GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

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Committee on Anti-Dumping Practices

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

Report of the Panel

1. INTRODUCTION

1.1 On 24 October 1990, Mexico requested consultations with the United States under Article 15:2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as "the Agreement"), regarding the imposition of anti-dumping duties by the United States on imports of gray portland cement and cement clinker[1] from Mexico (ADP/51). Consultation meetings were held between the two parties in March and May 1991, the last of these on 2 May 1991. On 21 May 1991, Mexico submitted to the United States a list of questions on various issues pertaining to this case. In a letter to the Committee on Anti-Dumping Practices (hereinafter referred to as "the Committee") dated 20 June 1991, Mexico stated that it had failed to reach a mutually satisfactory solution with the United States and referred the matter to the Committee for conciliation under Article 15:3 of the Agreement (ADP/59). A special meeting of the Committee was held for this purpose on 19 July 1991 (ADP/M/33). As the conciliation process did not lead to a resolution of this dispute, Mexico, on 4 October 1991, requested the establishment of a panel under Article 15:5 of the Agreement to examine the matter (ADP/66).

1.2 At its meeting on 21 October 1991, the Committee agreed to establish a panel on the matter (ADP/M/35). The representatives of Canada and the European Communities reserved their rights to present their views to the panel.

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[1] Portland cement was a hydraulic cement consisting mainly of compounds of calcium, silica, and iron oxide which, when mixed with water and aggregate, chemically reacted to form concrete. Cement clinker, in the form of small, greyish-black pellets, was made by sintering the mill feed at about 2,700 degrees Fahrenheit in rotary kilns. Clinker was ground to produce cement. When clinker was ground into cement, about 5 per cent gypsum and other materials were added to retard the absorption of water and allow for easier handling.

1.3 On 20 January 1992, the Committee was informed by its Chairman in document ADP/71 that the terms of reference and composition of the Panel were as follows:

Terms of Reference:

"To examine, in the light of the relevant provisions of the Agreement on Implementation of Article VI of the General Agreement, the matter referred to the Committee by Mexico in document ADP/66 and to make such findings as will assist the Committee in making recommendations or in giving rulings".

Composition:

Chairman: Mr. Peter Williams

Members: Mr. Miles Jordana
Mr. Jorge A. Ruiz

1.4 The Panel met with the parties on 23 and 24 March and 4 and 5 May 1992. On 23 March 1992, the delegations of Canada and the European Communities appeared before the Panel and presented their views on the dispute. The Panel submitted its findings and conclusions to the parties to the dispute on 9 July 1992.

2. FACTUAL ASPECTS

2.1 The following are the factual aspects of this dispute.

2.2 The dispute before the Panel concerned the imposition by the United States on 30 August 1990 of an anti-dumping duty order on imports of gray portland cement and cement clinker from Mexico.

2.3 On 26 September 1989, the Ad Hoc Committee of AZ-NM-TX-FL[1] representing a number of domestic producers of gray portland cement, filed an anti-dumping petition with the United States Department of Commerce (hereinafter referred to as the "Department of Commerce") and the United States International Trade Commission (hereinafter referred to as "Commission"). The petition alleged that two regional domestic industries in the United States, namely Arizona-New Mexico-Texas, and Florida, were injured or threatened with injury by dumped imports of gray portland cement

[1]The abbreviations stood for the following States in the United States: AZ = Arizona; NM = New Mexico; TX = Texas; FL = Florida. The Ad-Hoc Committee comprised the following companies: Southwestern Portland Cement Co., Inc., TX (whose parent company was Southdown Inc.); Ideal Basic Industries, Denver, CO; Gifford-Hill & Co., Inc., Dallas, TX; Box Crow Cement, Midlothian, TX; Florida Crushed Stone Co., Leesburg, FL; Phoenix Cement Co., Phoenix, AZ; and Texas Industries, Dallas, TX.

and cement clinker from Mexico.[1] The petitioners also suggested that the two regions could also be considered together as a single region. The petitioners asserted that the members of the petitioning trade association accounted for a majority of domestic production of gray portland cement in each of the regional markets at issue. The petition also included the names and addresses of members of the petitioning trade association, and other companies believed to produce the like product in the two regional industries.

2.4 The region which was ultimately considered by the Commission was larger than that proposed by the petitioners, as it comprised the States of Alabama, Arizona, California, Florida, Louisiana, Mississippi, New Mexico and Texas. This region, termed the Southern-tier region, was proposed by the respondents, whose initial position was that the case be considered for the national market as a whole.

2.5 The Commission published a notice in the Federal Register[2] on 2 October 1989, announcing the institution of a preliminary anti-dumping investigation and scheduling of a conference to be held in connection with the investigation.[3] The Department of Commerce published its notice in the Federal Register on 23 October 1989, announcing the initiation of the anti-dumping duty investigation.[4] On 8 November 1989, the Commission made its preliminary determination that "there is a reasonable indication that an industry in the United States is materially injured by reason of imports from Mexico of gray portland cement and cement clinker ... that are alleged to be sold in the United States at less than fair value"[5]; on

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[1]The petitioners requested that the Commission consider all relevant economic factors that had a bearing on the state of the industry "within the context of the business cycle", thereby looking at a period longer than the three-year period considered in most investigations. In view of this request, but also taking into consideration the difficulty in obtaining information concerning an earlier period, the Commission Staff, in the final investigation, asked producers and importers to provide limited trade, financial, and pricing information from 1983 to 1985, in addition to information for January 1986 to March 1990.

[2]The Federal Register was the United States' official publication of notices by all government agencies, including the Commission and the Department of Commerce.

[3] Gray Portland Cement and Cement Clinker from Mexico, 54 FR 40531 (2 October 1989). The conference was held on 17 October 1989, at which representatives of both petitioners and respondents were present.

[4] Initiation of Anti-Dumping Duty Investigation; Gray Portland Cement and Clinker from Mexico, 54 FR 43190 (23 October 1989).

[5] Gray Portland Cement and Cement Clinker from Mexico, Investigation No. 731-TA-451 (Preliminary); USITC Publication No. 2235 (November 1989), page 1.

12 April 1990, the Department of Commerce issued its preliminary determination that imports of gray portland cement and cement clinker from Mexico were being sold in the United States at less than fair value.[1]

2.6 On 18 May 1990, the Ad Hoc Committee of Southern California Producers of Gray Portland Cement, consisting of some of the same members as the petitioner in the case against Mexico, filed an anti-dumping petition with the Department of Commerce and the Commission, alleging that less than fair value sales of gray portland cement and cement clinker from Japan were causing material injury, or threat thereof, to a regional United States industry consisting only of Southern California.[2] The Department of Commerce initiated an anti-dumping investigation against gray portland cement and cement clinker from Japan on 7 June 1990, and on 2 July 1990, the Commission issued a preliminary determination that there existed a reasonable indication of material injury, or threat of material injury, to producers located in the Southern California region.[3]

2.7 On 22 June 1990, the petitioners in the Mexico case amended their petition to include certain co-petitioners, most of which were from California.[4] The Department of Commerce issued its final determination of sales at less than fair value in the Mexican case on 18 July 1990.[5] The Commission, as required by United States law, cumulated imports in the Japanese case with those in the Mexican case, and by a two to one majority, rendered its final determination in the Mexican case on 13 August 1990 that "an industry in the United States is materially injured by reason of imports from Mexico of gray portland cement and cement clinker ... that have been found by the Department of Commerce to be sold in the

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[1] Preliminary determination of sales at less than fair value; Gray Portland Cement and Cement Clinker from Mexico, 55 FR 13817 (12 April 1990).

[2] The dumping margins alleged in the petition ranged from 98 to 125 per cent.

[3] Gray Portland Cement and Cement Clinker from Japan, Investigation No. 731-TA-461 (Preliminary), USITC Publication No. 2297 (July 1990).

[4] These were: National Cement Co. of California, Inc., Encino, CA; Independent Workers of North America ("IWNA), Westmost, IL; IWNA, Local 49, Victorville, CA; IWNA Local 52, Mojave, CA; LWNA Local 89, Colton, CA; IWNA Local 192, Hesperia, CA; IWNA Local 471, Lebec, CA; and International Union of Operating Engineers, Local 12, Pasadena, CA.

[5] Final Determination Sales at Less Than Fair Value, Gray Portland Cement and Clinker from Mexico, 55 FR 29244 (18 July 1990). The margin of dumping was calculated at 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".

United States at less than fair value".[1] On account of an affirmative determination of material injury, the Commission did not make any ruling regarding the threat of material injury.[2]

2.8 At the time of the final determination of injury in the Mexican case, the Department of Commerce had not made any determination of dumping, preliminary or final, in the Japanese case. On 20 and 28 August 1990, the questionnaires sent out by the Department of Commerce to gather information for the preliminary investigation of alleged Japanese dumping were filed with the Department of Commerce. On 31 October 1990, the Department of Commerce issued its preliminary determination of sales at less than fair value in the case against Japan.[3]

3. MAIN ARGUMENTS

3.1 Preclusion of Certain Issues

3.1.1 The United States said that Mexico should be precluded from raising two issues before the Panel, i.e. "standing" and cumulation of Mexican and Japanese imports, because these issues had not been raised during the administrative proceedings. The United States argued that the issue of "standing" also should be precluded because it was not raised during consultations under Article 15 of the Agreement.

(a) Issues not raised during the administrative proceedings

3.1.2 The United States stated that the issues of "standing" and cumulation with Japanese imports were not properly before the Panel because they had not been raised during the administrative proceedings.[4] The

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[1] Gray Portland Cement and Cement Clinker from Mexico, Investigation No. 731-TA-451 (Final), USITC Publication No. 2305 (August 1990), hereinafter referred to as "Final Injury Determination", page 1.

[2] Commissioner Rohr, who gave the dissenting view in this case, analyzed the issue of threat of material injury and made a negative finding in this regard. Final Injury Determination, page 94. His views did not represent the view of the Commission, the latter being made up of the views of the majority.

[3] Preliminary Determination of Sales at Less Than Fair Value: Gray Portland Cement and Clinker from Japan, 55 FR 45831 (31 October 1990).

[4] The United States also said that Appendices K and L to Mexico's first written submission to the Panel had not been introduced during the administrative proceedings, and hence it was improper for Mexico to introduce them before the Panel. The United States argued that by failing to submit these materials to the national investigating authorities, Mexico has deprived the private interested parties of their right, guaranteed bythe Agreement, to review and rebut the matters asserted therein. The appendices in question were entitled: "Survey of the Percentage Alleged Dumping Margins Overstated Actual Margins in Final Dumping Determinations From 1987-1990", and "Letter Submitted to the USITC by the Government of Canada in the Generic Cephalexin Capsules From Canada Investigation", Investigation No. 731-TA-423 (21 July 1989).

