

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

Request for the Establishment of a Panel by Mexico

The following communication, dated 29 July 2003, from the Permanent Mission of Mexico to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 31 January 2003, the Government of Mexico requested consultations¹ with the Government of the United States of America (United States) pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII.1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement), regarding the final determinations of the United States Department of Commerce (the Department) and the United States International Trade Commission (the Commission) in various administrative and sunset reviews of the anti-dumping duty on cement from Mexico; the Commission's dismissal of the request to initiate a changed circumstances review; as well as certain United States laws, regulations, procedures, and administrative provisions, as described below:

Mexico and the United States held consultations on 2 April 2003, but they failed to settle the dispute.

Mexico therefore requests, pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994 and Article 17.4 of the Anti-Dumping Agreement, that a panel be established at the next meeting of the Dispute Settlement Body, to be held on 18 August 2003. Mexico further requests that the panel have the standard terms of reference provided in Article 7 of the DSU.

Mexico considers that the measures set forth below are inconsistent with the obligations of the United States under the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement) and the Agreements annexed thereto, and that they have resulted in the nullification or impairment of benefits accruing directly or indirectly to Mexico under those Agreements:

- Gray Portland Cement and Cement Clinker from Mexico: Final Results of Antidumping Administrative Review - 1 August 1994 - 31 July 1995, Federal Register Vol. 62, p.17148 (9 April 1997) ("Final Results of the Fifth Administrative Review");
- Gray Portland Cement and Cement Clinker from Mexico: Final Results of Antidumping Administrative Review - 1 August 1995 - 31 July 1996, Federal

¹ WT/DS281/1; G/L/604; G/ADP/D46/1.

Register Vol. 63, p.12764 (16 March 1998) ("Final Results of the Sixth Administrative Review");

- Gray Portland Cement and Cement Clinker from Mexico: Final Results of Antidumping Administrative Review - 1 August 1996 - 31 July 1997, Federal Register Vol. 64, p.13148 (17 March 1999) ("Final Results of the Seventh Administrative Review");
- Gray Portland Cement and Cement Clinker from Mexico: Final Results of Antidumping Administrative Review - 1 August 1997 - 31 July 1998, Federal Register Vol. 65, p.13943 (15 March 2000) and the accompanying Issues and Decision Memorandum ("Final Results of the Eighth Administrative Review");
- Gray Portland Cement and Cement Clinker from Mexico: Final Results of Antidumping Administrative Review - 1 August 1998 - 31 July 1999, Federal Register Vol. 66, p.14889 (14 March 2001) and the accompanying Issues and Decision Memorandum ("Final Results of the Ninth Administrative Review");
- Gray Portland Cement and Cement Clinker from Mexico: Final Results of Antidumping Administrative Review - 1 August 1999 - 31 July 2000, Federal Register Vol. 67, p.12518 (19 March 2002) and the accompanying Issues and Decision Memorandum ("Final Results of the Tenth Administrative Review");
- Gray Portland Cement and Cement Clinker from Mexico: Final Results of Antidumping Administrative Review - 1 August 2000 - 31 July 2001, Federal Register Vol. 68, p.1816 (14 January 2003) and the accompanying Issues and Decision Memorandum ("Final Results of the Eleventh Administrative Review");
- Gray Portland Cement and Cement Clinker from Mexico: Final Results of Full Sunset Review, Federal Register Vol. 65, p.41049 (3 July 2000) and the accompanying Issues and Decision Memorandum ("Department's Sunset Review Determination");
- Gray Portland Cement and Cement Clinker from Japan, Mexico and Venezuela, Investigation Nos. 303-TA-21, 731-TA-451, 461 and 519, USITC Publication No. 3361 (October 2000) and Federal Register Vol. 65, p.65327 (1 November 2000) ("Commission's Sunset Review Determination");
- Gray Portland Cement and Cement Clinker from Japan and Mexico: Continuation of Antidumping Duty Orders, Federal Register Vol. 65, p.68979 (15 November 2000);
- Gray Portland Cement and Cement Clinker from Mexico: Dismissal of Request for Institution of a Section 751(b) Review Investigation, Federal Register Vol. 66, p.65740 (20 December 2001) ("Commission's Determination to Dismiss Request to Initiate a Changed Circumstances Review");
- Sections 736, 737, 751, 752 and 778 of the Tariff Act of 1930, as amended, codified at Title 19 of the United States Code §§ 1673e, 1673f, 1675, 1675a, 1677 and 1677g ("Tariff Act") and the United States Statement of Administrative Action accompanying the Uruguay Round Agreements Act (the "SAA"), H.R. Doc., No. 103-316, Vol.1;

