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ANTI-DUMPING DUTIES IN THE UNITED STATES ON GRAY PORTLAND CEMENT AND CEMENT CLINKER IMPORTED FROM MEXICO

REQUEST FOR CONCILIATION UNDER ARTICLE 15:3 OF THE AGREEMENT

Communication from Mexico

Background

1. On September 1989, the Ad Hoc Committee of AZ-NM-TX-FL, representing a number of domestic producers of gray portland cement, filed an anti-dumping petition with the United States Department of Commerce (Commerce) and the United States International Trade Commission (Commission). The petition alleged that a regional domestic industry in the United States was injured or threatened with injury by dumped imports of gray portland cement and cement clinker from Mexico. The Mexican exporters concerned were Cemex, S.A. (CEMEX), Apasco, S.A. de C.V. (Apasco), and Cementos Hidalgo, S.C.L. (Hidalgo).

2. Commerce decided to open the anti-dumping investigation in October 1989, even though it apparently had not verified that the petition was duly filed on behalf of all or almost all of the domestic industry producing the like product within the region involved. On July 18, 1990, Commerce published its final determination calculating a margin of dumping of 58.38 per cent for CEMEX, 53.26 per cent for Apasco, 3.69 per cent for Hidalgo, and 58.05 per cent for "all others".

3. On May 18, 1990, nearly eight months after the filing of the anti-dumping petition in the Mexican cement investigation, the Ad Hoc Committee of Southern California Producers of Gray Portland Cement, representing a number of California cement producers, filed a separate anti-dumping petition with Commerce and the Commission, alleging that the domestic industry in Southern California was injured or threatened with injury by dumped imports of gray portland cement and clinker cement from Japan.

4. In August 1990, the Commission - with the participation of only three commissioners instead of the normal six - voted on the Mexican investigation. Finding that the regional domestic industry of the so-called "Southern-tier" region[1] was experiencing material injury by

[1]The "Southern-tier" region is defined by the ITC as the following US States, in their entirety: Florida, Alabama, Mississippi, Louisiana, Texas, New Mexico, Arizona, and California.

reason of the cumulated prices and volume effects of (i) imports from Mexico determined to be dumped, and (ii) imports from Japan alleged by petitioners to be dumped, Commissioners AB and SL cast affirmative votes, which together constituted the affirmative Commission determination in this investigation. Finding no injury or threat thereof, Commissioner DR cast a negative vote.

5. In its final determination, the Commission majority cumulated the volume and price effects of the Japanese imports corresponding to the newly-initiated case referred to in § 3 above, with those of the Mexican imports, in spite of serious procedural and substantive problems (among others, different regions involved).[2] In his examination of the indices of causation, in his affirmative determination, Commissioner SL made an explicit finding of significant price undercutting. In addition both he and Chairman AB found price suppression and depression. Finally, although recognizing that a number of domestic producers imported Mexican cement into the region, Commissioner AB did not exclude them from the investigation as related parties in order to reach her affirmative finding of material injury. Commissioner SL concurred.

6. Mexico has found that neither the anti-dumping investigation by Commerce, nor the Commission's determination of injury, are in conformity with the provisions of Article VI of the General Agreement nor of the Anti-Dumping Code. Mexico therefore requested consultations with the United States, in accordance with Article 15:2 of the Code. The consultations, held in March and April, 1991, were extensive and constructive, but failed to achieve a mutually agreed solution. Mexico has therefore decided to refer the matter to the GATT Anti-Dumping Committee for conciliation under Article 15:3.

7. The main issues are that: the stringent requirements established by the Code for an affirmative finding of injury within a regional industry were not met; basic due process provisions were not followed; and causal link between dumping and injury was not demonstrated. Furthermore, additional points are raised, all of them interrelated.