United States said that the principle of exhaustion of administrative remedies was manifest in numerous provisions of the Agreement, i.e. Articles 3 through 6 and Article 15, and that the protections guaranteed by the Agreement to all interested parties would be denied if new issues could be raised after the conclusion of administrative proceedings. If panels were forced to consider arguments and evidence in the first instance, they would be burdened with issues that could, and should, have been addressed in the first instance by national investigating authorities. Rather than functioning as a reviewing tribunal, panels would instead be placed in the role of investigating authorities, and would be forced to decide on the credibility of evidence, the conclusions to be drawn from that evidence, and whether to seek more evidence from the parties. These were matters that the Agreement reserved exclusively for the investigating authorities. Further, the United States claimed that the principle of exhaustion of administrative remedies at issue here was closely akin to the doctrine of exhaustion of local remedies, which was well-established in international law.

3.1.3 In reply, Mexico said that it had not found the principle of exhaustion advanced by the United States either in the General Agreement or in the Agreement. There was no requirement under the General Agreement or the Agreement to exhaust domestic remedies. Mexico said that exhaustion could be logically understood in the domestic context where differences in hierarchy of different agencies meant that all the arguments of the case had to be given at each level; the difference in the administrative and the judicial authorities meant that if all arguments were not made at the administrative level, then it could be alleged that the judicial level was usurping the administrative authority. Mexico also contended that by arguing in favour of exhaustion, the United States was implicitly arguing that panels were supranational bodies, a view which conflicted with its own position that panels were only review bodies.

3.1.4 The United States clarified that it was not contending that exhaustion of local judicial remedies was a requirement stipulated by the Agreement. By exhaustion of administrative remedies it meant that for an issue to be properly before a panel, it should have been raised earlier during the administrative proceedings. The United States said that the principle that a party could not present any issues and arguments in the first instance to a reviewing body was manifest in Articles 3 through 6 and 15, and in particular Articles 6:1, 6:2, 6:7 and 15:5(b). The provisions of Article 6 required that all issues and arguments had to be raised before the national investigating authorities.[1] Article 15:5 of the Agreement

[1]The United States said that Article 6:1 directed that before the administering authorities took final action, they had to provide all interested parties "ample opportunity to present in writing all evidence that they consider useful in respect of the anti-dumping investigation in question" (emphasis added by the United States). Similarly, Articles 6:1 and 6:2 guaranteed interested parties the opportunity to present evidence orally, to see all non-confidential information that was relevant to the presentation of their cases, and to present rebuttal arguments. And Article 6:7 mandated that "all parties shall have a full opportunity for the defence of their interests" through an oral hearing.

specifically stated that the examination by the panel had to be based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing country". The United States had argued that the drafters of the Agreement would not have provided all of these procedures if they had also contemplated that parties could decline to participate or raise issues and arguments in the administrative proceedings and then, if dissatisfied with the outcome, request the Committee to consider any perceived errors by the national investigating authorities. If issues were raised in the first instance before a panel, then the investigating authorities would be prevented from conducting a full investigation, and thus from considering all of the evidence and arguments required to render determinations.

3.1.5 The United States also said that the essential remedial nature of the Agreement would be vitiated if a domestic industry could succeed in demonstrating to its national authority that it was entitled to anti-dumping relief, but lose the relief provided because the government of the exporting country was allowed to raise new and different arguments, including new facts, in dispute settlement proceedings under the Agreement.

3.1.6 According to Mexico, Article 6 did not support the assertions by the United States. This Article granted all interested parties full defence opportunities during the proceedings: it imposed affirmative obligations on the investigating authorities. When the drafters of the Agreement had provided these procedures, their purpose was not, as suggested by the United States, to institute the never-mentioned principle of exhaustion against those parties that declined to participate in the proceedings, but to secure an ample possibility of defence to any interested party under the domestic procedures of the signatory. Similarly, Article 15:5 clearly referred only to facts made available to domestic authorities under the national regulations, not to facts and issues as raised before domestic authorities. This provision, which had to be interpreted in accordance with its ordinary meaning, had nothing to do with the principle of exhaustion proposed by the United States. Mexico claimed that it had met the Article 15:5(b) provision because the facts introduced before the Panel were the same as those introduced during the administrative proceedings; Mexico was not introducing any new facts. Mexico argued that the principle of exhaustion proposed by the United States would lead to illogical and impracticable results, i.e. the United States seemed to be arguing that unless the governments which had signed the Agreement became parties to every United States anti-dumping investigation involving their producers, and made every conceivable argument to the United States authorities, they would lose their international right to make arguments to a dispute settlement panel convened under the Agreement.[1]

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[1]Contesting the United States' argument that it was improper for Mexico to introduce material before the Panel if such material had not been introduced during the administrative proceedings, Mexico argued that following that line of thinking the United States could even object to Mexico's First Submission and other documents submitted to the Panel, which had certainly not been introduced in the record during the administrative proceedings.

3.1.7 Further, Mexico said that the United States factually was not correct in claiming that the issue of cumulation had not been mentioned by respondents during the administrative proceedings. According to Mexico, the Mexican exporters had contested cumulation during the administrative proceedings, for such reasons as that the Mexican and Japanese imports competed with the like product in different regional industries in the United States and that there was insufficient concentration of both Mexican and Japanese imports in the California region (25.8 per cent into Southern California). Mexico also pointed out that in this case, the Commission cumulated Japanese and Mexican imports because it was mandatory under United States statutory law to do so, and hence it would have been futile for the Mexican respondents to have made the argument relating to cumulation.

3.1.8 The United States said that the Agreement certainly contained provisions relating specifically to procedures before the national investigating authorities. Thus, Article 6 provisions which required issues and arguments to be raised before the national investigating authorities could not be ignored. Moreover, frequently issues could not be resolved without consideration of facts. Since new facts could not be introduced under Article 15:5, it followed that new legal arguments based on those facts could not be introduced either. Mexico's arguments amounted to disregarding these procedures or to saying that they were irrelevant. In many instances, the investigating authorities had no need to address (or even be aware of) a factual or legal issue unless it was raised during the administrative proceedings. If a party neglected to raise an issue before the administrative tribunal but was allowed to raise it during the later stages of dispute resolution, the investigating authorities would be forced to defend their actions under the Agreement when they had no reason to be aware of the issue. Parties to the proceeding could refrain from asserting certain arguments, thereby avoiding the collection and consideration of evidence pertinent to those arguments, and then later argue before a panel that the investigating authorities' determination was not based upon "positive evidence". The United States also said that while, technically, panel proceedings were government-to-government interaction, this did not mean that rights provided to governments or private parties under the Agreement could be ignored. Panel proceedings involved governments espousing the claims of their citizens, and under established principles of international law, the espousal of claims generally was subject to the exhaustion doctrine.

3.1.9 The United States claimed that Mexico's right to present its arguments before the national authorities was not only guaranteed by United States statutory law, 19 U.S.C. 1677(9)(B), but also by Article 6 of the Agreement. Accordingly, Mexico had had every opportunity to appear before the proper administrative tribunal and challenge, for example, the "standing" of the petitioners. According to the United States, the exhaustion principle mandated in the Agreement did not mandate that a government of an exporting country participate in every anti-dumping investigation involving its exporters or raise every conceivable argument. It did, however, require some interested party, whether government or

private, to raise before the national investigating authorities any issue or evidence that might later be raised before a panel. Otherwise, the private parties might even decline to take part in the administrative proceedings and the issues might be raised only during the GATT dispute settlement proceedings. In this process, a condemnation of the determination by a panel on grounds that were never raised before the national authorities would contravene the Agreement because the issues and arguments deemed to be relevant to the determination would have been concealed from the national authorities, and private interested parties would be denied their rights under the Agreement to introduce evidence and rebut arguments presented by other parties. In this case, for example, though the respondents had challenged cumulation during the administrative proceedings, their reasons for doing so were not the same as those raised by the Government of Mexico in the dispute before the Panel.

3.1.10 The United States agreed that in this case the Commission had had to cumulate under United States statutory law[1], but said that an alternative determination with only Mexican imports could have been made if the issues being raised here had been brought to the attention of the Commissioners during the administrative proceedings.[2] However, the United States said that it was not asserting that the Commission would have definitely made such a determination in this case, because it could not speak on behalf of the Commission in this regard. Nonetheless, the United States claimed that Mexico should not now complain as neither it nor any respondent had ever provided the Commission with the opportunity to consider the possibility of an alternative determination.

3.1.11 Mexico said that the private parties involved in the administrative proceedings were not signatories to the Agreement and thus were not expected to be given an opportunity to consider arguments and provide rebuttals in the panel process: the Agreement's dispute settlement system was a government-to-government process. Further, Mexico argued that the United States' statement that the government espoused the claims of their citizens in a dispute under a multilateral agreement reflected a flawed

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[1]United States law required cumulative assessment of the volume and price effects of imports from two or more countries if certain criteria were satisfied. These criteria were that the imports had to: (1) be subject to investigation; (2) compete with each other and with the domestic like product; and (3) be marketed reasonable coincident in time with each other and with the domestic like product.

[2]The United States pointed out that in some other cases, where arguments on cumulation had been raised, the Commission had made alternative determinations in order to avoid having to later reconsider a determination because of some error in the cumulation analysis. Two examples were: Certain Forged Steel Crankshafts from the Federal Republic of Germany and the United Kingdom, Investigation Nos. 731-TA-351 and 352 (Final), USITC Publication No. 2014 (September 1987), page 18; and Gray Portland Cement and Cement Clinker from Japan, Investigation No. 731-TA-461 (Final), USITC Publication No. 2376 (April 1991), page 36, footnote 93.

approach because no party could claim ignorance of the affirmative obligations it had undertaken by signing the Agreement: signatories were required to implement and meet those obligations in their domestic procedures. Thus, for issues of law (i.e. the affirmative obligations under the Agreement which in this case had not been met with regard to "standing" and cumulation as related to the injury test), the fact that they were not raised during the administrative proceedings neither rebutted potential inconsistencies with the General Agreement nor precluded the affected country from challenging the issue in a dispute settlement proceeding. Such a provision would result in the unreasonable situation that though a party might have violated some affirmative obligations under the Agreement, its action could not be challenged under the Article 15 dispute settlement process. The principle advanced by the United States was contrary to the concept of a multilateral agreement setting forth rules that signatory governments had to observe and was contrary to the concept of "nullification or impairment" which was fundamental to dispute settlement procedures under the General Agreement and the Agreement. For example, Article 15:3 of the Agreement expressly allowed signatories to challenge final determinations, and even preliminary determinations where these had a significant impact on their trading interests. Signatories to the Agreement were not thereby subject to the United States law or administrative proceedings; all they had, in a relationship among equals, was a contractual arrangement called the Agreement. Moreover, the provisions of the Agreement were quite different to those of the United States' legislation (the provisions of the General Agreement had no legal status in the United States). If Mexico had the obligation to exhaust administrative remedies in the United States, under what domestic provisions would or could it receive, for example, the special and differential treatment provided to developing countries under Article 13 of the Agreement?