- The Department's Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, Federal Register Vol. 63, p.18871 (April 16, 1998) ("Department's Sunset Policy Bulletin");
- The Department's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations § 351.218; and the Commission's sunset review regulations, codified at Title 19 of the United States Code of Federal Regulations §§ 207.60-69; and
- The Department's rules governing the calculation of dumping margins, codified at Title 19 of the United States Code of Federal Regulations §§ 351.102; 351.212(f); 351.213(j); 351.403 and 351.414(c)(2).

These anti-dumping measures are inconsistent with the following provisions of the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement:

- Articles 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 18 and Annex II of the Anti-Dumping Agreement;
- Articles VI and X of the GATT 1994; and
- Article XVI.4 of the WTO Agreement.

Mexico's claims are described in detail below:

A. In the context of the Fifth to Eleventh Administrative Reviews and the Department's Sunset Review, the Department failed to terminate the anti-dumping duties, failed to establish that there was domestic industry support for the imposition of the anti-dumping duties, as required by Articles 4 and 5 of the Anti-Dumping Agreement, and did not otherwise bring the anti-dumping measures into conformity with the United States WTO obligations, inconsistent with Articles 11.1, 11.2, 11.3, 18.1, 18.3 and 18.4 of the Anti-Dumping Agreement, Article XVI.4 of the WTO Agreement, and Article X.3(a) of the GATT 1994.

B. With respect to the Commission's Sunset Review Determination:

1. The Commission's "likely" standard for determining whether the termination of the anti-dumping duties would be likely to lead to continuation or recurrence of the injury is inconsistent, both as such and as applied, with Articles 11.1, 11.3, 3.1, 3.2, 3.4, 3.5, 3.7 and 3.8 of the Anti-Dumping Agreement.

2. The United States statutory requirements that the Commission determine whether termination of the anti-dumping duties would be likely to lead to continuation or recurrence of the injury "within a reasonably foreseeable time" (19 U.S.C. § 1675 a(a)(1)), and the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time" (19 U.S.C. § 1675 a(a)(5)), are inconsistent, both as such and as applied, with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1 and 11.3 of the Anti-Dumping Agreement.

3. The Commission's finding that "all or almost all" of the producers in the "Southern Tier" of the United States would suffer material injury in the event of termination of the anti-dumping duties is inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 4.1(ii), 6.1, 6.2, 6.4, 6.9, 11.1, 11.3 and 11.4 of the Anti-Dumping Agreement.

4. The Commission's failure to determine the "exceptional circumstances" and its incorrect determination that the appropriate region for purposes of analysing the effects of imports from Mexico was the grouping of states denominated the "Southern Tier" (Florida, Alabama, Mississippi, Louisiana, Texas, New Mexico, Arizona, and California), the region used in the original investigation, is inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 4.1, 11.1 and 11.3 of the Anti-Dumping Agreement.

5. The Commission's determination that termination of the anti-dumping duties would be likely to lead to continuation or recurrence of injury is inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1 and 11.3 of the Anti-Dumping Agreement inasmuch as the Commission failed to conduct an "objective examination" of the record and did not base its determination on "positive evidence".

6. The Commission's Sunset Review Determination is inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1 and 11.3 of the Anti-Dumping Agreement inasmuch as the Commission:

- (a) Failed to base its determination on a proper analysis of the volume of dumped imports, their effect on prices in the domestic market, and the consequent impact of the dumped imports on the domestic industry;
- (b) failed to evaluate all relevant economic factors and indices having a bearing on the state of the domestic industry, including all the factors enumerated in Article 3.4;
- (c) failed to base its determination on the "effects of dumping" on the domestic industry;
- (d) failed to consider in making its determination "any known factors other than the dumped imports"; and
- (e) in making its determination, improperly considered the WTO-inconsistent margin reported by the Department.

C. With respect to the Department's Sunset Review Determination:

1. The Department's "likely" standard for determining whether termination of the anti-dumping duties would be likely to lead to continuation or recurrence of dumping, the Department's determination in this regard, and the Department's calculation of the likely margin of dumping reported to the Commission are inconsistent, both as such and as applied, with Article 11.1 and 11.3 of the Anti-Dumping Agreement.

