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UNITED STATES - ANTI-DUMPING MEASURES ON CEMENT FROM MEXICO

Request for Consultations by Mexico

The following communication, dated 31 January 2003, from the Permanent Mission of Mexico to the Permanent Mission of the United States and to the Chairman of the Dispute Settlement Body is circulated in accordance with Article 4.4 of the DSU.

The Government of Mexico hereby requests consultations with the Government of the United States, pursuant to Article 4 of the WTO 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 GATT 1994 (Anti-Dumping Agreement), in relation to the measures, including the determinations of the United States Department of Commerce (the Department) and the United States International Trade Commission (the Commission), and the laws, regulations and administrative provisions listed hereunder:

- Gray Portland Cement and Cement Clinker from Mexico: Final Results of Antidumping Duty 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 Duty Administrative Review - 1 August 1995 - 31 July 1996, Federal 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 Duty 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 Duty 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 Duty 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 Duty 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 Duty Administrative Review - 1 August 2000 - 31 July 2001, Federal Register Vol. 67, p.12518 (14 January 2003) and the accompanying Issues and Decision Memorandum ("Final Results of the Eleventh Administrative Review");

- Gray Portland Cement and Cement Clinker from Japan: Final Results of Full Sunset Review, Federal Register Vol. 65, p.41049 (3 July 2000) and the accompanying Issues and Decision Memorandum ("Department Sunset Review");

- 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 Sunset Review");

- Gray Portland Cement and Cement Clinker from Japan and Mexico: Continuation of Antidumping Duty Orders, Federal Register Vol. 65, p.68979 (15 November 2000); and

- 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 Determination rejecting the request for a review based on changed circumstances);

- 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 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 (16 April 1998) (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, Federal Register Vol. 63, p.30599 (5 June 1998); 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).

As explained hereunder, Mexico considers that these measures appear to violate 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 that Agreement.

In particular, Mexico considers that the US anti-dumping measures are inconsistent with the following provisions of the Anti-Dumping Agreement of the GATT 1994 and the WTO Agreement:

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

Some of the elements of Mexico's claims are listed hereunder:

A. With regard to the sunset review conducted by the Department:

1. The Department misapplied the standard of "would be likely to lead to" in its determination as to whether termination of the anti-dumping measure "would be likely to lead to continuation or recurrence of dumping and injury", as required by Articles 1, 2 and 11.3 of the Anti-Dumping Agreement.

2. The basis of the Department's determination of the likelihood of dumping is inconsistent with Articles 1, 2, 6 and 11.3 of the Anti-Dumping Agreement.

3. The Department failed to disclose the "essential facts under consideration which form the basis for the decision", as required by Articles 6.9 and 11.3 of the Anti-Dumping Agreement.

4. United States laws, regulations and procedures relating to duty absorption are, both *per se* and as applied, inconsistent with Article 11.3 of the Anti-Dumping Agreement.

5. The Department incorrectly relied on a presumption in favour of maintaining the anti-dumping measures, in a manner inconsistent with the United States' obligations under Article 11.3 of the Anti-Dumping Agreement.

B. With regard to the sunset review conducted by the Commission:

1. The Commission misapplied the "would be likely to lead to" principle in determining whether termination of the anti-dumping measure "would be likely to lead to continuation or recurrence of dumping and injury", as required by Articles 3 and 11.3 of the Anti-Dumping Agreement.

2. The Commission failed to compile sufficient information on the existence of either a domestic industry or regional industries, as required by Articles 3, 4, 6 and 11.3 of the Anti-Dumping Agreement.

3. The determination of the Commission to the effect that "all or almost all" US producers from southern United States would suffer material injury in the event of the anti-dumping measure being terminated was inconsistent with Articles 4 and 11.3 of the Anti-Dumping Agreement.

4. The Commission failed to conduct an "objective examination" of the record based on "positive evidence" when it determined that revocation of the anti-dumping measure "would be likely to lead to continuation or recurrence of dumping and injury", as required by Articles 3 and 11.3 of the Anti-Dumping Agreement.

5. The Commission failed to base its determination of injury on the "effects of dumping" on the domestic industry and to consider whether injury was caused by "any known factors other than the dumped imports", as required by Articles 3.5 and 11.3 of the Anti-Dumping Agreement.

6. The US statutory requirements that the Commission determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" and that 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" are, both *per se* and as applied, inconsistent with Article 11.3 of the Anti-Dumping Agreement. Likewise, the application of those provisions to the sunset review on cement from Mexico was inconsistent with Articles 3 and 11.3 of the Anti-Dumping Agreement.

C. With regard to the determination of the Commission to reject the request of the Mexican producers for the initiation of a changed circumstances review of the anti-dumping measure:

1. The Commission failed to consider the positive evidence which justified the need for a changed circumstances review and, furthermore, failed to initiate such a review, as stipulated in Article 11.2 of the Anti-Dumping Agreement.

2. The Commission failed to initiate a changed circumstances review to ensure that the anti-dumping measures only applied to a regional industry in exceptional circumstances, as required by Articles 4.1 and 11.2 of the Anti-Dumping Agreement.

3. The Commission failed to disclose the necessary evidence for and adequately substantiate its decision, as required by Articles 6 and 12 of the Anti-Dumping Agreement.

D. With regard to the administrative reviews:

1. The Department failed to compare the export price and the normal value properly as required by Articles 2.1, 2.4 and 2.6 of the Anti-Dumping Agreement, given that, in the fifth to ninth administrative reviews and in its calculation of the margin adopted in the sunset review, it improperly excluded domestic sales of identical Type II and Type V LA cement.