8. There are many questions in the dispute, inter alia,

(i) Whether the requirements for standing to file an anti-dumping petition based on injury to a regional industry are more stringent than the requirements for standing to file other anti-dumping petitions, and whether the more stringent requirements were met in this case;

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[2] The regions involved in each case were different but overlapping: the "Southern-tier" region in the Mexican case (including Southern California), vis-a-vis Southern California alone in the Japanese case, hence comprising different regional industries.

(ii) Whether industry totals and average can be used to meet requirement of Anti-Dumping Code Article 4:1, ii, that producers of "all or almost all" production must be injured in order to sustain a finding of regional injury, and whether an assumption that all producers are injured can replace a factual inquiry;

(iii) The question of whether the practice of cumulative injury assessment (cumulation)[3] can take place: in the context of a regional dumping case; across separate investigations; for different regions; under very different timings --when there had not even been a preliminary finding that Japanese imports were being dumped; and, at another level, in a mandatory fashion;

(iv) Whether Commissioner SL was justified in failing to consider dumping margins, despite the requirements of Article 3 of the Code, including that "{i}t must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code." (Emphasis added);

(v) The determination of the existence of price undercutting, which was based on price comparisons that did not account for wide discrepancies in volumes reported by producers and by importers;

(vi) Whether the fact that domestic producers participated directly in the alleged dumping and thus benefited from the imports in question undermines a finding of material injury pursuant to Article 4.1 of the Code;

9. In order to expand and provide some detail on the above observations, what follows organizes the discussion under three main headings:

I Problems that arise in relation to the regional analysis as such, both in relation to injury, and to standing in the initial application;

II The inadequate way, under a number of points of view, in which cumulation with the Japanese cement investigation was effected; and

III Serious flaws in the analysis of the causal link behind injury, which was never established: namely, the required existence of price undercutting which was not ascertained, and serious problems of conflict of interest that were unduly ignored.

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[3]Mexico will leave aside, for the moment, the question of consistency of the cumulation practice as such, with both the General Agreement and the Anti-Dumping Code.

I. Regional industry

10. Injury: the "aggregate" analysis

10.1 Article 4:1, ii of the Code prescribes the exceptional circumstances under which an injury determination involving a regional domestic industry may take place. Among other important requirements it must be demonstrated that "producers of all or almost all of the production within the region" (emphasis added) are experiencing injury by the dumped imports. It is certainly a more stringent requirement than the one applied to a national domestic industry, where it is only "a major proportion" that must be found to be injured by dumping. Although the Code does not spell out the threshold for interpreting the referred "all or almost all" standard, based on relevant references Mexico notes that the percentage should be read to approach 100 per cent of the regional production.[4]

10.2 Against the above stringent requirements, Commissioners AB and SL, in reaching their affirmative determination of injury in the Mexican investigation, relied on an "aggregate" analysis for the evaluation of the condition of the regional domestic industry. An aggregate analysis employs only total and average data: it determines the average condition of the domestic industry as a whole; it does not and can not, by itself, indicate whether the "producers of all or almost all" of the regional production are materially injured. Without providing and addressing the distribution of the data, it is impossible for the Commission to demonstrate whether regional producers who account for all or almost all of regional production are materially injured. Accordingly, if the aggregate approach is utilized, a guarantee must be incorporated in order to clearly verify for the regional injury standard, at least through suitable examination in one form or other of the data distribution (i.e., to account for and guard from the dispersion and variance of the data). This was not done by the referred two Commissioners in this case.

10.3 Based upon her aggregate analysis, Commissioner AB found that the domestic regional industry was, on the average, being injured. She then assumed that cement is highly fungible[5], and that therefore each producer within the regional industry was suffering injury, and to the same degree as the average. Reliance on this assumption is erroneous. First, it is patently unjustified to assume that producers situated in such far-flung

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[4]For example, the United States Court of International Trade has acknowledged that the percentage concerning the regional standard of "all or almost all" approaches 100 per cent (See, Atlantic Sugar, Ltd. v. United States, 2 CIT 295, 302/1981).