2. The Department's standard for determining the "likely" margin of dumping, its reliance on that margin in determining whether termination of the anti-dumping duties would be likely to lead to continuation or recurrence of dumping, and its reporting of that margin to the Commission, are inconsistent, both as such and as applied, with Articles 11.1, 11.3, 2.1, 2.2 and 2.4 of the Anti-Dumping Agreement.

3. The Department's standard relating to duty absorption, its reliance on the margin of dumping based on duty absorption in determining whether termination of the anti-dumping duties would be likely to lead to continuation or recurrence of dumping, and its reporting of that margin of dumping to the Commission for the purposes of the Commission's sunset review, are inconsistent, both as such and as applied, with Articles 11.1, 11.3, 11.4, 2 and 6 of the Anti-Dumping Agreement.

- (a) The Department's duty absorption calculation is inconsistent with Articles 11.3 and 2 of the Anti-Dumping Agreement;

- (b) The Department's duty-absorption standard does not give respondents a full opportunity to defend their interests which is inconsistent with Articles 11.3, 11.4, 6.1, 6.2, 6.4 and 6.9 of the Anti-Dumping Agreement; and
- (c) The Department's duty absorption standard imposes a WTO-inconsistent presumption that violates Articles 11.1, 11.3, 11.4, 2 and 6 of the Anti-Dumping Agreement.

D. With regard to the Commission's determination to dismiss the request to initiate a changed circumstances review, the Commission's refusal to initiate the review after an interested party had presented positive information that substantiated the need for a review is inconsistent with Articles 11.1, 11.2, 11.4, 4.1, 6.2 and 6.4 of the Anti-Dumping Agreement.

E. The Department employed anti-dumping margin calculation methodologies inconsistently with Articles 2, 4, 6, 9.3, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement in its administrative reviews and sunset reviews as follows:

1. In the Fifth to Ninth Administrative Reviews and the margin adopted in the Department's Sunset Review Determination, the Department improperly excluded domestic sales of identical Type II and Type V LA cement and thus failed properly to compare the export price and the normal value, as required by Article 2.1, 2.4, and 2.6 of the Anti-Dumping Agreement.
2. In the Fifth to Ninth Administrative Reviews and the margin adopted in the Department's Sunset Review Determination, the Department improperly compared sales of bagged cement with sales of in bulk cement and thus failed properly to compare the export price and the normal value, as required by Article 2.1, 2.4 and 2.6 of the Anti-Dumping Agreement.
3. In the Fifth to Eleventh Administrative Reviews and the margin adopted in the Department's Sunset Review Determination, the Department calculated a margin without having compared the export price and the normal value on a weighted average basis or on a transaction-to-transaction basis, as required by Article 2.4.2 of the Anti-Dumping Agreement.
4. In the Fifth to Eleventh Administrative Reviews and the margin adopted in the Department's Sunset Review Determination, the Department followed the practice known as "zeroing" for negative dumping margins, which is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.
5. In the Seventh to Eleventh Administrative Reviews, the Department's determination to levy anti-dumping duties on Mexican cement consigned for final consumption outside the "Southern Tier Region" is inconsistent with Article 4.2 of the Anti-Dumping Agreement.
6. In the Fifth to Eleventh Administrative Reviews and the margin adopted in the Department's Sunset Review Determination, the Department applied the so-called "arm's length" test to determine whether sales to related customers were in the ordinary course of trade, in a manner inconsistent with Article 2.1 of the Anti-Dumping Agreement.
7. The Department improperly applied the facts available: (i) in the Fifth to Eighth Administrative Reviews and the margin adopted in the Department's Sunset Review Determination, by failing to take account of cost-related evidence on the record in relation to "differences in merchandise" which affected price comparability when making the difference-in-merchandise ("difmer") adjustment in a manner inconsistent with Articles 2.1, 2.4, 6.8 and Annex II of the Anti-Dumping Agreement; and (ii) by calculating the anti-dumping margin in the Seventh Administrative Review by using the facts available, in a manner inconsistent with Articles 2.1, 2.4, 6.8, 6.13 and Annex II of the Anti-Dumping Agreement.