3.1.12 The United States said that the fact that private parties were excluded from the proceedings under the Agreement merely underscored the importance of raising issues and arguments before national authorities. While the United States agreed with Mexico that no party could claim ignorance of the affirmative obligations of the Agreement, it contended that this case did not concern ignorance of obligations under the Agreement but a difference of interpretation between Mexico and the United States regarding the nature of those obligations. According to the United States, Mexico's argument was essentially that the United States should have known Mexico's interpretation of the Agreement, accepted it as the correct interpretation and thus acted according to it. The United States said that this was questionable particularly in view of the fact that when the contested determinations were made, no GATT panel had ever considered any of these issues. The failure of any Mexican party to contest the issues in question was highly relevant, because where in the past when the Commission had been made aware of a potential problem, it had dealt with the issue in an alternative manner. The United States said that Mexico could not indicate any instance when this had not been done. In this context, the United States gave the example of cumulation: while Mexico was complaining to the Panel that Commissioner Brunsdale had cumulated Mexican dumping

margins with alleged Japanese dumping margins (see section 3.4 below), Commissioner Lodwick had cumulated without taking into consideration these alleged margins. Likewise, the failure to raise any challenge to the petitioner's "standing" prior to dispute settlement proceedings had deprived the private parties, who were most able to obtain any necessary information concerning this issue, of the opportunity to respond.

3.1.13 Regarding Article 15:3, the United States said that this Article did not obviate the requirement that the basis for challenging a determination -- whether preliminary or final -- be raised first before the national investigating authorities. Otherwise, interested parties would be deprived of their rights to comment upon the arguments and submit rebuttal arguments and evidence.

3.1.14 Mexico argued that it was an assumption on the part of the United States to assert that if respondents had raised certain issues during the administrative proceedings then they would have been adequately dealt with at that time. Moreover, the "standing" requirement was an affirmative obligation and the United States' view reflected a flawed approach because "standing" had to be determined before initiation of investigation and yet, the affected parties could raise objections only after the investigation had been initiated. Mexico claimed that the United States was not correct even with regard to the argument that Mexican importers should have raised the issue of cumulation during the administrative proceedings because, as the United States had itself acknowledged, cumulation was statutorily required under United States law.

(b) Issues not raised during consultations

3.1.15 The United States contended that the issue of "standing" was not properly before the Panel on another ground, namely that it was not raised during the consultations under Article 15. According to the United States, Article 15 set up a hierarchy for dispute resolution, starting with consultations; if the dispute was not resolved by consultations, the Agreement provided for conciliation and, if necessary, the establishment of a panel. To be effective, this process required that all issues be raised at the outset. Otherwise, no satisfactory result could be reached without resort to a panel because the responding country would not have been fully apprised of the complaints against it and would not have had an adequate opportunity to address them. The United States pointed out that Mexico raised the issue of "standing" for the first time on 21 May 1991 in one of a long list of questions submitted to the United States, more than three weeks after the last consultation meeting on 2 May 1991.[1] No further consultations had occurred after this time.

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[1]The question posed by Mexico was: "What percentage of regional production was accounted for by producers which - supported the petition? - opposed the petition? - neither supported nor opposed the petition?"

3.1.16 Mexico said that in legal terms, the time period before the conciliation phase of the dispute was the consultation phase. Since the Mexican request for conciliation was made in a letter dated 20 June 1991, and the question regarding "standing" was raised on 21 May 1991, it was clear that the issue had been raised during the consultation phase. Moreover, Mexico said that this question reflected Mexico's previous discussions during consultations with the United States; Mexico strongly adhered to and confirmed its recollection that this issue had indeed been raised.[1] Mexico claimed that opposition to this issue being raised in the dispute was mentioned by the United States for the first time only during the conciliation meeting on 19 July 1991. Even at that meeting, Mexico had informed the United States that Mexico was fully available if the United States considered it necessary to hold additional consultations in this or any other regard. Furthermore, the issues in question were extensively discussed in the documents submitted by Mexico to the Committee in respect of its requests for conciliation and for the establishment of the Panel (ADP/59 and ADP/66). These issues were also covered by the terms of reference of the Panel (ADP/71) and the United States had not objected to these terms of reference. Mexico noted that the United States' recurrent allegation in this regard was a particularly apt illustration of a point Mexico had made in connection with various aspects of the present case, namely that rather than addressing the substance of the problems involved, the United States' defence of its anti-dumping measures had hardly gone beyond the surface. Moreover, Mexico claimed that the procedural requirement on the content and role of consultations alleged by the United States was nowhere to be found in the Agreement. And, according to Mexico, this was not a matter of interpretation of the Agreement, as demonstrated by the fact that the United States proposals in this matter in the Uruguay Round negotiations were rejected by participants.

3.1.17 The United States stated that none of its representatives to the consultations recalled that the "standing" had ever been raised, although they did recall being surprised to see the issue raised for the first time in written questions posed after the second and last consultation meeting. Further, the United States said that it was irrelevant that proposals to improve the process might have been rejected during the negotiations subsequent to the adoption of the Agreement. Although the process could be strengthened, the existing Agreement contained discrete procedures that had to be followed to ensure the integrity of the process and to maximize the potential for resolving disputes without the need for panel consideration.

3.2 Burden of Proof

3.2.1 Mexico said that both Article VI of the General Agreement and the Agreement were exceptions to the General Agreement (i.e. anti-dumping actions were derogations from the basic principles of the General

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[1] No minutes were kept of the discussions during consultations, as consultations were an informal stage during the dispute settlement process.

Agreement), and had to be narrowly construed. Hence, the burden of proof was on the government taking anti-dumping actions (the United States in this case), to show that its actions were consistent with the requirements of the Agreement. This burden included a requirement to demonstrate that the prerequisite facts were established in the domestic proceedings. To support its contention, Mexico referred to Article 1 of the Agreement[1], and to the reports of the panel on "United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada" (hereinafter referred to as the "United States - Pork" panel)[2], the panel on "Swedish Anti-Dumping Duties" (hereinafter referred to as the "Sweden - Anti-Dumping Duties" panel)[3], and the panel on "New Zealand - Imports of Electrical Transformers from Finland" (hereinafter referred to as the "New Zealand - Electrical

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[1]Mexico pointed out that Article 1 of the Agreement provided that: "The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated and conducted in accordance with the provisions of this Code" (emphasis added by Mexico).

[2]Mexico quoted from this panel's findings as follows: "The Panel took into account that Article VI:3 is an exception to the basic principles of the General Agreement, namely that the importation of products listed in a Schedule of Concessions must not be subject to charges other than ordinary customs duties not in excess of those set forth in that Schedule (Article II:1(b)), and that charges of any kind imposed in connection with importation must meet the most-favoured-nation standard (Article I:1). The Panel also noted in this context that discriminatory trade measures may under the General Agreement only be taken in expressly defined circumstances. In conformity with the practice followed by the CONTRACTING PARTIES in previous cases, the Panel found that Article VI:3, as an exception to basic principles of the General Agreement, had to be interpreted narrowly and that it was up to the United States, as the party invoking the exception, to demonstrate that it had met the requirements of Article VI:3". "United States - Pork", report by the panel (adopted 11 July 1991), Doc. DS7/R, page 17, paragraph 4.4.

[3]Mexico pointed out that this panel had concluded that "[i]t was clear from the wording of Article VI that no anti-dumping duties should be levied unless certain facts have been established. As this represented an obligation on the part of the contracting parties imposing such duties, it would be reasonable to expect that the contracting party should establish the existence of these facts when its action is challenged". "Sweden - Anti-Dumping Duties", report by the panel (adopted 26 February 1955), BISD 3S/85, paragraph 15.

Transformers" panel)[1]. In this context, Mexico also said that the Panel on "United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden"[2] (hereinafter referred to as the "United States - Stainless Steel" panel) ruled that there was a prima facie case of nullification or impairment of benefits accruing to Sweden, a finding with direct implications for the burden of proof issue.

3.2.2 Mexico said that it was not questioning the United States' rights under Article VI of the General Agreement, or under the Agreement, when dealing with anti-dumping investigations. However, the burden of proof in this case was not borne by the complaining party, i.e. Mexico, because it had not impaired or nullified the other country's rights under the General Agreement or the Agreement by adopting the measures in question. Mexico did not contest the fact that as the complaining party, it had to indicate where the United States' actions violated the Agreement. Mexico contended that it had proved before the Panel specific violations of affirmative obligations by the United States, but this did not mean that the United States, as the investigating authority, was relieved, when challenged, from demonstrating that the basic premises for the imposition of anti-dumping duties had been present and satisfied in the Mexican case. Mexico asserted that the United States now had the onus to demonstrate that the measures were taken in conformity with its obligations under the Agreement. This, according to Mexico, was the interpretation of the burden of proof issue by the panels cited earlier.

3.2.3 In reply, the United States said that Article VI was not an exception to the General Agreement. It established fundamental rights that were neither a "derogation" from nor an "exception" to the basic principles of the General Agreement. The United States said that these arguments were substantiated by the negotiating history of the General Agreement[3], the

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[1]This panel report, citing the "Sweden - Anti-Dumping Duties" panel report, stated that "[t]he Panel fully shared the view expressed by that panel when it stated that 'it was clear from the wording of Article VI that no anti-dumping duties could be levied until certain facts had been established'. As this represented an obligation on the part of the contracting party imposing such duties, it would be reasonable to expect that the contracting party should establish the existence of these facts when its action is challenged". "New Zealand - Electrical Transformers", report by the panel (adopted 18 July 1985), BISD 32S/68, paragraph 4:4.

[2]Doc. ADP/47, 20 August 1990.

[3]The United States said that the early drafting proposals for Article VI would have required the importing country to prove dumping allegations; these proposals were rejected in favour of the current language of Article VI which provided that anti-dumping or countervailing duties could be imposed only after a contracting party determined the existence of injury caused by dumping.

central role given to Article VI in the General Agreement[1], its location in the General Agreement[2], and the fact that the provisions of this Article were not encumbered with the restrictions and consultation requirements found in several other Articles, such as XIX, XXIII and XXVIII. If the rights created by Article VI were to be narrow, consultation requirements or other prerequisites would have been included by the drafters. The General Agreement reflected the essential balance of the opening of markets (principally through tariff reduction) in exchange for reciprocal access and the right to take action against unfairly traded imports; Article VI focused on the latter, essential aspect of the General Agreement.[3]

3.2.4 The United States pointed out that Mexico's contention on burden of proof would impose upon the responding government a rebuttable presumption of error, rather than the rebuttable presumption of correctness usually afforded the determinations of national investigating authorities. Also, in view of the drafters' express condemnation of injurious dumping and authorization of the imposition of special duties to offset its injurious effects, Article VI was a remedial provision. Furthermore, even if it was assumed for the sake of argument that Article VI was an "exception" to the other provisions of the General Agreement, this assumption would only require that substantive provisions of Article VI be construed narrowly. It had nothing to do with the procedural issue regarding which party bore the burden of proof in panel proceedings. The United States said that while a contracting party exercising its rights pursuant to Article VI had to have a basis for its determination (and the United States contended that it had explained the bases in this case in detail), this did not mean that the burden of proof in a panel proceeding was borne by this party. Rather, Article 15 of the Agreement established that the complaining party had the burden of proving its case and, according to the United States, Mexico had failed to do so.

