallel to the refund provision requiring collection of duties not paid at the time of entry.

542. There is no implicit, much less explicit limitation in Article 9.3.1 on a Member's discretion to levy the full amount of the duties, regardless of when they are levied. Mexico's attempt to use a timing provision to turn an explicitly discretionary "lesser duty rule" into a mandatory "lesser duty rule" that only applies in retrospective systems does not comport with the text of the Agreement. Because Article 9.1 expressly vests discretion in the Members to determine whether to impose a lesser duty or the full duty, any limitation on that discretion would have to be equally explicit.

⁸¹² Article 9.1 states with respect to imposition that:

The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. . . .

⁸¹³ The same restriction is articulated in Article VI:2 of the GATT 1994, which states that a Member may levy "on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. . . ."

⁸¹⁴ Mexico First Submission, para. 1070.

543. Indeed, the only limitation upon a Member's discretion to levy the full amount of a duty is found in Article 10.3, which applies to the collection of antidumping duties on entries made during the period in which a provisional measure is in place. Article 10.3 states, in relevant part, that:

If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected.

544. With the exception of Article 10, nothing in the AD Agreement or GATT 1994 precludes a Member from assessing duties in the full amount of dumping that is calculated. To the contrary, as discussed above, Article 9.1 explicitly preserves a Member's right to do so. Therefore, in those instances in which the final liability for payment of antidumping duties is greater than the deposit collected, the United States is entitled to assess duties based on the full amount of dumping found to exist.⁸¹⁵

3. “Retrospective Assessment” is not the same as “Retroactive Application”

545. In a further attack on the validity of assessment of antidumping duties on a retrospective basis, Mexico erroneously submits that the AD Agreement provides only two limited circumstances in which “retrospective assessment” is permitted.⁸¹⁶ The circumstances cited by Mexico are those reflected in Articles 10.2⁸¹⁷ and 10.6.⁸¹⁸ Mexico bases this conclusion on a fundamentally flawed interpretation of the AD Agreement.

546. Mexico begins by confusing “retroactive” application of antidumping duties with a “retrospective” system for determining final antidumping duty liability. Article 10 addresses the former, not the latter.⁸¹⁹

⁸¹⁵ 19 U.S.C. 1675(a)(3)(B) (Exhibit MEX-4).

⁸¹⁶ Mexico First Submission, para. 1081.

⁸¹⁷ Article 10.2 states in full: “Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measure, if any, have been applied.”

⁸¹⁸ Article 10.6 contains the second exception to the general proposition that, whether assessment occurs on a retrospective or prospective basis, liability attaches subsequent to the preliminary or final duty determination. Article 10.6 of the AD Agreement permits Members when certain conditions have been met in an investigation to levy a definitive anti-dumping duty “on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures”

⁸¹⁹ Mexico's reference to *US - Softwood Lumber Preliminary Determinations (Panel)* exemplifies its confusion. In that case, the panel addressed whether provisional measures could be imposed retroactively, *i.e.*, to entries made prior to the preliminary determination, pursuant to the “critical circumstances” provision in Article 20.6 of the SCM Agreement. See *US - Softwood Lumber Preliminary Determinations (Panel)*, paras. 7.91-7.98. There is absolutely nothing in that decision that addresses the assessment of duties on an entry made *after* provisional measures were put in place, regardless of whether assessment was on a prospective or retrospective basis.

547. Article 10.1 of the AD Agreement establishes the general rule that antidumping measures are to be applied only to merchandise that enters for consumption after a preliminary determination is made of dumping and material injury or, if there is only a threat of injury, after a final determination of injurious dumping. Thus, the rule addresses *when* the measure may take effect at the border. It does not address when or how the duties are to be assessed on the entries.

548. Under a retrospective assessment system, the exact amount of final duties is determined and assessed after the date of entry. Such a system does not, however, impose duties retroactively, *i.e.*, it does not impose duties on entries made prior to the imposition of the measure. In either a retrospective or prospective assessment system, liability for the duties attaches at the time of entry. The difference is that in a prospective system the importer gets the bill at the time of entry (even though the bill is subject to modification⁸²⁰) but in an retrospective system the importer pays a security at the time of entry and gets the final bill at a later date. Accordingly, neither estimated nor final duties under a retrospective antidumping duty assessment system are applied “retroactively” within the meaning of Article 10.

549. Mexico’s argument attempts to circumscribe impermissibly the circumstances in which Members can assess duties on a retrospective basis. In so doing, Mexico ignores the plain language of the AD Agreement and renders Article 9.3.1 a nullity. Specifically, Article 9.3.1. allows final duty assessment within 12 to 18 months of a request for final assessment. Under Mexico’s argument, an investigating authority would have to make final assessment on or before the date of entry of the merchandise except in the two limited circumstances discussed in Article 10. This is an illogical argument that fails to respect the text of the AD Agreement and the principle that a treaty interpreter must “give meaning and effect to all the terms of a treaty” and is “not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”⁸²¹ Thus, Mexico’s claim under Article 10 must fail.

4. The U.S. Retrospective Antidumping Duty Assessment System is Consistent with Article X:2 of the GATT 1994

550. Finally, Mexico claims that the U.S. system is incompatible with Article X:2 of the GATT 1994 because the United States fails “to provide for publication prior to enforcement.”⁸²² This claim, like many of Mexico’s other claims, demonstrates a fundamental misunderstanding

⁸²⁰ In a prospective system, as in a retrospective system, the possibility exists that as a result of the assessment review or “re-determination” the administering authority may determine that the duty levied is insufficient and does not reflect the actual level of dumping at the time of entry. In such instances where the definitive liability is greater than the deposit collected, the importer must pay the additional amount. *See, e.g.*, Canada’s Special Import Measures Act, Sec. 60(1) (“Where ... a re-determination of the normal value or export price of ... the goods has been made, (a) the importer shall pay any additional duty payable with respect to the goods. . . .”) (Exhibit US-107)

⁸²¹ *Korea - Dairy (AB)*, para. 80 (citations omitted).