[5]Mexican exporters claimed during the investigation that cement is not completely homogenous economically, among other reasons in light of spatial (geographic) differences.

locations as California, Texas, and Florida are all experiencing injury to precisely the same degree. Second, assumptions may not be substituted for an analysis of the facts.

10.4 The affirmative determination of Commissioner SL is equally flawed. Unlike Commissioner AB, Commissioner SL explicitly recognized that certain producers within the regional domestic industry were not injured. Inexplicably, he did not determine whether the remaining producers accounted for "all or almost all" of the regional production. Instead, he simply stated that he "refuse{d} to be misled by the performance trends of isolated groups of individual producers that may have benefited from positive economic conditions in their local marketing areas." Complementary reasons of the Commission's flawed finding in this regard are given in § 20 of this communication.

11. Standing

11.1 It is clear that, for regional dumping investigations, the Code clearly and unambiguously establishes that more stringent requirements should be set than those applied for a national dumping investigation. For the latter, the normal case, Article 5:1 of the Code requires that an anti-dumping investigation be solicited upon a written request by or on behalf of the industry affected. This provision affords protection against frivolous investigations.

11.2 When Article 5:1 refers to a national dumping investigation the standing criterion refers to the "major proportion" of the total domestic production. In a <u>regional investigation</u> the term "industry" of the referred article has to be interpreted in accordance with the definition of this term in Article 4:1, ii of the Code: that is, not simply that the "major proportion" of Article 4:1, but the producers of "<u>all or almost all</u> of the production" within the regional market submit the initial application. Yet, it appears, and the consultations with the United States did not suggest otherwise, that in the Mexican investigation Commerce did not verify, before opening it, that the petition was made on behalf of all or almost all of that industry.

11.3 Relatedly, Commerce did not exclude as petitioners two important US regional producers: Southdown, Inc. (Southdown) and Ideal Basic Industries (Ideal). Indeed, these should have been ruled to have no right to file the petition against Mexican imports of cement and cement clinker, as they directly participated and benefited from the imports in question. Southdown, for example, formed in 1986 a joint venture with the Mexican producer CEMEX: under this agreement Southdown <u>controled both marketing and resale prices</u> of Mexican cement in the US.

II. Cumulation

12. In its injury finding the Commission recognized the fundamental problems that the cumulation practice, as proposed, presented in this case.[6] Nevertheless the Commission majority decided to proceed and apply it, cumulating the volume and price effects of Mexican and Japanese imports. Leaving aside the question of consistency of the cumulation practice within GATT, Mexico considers that this cumulation should not have taken place, not in the form it was done, for the following reasons, which severely affected Mexico's basic due process rights under the General Agreement and the Code.

13. An exceptional provision

It is a general principle of law that exceptions must be interpreted and applied restrictively in order to avoid abuses. The regional dumping investigation has an exceptional character, as stated in Article 4:1, ii of the Code. At the same time, it is recognized that neither the General Agreement nor the Code make explicit reference to the practice of cumulating dumped imports. The Commission was handling an exceptional investigation where restrictive interpretation and application should have taken place; yet, to cumulate in a regional investigation means to interpret and apply broadly, not restrictively, the exceptions of the Code.

14. Separate investigations

Assuming, without accepting, that cumulation can take place in the context of a regional dumping investigation, Mexico considers that, then, in that stricter regime, it cannot be justified to conduct it under separate investigations. To sustain the opposite would deprive countries from the due process provisions granted by Article VI of the General Agreement and by the Code. However, in the present case, not only is the investigation a regional-based one, with cumulation, and the latter coming from different investigations. There are, in addition, serious further questions of procedural and substantive nature, which are described in what follows.

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[6] Commissioner Brunsdale's statement in this regard is illustrative: "This case raises the issue, apparently not contemplated by Congress, of how to proceed in a situation in which imports from two countries subject to separate investigations involving different but overlapping regional industries are potentially subject to cumulative analysis. Neither the statute nor the legislative history provides any guidance as to how the cumulation and regional industry provisions of the statute are to operate in conjunction." It is not even evident that this practice whereby cumulation is conducted across separate investigations, let alone with different definitions of the region and at qualitatively different states of progress in the two, can properly be called "cumulation"; it is much more than that; it is a mutant.