8. In the Fifth to Eleventh Administrative Reviews and the margin adopted in the Sunset Review, the Department improperly "amalgamated" the firms Cementos de Chihuahua, S.A. de C.V. and CEMEX S.A. de C.V. in order to calculate a single weighted average margin, in a manner inconsistent with Articles 2.1, 2.2, 2.4, 6.8, 6.10 and Annex II to the Anti-Dumping Agreement.

9. The Department's "duty absorption" standard in the Eighth Administrative Review and the use of that finding in the calculation of the margin of dumping reported to the Commission for purposes of the Commission's sunset review are inconsistent, both as such and as applied, with Articles 11.1, 11.3, 2 and 6 of the Anti-Dumping Agreement.

- (a) The margin of dumping resulting from the duty absorption finding is inconsistent with Articles 11.3 and 2 of the Anti-Dumping Agreement.
- (b) The Department's "duty absorption standard" does not give respondents a full opportunity to defend their interests, which is inconsistent with Article 6.1, 6.2, 6.4 and 6.9 of the Anti-Dumping Agreement.
- (c) The Department's "duty absorption" standard imposes a WTO-inconsistent presumption that violates Articles 11.1, 11.3, 2 and 6 of the Anti-Dumping Agreement.

F. With regard to the imposition of anti-dumping duties on imports of cement from Mexico:

1. The United States retrospective duty assessment system, implemented by 19 U.S.C. §§ 1673e, 1673f, 1675, 1675a and 1677g, is inconsistent with Articles 9.1, 9.2, 9.3 and 10 of the Anti-Dumping Agreement and Article X.2 of the GATT 1994 inasmuch as:

- (a) Importers are not notified at the time of entry of the goods of their maximum liability for definitive anti-dumping duties; and
- (b) definitive anti-dumping duties are imposed in review periods at higher rates than established at the time of entry.

2. The United States statutory provision, 19 U.S.C. § 1677g, is inconsistent with Article 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI.2 of the GATT 1994 because it requires the payment of interest over and above the amount of the margin of dumping.

G. The Department and the Commission failed to apply United States anti-dumping laws, regulations, decisions and rulings in a uniform, impartial and reasonable manner, as required by Article X.3(a) of the GATT 1994. The facts and claims set forth above reveal a lack of uniformity, impartiality and objectivity on the part of the United States in administering laws, regulations, procedures and practice in relation to the anti-dumping duties on cement from Mexico. In addition, the following actions are inconsistent with the United States obligations under Article X.3 of the GATT 1994 to administer its laws and regulations in a uniform, impartial, and reasonable manner:

- 1. The Department's imposition of additional requirements on foreign parties, greater than those imposed on domestic parties, in the response to the Department's sunset initiation notice.
- 2. The Department's imposition of a more stringent standard on foreign parties than on the regional industry for assessing the adequacy of participation in the sunset review process.
- 3. The Commission's verification of the information submitted by CEMEX and failure to verify information submitted by members of the regional industry, and, in particular the Commission's

failure to verify the information submitted by United States regional industry concerning its plans to expand production capacity.

4. The Department's "below cost" investigations in the Fifth to Eleventh Administrative Reviews, when the Department had no grounds to suspect that cement was being sold on the Mexican market in substantial quantities for an extended period at prices which did not provide for the recovery of all costs within a reasonable period of time.

5. The Commission's failure to require producers to provide sufficient detail to permit exporters to have a reasonable understanding of the substance of the information in the record.

H. The Department and the Commission acted inconsistently with Article 1 of the Anti-Dumping Agreement inasmuch as the anti-dumping duty on cement from Mexico was not applied under the circumstances provided in Article VI of the GATT 1994. The Department and the Commission acted inconsistently with Article 18.1 of the Anti-Dumping Agreement inasmuch as the anti-dumping duty measure on cement from Mexico was not imposed in accordance with the provisions of the GATT 1994, as interpreted by the Anti-Dumping Agreement.

I. Insofar as the aforementioned United States laws, regulations and administrative procedures do not comply with the United States WTO obligations, they are inconsistent with Article XVI.4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

Mexico respectfully requests the panel recommend that the United States bring its measures into conformity with its WTO obligations. Pursuant to Article 19 of the DSU, Mexico requests that the panel suggest that the United States implement the recommendation by terminating the anti-dumping duties on cement from Mexico, reimbursing the anti-dumping duties that have been deposited under such measures, and repealing or amending WTO-inconsistent laws, regulations, procedures, and administrative provisions.