⁸²² Mexico First Submission, para. 1060.

of Members' obligations under the AD Agreement and the GATT 1994 and of the U.S. duty assessment system.

551. First, the United States notes that Mexico makes its claim under Article X:2 of the GATT 1994, and not under Article 12 of the AD Agreement, which requires public notice of a Member's determinations and details the information that is to be contained in such notices.⁸²³ The United States has fully complied with Article 12 in all the proceedings at issue here, and Mexico has made no claim to the contrary.

552. Even assuming *arguendo* that GATT Article X:2 applies to publication of determinations in particular antidumping proceedings,⁸²⁴ the United States has plainly also complied with those obligations.

553. Specifically, Article X:2 provides that:

No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

554. The U.S. anti-dumping law requires publication in the Federal Register *before* duties are assessed or the cash deposit rate is changed.⁸²⁵ There is therefore no basis for Mexico's claim of an inconsistency with Article X:2 of the GATT.

5. The U.S. Retrospective Antidumping Duty Assessment System Is Not Inconsistent, As Applied

555. The United States notes that Mexico has failed to allege any inconsistency "as applied" that is independent of its "as such" claims with respect to the U.S. retrospective antidumping duty assessment system. Because the U.S. system is not inconsistent, as such, with any of the provisions cited by Mexico, the consequential "as applied" claim must also fail.⁸²⁶

G. The Requirement Under U.S. Law That Interest Be Paid on Over- and Under-Payment of Antidumping Duties Is Consistent with Article 9 of the AD Agreement and Article VI:2 of GATT

⁸²³ The text of the U.S. statute expressly provides for the official publication of the results of Commerce's investigations and assessment reviews. See 19 U.S.C. 1677f(i) (Exhibit US- 108).

⁸²⁴ Article X:2 only applies to a measures of "general application." The United States has officially published its antidumping laws and regulations, which are measures of general application relevant in this case. The determination of final duty liability in any individual assessment review of a particular antidumping measure is not a "measure of general application." See *US - Hot-Rolled Steel (Panel)*, para. 7.268 (expressing doubt that a specific antidumping determination can be considered a measure of "general application").

⁸²⁵ See 19 U.S.C. 1677f(i) (Exhibit US-108).

⁸²⁶ See *US - Section 129*, para. 6.133 (consequential claims rejected when main claims not successful).

556. Mexico argues that requiring the payment of interest on under-payments of antidumping duties is inconsistent with GATT Article VI:2 and Article 9 of the AD Agreement.⁸²⁷ Mexico's claims are without basis and rest on a mischaracterization of U.S. law regarding payment of interest on over- and under-payment of duties at the time of entry.

557. U.S. law requires the payment and collection of interest whenever the estimated duties on deposit differ from the actual duties due. In those instances in which an importer's cash deposits are greater than the antidumping duty that is assessed, upon reimbursement of the overpayment as required in Article 9.3.1, the United States pays interest to the importer. In those instances in which the cash deposits are less than the antidumping duty that is assessed, the United States requires the payment of interest on the underpaid portion.⁸²⁸

558. The interest rate payable by the United States or required to be paid to the United States in connection with such over- and under-payments, respectively, is set by statute.⁸²⁹ Once the interest rate is properly determined, the amount of interest payable is calculated based on the difference between the estimated duties deposited and final duties assessed.

559. The interest payable in both situations compensates the party entitled to the money for the time it has waited to receive the money. In the case of interest paid by the United States when it refunds deposits paid in excess of the final amount of duties calculated, the United States is compensating the affected party for the value of the use of the monies overpaid. Similarly, in those instances in which the security paid is less than the final definitive duty amount calculated, the United States collects interest from the affected party to compensate for the value of the importer's use of the amount determined to be due. The United States recognizes the time value of money in each case and does not discriminate based on whether it must pay a refund or collect additional duties.

560. Mexico's claim that "the levying of interest, in addition to the definitive anti-dumping duties, by definition constitutes anti-dumping duties in excess of the margin of dumping" is entirely baseless.⁸³⁰ Interest paid on antidumping duties, whether by the United States (in the case of over-payment) or an importer (in the case of under-payment) is not an antidumping duty

⁸²⁷ Mexico First Submission, paras. 1090-1106.

⁸²⁸ The statute provides, in relevant part that "[i]nterest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after ... (1) the date of publication of a countervailing or antidumping duty order under this subtitle" 19 U.S.C. 1677g(a) (Exhibit US-2).

⁸²⁹ The interest rate payable is the rate of interest established under Section 6621 of title 26 for such period. 19 U.S.C. 1677g(b) (Exhibit US-2). On a quarterly basis, Customs publishes in the Federal Register the quarterly Internal Revenue Service interest rates used in calculating interest on underpayments of duties and on refunds of duties. See, e.g., *Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties*, 69 FR 61401 (October 18, 2004) (Exhibit US-109).

⁸³⁰ Mexico First Submission, para. 1099.

but rather, as discussed above, a separate payment or charge that reflects the time value of money.

561. No provision of the AD Agreement, or any other WTO agreement, sets out obligations regarding the payment of interest in these circumstances.⁸³¹ For example, Article 9.3.1 of the AD Agreement obligates an investigating authority to determine the final liability for antidumping duties within 18 months of any request. Neither Article 9.3.1 nor any other provision in the AD Agreement obligates an authority to pay interest or precludes an authority from paying interest on the amount of cash deposits or other security exceeding the final liability for antidumping duties. Likewise, neither Article 9.3.1 nor any other provision in the AD Agreement obligates an authority to collect interest or precludes an authority from collecting interest on the amount of final duty liability that may exceed cash deposits or other security posted at the time of entry.