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[1]In this context, the United States said that the language of Article VI was unique in the General Agreement in terms of its clarity and force because the Article stated that "[t]he contracting parties recognize that dumping ... is to be condemned if it causes or threatens material injury ..." (emphasis added by the United States). The United States said that the drafters had not deemed it necessary or appropriate to condemn any other commercial practice.

[2]The United States said that Article VI appeared near the beginning of the General Agreement, where the primary subjects were found. The drafters had placed the exceptions to the General Agreement, such as Articles XX and XXI, near the end. The titles of the Articles placed near the end expressly identified them as exceptions, and their text, which required that they not be a disguised form of protection, also distinguished them from Article VI.

[3]The United States emphasized that the elimination of injurious dumping or, at a minimum, the incorporation of effective remedies to address injurious dumping, was an essential requirement of global trade liberalization after World War II and during both the Kennedy and Tokyo Rounds of trade negotiations.

3.2.5 The United States said that Article 15:5 of the Agreement explicitly required that the party requesting the formation of a panel submit "a written statement ... indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired ...". This rule reflected the basic principle of procedure, found in the domestic law of all signatories, that the complainant had to prove its case. This principle was also demonstrated by prior panel reports involving nullification or impairment[1] and by the "Agreed Description of Customary Practices of the GATT in the Field of Dispute Settlement (Article XXIII:2)" annexed to the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" of 28 November 1979.[2] These documents clarified that the complainant had to establish a prima facie case of nullification and impairment before the responding party bore any responsibility for defending against the charges. In this context, the United States also said that the Panel's own working procedures reflected this principle by directing the complaining party to submit its written submission in advance of the submission by the responding party.

3.2.6 In addition, the United States claimed that even the panel reports cited by Mexico did not support its contention regarding burden of proof. The "Sweden - Anti-Dumping Duties" panel determined that a principle as critical to the General Agreement as most-favoured-nation did not override the fundamental rights granted by Article VI, and concluded that the party taking action pursuant to Article VI bore no special burden of proof. Rather it simply commented that it "would be reasonable to expect that [a] contracting party should establish the existence of [dumping] when its action is challenged".[3] In the context of that case, the panel had meant

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[1]The United States quoted the following from a panel report: "While it is not precluded that a prima facie case of nullification or impairment could arise even if there is no infringement of General Agreement provisions, it would be in such cases incumbent on the country invoking Article XXIII to demonstrate the grounds and reasons for its invocation. Detailed submissions on the part of that contracting party on these points were therefore essential for a judgement to be made under this Article". "Uruguayan Recourse to Article XXIII", report of the panel (adopted 16 November 1962), BISD 11S/100, paragraph 15, emphasis added by the United States.

[2]The United States pointed out that with respect to Article XXIII, this document stated that "[p]aragraph 1(b) permits recourse to Article XXIII if nullification or impairment results from measures taken by other contracting parties whether or not these conflict with the provisions of the General Agreement, and paragraph 1(c) if any other situation exists. If a contracting party bringing an Article XXIII case claims that measures which do not conflict with the provisions of the General Agreement have nullified or impaired benefits accruing to it under the General Agreement, it would be called upon to provide a detailed justification" (emphasis added by the United States).

[3]BISD 3S/85, paragraph 15.

that the contracting party taking the anti-dumping measure (i.e. Sweden) had to have a basis for its determination; the Swedish authorities had collected no evidence of dumping and were unable to state the basis on which they had ascertained the existence of dumping. Thus, the Panel had ruled against the Swedish authorities for having imposed anti-dumping duties without establishing any dumping. The United States pointed out that the interpretation by the "Sweden - Anti-Dumping Duties" panel had also been accepted by the "New Zealand - Electrical Transformers" panel, the conclusions of which indicated that without some showing that an express provision of the Agreement had been violated or that the dumping finding lacked any basis, the respondent party could be considered to have acted within its rights[1]; thus, according to the United States, the "New Zealand - Electrical Transformers" panel did not articulate or embrace the burden of proof principles advocated by Mexico. Further, the United States said that Mexico's reliance on the "United States - Stainless Steel" panel for the burden of proof issue was erroneous because that panel did not say that the respondent had not met its burden of proof; the burden of proof was still on the complainant.

3.2.7 With reference to the "United States - Pork" panel, the United States said that the panel's premise was inconsistent with the text and negotiating history of the General Agreement. Moreover, the United States said that the sources relied upon by this panel bore no relation to the interpretation or application of Article VI.[2] In any event, the Panel reviewing the current case was not bound by the prior ruling of the "United States - Pork" panel which had been convened to consider an entirely different dispute, and the "United States - Pork" panel had expressly "limited itself to making recommendations confined to the pork case".[3] According to the United States, the "United States - Pork" panel had also erred in relying upon the canon that "statutes in derogation of the common law are to be narrowly construed." This canon, which was developed at a time when common law was the rule, was rarely applied even by common law, and had no application to the General Agreement or the Agreement which were the result of hard, focused bargaining, and not centuries of incremental, adjudicative lawmaking. Since Article VI was a remedial provision, and remedial statutes were intended to create nonpenal remedies to redress wrongs, the canon of construction that should have been

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[1]The United States pointed out that the panel had "noted that Article VI did not contain any specific guidelines for the calculation of cost-of-production and considered that the method used in this particular case appeared to be a reasonable one. In view of this ... [the] Panel considered that there was no basis on which to disagree with the New Zealand authorities' finding of dumping", BISD 32S/68, paragraph 4:4.

[2]The relevant Articles were XI:2, XX, and XXIV:12.

[3]The United States also said that the "United States - Pork" panel's erroneous conclusions regarding burden of proof might have resulted from the fact that the burden of proof was barely mentioned in the parties' submissions and apparently was not a significant issue in the proceedings. Therefore, the "United States - Pork" panel lacked the benefit of a full analysis of the issue.

applied, but apparently had not been considered, held that remedial statutes were to be construed broadly. Therefore, the United States claimed that the previous panel findings affirmed that the complaining party had the burden of proof to show that another party's anti-dumping action did not meet the provisions of the Agreement. The party taking the anti-dumping action was supposed to make sure that its determination was in conformity with the provisions of the Agreement, and not to prove that this was so.

3.2.8 Further, the United States said that it would be particularly inappropriate to require the United States to bear the burden of proof in this case in view of Mexico's failure to raise issues in a timely manner. Had Mexico raised all the issues in a timely manner, this would have put the United States on notice of the issues before the Panel. If parties were allowed to raise new issues for the first time before a panel, the responding party would be forced to disprove allegations that it never had an opportunity to consider when it could have resolved the matter either administratively or during early stages of dispute resolution.

3.2.9 Mexico contested the United States' argument that remedial statutes were to be construed broadly, arguing that this had no support within the General Agreement. Anti-dumping practices were exceptions to the basic principles of the General Agreement concerning tariff bindings, national treatment and most-favoured nation treatment. Mexico argued that this was self-evident, unless the United States would sustain that anti-dumping actions should be applied on a most-favoured-nation basis or respecting the national treatment principle. Thus, Mexico contended that these measures had to be narrowly construed so as not to constitute an unjustifiable impediment to trade. Further, while Mexico agreed that remedial statutes such as anti-dumping measures were intended to redress "wrongs", it emphasized that such relief was to be granted only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated and conducted in accordance with the Agreement (Article 1).[1] Mexico pointed out the drafters had condemned dumping only if it caused or threatened material injury, and both Article VI and the Agreement's provisions specifically circumscribed the use of anti-dumping measures when applied under these circumstances.

3.2.10 Further, Mexico said that the United States' argument regarding the location of Article VI in the General Agreement or the lack of consultation requirements or other prerequisites, did not support the United States'

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[1] Mexico contested the United States' interpretation of Article VI that the "contracting parties recognize that dumping ... is to be condemned if it causes or threatens material injury ...", and indicated that the United States had emphasized the wrong part of the quotation. Mexico said that dumping was to be condemned only if it caused or threatened material injury; the word only had been expressly incorporated in several parts of the Agreement, i.e. the preamble, Article 1 and 5:1.

characterization of anti-dumping rights as being of a "broad nature".[1] The provisions on anti-dumping had to be narrowly construed on account of their being exceptions to the basic principles of the General Agreement. The narrow or strict interpretation was particularly expected in the context of regional cases which were exceptions even within the anti-dumping provisions because according to the plain letter of Article 4:1(ii) of the Agreement, they could be invoked only in exceptional circumstances.

3.3 Initiation Requirements

3.3.1 Mexico stated that in this regional industry case, the United States had initiated the investigation without verifying whether the "standing" requirement under Article 5:1 had been met.[2] Furthermore, the evidence on support (which emerged later) had not been available to the Department of Commerce, and in any case, did not show that there was adequate support by the industry affected for the request for initiation. According to Mexico, the definition of industry affected for the purpose of ascertaining "standing" was provided by the regional injury standard in Article 4:1(ii), and lack of "standing" in this case meant a violation of this Article also. Moreover, since the United States had initiated the investigation without sufficient evidence for doing so, Article 6:6 was also violated. Finally, Mexico considered that because Article 5:1 provided an essential procedural requirement under the Agreement, its violation meant that the United States' action also was inconsistent with Article 1 of the Agreement (principles governing the application of anti-dumping measures).

3.3.2 The United States stated that Mexico had misinterpreted the "standing" requirement and that the United States action was consistent with the Agreement.

3.3.3 Mexico said that Article 5:1 of the Agreement provided that an anti-dumping investigation was normally to be initiated upon a written request "by or on behalf of the industry affected". A footnote to this

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[1] In this context, Mexico pointed out that Article XX (General Exceptions) was also in Part II of the General Agreement, and similar to Article VI, did not require consultations. In connection with the United States' handling of the conclusions of previous panels, Mexico said that the United States appeared to find panel determinations supporting its positions to be correct, and those not supporting its positions to be incorrect.

[2] Article 5 provided the provisions relating to the initiation of an anti-dumping investigation. Mexico argued that the "standing" requirement was provided by the first sentence of Article 5:1. This sentence stated that: "An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry affected" (footnote omitted).