15. Different regions

15.1 The Commission did cumulate Mexican and Japanese imports, even though they related to different regions: the so-called "Southern-tier" region, comprising the entire eight states listed in § 4 above, vis-a-vis the "Southern California" region. This action directly contradicts the fundamental principle on which a regional dumping investigation is supposed to rely: the isolated-market nature, in economic terms, that the region should satisfy for the product in question (Article 4:1, ii of the Code). An isolated market (Southern California, if the Japan regional case was at all justifiable), by definition cannot be merged for the analysis with another isolated market.

15.2 In addition, in conducting this cumulation,the Commission simply averaged the full volume of Southern California's Japanese cement imports across the entire "Southern-tier" region, with decisive results for Mexico. That is, the add-on effect of the Japanese and Mexican imports was not restricted to the area where both sets of imports occurred. This universal averaging loaded the numbers and ensured apparent joint-injury throughout the 38 firms of the entire "Southern-tier" region of the Mexico case (only 8 of which were in the Japan-case Southern California region), in most of which the dumped Japanese cement was not present at all. This inappropriate analytical exportation of dumped Japanese cement from California to the rest of the Southern-tier doubtless made a decisive difference, as to whether "all or almost all" of the production in the "Southern-tier" region was injured.[7]

16. Different timing

At the point in time where the Commission decided to cumulate, it had issued only a preliminary injury determination in the Japanese cement investigation, while Commerce had not yet issued not even its preliminary dumping determination for the same case. It could well have happened that the eventual final determination by Commerce in the Japanese case had turned out to be negative (finding no dumping), hence risking an affirmative assessment of injury from Mexican exporters through cumulation with operations determined not to have been made under unfair trade conditions. As a result, the analysis was:

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[7] To give just an illustration of the enormous quantitative implications of this manner of proceeding, the Commission found that imports from Mexico into the "Southern-tier" rose irregularly by 20 per cent during 1986-1989; yet "combined U.S. imports of portland cement from Mexico and Japan increased irregularly by 67 per cent ..." (emphasis added) during the same period. This latter, fictitious total formed part of the quantitative basis for the injury finding, as applied to the (whole of the) "Southern-tier".

17. Not based on positive evidence

Commerce had not made not even a preliminary finding on dumping margins in the Japanese case. Yet, Chairman AB decided to proceed with the cumulation from that too-new and very different case. To that effect, she used, simply, the margins alleged in the Japanese petition, as part of her cumulative analysis.[8] Indeed, the alleged Japanese dumping margins played a pivotal role in the Commission's determination of injury. Reliance by the Commission on mere allegations violates Article 3 of the Code that clearly prescribes that a determination of injury shall be based on positive evidence.

18. Mandatory

In different parts of its determination, the Commission recognizes the mandatory nature of this provision under US law. Commissioner AB indicated: "I therefore determine that consideration of the cumulation issue in these circunstances is required as a matter of law". So, despite the serious and numerous problems that pervade this case in relation to cumulation as effected, the Commission decided to cumulate because it was "mandated". To accept cumulation in a mandatory fashion, regardless of the particularities of each case, would require a far-reaching free interpretation of the Code.

III. Causality and injury

19. Price undercutting

19.1 Article 3:1 of the Code refers to the volume of dumped imports and their effects on prices in the domestic market. In order to conduct the required price comparisons, the Commission collected pricing data through questionnaires sent to Mexican producers and US producers and importers. The Commission explicitly and specifically indicated that the prices it was requesting were for sales within the volume range of 300-700 tons, for each month of the investigation period. In the vast majority of cases, the domestic producers reported prices for sales either above or below the required volume range (for example the questionnaire guidelines were violated in 80 to 90 per cent of the responses from Tampa and Houston). In contrast, the vast majority of importers adhered to the questionnaire instructions.