562. That interest is payable at the time the final definitive duty is payable does not alter the fundamental fact that interest is not an antidumping duty. It is a separate charge that accounts for the importer's continued use of the funds during the pendency of the proceeding. No amount of wordplay by Mexico can transform the interest payment into an anti-dumping duty.

H. Mexico's Claims Under Article X:3(a) of the GATT 1994 Are Unfounded

563. Having failed to demonstrate that the U.S. measures it identifies are contrary to the AD Agreement, Mexico resubmits its complaints about the same measures in the guise of a general challenge to the "overall administration of U.S. anti-dumping law in the present case" under Article X:3(a).⁸³² Mexico then presents a motley list of additional measures that it alleges are also inconsistent with Article X:3(a).⁸³³

⁸³¹ As Mexico itself has noted, the fundamental precept that "the amount of duties cannot exceed the margin of dumping" has not been modified since the Kennedy Round. Mexico First Submission, para. 1093. Although the AD Agreement is silent on the issue of interest, such payments have been required under U.S. law since the 1979 amendments to the Tariff Act. *See Trade Agreements Act of 1979*, 93 Stat. 188-189 (July 26, 1979), amending the *Tariff Act of 1930* ("Sec. 778 – Interest on Certain Overpayment and Underpayments") (Exhibit US-110). The co-existence of the interest requirement in the U.S. statute and this precept for the past quarter century – even through and beyond the Uruguay Round negotiations – demonstrates that Members did not consider interest to be an anti-dumping duty.

⁸³² Mexico First Submission, para. 1126.

⁸³³ Article X:3(a) states that "[e]ach contracting party shall administer in a uniform, impartial and reasonable manner all of its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article." Article X:1, in turn, describes the following:

[L]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use. . . .

564. As demonstrated below, neither the “overall administration of U.S. anti-dumping laws in the present case” nor the additional measures identified in Section XIII.C of Mexico’s first submission are inconsistent with Article X:3(a).

1. **Mexico Fails To Meet Its Burden of Establishing That The “Overall Administration of U.S. Anti-dumping Laws in the Present Case” Is Inconsistent With Article X:3**

565. With respect to Mexico’s claim about the “overall administration of U.S. anti-dumping laws in the present case,” Mexico fails to make a *prima facie* case of inconsistency with Article X:3(a). Mexico merely lists a handful of government actions that it alleges are “examples of U.S. violations of its Article X:3(a) obligations”⁸³⁴ and excuses itself of any further effort with the statement that “[t]he administration of U.S. anti-dumping laws in this case has been described in detail above, and need not be repeated here.”⁸³⁵

566. First, Mexico fails even to *identify* any particular laws, regulations, decisions or rulings the administration of which allegedly breaches Article X:3(a). Instead, it merely summarizes its earlier arguments regarding substantive Commerce and ITC decisions in the reviews at issue⁸³⁶ and asserts that the “overall administration of U.S. anti-dumping laws in the present case” breaches Article X:3(a).⁸³⁷ Mexico has failed to undertake even the minimal argumentation necessary to establish a breach of Article X:3(a), as it has failed to identify any particular measures, let alone establish how they are being administered in a WTO-inconsistent fashion. Mexico’s generic references to “U.S. antidumping laws” do not demonstrate how the administration of any particular law is not “uniform, impartial and reasonable.” Mexico cannot fulfill this burden simply through non-specific assertions that somewhere among the broad corpus of “U.S. antidumping laws” there might be one or more laws that Commerce is administering in a manner that may breach Article X:3(a).⁸³⁸

567. Second, although Mexico purports to base its Article X:3(a) claim on “the pattern of U.S. actions from January 1, 1995 to the present,”⁸³⁹ it does no more than refer back to its earlier arguments, which relate to substantive Commerce and ITC decisions in the context of various reviews of a *single* antidumping duty order – that on cement from Mexico. Mexico is thus challenging particular decisions made in particular reviews. Article X:3(a) applies, however, only with respect to the *administration* of certain laws, regulations, decisions and rulings of

⁸³⁴ Mexico First Submission, paras. 1121-1125.

⁸³⁵ Mexico First Submission, para. 1121.

⁸³⁶ Mexico First Submission, paras. 1121-1125.

⁸³⁷ Mexico First Submission, para. 1126.

⁸³⁸ Even if this cursory argumentation were sufficient to argue a breach in the administration of all “U.S. antidumping laws,” Mexico failed to list “U.S. antidumping laws” as a whole among the measures it purports to be challenging in its panel request. *See* Mexico Panel Request, pages 1-3.

⁸³⁹ Mexico First Submission, para. 1120.

general application, *not* to particular decisions in and of themselves. Recognizing this, the Appellate Body stated in *EC - Bananas*,

[t]he text of Article X:3(a) clearly indicates that the requirements of “uniformity, impartiality, and reasonableness” do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions, and rulings. . . . To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.⁸⁴⁰

568. Contrary to Mexico’s assertions, it has not established any sort of WTO-inconsistent “pattern” in the administration of laws, regulations, decisions, and rulings. It has simply strung together complaints about different substantive decisions made in the course of reviews of a single antidumping order. Mexico’s arguments are properly addressed in the context of its claims under the AD Agreement, and not under GATT Article X:3(a).⁸⁴¹

569. Moreover, the Commerce and ITC decisions of which Mexico complains are not “laws, regulations, decisions, and rulings of *general application*.” In recognition of this limitation in the text of Article X:3(a), the Appellate Body in *EC - Poultry Products* observed that “licences issued to a specific company or applied to a specific shipment cannot be considered to be a measure ‘of general application’ within the meaning of Article X.”⁸⁴² Similarly, the panel in *US - Japan Sunset* found that the determinations of the US investigating authorities in a single sunset review were not measures of “general application” within the meaning of Article X:3.⁸⁴³

570. Recently, in *US - Argentina Sunset*, the Appellate Body noted that a vague and unsubstantiated claim is not sufficient to establish a breach of Article X:3(a), saying:

We observe . . . that allegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances. Such allegations should not be brought lightly, or in a subsidiary fashion. A claim under Article X:3(a) of the GATT 1994 must be supported by solid evidence; the nature and scope of the claim, and the evidence adduced by the complainant in support

⁸⁴⁰ *EC – Bananas (AB)*, para. 200.