Article specified that the "industry affected" was to be determined with reference to Article 4 of the Agreement. Thus, in defining industry for initiation purposes, Articles 5:1 and 4 had to be considered together. Mexico pointed out that this was also the interpretation of the "United States - Stainless Steel" panel. In the exceptional circumstances where a case was filed on behalf of a regional industry instead of a national one, Article 4:1(ii) provided that the "domestic industry" was to consist of "producers of all or almost all of the production" within the region. Thus, the requirement for filing anti-dumping petitions was more stringent in the case of a regional industry compared to a national industry case. The higher standard for the regional industry case was rigorous not by coincidence. Anti-dumping duties arising from a regional industry case could be levied on a national basis, and not only on imports into the region. Mexico pointed out that imposition of anti-dumping duties on a national basis was required under the United States' Constitution.

3.3.4 According to Mexico, the United States did not meet the "standing" requirement in this specific case. The petition was supported by producers of about 62 per cent of the regional industry's production in 1989, the year when the case was initiated. The producers which did not take any position regarding the petition could not be deemed to support the petition, which was also the conclusion of the "United States - Stainless Steel" panel.[1] Thus, Mexico claimed that the United States had violated Article 5:1 because it initiated the investigation without establishing that producers of all or almost all of the production in the region supported or approved the petition.

3.3.5 Regarding duties being imposed on national imports rather than only on regional imports, the United States said that the criteria of import concentration limited the impact of these duties mainly to the regional industry to which injury was determined. Moreover, the interpretation of an initiation requirement under the Agreement should be the same for all signatories and not linked to the legislation or constitution of any particular country.

3.3.6 The United States disagreed with the Mexican interpretation of Article 5:1, and said that the Agreement did not require any investigation of the level of support for or opposition to a petition. The term "support" did not appear in the Agreement. The requirement in Article 5:1 was that the investigation had to be requested "by" an industry or, alternatively, by a representative acting "on behalf of" an industry, and the Agreement did not specify the meaning of "on behalf of" in terms of any affirmative demonstration of support by any specific proportion of the producers of the like product. According to the United States, the phrase "by or on behalf of the industry affected" could simply mean that an investigation could not be requested by a single member of an industry, i.e. an individual company could not be the sole beneficiary of an

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[1]Document ADP/47, paragraph 5.17.

anti-dumping investigation. The United States claimed that the lack of any requirement regarding support for the request for initiation was also shown by the fact that if one considered the text of Article 5:1, the detailed provisions requiring sufficient evidence related not to the term "by or on behalf of", but to evidence on the existence of dumping and injury and the causal link between these two elements. Nothing in the Agreement restricted the national investigating authorities from exercising their discretion in determining whether a petition had been filed "by or on behalf of" an industry.

3.3.7 According to the United States, Mexico was misinterpreting the definition of "industry" in Article 4. The only place in Article 4 which gave the definition of industry was in the beginning of the Article[1], and there was no separate definition for regional industry. While the term "industry" in Article 5 was the same as in Article 4, this did not imply that the standard for initiation and for injury was the same. According to the United States, the two standards, i.e. injury and initiation, were different, and in Article 4:1(ii), the "all or almost all"[2] standard related only to injury in a regional industry case. Nothing in Article 4 required that the separate injury test for regional markets established a separate initiation standard for purposes of Article 5. To read the injury standard for regional industries as establishing a stricter requirement for initiation of investigations would conflict with the language and structure of the Agreement.[3] In the case of a regional industry, there was a logical basis for applying a stricter injury standard because the injury investigation focused upon a smaller segment of the total universe of domestic production, one in which the effect of imports was concentrated. Absent a stricter injury standard, injury might be more easily demonstrated

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[1]Article 4 began as follows: "In determining injury the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products ...".

[2]The United States said that Article 4:1(ii) provided that in certain exceptional circumstances, "injury may be found to exist even where a major proportion of the total domestic industry is not injured". In determining the existence of these circumstances, an investigating authority had to examine whether the territory of the importing country might be divided into two or more competitive markets pursuant to the market isolation criteria in Article 4:1(ii). If those criteria were met, then "producers within each market may be regarded as a separate industry". In that case, a distinct injury standard had to be applied, and this standard was injury to producers of all or almost all of the production within such market.

[3]The United States argued that "[i]n fact, to the extent that Article 4 may have any bearing upon this issue, its plain language suggests the opposite -- that 'injury may be found to exist even where a major portion of the total domestic industry is not injured'" (emphasis added by the United States).

in a regional industry case. The United States argued that there was no similar reason for requiring a higher level of support for the petition if injury was alleged to a regional industry. Establishment of any parallelism between the initiation and injury standards would be a false interpretation of the Agreement.

3.3.8 The United States went on to say that even if it was assumed that the Agreement imposed some requirement of affirmative industry support for a petition, it did not require a showing of support by producers of "all or almost all" of the production within a region. According to the United States, the text of Articles 4 and 5 showed that a petition filed "by or on behalf of" a domestic industry should be assessed upon the same basis whether the affected industry was a national industry or a regional industry. Nowhere did Articles 4 and 5 imply that the initiation standard, i.e. the level of support required for initiation of an investigation, was higher in a regional industry case than in a national industry case. Rather, if it was assumed that any level of support was required for the request, the same standard -- support by a "major proportion of the industry" -- should apply in both national and regional investigations. This interpretation of Articles 4 and 5 was also supported by the practice of other signatories. Other national investigating authorities applied the same standard for initiation in both regional and national industry cases. The United States pointed out that Mexico itself initiated investigations based upon a petition filed by producers accounting for only 25 per cent of production, and nothing in the Mexican statute or practice suggested that the standard for initiation was different for a regional industry case.

3.3.9 Mexico pointed out that the practice of signatories was not a fact that per se proved the consistency of a measure with the General Agreement. Moreover, Mexico said that the United States had incorrectly characterized the Mexican regulations. The 25 per cent rule referred to by the United States was a minimum for automatic rejection of petitions under the Mexican regulations, and was applicable only for national investigations. Unlike in the United States, the Agreement was a part of Mexican legislation and though Mexico had never handled a regional investigation, if it were to do so, it would be obliged to apply the standard prescribed by Article 4:1(ii).

3.3.10 Mexico claimed that the position of the United States regarding the phrase "by or on behalf of" did not rebut the link between Articles 5 and 4. The definition of domestic industry in both Articles 4 and 5:1 was structured on the notion of injury. In Article 5:1, the notion of injury was plain because when this Article made reference to the initiation of an investigation, it clarified that the petition had to be presented by or on behalf of "the industry affected", and this industry was defined in Article 4. Article 4 defined industry in terms of injury, and thus the definition of regional industry was "producers of all or almost all of the production within such market", and the request for initiating the investigation should be "by or on behalf of" this entity, i.e. by this industry or by representatives of this industry. The United States' contention that the last sentence of Article 4:1(ii) gave only the injury standard was wrong because even the title of Article 4 was "Definition of

Industry". Where, if not in this provision, did the Agreement define the regional industry? The fact that this provision defined industry was also confirmed by Article 4:2 which stated that, "[w]hen the industry has been interpreted as referring to the producers in a certain area ...". Thus, it was in Article 4 that two definitions were provided for domestic industry in terms of injury, mirroring the two levels at which the investigations could be conducted, namely national investigations and regional investigations. To support its claim, Mexico also referred to the conclusions of the "United States - Stainless Steel" panel, that in Article 5:1 the term "on behalf of" was used as an alternative to "by" and implied a notion of agency or representativeness, that Articles 5:1 and 4 had to be considered together for the purpose of the initiation criteria and that the investigating authorities had to satisfy themselves, before initiating the investigation, that the request for initiation was by or on behalf of the industry affected.

3.3.11 The United States said that the title of Article 4 was "Definition of Industry" and not "Definitions of Industry". There was only one definition of industry provided and that was in the first sentence of Article 4. Moreover, Article 5:1 only required that an investigation be initiated "upon" the request by or on behalf of the industry affected, and not that the authorities verify "before" initiation that such a request was by or on behalf of the industry affected.[1] Furthermore, it was illogical to conclude that the notion of "standing" was premised upon the proportion of the domestic industry that was injured, because it was only at the end of the investigation that it became clear what proportion of production was injured.

3.3.12 Regarding Mexico's reliance on the findings of the "United States - Stainless Steel" panel, the United States said that: the panel report was not yet adopted; even if it were to be adopted, it would not be binding upon subsequent panels; that panel's terms of reference referred only to the "determinations of injury and dumping made by the United States' authorities in an anti-dumping duty investigation of imports of stainless steel pipes and tubes from Sweden ...".[2]; the panel had expressly stated that "rather than attempting to formulate a general standard of review -- it would be more appropriate for the Panel to examine and decide on these arguments and legal issues where they arose in relation

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[1]According to the United States, if the drafters of the Agreement had truly intended to create the "standing" requirement envisioned by the "United States - Stainless Steel" panel, they would have expressly required that investigating authorities determine, prior to initiating an investigation, whether the industry in fact supported the investigation. The United States argued that the omission of any provision of this nature from the current Agreement suggested that the drafters never intended to impose such a requirement.

[2]Document ADP/47, page 1.

to specific matters in dispute"[1]; while Mexico's arguments here related not to whether the signatory had to determine the level of domestic industry support for a petition before initiating an investigation but to the degree or level of support, i.e. producers of "all or almost all" of the production, the "United States - Stainless Steel" panel had not even addressed the issue of level of support in the context of initiation. Rather, it had considered whether the United States had erred by initiating an anti-dumping investigation without first determining that the petition was filed "on behalf of" an industry as defined in Article 4. Another difference between the two cases was that in "United States - Stainless Steel", unlike this case, the "standing" issue had been exhaustively litigated during the administrative proceedings, thereby providing the interested parties an opportunity to submit evidence in the record concerning the issue. Moreover, in "United States - Stainless Steel", the members of the domestic industry who were not parties to the administrative proceedings had less notice of the investigation than the nonparticipating members of the domestic industry in this case. Because of unusual circumstances present in "United States - Stainless Steel", the Commission did not send out preliminary questionnaires to the domestic industry.[2] In this case, by contrast, the Commission had followed its usual practice of sending out preliminary questionnaires even before the Department of Commerce initiated the investigation. Thus, every domestic producer and importer had express notice of the filing of the petition.