2. The Department failed to compare the export price and the normal value properly as required by Articles 2.1, 2.4 and 2.6 of the Anti-Dumping Agreement, given that, in the fifth to ninth administrative reviews and in its calculation of the margin adopted in the sunset review, it compared sales of bagged cement with sales of cement in bulk.

3. The Department failed to make a "fair comparison" between the export price and the normal value on the basis of a weighted average normal or transaction value in the fifth to ninth administrative reviews and in its determination of the margin of dumping for the sunset review. It also failed to make the required relevant determinations with regard to the use of alternative methodologies, as stipulated in Article 2.4.2.

4. The Department used the practice known as "zeroing" for negative dumping margins in its calculation of margins in the fifth to eleventh administrative reviews and the sunset review, which is inconsistent with Article 2.4.

5. The Department improperly levied anti-dumping duties on the products consigned outside the area defined in the seventh to tenth administrative reviews. This is inconsistent with Articles 4.2. and 8 of the Anti-Dumping Agreement in view of the failure to: (1) present any determination or explanation in relation to the US Constitutional prohibition on levying anti-dumping duties on products consigned only for consumption in that area; (2) give exporters an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances.

6. The Department conducted what is known as an "arm's length" review to determine whether sales to related customers were "in the ordinary course of trade" in the fifth to eleventh administrative reviews in a manner inconsistent with Article 2.1 of the Anti-Dumping Agreement.

7. The Department acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in the fifth to eighth administrative reviews by: (1) requesting that the Mexican respondent parties report downstream sales by affiliated to unaffiliated customers and (2) basing its calculation of dumping margins on these downstream sales instead of on sales by the respondent parties themselves.

8. The Department failed to take account of cost-related evidence in the record in relation to differences in merchandise which affected price comparability when making the difference in merchandise (“difmer”) adjustment in the sixth and seventh administrative reviews and instead applied the "facts available", which is inconsistent with Articles 2.1, 2.4 and 6.8 and Annex II of the Anti-Dumping Agreement.

9. The Department failed to deduct certain pre-sale warehousing costs incurred by Cemex in Mexico at ex-factory level from the normal value in the seventh administrative review, as stipulated in Article 4.2 of the Anti-Dumping Agreement.

10. The determination of the Department in the fifth to tenth administrative reviews, and for the purpose of establishing the margin of dumping on which the sunset review was to be based, to "amalgamate" Cementos de Chihuahua, S.A. de C.V. ("CDC") and CEMEX S.A. de C.V. and to calculate a single weighted average margin and establish a single importer-specific rate applicable to both Mexican respondent companies was inconsistent with Article 6.10 of the Anti-Dumping Agreement.

11. The Department imposed an unreasonable burden of proof on the Mexican respondent parties in the determination of duty absorption established in the eighth administrative review and implemented in the sunset review. This prevented a fair

comparison between the normal value and the export price and is therefore inconsistent with Articles 2.4 and 2.4.1 of the Anti-Dumping Agreement and Article X of the GATT 1994. Likewise, the determination improperly increased the resulting dumping margin in a manner inconsistent with Article 2 of the Anti-Dumping Agreement.

E. The Department failed to establish that there was adequate support from the regional industry for continued imposition of the anti-dumping duty. Continuation of the measure by the United States was therefore inconsistent with Articles 4, 11.3 and 18.3 of the Anti-Dumping Agreement.

G. With regard to the establishment by the United States of duties on imports of cement from Mexico:

1. The US retrospective duty assessment system is inconsistent with the requirements set out in Articles 9 and 10 of the Anti-Dumping Agreement and Article X of the GATT 1994, both *per se* and as applied, given that: (i) importers were not notified of the application of final or definitive anti-dumping duties and (ii) the rate of the resulting anti-dumping duty in some review periods is higher than that applicable at the time of entry.

2. The retrospective duty assessment system is inconsistent with Articles 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI.2 of the GATT 1994, both *per se* and as applied, given that it provides for the collection of interest payments over and above the amount of the applicable dumping margin.

3. The application of Section 129(c)(1) of the Uruguay Round Agreements Act to currently unpaid amounts in respect of cement from Mexico is inconsistent with the WTO Agreement, Article VI of the GATT 1994 and Articles 1, 9, 10 and 18 of the Anti-Dumping Agreement.

H. Furthermore, the above claims reveal that the US anti-dumping measures resulted in less favourable treatment being accorded to Mexican cement than to the US like product in a manner inconsistent with Article III.4 of the GATT 1994.

I. In addition, the above claims, viewed cumulatively, show that both the Department and the Commission failed to administer anti-dumping legislation in a "uniform, impartial and reasonable" manner, thereby violating Article X.3(a) of the GATT, and that they failed to adopt anti-dumping measures in the circumstances provided for by, and in a manner consistent with the GATT 1994, as interpreted by the Anti-Dumping Agreement, thereby rendering such measures contrary to Articles 1 and 18 of the latter. Ever since the original investigation, the history of this procedure has revealed a lack of uniformity, impartiality and objectivity on the part of the US government in its administration of US anti-dumping legislation in relation to anti-dumping procedures for cement from Mexico.

Moreover, insofar as US laws, regulations and administrative procedures are not in compliance with its WTO obligations, they are inconsistent with Article XVI:4 of the WTO Agreement.

Mexico reserves the right to raise further factual and legal claims during the course of the consultations. We look forward to receiving your reply to this request and to fixing a mutually convenient date for consultations.