⁸⁴¹ The Appellate Body in *EC - Poultry* explained that to the extent Brazil’s appeal relates to the *substantive content* of the EC rules themselves, and not their *publication* or *administration*, that appeal falls outside the scope of Article X of the GATT 1994. The WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994.

EC – Poultry (AB), para. 115 (emphasis in original).

⁸⁴² *EC - Poultry Products (AB)*, para. 114.

⁸⁴³ *US - Japan Sunset (Panel)*, para. 7.310.

of it, should reflect the gravity of the accusations inherent in claims under Article X:3(a) of the GATT 1994.⁸⁴⁴

571. Mexico’s Article X:3(a) claim is not supported by any evidence. It is, in fact, entirely derivative in nature.⁸⁴⁵ Mexico simply asserts that the United States has failed to comply with its obligations under the AD Agreement and then urges the Panel to assume that this cannot be “uniform, impartial and reasonable” under Article X:3(a). Contrary to Mexico’s assertions, Article X:3(a) cannot be the basis of this type of derivative claim. Article X:3(a) is a distinct provision that sets out particular criteria that must be met for the provision to apply. To make a case of inconsistency with Article X:3(a), a complaining party must, first, identify specifically the laws, regulations, decisions, and rulings of general application at issue and then establish with solid evidence that each was not administered in a “uniform, impartial, and reasonable manner.” Mexico cannot establish a claim under Article X:3(a) simply by alleging that the United States acted inconsistently with other WTO provisions.

572. For the reasons above, Mexico fails to meet its burden of establishing that the “administration of U.S. anti-dumping law in the present case” is inconsistent with Article X:3(a) of the GATT 1994. Accordingly, the Panel should reject Mexico’s claim.

2. Mexico’s Article X:3(a) Claims Regarding the Additional Measures Are Similarly Unfounded

573. There is also no merit, either legal or factual, to Mexico’s claims that the additional measures identified in Section XIII.C of its first submission are inconsistent with Article X:3(a). Each of these claims is addressed in turn below:

- a. Mexico Cannot Challenge Under Article X:3(a) the Substance of the Sunset Review Law and Commerce’s Regulations Regarding Responses to Commerce’s Notice of Initiation of a Sunset Review

574. Mexico argues that Commerce “imposes additional requirements on foreign parties, greater than those imposed on domestic parties” in determining whether a response to its sunset review initiation notice is “adequate” and claims that this is inconsistent with Article X:3(a).⁸⁴⁶ Mexico admits at the outset, however, that its challenge is not to the administration of any U.S. sunset law but to the *substance* of a particular regulatory provision. Specifically, Mexico states that the “U.S. sunset review law establishes a highly discriminatory double standard” and cites Commerce’s regulation, 19 C.F.R. 351.218.⁸⁴⁷ As discussed above, such a claim against the

⁸⁴⁴ *US - Argentina Sunset (AB)*, para. 217.

⁸⁴⁵ Mexico First Submission, paras. 1121-1125.

⁸⁴⁶ Mexico First Submission, para. 1130-1139.

⁸⁴⁷ *Id.*, para. 1135.

substance of a regulation, as opposed to its administration, is not properly founded in Article X:3(a).⁸⁴⁸

575. Moreover, even assuming *arguendo* that Mexico's claim could be within the scope of Article X:3(a), it still lacks merit. "Impartial" means "[n]ot partial; not favouring one party or side more than another; unprejudiced, unbiased; fair."⁸⁴⁹ As the panel recognized in *US - Japan Sunset*, treatment in an unbiased and fair manner is distinguishable from identical treatment.⁸⁵⁰ There is no favoritism, prejudice, bias, or unfairness in imposing one set of conditions for proceeding with a sunset review,⁸⁵¹ but establishing a different set of conditions for conducting a "full" sunset review.⁸⁵² Article X:3(a) does not require that identical conditions be imposed in entirely different contexts.

576. There is also nothing "unreasonable" about the differences of which Mexico complains. "Reasonable" means "[i]n accordance with reason; not irrational or absurd."⁸⁵³ Practical concerns underlie Commerce's request for complete substantive responses from foreign interested parties accounting for at least 50 percent of exports in the specified period. As the panel acknowledged in *US - Japan Sunset*, the information requested from foreign parties is uniquely important to the determination that Commerce must make regarding the likelihood of continuation or recurrence of dumping.⁸⁵⁴ Plainly, if this necessary information is not submitted by the foreign parties regarding at least the majority of exports in the period subject to analysis in the sunset review, Commerce is hindered in its ability to make a meaningful determination of the likelihood of continuation or recurrence of dumping based on the data submitted. It is for this reason, which is neither "irrational" or "absurd," that Commerce requests complete substantive

⁸⁴⁸ *EC – Bananas (AB)*, para. 200.

⁸⁴⁹ *New Shorter Oxford English Dictionary* 1318 (1993) (Exhibit US-111).

⁸⁵⁰ See *US – Japan Sunset (Panel)*, para. 7.306 (explaining that Commerce was not "partial" in requiring more information from foreign exporters than domestic parties in a sunset review because "foreign exporters will be the main source of information regarding dumping, or likelihood of continuation or recurrence of dumping" and, as such, the quantity of information required from foreign exporters will necessarily differ.)