3.3.13 The United States moreover contended that the ruling of the "United States - Stainless Steel" panel lacked reasoned analysis and misconstrued Article 5, because nowhere in Article 5 nor anywhere else in the Agreement was there any mention of the term "standing" or any express requirement of affirmative support by any specific proportion of the domestic industry. According to the United States, that panel's entire reading rested upon an expansive and unwarranted reading of a prepositional phrase "by or on behalf of". If "by or on behalf of" implied an affirmative demonstration of industry support, then the words "on behalf of" would become a nullity because in every case the request would be "by" an industry. It had to be assumed that the words "on behalf of" had a different and alternative meaning to the word "by". This was also inconsistent with the "United States - Stainless Steel" panel's recognition that "on behalf of" appeared in Article 5:1 as an alternative to "by" and that the "ordinary meaning" of "on behalf of" involved the notion of representation. The United States said that the negotiating history showed that there was no requirement for a majority or the whole of the industry asking for the initiation of an investigation. In 1978, for example, the Committee on Anti-Dumping Practices had concluded that an anti-dumping investigation could be initiated based upon a request submitted or supported by firms whose production did not represent more than 50 per cent of total industry production. The consensus of the Committee was that

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[1]Document ADP/47, page 74.

[2]Document ADP/47, page 79.

problems would arise only if "the production of that part of an industry on whose behalf the request is submitted constitutes a relatively small proportion of total domestic production".[1] Thus, the United States claimed that the interpretation of "on behalf of" had been incorrectly read into the text by the "United States - Stainless Steel" panel, and its conclusions were inconsistent with the Committee's analysis. By prescribing a methodology that was not required by the Agreement, that panel had exceeded the boundaries of its jurisdiction and had improperly imposed a standard without any consensus or agreement among the contracting parties.

3.3.14 Further contesting the findings of the "United States - Stainless Steel" panel, the United States said that Article 5:1 did not require that there be any assessment, prior to initiation, of whether the request was affirmatively supported by producers accounting for any specific portion of the industry affected. According to the United States, that panel reached conclusions to the contrary without any explanation or reasoned analysis, which reflected a misinterpretation of the term "industry" in Article 5:1. According to the United States, the only purpose of the term "industry" in Article 5:1 was to identify the entity to be represented, and the reference to the definition of industry in Article 4 most logically meant that the industry filing a petition had to produce the like product affected. According to the United States, this eliminated the possibility of producers of one product seeking relief from injury caused by dumped imports of, for example, an input or competing product.

3.3.15 The United States maintained that the manner in which the investigating authorities were to determine whether a petitioner represented the industry had been left to the national investigating authorities by the drafters of the Agreement. The "United States - Stainless Steel" panel, on the other hand, read into the Agreement rigid and specific requirements that were not supported by the language of the Agreement. Specifically, that panel prescribed a methodology for determining whether a request had been filed "by or on behalf of the industry affected", as well as a deadline for making this determination. The text of Article 5:1 imposed no such methodology or deadline. In particular, Article 5:1 stated only that an investigation normally had to be initiated "upon" a request filed by or on behalf of an industry. The word "upon" did not mean "prior to"; it simply meant that an investigation normally had not to be initiated absent a written request by or on behalf of the industry. This interpretation was consistent with the negotiating history, which demonstrated that the drafters of Article 5:1 were concerned only that there be some indication that some member of the industry desired the investigation. The United States said that in any event, Mexico was not arguing that "standing" had to be verified before initiating an investigation, but only that the level of support regarding "standing" was not adequate in this case.

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[1] Document COM.AD/W/83, 17 November 1978, pages 9 and 10.

3.3.16 Mexico agreed that the "United States - Stainless Steel" panel's recommendations did not have any legal standing, but said that they were valuable references because they were the real interpretation of the Agreement. That panel did draw a link between Articles 4 and 5, and had also said that the request "by or on behalf of the industry affected" should be made before the initiation of the investigation. Moreover, it dealt with affirmative obligations, which also had implications regarding the preclusion of issues.

3.3.17 Mexico pointed out that Article 5:1 did specify when the request had to be made and by whom, i.e. the request by or on behalf of the industry affected had to be made prior to investigation, and without such a request the authorities could not initiate the investigation. Mexico said that the United States was wrong in presuming that Mexico was not arguing that "standing" be verified before initiating the investigation. Mexico's position was that "standing" was a basic prerequisite and an ongoing requirement, and in this case too, the "standing" requirement should have been met before initiation of the investigation.

3.3.18 Mexico said that the United States seemed to agree to the link between Articles 5 and 4 in the case of a national industry investigation. For a regional industry investigation, however, the United States was saying that Article 4 referred only to injury and not to industry. As actually drafted, the definition of industry in Article 4 was in terms of injury. This was the structure of the Agreement: the title of Article 4 was "Definition of Industry" and the whole Article was a definition of industry which was provided in terms of the proportion of production to which there was injury. Mexico said that it was not claiming that the request for initiation of the investigation had to be by or on behalf of those producers which were ultimately found to be injured. Rather, it was emphasizing that the term "industry affected" and the footnote in Article 5:1 provided a link with the standard for injury in Article 4 which had to be met in the case of initiation also.

3.3.19 Mexico said that the note by the United Kingdom which was referred to by the United States dealt with an issue which was different from that being discussed before the Panel, in that the note criticized the United States for self-initiating anti-dumping investigations.

3.3.20 The United States argued that the negotiating history showed that the main pre-occupation of the drafters of the 1967 Anti-Dumping Agreement (hereinafter referred to as the "1967 Agreement"), where the "by or on behalf of" language first appeared, had been not with any requirement of overt support by a major proportion of an industry, but with the requirement that the impetus for investigations should normally come from domestic producers who considered themselves injured or threatened with injury by dumping, and that there should be sufficient evidence of dumping,

injury and causality.[1] Further, the United States pointed out that the Agreement expressly provided for rejection of the petition in certain circumstances: Article 5:3 provided that "[a]n application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case". The drafters could have provided for the rejection of an application if the authorities concerned were not satisfied that it was properly supported by the industry. The omission of any suggestion of such provision was evidence of the lack of any intention of the signatories to adopt the "standing" requirement advocated by Mexico.

3.3.21 The United States said that another reason for the level of representation necessary to initiate a regional industry case being the

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[1]To support its claim, the United States quoted the views of the members of the Group on Anti-Dumping Policies of the Sub-Committee on Non-Tariff Barriers and the views of individual delegations. Thus, regarding the initiations of investigations by national authorities (particularly the United States) without any indication of interest by domestic producers, the United Kingdom had said, "[i]t appears that the United States Administration is initiating action in exactly those circumstances in which action is unwarranted, i.e. in cases where there is no cause for complaint, since it can safely be assumed that an industry which had any reason to believe that it was being injured or threatened by dumped imports would file a complaint. This view is in accordance with that expressed by the GATT Group of Experts who agreed that 'since the criterion of material injury was one of the two factors required to allow anti-dumping action, the initiation for such action should normally come from domestic producers who considered themselves injured or threatened with injury by dumping.' The Group went on to say that 'Governments would, however, have the right to take such initiative when the conditions set forth in Article VI existed'" (Doc. TN.64/NTB/38, 14 June 1965, page 7). The United States also quoted from TN.64/NTB/W/2/Rev.1, 17 January 1966, page 2, and TN.64/NTB/W/10, 19 April 1966, pages 3-4, to show the emphasis given by the United Kingdom on evidence on dumping, injury and causality, without even a mention of any "standing" requirement of the nature determined by the "United States - Stainless Steel" panel. The United States also pointed out that the European Economic Community had commented in this context that: "The EEC considers that an investigation in regard to dumping should, in general, be initiated only on request of the producers to whom injury is caused or threatened. Certain minimum criteria should be required for such a request to be taken into consideration. Thus, any party so requesting should be required to furnish all the elements in his possession that might enable the competent authorities to verify the existence of dumping practices and material injury" (Doc. TN.64/NTB/W/10/Add.1, 21 April 1966, page 6). In support of its contention, the United States also quoted the views of Canada in TN.64/NTB/W/15, 21 February 1967, page 1.

same as that for a national industry case, assuming that such a requirement existed, was that the question of whether a regional industry existed and the scope of that regional industry were not determined by a petitioner's allegations, but by national investigating authorities based upon the facts adduced during the investigation.[1] For example, in this case, the Commission, as urged by the Mexican respondents, defined a single regional industry encompassing the two regions proposed by petitioners, plus California, Louisiana, Mississippi and Alabama. Thus, any requirement of verifying "whether petitioners represent producers in the region" was simply not possible to meet prior to initiation of a regional industry investigation. This could lead to the ridiculous situation that in the end it might be found that there was material injury to the industry but that adequate "standing" did not exist. The uncertainty about the region also implied that a stricter criteria, such as support by "producers of all or almost all of the production in the region", would be difficult, if not impossible, to meet. This was particularly true in the case of industries composed of numerous producers, e.g. agriculture. In such cases, it might be impossible to identify all of the members of the industry, let alone poll them prior to initiating an investigation. The Agreement affirmatively provided for investigations of regional industries if the circumstances warranted, and thus did not intend to make it impossible to initiate these investigations. Therefore, on grounds of feasibility, it was more reasonable to apply a requirement of industry support if it was interpreted as "support by a major proportion".

3.3.22 Mexico said that the United States should not have initiated this case if, as it alleged, it was "simply not possible" to determine at the outset of the investigation that the strict standards for a regional case had been met. The initiation under these circumstances was in outright contradiction with Articles 5:1, 4:1(ii) and 6:6 of the Agreement; and this implied a violation of Article 1 also because this Article stipulated that anti-dumping measures could be taken only under the circumstances provided for in Article VI of the General Agreement pursuant to investigations initiated and conducted in accordance with the provisions of the Agreement.

3.3.23 Mexico argued that agreeing to low standards for petitioner's "standing" for the reasons mentioned by the United States would be ill-founded and positively harmful, because investigations could continue for months before the authorities needed to become aware of the lack of "standing". Exporters might incur substantial costs before "standing" could be ultimately ascertained in a regional industry case. The Agreement had several provisions, such as Articles 5:1, 5:3, 4:1(ii) and 6:6, which were designed to ensure against frivolous petitions, and central among these was a clear and appropriate resolution of the issue of "standing",

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[1]The United States pointed out that both the United States and the European Communities had each determined, on several occasions, that despite a petitioner's allegations, no regional industry existed.

which was a precondition for the conduct and continuation of the investigation. According to Mexico, "standing" was an ongoing procedural requirement, and only in that sense could the letter and spirit of Articles 5:1, 5:3 and 6:6 be faithfully interpreted. There was no legal justification to assume that signatories were exempted from the obligations derived from the essential procedural requirements of Article 5:1. Mexico said that in a regional investigation this meant, among other things, that the competent authority had to satisfy itself -- verify -- that the written request for the initiation of the case had been filed by or on behalf of producers of all or almost all of the production in the regional market. If it was not possible to meet a requirement under the Agreement, then there might be something wrong with the Agreement. But then, what the signatories had agreed was in the Agreement, and their actions had to conform to it unless the obligations under the Agreement were altered by consensus. The task of this Panel was only to consider whether the requirements under the Agreement had been met.