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[8] One of the commissioners recognized that "{u}pon further investigation, Commerce might well find that the dumping margins were not as high as petitioners allege." In fact, the final Japanese margins of dumping were substantially lower than those originally alleged in the petition.

19.2 Although prices of cement can vary considerably depending upon the volume sold, the Commission conducted its price comparisons without accounting for the wide discrepancy in reported volumes between producers and importers. The non-comparability of prices reported in most responses from the domestic industry rendered the pricing data fatally defective, which in turn wholly invalidates the Commission's price comparisons. It is not surprising that, with such data at hand, Commissioner SL found predominant undercutting in 9 of the 10 market areas in which price comparisons were conducted.

19.3 Nevertheless, according to our information, when examination of the prices collected by the Commission is limited to sales within the stipulated range of 300-700 tons, the pattern shows overselling in 4 and mixed overselling and undercutting in 2 of the market areas in which price comparisons were conducted. Thus, the "predominant underselling" observed by Commisioner SL disappears when the pricing data are properly analized.

19.4 On her part, Chairman AB did not even seek to establish the existence of price undercutting on the Mexican imports in question. This is not positively asserted in the report but nor is there any indication to the contrary in it. Similarly, the consultations with the United States did not suggest otherwise in any way. Yet, a finding of price undercutting is essential to an affirmative determination of injury. The lack of comparable data, and generally the way the whole question of price undercutting was treated in the investigation, vitiates the entire affirmative injury determination by the Commission.

20. Conflict of interests

20.1 The Commission's finding of injury (and of its causal link with dumping) to domestic producers, including an important number of them that benefited and directly participated in the alleged dumping of Mexican cement and cement clinker by importing the product and setting its price, is inconsistent with Article VI:6, a of the General Agreement and Articles 3 and 4:1, ii of the Code. Together, these provisions spell out the circumstances under which the investigating authorities may make an affirmative determination of injury. First, there must be injury, and second, a causal link must be established, between that injury and the dumped imports.

20.2 In this regard, the Commission recognized that "a number" of US producers imported Mexican cement into the region. They were not excluded "because that exclusion would have skewed the data concerning the domestic industry." To be sure, the number of US producers that imported Mexican cement and clinker was very important: 10 out of 38 in the region in question, including petitioners Southdown and Ideal.

20.3 As was remarked earlier (§ 11.3), Mexico considers that the standing of the petition in this case was vitiated, as at least 2 petitioners participated and benefited from the Mexican cement imports. Commerce

should not have admitted them as petitioners. Similarly, and perhaps more importantly, the Commission should have excluded those two as well as other related parties when determinig the injury to the regional industry. The producers who imported the Mexican products gained substantial benefit to their respective operations, and in no respect can they be construed to have been injured by the imports they themselves brought into their trade.

20.4 Far from being injured, producers benefited from their imports of Mexican cement and clinker, as they: (i) enabled them to supplement their own fully employed capacity, (ii) serve additional marketing areas without diverting production from their traditional marketing areas, and (iii) mantain their customer base when experiencing supply shortages or technical problems with their own production facilities. Assuming, and only for the sake of argument, that these companies were indeed injured, no causal link at all was demonstrated within the Mexican imports.

20.5 Lastly, it should be noted that two of the US regional producers (and also petitioners) that imported Mexican cement and clinker, Southdown and Ideal, alone represent a substantial portion of total regional production. Thus, a finding that these two producers are uninjured by Mexican imports means, all by itself, that the "all or almost all of the production" standard for injury has not been met. This conclusion is only reinforced if all other regional producers that were importers of Mexican cement and clinker are found not to have been injured by reason of these imports. Injury to the regional industry, even under a worst-case scenario, simply did not approach the level necessary for an affirmative determination. And certainly, assuming that injury ever existed, it was not linked to Mexican imports.

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Given the preliminary and expository nature of this document and the early stage of the process, Mexico naturally reserves its right to amend and/or complement its position as appropriate.