⁸⁵¹ In response to a Commerce "notice of initiation" of a sunset review, a domestic interested party that wishes to participate in the review is required, within 15 days of publication, to submit a notice of its intent. See 19 C.F.R. 351.218(d)(i). Foreign interested parties are not required to take any action at that time. If no notices of intent are received from any domestic party by the date specified, Commerce is required to terminate the sunset review and automatically revoke the antidumping order. See Section 751(c)(3)(A) of the Act, codified at 19 U.S.C. § 1675(c)(3)(A) (Exhibit MEX-4) and 19 C.F.R. 351.218(e)(1)(A) and 351.218(e)(1)(C) (Exhibit MEX-112). If at least one domestic interested party submits a notice of intent to participate, Commerce will continue the sunset review.

⁸⁵² Commerce normally will conduct a "full" review if complete substantive responses are received from foreign interested parties "accounting on average for more than 50 percent . . . of the total exports of subject merchandise to the United States over the five calendar years preceding the year of publication of the notice of initiation." Otherwise, Commerce will conduct an "expedited" review. The main difference between a "full" review and an "expedited" review is that, in the case of the former, Commerce will issue preliminary results before issuing its final results of review. Contrary to Mexico's assertion, in *both* full and expedited sunset reviews, Commerce considers all information submitted by all parties to the review. See Mexico First Submission, para. 1132.

⁸⁵³ *New Shorter Oxford English Dictionary* 2496 (1993) (Exhibit US-111).

⁸⁵⁴ *US – Japan Sunset (Panel)*, para. 7.306.

responses from foreign interested parties accounting for at least 50 percent of exports in the specified period before conducting a “full” sunset review.

577. At the same time, it is not “irrational” or “absurd” for Commerce to require at least one domestic interested party to submit a notice of intent to participate and a complete substantive response. As noted above, domestic interested parties are not the main source of information regarding dumping by foreign parties, or the likelihood of continuation or recurrence of dumping.⁸⁵⁵ Commerce’s main objective in seeking information from domestic parties is to determine whether there is domestic interest in continuation of the order.⁸⁵⁶ Concerns about obtaining sufficient information on which to base a determination of the likelihood or recurrence of dumping simply do not apply to the same extent with respect to the domestic parties.

b. Mexico Cannot Challenge Under Article X:3(a) The Substance of Commerce’s Regulations Regarding the Type and Quantity of Information Requested In a Sunset Review

578. Mexico also claims an inconsistency with Article X:3(a) on the basis that, in the sunset review process, Commerce requires foreign interested parties to submit more information than domestic parties. Once again, Mexico’s claim falls outside the scope of Article X:3(a) because it is a challenge to the *substance* of particular Commerce regulations, not their administration, as Mexico again admits: “[t]he regulations pertaining to the adequacy of participation in the sunset review process are similarly neither ‘impartial’ nor ‘reasonable.’”⁸⁵⁷ Such a claim can only be made, if at all, under the substantive provisions of the AD Agreement.

579. Even if Mexico’s claim were not outside the scope of Article X:3(a), however, it would fail. The panel in *US - Japan Sunset* considered and dismissed an identical claim made by Japan. The panel found that Japan had failed to establish that Commerce’s different informational requirements for foreign and domestic parties were “unreasonable” and “impartial” noting:

The nature and quantity of the information that will be in the possession of foreign exporters and producers will necessarily differ from the information possessed by the domestic industry, and this information will be used for different purposes by the investigating authority. This is because generally, in investigations (and reviews), foreign exporters will be the main source of information regarding the dumping, or likelihood of continuation or recurrence of dumping, component of the determination that must be made. . . .⁸⁵⁸

⁸⁵⁵ *US - Japan Sunset (Panel)*, para. 7.306.

⁸⁵⁶ If there is not, Commerce automatically revokes the order.

⁸⁵⁷ Mexico First Submission, para. 1144. See *US - Japan Sunset (Panel)*, para. 7.306 (finding that an identical claim made by Japan fell outside the scope of Article X:3(a)).

⁸⁵⁸ *US - Japan Sunset (Panel)*, para. 7.306.

580. The same reasoning applies here. The differences in the requirements for domestic and foreign interested parties reflect the fact that Commerce’s likelihood of dumping analysis necessarily focuses on foreign parties and their likely conduct. Commerce simply *needs* more information from those parties in order to make its determination. There is no “partiality” or “unreasonableness” underlying the difference.

c. Mexico’s Claim Regarding the ITC’s Verification of Capacity Figures Reported by a Mexican Producer Is Unfounded

581. Mexico alleges that the ITC’s decision to verify the capacity data reported by one Mexican producer, CEMEX, but not to “verify the information provided by the U.S. regional producers concerning their plans for production capacity expansion projects” was not “impartial” and therefore is inconsistent with Article X:3(a). Again, Mexico’s claim falls outside the scope of Article X:3(a).

582. Mexico appears to be challenging here the substance of a single decision made by the ITC in the course of a single sunset review determination. This is not a challenge to the administration of a measure of “general application” under Article X:3(a).⁸⁵⁹

583. Moreover, even if Mexico’s claim were to be considered on the merits – which it should not be – it would be unfounded. Mexico asserts that “[a]n impartial process would have subjected to verification the statements of *both* the domestic industry and the foreign producers, to ensure they had equal evidentiary weight.”⁸⁶⁰ It is important to point out, at the outset, that there were *three* Mexican producers participating in the sunset review at issue.⁸⁶¹ The ITC decided to verify the capacity data submitted by only *one*, CEMEX. Thus, Mexico’s suggestion that the ITC somehow treated “foreign producers” differently from “the domestic industry” is entirely misleading.