3.3.24 The United States said that its procedures for initiation were extremely thorough and violated no provisions of the Agreement. Upon receiving the petition, the Department of Commerce, which was the agency responsible for deciding whether to initiate an anti-dumping investigation, thoroughly reviewed its contents to ensure that the rigorous statutory and regulatory content requirements were satisfied.[1] If the petitioner

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[1]The United States said that by regulation, the Department of Commerce required the submission of information concerning, inter alia, (1) the name and address of the petitioner and any persons the petitioner represented; (2) the identity of the industry the petitioner represented, including the names and addresses of other persons in the industry; (3) a detailed description of the merchandise defining the requested scope of the investigation, including technical characteristics and uses; (4) the name of the home market country (ies), the names and addresses of each person believed to be selling the merchandise at less than fair value and the proportion of total exports to the United States which each person accounted for during the most recent 12-month period; (5) all factual information, particularly documentary evidence, relevant to calculation of the United States price of the merchandise and the foreign market value of such or similar merchandise, with reference to the Department of Commerce's regulations on how such calculations were to be made, or in the alternative, information on production costs in the United States, adjusted to reflect production costs in the home market country of merchandise; (6) information concerning the volume and value of the merchandise imported during the most recent two-year period, or if the merchandise was not imported, information as to the likelihood of its sale for importation; (7) the name and address of each person believed to be importing the merchandise; and (8) factual information concerning material injury, threat of material injury, or material retardation. In addition, a petitioner was required by the statute to certify that the information in the petition was "accurate and complete to the best of that person's knowledge."

alleged that the petition was filed "on behalf of" an industry and there were no indications to the contrary, the Department of Commerce normally initiated an investigation. A notice was published in the Federal Register, informing the industry about the details of the petition and telling them whom to contact if they wished to express support or opposition to it.[1] If opponents to the investigation came forward, the Department of Commerce attempted to determine the proportion of the industry for which they accounted. If they constituted a minority of the domestic industry, the Department of Commerce usually exercised its discretion to continue the investigation. If unrelated producers accounting for a majority of production expressed opposition to the petition, the Department of Commerce considered whether to terminate the investigation.[2]

3.3.25 The United States said that the Department of Commerce did not investigate the level of domestic support for a petition prior to initiating.[3] However, it also argued that the requirements of Article 5 were satisfied in this case because the Commission sent questionnaires to domestic producers throughout the region during its preliminary investigation, and thus potential opponents had actual notice of the petition, in addition to the notice by the Department of Commerce in the Federal Register which invited interested parties to submit information concerning the petitioners' claim that it had filed the petition "on behalf of" the domestic industry. In this case, no member of the domestic regional industry expressed opposition to the investigation to the Department of Commerce, and therefore the Department of Commerce had no reason to conduct any further investigation. Subsequently, the Commission, for reasons related solely to the injury determination, asked domestic producers to indicate whether they supported, opposed, or took no position regarding the petition. This data showed that producers accounting for 74 per cent of the production in the region mentioned in the petition supported the petition. For the region ultimately considered by the Commission for injury purposes, this figure was about 62 per cent. Two producers accounting for 4 per cent of the regional production had indicated in their questionnaire responses to the Commission that they opposed the investigation. Both of these producers were related to the Mexican respondents. Producers not expressing any opinion accounted for 34 per cent of the regional production. This showed that any "standing"

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[1] Major newspaper and trade publications normally reported the initiation of investigations.

[2] On the only occassion when producers accounting for a "major proportion" of the industry had opposed the investigation, the Department of Commerce terminated the investigation. Gilmore Steel Corp. v. United States, 585 F. Supp. 670 (Court of International Trade 1984).

[3] The United States informed the Panel that under a new regulation, at least 85 days were granted after the petition to register opposition. However, in practical terms, the Department of Commerce did not preclude expression of support or opposition even after this period.

requirement had been met in this case. Nonetheless, the United States also said the information regarding the proportion of industry supporting the petition "was not available -- indeed, it had not yet been gathered or calculated -- when the Department of Commerce decided to initiate this investigation".

3.3.26 The United States emphasised that in an increasingly interconnected world, if producers remained neutral it did not mean that they opposed the investigation. Certainly the Agreement did not require such an interpretation. If neutrality were equated with opposition, it could become impossible for contracting parties to exercise their rights pursuant to Article VI to protect their domestic industries against unfair trade. This would be particularly true for industries with numerous producers whom it might be impossible identify, let alone poll for their opinion prior to initiation.

3.3.27 Mexico argued that those producers who were silent regarding the petition should not be counted or assumed as giving support, because there were also good reasons for producers to oppose a petition but be silent about it.[1] All one could claim regarding those producers who remained silent was that they were neither supporting nor opposing the petition. Regarding the level of support, Mexico said that the United States had admitted that producers of 61.7 per cent of regional production were ultimately found to support the petition. A support by about 62 per cent of the production could not be interpreted as support by all or almost all. Furthermore, Mexico pointed out that since the data on support cited by the United States was gathered during the investigation, it was not clear whether the petition had this level of support prior to initiation of the investigation. Moreover, the estimates for industry support were calculated from the replies to questionnaires sent out by the Commission, and these questionnaires were not sent for the purpose of "standing" but for the purpose of injury. Thus, the Department of Commerce did not actively participate at all in verifying "standing", nor did it have any data to assess "standing" prior to the initiation of the investigation.

3.3.28 The United States agreed that silence of producers regarding the petition should be interpreted as neither support nor opposition. It pointed out, however, that though the initiation notice in the Federal Register was the sole official means of asking the industry affected for its views on the petition, the petitioners almost always consulted with the Department of Commerce before filing a petition and, at times, might even be dissuaded from filing by the Department of Commerce if the Department of Commerce was of the opinion that support for the petition was lacking. The Department of Commerce had 20 days to make a decision

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[1] In support of this proposition, Mexico cited the conclusions of the "United States - Stainless Steel" panel. Doc. ADP/47, page 79.

regarding initiation. However, once the petition was filed, questionnaires were sent out by the Commission within the first week, and domestic producers were allowed to contact the Department of Commerce even before the initiation notice by the Department of Commerce was issued. The information gathered by the Commission in the context of the injury enquiry was, however, normally not provided to the Department of Commerce. Thus, the estimate that producers accounting for about 62 per cent of the production supported the petition was not available to the Department of Commerce, and thus was not considered in determining whether to initiate the investigation. Nonetheless, the information regarding lack of support was monitored by the Department of Commerce throughout the investigation, and in one case the authorities had revoked the order because of lack of support.[1] Usually, in major cases, if support was challenged and the issue was raised by respondents, the Department of Commerce would make an assessment even at the time of the final determination.

3.3.29 Mexico pointed out that the United States agreed that "standing" was an ongoing requirement, otherwise the Department of Commerce would not monitor it throughout.

3.3.30 The United States said that the Department of Commerce did not monitor "standing" during or after an investigation. The legislative history accompanying the statutory provision governing administrative reviews and revocation of anti-dumping duty orders suggested that the Department of Commerce should revoke orders that were no longer of interest to the domestic industry. Accordingly, the Department of Commerce had revoked orders based upon the expressed lack of interest by the domestic industry. These revocations, however, were not pursuant to the initiation provisions of the Agreement or United States law. The United States said that it had met the requirements under the Agreement for initiating the investigation in this case.

3.3.31 Mexico said that the United States had agreed that the Department of Commerce in general did not even make an attempt to get information on the level of industry support for a petition prior to initiating an investigation. In this case, the Department of Commerce certainly did not have the requisite information prior to initiation, and even the information that about 62 per cent of the industry supported the petition was not available to the Department of Commerce because the Commission did not give it to that agency. Moreover, the 62 per cent support could not be construed as support by or on behalf of producers of "all or almost all" of the production in the region, which was the initiation standard in a regional industry case. For all these reasons, Mexico considered that the United States had not met the initiation criteria in this case.

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[1] Oregon Steel Mills v. United States, 862 F.2nd (Fed. Cir. 1988).

3.4 Determination of injury

3.4.1 Mexico argued that the determination of injury in this case violated the Agreement because of: the cumulative injury assessment (cumulation) of Mexican and Japanese imports and price effects; the use of aggregate and average data for determining the regional injury; the use of inappropriate price data in the determination of price undercutting; and the inclusion of related producers in determining injury to regional industry, affecting the key notion of causal link between dumping and injury.

(a) Cumulation

3.4.2 Mexico clarified that it was not contesting the consistency of the cumulation practice within GATT, but rather the way in which it had been done in the present case. Mexico pointed out that Article 4:1(ii) explicitly stated that regional injury determination was an exception. By cumulating in a regional industry case, the United States had interpreted broadly, rather than narrowly, the exceptions to the Agreement. By cumulating Japanese and Mexican imports and price effects, the United States had also combined two cases that involved different timetables, different regional industries and separate investigations, and thus had cumulated Japanese imports without even a preliminary determination of dumping for them. It had also used petitioner's allegation of dumping margins which did not constitute positive evidence or provide the basis for an objective examination of the effect of dumped imports. Moreover, cumulation across two regional markets implied cumulating across two isolated markets. In addition, the United States law had prevented the Mexican respondents from questioning the alleged Japanese dumping margins, and thus had precluded full opportunity of defence of their interests which was guaranteed by Article 6:7.[1]

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[1]Mexico argued that in this case, cumulation was not only completely unworkable, but incompatible with the United States' obligations under the Agreement. Mexico pointed out that even the Commission had recognized the fundamental problems that the cumulation practice posed in this case. Mexico quoted Commissioner Brunsdale, who said that "[t]his 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", and "[t]his case provides an example of the problems caused when petitions are filed at different points in time while we are required to cumulate the effects of imports from the various countries". Final Injury Determination, pages 25 and 34.

(i) No preliminary dumping determination for the Japanese imports

3.4.3 Mexico argued that the Japanese imports which were cumulated with Mexican imports were not dumped imports because the Department of Commerce had not made even a preliminary determination of dumping for these when the final injury determination was made in the Mexican case. This violated Article 3:1 (which required that injury determinations involve an objective examination of dumped imports and their effects on prices and domestic producers), Article 3:4 (which required that injury be caused by dumped imports), and Article 4:1(ii) (which required that injury to regional industry be caused by dumped imports). Furthermore, an infringement of these provisions meant that Article 1, which governed the circumstances under which anti-dumping investigations were to be initiated and conducted, had also been violated.