584. Moreover, the ITC asked to verify the capacity data submitted by CEMEX because there were concerns about that data that did not exist to the same extent with respect to the information submitted by the other Mexican producers or by the members of the domestic industry. Specifically, CEMEX did not submit all of the capacity data that the ITC requested until numerous requests had been made, including a direct request by one of the ITC Commissioners during a hearing.⁸⁶² Moreover, certain of the capacity data provided by CEMEX to the ITC was different from capacity numbers submitted by the same producer to Commerce in the course of assessment reviews and to the U.S. Securities and Exchange Commission.⁸⁶³ Given the totality of these facts, the ITC conducted a verification “to understand, review and verify the average

⁸⁵⁹ See *EC - Bananas (AB)* para. 200; *EC - Poultry (AB)*, para. 114.

⁸⁶⁰ Mexico First Submission, para. 1155.

⁸⁶¹ See ITC Report at 5 (Exhibit MEX-9).

⁸⁶² See Hearing Transcript at 165-166 (MEX-120).

⁸⁶³ ITC Report at IV-14-16 (Exhibit MEX-9).

production capacity data” submitted by CEMEX and to reconcile this data with the submissions by CEMEX of different capacity numbers to the other agencies.⁸⁶⁴

585. As noted above, the requirement in Article X:3(a) that certain measures be administered “impartially” does not translate into a requirement that all parties be treated in an identical manner regardless of whether they are similarly situated.⁸⁶⁵ Given CEMEX’s attempts to disregard the informational requests of the ITC and its submission of ostensibly inconsistent data to different agencies, the ITC did not act in a prejudiced, biased, or unfair manner by determining that verification of CEMEX’s capacity data was warranted but that verification of the information submitted by other Mexican producers or the domestic industry, which did not appear to suffer from the same type of defects, was not warranted.

d. Mexico Cannot Challenge Under Article X:3(a) the U.S. Antidumping Law Regarding Conduct of “Below Cost” Investigations

586. Mexico alleges that the United States did not administer its antidumping laws in a “reasonable manner” under Article X:3(a) because in the assessment reviews at issue, Commerce conducted “below cost” investigations of Mexican respondents without meeting some vague “sufficient evidentiary standard.”⁸⁶⁶ Once again, Mexico’s claim must be rejected as falling outside the scope of Article X:3(a).

587. In asserting that the United States acted in a WTO-inconsistent manner by conducting below-cost investigations in the assessment reviews at issue, Mexico is, in essence, challenging the requirement in U.S. law that a below-cost investigation be conducted if certain conditions exist.⁸⁶⁷ As discussed above, such challenges to the *substance* of laws, as opposed to their administration, are not properly founded in Article X:3(a).⁸⁶⁸

⁸⁶⁴ ITC Report at IV-16 (Exhibit MEX-9).

⁸⁶⁵ See *US - Japan Sunset (Panel)*, para. 7.306.

⁸⁶⁶ Mexico First Submission, para. 1157.

⁸⁶⁷ Commerce’s actions, in this regard, were directed by U.S. anti-dumping law. Specifically, Section 773(b)(1) of the Act provides that:

[w]henver the administering authority has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product, the administering authority *shall* determine whether, in fact, such sales were made at less than the cost of production.

Section 773(b)(1) of the Act, 19 U.S.C. 1677b(b)(1) (Exhibit MEX-2). Under Section 773(b)(2)(A)(ii) there are “reasonable grounds to believe or suspect that sales of the foreign like product were made at prices that are less than the cost of production of the product” where a domestic interested party “provides information, based upon observed prices or constructed prices or costs, that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of the product. . . .” Section 773(b)(2)(A)(ii) of the Act, 19 U.S.C. 1677b(b)(2)(A)(ii) (Exhibit MEX-2).

⁸⁶⁸ *EC – Bananas (AB)*, para. 200.

588. In each of the assessment reviews at issue, the U.S. petitioner submitted a formal allegation of sales below cost meeting the requirements of 19 U.S.C. 1677b(b)(2)(A)(ii).⁸⁶⁹ Based on these allegations, Commerce initiated below-cost investigations, as required under the U.S. statute.

589. Mexico has offered no evidence to support its allegation that it was “unreasonable” for Commerce to have initiated below-cost investigations under the circumstances of the challenged assessment reviews. As noted above, “reasonable” means “[i]n accordance with reason; not irrational or absurd.”⁸⁷⁰ Where one party submits data suggesting that another has made sales below cost, it is not “irrational” or “absurd” for the investigating authority to do what is clearly authorized under Articles 2.1 and 2.2 of the AD Agreement⁸⁷¹ – *i.e.* request information to determine whether such sales had, in fact, been made. Although Mexico would prefer that Commerce had turned a blind eye to this information, such an outcome is not mandated by Article X:3(a).

- e. Mexico Cannot Challenge Under Article X:3(a) the ITC’s Regulations Regarding Submission of Non-Confidential Summaries of Business Confidential Data

590. In the last of its Article X:3(a) claims, Mexico complains that the ITC “unreasonably” limits access by foreign parties to the information submitted by the domestic industry because, accordingly to Mexico, the ITC does not require non-confidential summaries of “questionnaire responses, briefs or other confidential information provided in injury investigations or sunset review determinations” and “deletes large sections of their [sic] reports as confidential, without providing non-confidential summaries.”⁸⁷² Once again, Mexico admits that it is challenging the substance of the ITC’s regulations governing submission and disclosure of confidential business information (CBI): “[u]nder the Commission’s regulations – which were followed in the sunset review in the present case – non-confidential summaries of questionnaire responses and other submissions in injury investigations or sunset reviews are not required.”⁸⁷³ As discussed above, such a claim is not properly founded in Article X:3(a).

⁸⁶⁹ See *Fifth Review Preliminary Results*, 61 FR at 51678 (Exhibit MEX-26); *Sixth Review Preliminary Results*, 62 FR at 47629 (Exhibit US-DOC29); *Seventh Review Preliminary Results*, 63 FR at 48474 (Exhibit MEX-63); *Eighth Review Preliminary Results*, 64 FR at 78782 (Exhibit MEX-78); *Ninth Review Preliminary Results*, 65 FR at 54223 (Exhibit MEX-93); *Tenth Review Preliminary Results*, 66 FR at 47635 (Exhibit MEX-102); *Eleventh Review Preliminary Results*, 67 FR at 57382 (Exhibit MEX-107).

⁸⁷⁰ *New Shorter Oxford English Dictionary* 2496 (1993) (Exhibit US-111).

⁸⁷¹ Articles 2.1 and 2.2 allow an investigating authority to disregard sales that are made at prices below the cost and establish other obligations with respect to cost information. They do not limit the circumstances under which an investigating authority may seek cost information. See also *Guatemala - Cement II (Panel)*, para. 8.183 (finding that an investigating authority is not prevented from asking for cost information under Article 2.1 and 2.2 of the AD Agreement even when no allegation is made of sales below cost).

⁸⁷² Mexico First Submission, para. 1162.

⁸⁷³ *Id.*, para. 1163.

591. Moreover, Mexico’s claim is based on a substantial mischaracterization of the facts. First, certain representatives (such as lawyers and consultants) of *all* interested parties – foreign and domestic alike – are ordinarily provided access to *all* CBI subject to an administrative protective order (APO), which is designed to protect the confidentiality of the information.⁸⁷⁴ Mexico’s allegation that the ITC’s rules “inhibit[] the ability of foreign respondents to present an effective defence” is therefore twice false; first, because nothing distinguishes foreign respondents from domestic parties under the ITC’s rules regarding CBI and, second, because those rules *do* provide a means of access, within the parameters of the APO system, to all CBI submitted by any other party.

592. Second, contrary to Mexico’s assertions, information submitted by individual parties in their questionnaire responses is collected by the ITC staff and then summarized and compiled in a public staff report, an example of which Mexico has provided in Exhibit MEX-9. This aggregate public data is available to all interested parties.

593. Finally, even if Mexico’s claim were to survive the significant legal and factual failings discussed above, which it should not, there is nothing “unreasonable” about the ITC’s CBI regulations. The purpose of these regulations is to protect sensitive information submitted by parties (both foreign and domestic) – such as data on private companies’ profits, investments, and production processes – from disclosure to other parties, often their business competitors. In establishing these regulations, the ITC struck a fine balance between the interest of all participants in avoiding disclosure of CBI and the concomitant interest of the parties to a dispute in obtaining access to information relevant to their case. This balance cannot lightly be disturbed. Given that ample opportunity is provided for representatives of all parties to access CBI information under APO, and that an aggregated public summary of the relevant data is made available by ITC staff in such a fashion as to avoid disclosing the identity and CBI of individual respondents, Mexico’s charge of “unreasonableness” is plainly untenable.

I. None of the “Measures” Identified by Mexico Is Inconsistent with Article VI of the GATT 1994, Articles 1 or 18 of the AD Agreement, or Article XVI:4 of the WTO Agreement

594. In Section XIV of its first submission, Mexico claims that certain of the “measures” it identifies are inconsistent with Article VI of the GATT 1994, Articles 1, 18.1 and 18.4 of the AD Agreement, and Article XVI:4 of the WTO Agreement. These appear to all be “dependent” claims in that they depend upon a finding of an inconsistency with an obligation contained in some other provision of the AD Agreement. Because, as demonstrated above, none of the “measures” identified by Mexico in its first submission are inconsistent with provisions of the AD Agreement, they are, by definition, not inconsistent with the provisions comprising Mexico’s dependent claims.

⁸⁷⁴ See Section 777(c)(1) of the Act, 19 U.S.C. 1677f(c)(1) (Exhibit US-108) and 19 C.F.R. 201.6 and 207.7 (Exhibit US-112).

595. The United States also notes that, as discussed above, many of Mexico's "as such" challenges pertain to things that are not "measures" or "mandatory" measures subject to challenge "as such." To the extent that Mexico's claims of inconsistency with Article 18.4 of the AD Agreement or Article XVI:4 of the WTO Agreement depend on these defective claims, they must be rejected. Similarly, to the extent that any of Mexico's dependent claims are based upon claims that, as demonstrated in Section IV, above, are not within the Panel's terms of reference, they too must be rejected.

596. Finally, the United States notes that Mexico has identified the following as "antidumping measures" in its discussion of Article 1 of the AD Agreement: the "final determinations of the Department and the ITC in the identified administrative and sunset reviews of the antidumping duty on Cement from Mexico, as well as the ITC's dismissal of the request to initiate a changed circumstances review."⁸⁷⁵ Contrary to Mexico's assertions, the items identified by Mexico do not constitute "antidumping measures" for purposes of the AD Agreement.⁸⁷⁶ Although claims may be made with respect to these determinations as part of a challenge to a *bona fide* antidumping measure, the determinations and decisions referenced are not antidumping measures themselves and cannot be challenged in their own right. The United States therefore respectfully requests that the Panel find that they do not constitute "antidumping measures" for purposes of Article 1 of the AD Agreement, but rather are determinations and decisions with respect to an "antidumping measure."

J. The Specific Remedy Sought by Mexico Is Inconsistent With Established Panel Practice and the DSU

597. In its first submission, Mexico has asked this Panel to make certain recommendations in the event that it agrees with Mexico on the merits. Specifically, Mexico asks that, if the Panel's findings result in a determination that there is insufficient evidence to determine that dumping and injury were likely to continue or recur if the order were revoked, or that the product had been dumped in the challenged reviews to a lesser extent than the duties actually imposed, the DSB request that the United States revoke its antidumping duty order and reimburse antidumping duties collected.⁸⁷⁷ In so doing, Mexico has requested a specific remedy that is inconsistent with established GATT/WTO practice and the DSU. Therefore, should the Panel agree with Mexico on the merits, the Panel nonetheless should reject the requested remedy, and instead should make a general recommendation, consistent with the DSU and established GATT/WTO practice, that the United States bring its anti-dumping measure into conformity with its obligations under the AD Agreement.

⁸⁷⁵ Mexico First Submission, para. 1175.

⁸⁷⁶ See *Guatemala - Cement (AB)*, paras. 79-80 (identifying definitive antidumping duties, provisional measures, and price undertakings as the three types of "antidumping measures" that are subject to dispute resolution under Article 17.4 of the AD Agreement); see also *EC - Pipe Fittings (Panel)*, para. 7.82 (finding that "the *Anti-Dumping Agreement* consistently uses the term 'provisional measures' to refer to measures imposed prior to the completion of the investigation" and that "the ordinary meaning of the term 'anti-dumping duties' . . . refers to the imposition of definitive anti-dumping duties following the completion of the investigation process.")

⁸⁷⁷ Mexico First Submission, paras. 1210-1228.

598. The text of DSU Article 19.1 is unequivocal regarding the recommendation that a panel is to make in such a case: “Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it *shall* recommend that the Member concerned bring the measure into conformity with that agreement.” (Emphasis added). In short, specific remedies – such as the ones that Mexico seeks here – are not authorized by the text of the DSU.

599. In addition, the specific remedy⁸⁷⁸ of revocation requested by Mexico goes far beyond the type of remedies recommended by the overwhelming preponderance of prior GATT 1947 and WTO panels. In virtually every case in which a panel has found a measure to be inconsistent with a GATT or WTO obligation, panels have issued the general recommendation that the country “bring its measures . . . into conformity with GATT.”⁸⁷⁹ This is true not only for GATT disputes, in general, but for disputes involving the imposition of anti-dumping (and countervailing duty) measures, in particular.⁸⁸⁰

600. The requirement that panels make general recommendations reflects the purpose and role of dispute settlement in the WTO, and, before it, under GATT 1947. Article 3.4 of the DSU provides that “[r]ecommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter,” and Article 3.7 provides that “[a] solution mutually acceptable to the parties to a dispute . . . is clearly to be preferred.” To this end, Article 11 of the DSU directs panels to “consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.” Ideally, a mutually agreed solution will be achieved before a panel issues its report. However, if this does not occur, a general panel recommendation that directs a party to conform with its obligations still leaves parties with the necessary room to cooperate in arriving at a mutually agreed solution.

601. Indeed, a Member generally has many options available to it to bring a measure into conformity with its WTO obligations. A panel cannot, and should not, prejudice by its recommendation the solution to be arrived at by the parties to the dispute after the DSB adopts the panel’s report.

602. In addition, the requirement that panels issue general recommendations comports with the nature of a panel’s expertise, which lies in the interpretation of covered agreements. Panels generally lack expertise in the domestic law of a defending party.⁸⁸¹ Thus, while it is appropriate for a panel to determine in a particular case that a Member’s legislation was applied in a manner

⁸⁷⁸ By “specific” remedy, the United States means a remedy that requires a party to take a particular, specific action in order to cure a WTO-inconsistency found by a panel.

⁸⁷⁹ See, e.g., *Canada - Herring and Salmon*, para. 5.1; *US - Argentina Sunset (Panel)*, para. 8.2. The United States will spare the Panel a lengthy citation of all other panel reports in which panels have made recommendations using similar language; the number of such reports is well in excess of 100.

⁸⁸⁰ See, e.g., *US - Argentina Sunset (Panel)*, para. 8.2 (also rejecting request to recommend specific remedies); *Canada - Grain Corn*, para. 6.2; *Korea - Resins*, para. 302.

⁸⁸¹ Indeed, Article 8.3 of the DSU provides that citizens of Members whose governments are parties to a dispute normally shall not serve on a panel concerned with that dispute, absent agreement by the parties.

inconsistent with that country's obligations under a WTO agreement, it is not appropriate for a panel to dictate which of the available options a party must take to bring its actions into conformity with its international obligations.

603. Mexico's proposed remedy is particularly inappropriate in view of the arguments that it makes in this case. Although Mexico contests certain aspects of Commerce's dumping margin calculations, even if Commerce were to calculate the margins as Mexico prefers, it would still find Mexican imports to be sold at dumped prices. Likewise, although Mexico contests certain aspects of Commerce's final sunset determination, Commerce could reach the same conclusion in its final sunset determination even if Mexico were to prevail on several of its claims. The same is true of Mexico's arguments regarding the ITC's final sunset determination. Thus, even on Mexico's own arguments, it would be possible for the U.S. authorities to reach revised determinations in response to an adverse panel decision that would not necessitate terminating the antidumping order. Especially in this case, it should be for the WTO Member and its investigating authorities to decide how to conform their measures to any adverse panel findings.

604. The compliance process under the DSU makes the precise manner of implementation a matter to be determined in the first instance by the Member concerned, subject to limited rights to compensation or retaliation by parties that have successfully invoked the dispute settlement procedures. In Article 19 of the DSU, the drafters precluded a panel from prejudging the outcome of this process in their recommendations.

605. In sum, specific remedies are at odds with established GATT and WTO practice and the express terms of the DSU. Therefore, regardless of how the merits of this case are decided, Mexico's request for specific remedies should be rejected.

VII. CONCLUSION

606. Based on the foregoing, the United States respectfully requests that the Panel reject Mexico's claims in their entirety.

607. In addition, for the reasons discussed above, the United States respectfully requests that the Panel find that because the following matters were not included in Mexico's panel request, they are not within the Panel's terms of reference:

- (a) Mexico's claim that Commerce's "consistent practice in sunset reviews" is inconsistent, as such, with Article 11.3;
- (b) Mexico's claim that Section 736(d) of the Act and 19 C.F.R. 351.212(f) are inconsistent, as such, with Article 4.2; and
- (c) Mexico's claim that 19 C.F.R. 351.401(f) is inconsistent, as such, with Article 6.10.