3.4.4 Mexico pointed out that at the time of the Commission's final determination in the Mexican case (13 August 1990), the only active proceeding in the Japanese case was the Commission's preliminary injury investigation. At the time of the Commission's final injury determination in the Mexican case, the Department of Commerce had not even received responses to its questionnaires, upon which it would base its determination of Japanese dumping. Since the Department of Commerce, and not the Commission, was the agency with legal jurisdiction and professional competence to evaluate allegations of dumping, in legal terms the Japanese imports could not have been considered to be dumped imports at the time of the final determination in the Mexican case. Thus, the United States action violated the Article 3:4 requirement that "[i]t must be demonstrated that the dumped imports are, through the effects of dumping, causing injury ... and the injuries caused by other factors must not be attributed to dumped imports" (emphasis added by Mexico). Mexico pointed out that the text of a footnote to this sentence provided that "[s]uch factors include, inter alia, the volume and prices of imports not sold at dumping prices, ...". In addition, Mexico claimed that the United States' action did not meet the requirement of Article 4:1(ii) that there be "a concentration of dumped imports into such an isolated market" in order to support a regional injury determination (emphasis added by Mexico). Similarly, Article 3:1 provided that "[a] determination of injury shall be based on positive evidence and involve an objective examination of both (a) the volume of dumped imports and their effect on prices in the domestic market for the like products, and (b) the consequent impact of these imports on domestic producers of such products" (emphasis added by Mexico).

3.4.5 Mexico said that the Department of Commerce had finally found substantially lower Japanese dumping margins than those alleged by the petitioners, and might have found that some imports had not been dumped at all. Since cumulation took place with regard to volume of imports, market share and the margins of dumping, and since these were the three pillars of the analysis used by Commissioner Brunsdale, the determination of injury in this case was in violation of the Agreement. Mexico expressed concern about the United States' assertions that "regardless of the investigation's

procedural posture", the cumulation practice was well established in that country if imports were "subject to investigation". Mexico added that cumulation had been decisive in this case.

3.4.6 The United States said that the Agreement did not prohibit cumulation, and the drafters of the Agreement had considered cumulation but had left the methodological issues to the investigating authorities. Article 8:2 showed that the Agreement contemplated that more than one country might be involved in an anti-dumping proceeding. Article 3 specified the factors to take into account in the determination of injury, but no one or several of these factors could necessarily give decisive guidance.

3.4.7 According to the United States, the Commission did consider the impact of dumped Mexican imports upon the domestic industry in making its determination. Mexico had misconstrued Article 3:4 when it asserted that the United States erred by cumulating Japanese imports that had not yet been affirmatively established as dumped. Article 3:4 essentially required the administering authorities to ensure that injury to the domestic industry resulted from the effect of dumped imports under investigation and not from other imports or market forces unrelated to dumping. The United States initially argued that in Article 3:4, the phrase "imports not sold at dumped prices" referred to imports from countries that were not subject to anti-dumping investigations. The United States later clarified that it "makes no presumption that imports subject to investigations are dumped. ... [U]nder United States law, only [the Department of] Commerce may make the determination whether imports subject to investigation are dumped. Thus, in conducting its injury investigation (and in determining whether to cumulate imports from different countries that are under investigation), the Commission must assume that the imports are dumped unless and until [the Department of] Commerce determines that they are not" (emphasis by the United States).

3.4.8 Furthermore, the United States said that Article 3:4 contained no mention of the margin of dumping and did not require consideration of dumping margins in making a determination of material injury. Thus, the margin of dumping for Japanese imports was irrelevant. Moreover, though the margins of Japanese dumping finally determined were lower than those alleged by the petitioners, there was no flaw in the analysis because the final margins which were determined were similar to those for Mexico. The United States pointed out that the economic analysis which Commissioner Brunsdale considered in making her determination, prepared by the Commission's staff, made the use of value inputs for various parameters (import volume, the margin of dumping, and the elasticity of demand, supply and substitution) only for Mexican imports. The relevant information indicated that the values for those parameters for Japanese imports would not have yielded significantly different results. Thus, the results regarding material injury would not have been different even if the two cases had started at the same time. In addition, because no duty could possibly be imposed on Japanese imports as a result of the Commission's

determination in the Mexican investigation, the United States' determination did not violate the Agreement's requirement that there had to be a determination of dumping and injury before imposing anti-dumping duties. The duties on Mexican imports were based on such findings.

3.4.9 The United States also stated that data on volume and import share were available to the Commission both on a cumulated basis and separately for Japanese and Mexican imports. In fact, the data on prices were not cumulated across the sub-markets of the Southern-tier region, and were considered separately for each sub-market. The Commissioners took into account both the cumulated and disaggregated data in making their determination, and hence Mexico was not correct in asserting that the determination was based only on cumulated imports. Moreover, if any of the respondents had raised the issue of cumulation during the administrative proceedings in the same manner as raised here, the Commissioners could have made an alternative determination with only Mexican imports. The United States pointed out that in the past, the Commission had made such an alternative determination when the issue had been raised.

3.4.10 Mexico agreed that the Agreement did not have any provisions relating particularly to cumulation, but argued that the way in which cumulation had been done in this case violated affirmative obligations of the United States under the Agreement. Cumulation had nullified Mexico's fundamental rights under the Agreement. Mexico argued that the view that the drafters of the Agreement had left the methodological issues regarding cumulation to the investigating authorities was an over-simplified interpretation of the cumulation practice, and added that if one issue had proved to be controversial in the Uruguay Round negotiations on Anti-Dumping it was precisely this issue, which it had not even been possible to incorporate in any form in the Draft Final Act of 20 December 1991.

3.4.11 Mexico said that the United States' suggestion that dumping margins were not relevant was contradicted by the central role played by dumping margins in Commissioner Brunsdale's analysis. Regarding the Japanese dumping margins, Commissioner Brunsdale had found: "For cement imports from Japan, the only information we have on the dumping margins is that alleged by petitioners, who allege margins ranging between 98 and 125 percent. These margins suggest that, absent dumping, prices in the domestic market for the subject imports would have been significantly higher than they were over the period of investigation".[1] Furthermore, two additional factors which were decisive in Commissioner Brunsdale's analysis were the volume of imports and market share, both of which were taken into account on a cumulated basis. Mexico said that whatever the final margins of Japanese dumping, they were speculation at the time when cumulation was done. The Japanese dumping margins were found 8 months after the conclusion of the Mexican case, and were 75 per cent lower than originally alleged by the petitioners of the Japanese case.

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[1]Final Injury Determination, page 34.

3.4.12 Mexico also emphasized that the Commissioners did not analyze Mexican imports separately from Japanese imports in order to make their determination of material injury. It was clear from their comments that when Commissioners Brunsdale and Lodwick referred to the word "imports", they were referring to combined Mexican and Japanese imports, unless they specifically stated otherwise.[1] Also, while anti-dumping duties on Japanese imports had not been imposed without a determination of their being dumped, no anti-dumping duties in the Mexican case were established based solely on Mexican imports. Mexico claimed that the United States also recognized this point because it had argued that "had Mexico or any respondent raised the cumulation argument presented to the panel, the Commission could have issued an alternative determination regarding the injurious effects of Mexican imports alone, as it has in other instances" (emphasis added by Mexico). However, the problem was that the alternative injury test was not done and thus, it was not possible to claim that an affirmative finding of injury would have been made on the basis of only Mexican imports. Mexico said that the United States' assertion in this regard was speculative, and that the Panel was not called upon to analyze what the Commission could have done, but what it effectively did in this case.

3.4.13 Mexico said that it had been unable to find another instance in which any other government had ever cumulated imports from two or more countries in a final injury determination, without a determination of dumping against imports from all countries that were subject to cumulation. Mexico gave the example of Canada's protest letter to the Commission, which stated that "... the Canadian Import Tribunal does not cumulate for the purpose of injury without a final determination of dumping". In this context, Mexico also pointed out that the European Communities had said that such cumulation would not have occurred in their system. They would have stayed the Mexican investigation and cumulated with Japanese imports once there was a determination of dumping for them (see section 4).

3.4.14 The United States agreed that dumping margins were an important element of Commissioner Brunsdale's elasticities analysis, but said that they were by no means the only important element, nor were they determinative. Commissioner Brunsdale had considered the alleged Japanese

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[1] Mexico quoted from several parts of the Final Injury Determination to support this assertion: "The ratio of combined imports from Mexico and Japan to consumption in the Souther-tier region therefore ranged from 10 per cent in 1986 to 16 per cent in 1989" (page 33); "These margins [reference to both Japanese and Mexican margins] suggest that, absent dumping, prices in the domestic market would have been significantly higher" (page 34); "The cumulated LTFV import's effects on prices of producers in the southern-tier region have adversely affected income-related indices discussed above, such as profits, cash flows and return on investments, and thus, the domestic industry's ability to invest ... Taken as a whole, the record evidence supports the conclusion that the regional industry has been materially affected by cumulated LTFV imports" (page 65), etc.

margins in her analysis, but noted their preliminary nature and that they might decline after investigation by the Department of Commerce. The United States emphasized that Mexico had not challenged any of the fundamental evidence in this case: for the regional industry, there had been a decline in unit values, employment and financial performance, all of which were also pillars of the basis for determination of injury by Commissioner Brunsdale. And in any case, the main basis of Commissioner Brunsdale's analysis was the data on Mexican imports and import prices.[1] Furthermore, the Japanese imports had been ultimately determined to be dumped, with the dumping margins being similar to those for Mexican imports.

3.4.15 The United States said that its cumulation analysis was consistent with the practices of other contracting parties, such as Canada and the European Communities. In those countries, however, unlike the United States practice, there were no regulatory or statutory provisions governing the factors or criteria used in determining whether cumulation was appropriate, and the decisions of the national authorities did not elucidate this issue. Regarding Mexico's point relating to the Uruguay Round Draft Final Act of 20 December 1991, the United States said that it was irrelevant that proposals to improve the process might have been rejected during the negotiations subsequent to the adoption of the Agreement. The United States said that although the process could be strengthened, the existing Agreement contained discrete procedures that had to be followed, and the Agreement had left the methodological issues regarding cumulation to the investigating authorities.

3.4.16 Mexico said that a determination that Japanese imports were being unfairly traded was an essential procedural prerequisite to the cumulation of Japanese imports with imports from Mexico. Moreover, in this context, if there was any argument regarding "retroactive curing", Mexico's position was that such curing would be unworkable and grossly unfair to respondents.[2] To support this view, Mexico cited the finding of the

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[1]The United States pointed out that in the Final Injury Determination, Commissioner Brunsdale had concluded that: the market penetration of Mexican imports alone was significant during the period of investigation and the market penetration of cumulated imports from Mexico and Japan was even higher (page 33); the average dumping margins for Mexican imports alone was relatively high, at over 50 per cent, and the alleged margins for Japanese imports ranged from 98 to 125 per cent (page 34); the cement imported from Mexico was 'highly substitutable' for domestically produced cement (pages 36-37); the domestic industry's sales revenues were 'significantly reduced' below the level 'one would expect had the imports from Mexico been fairly traded' (page 45).

[2]According to Mexico, curing would have to work both ways, i.e., it should result in the revocation of injury determinations that were based on cumulated imports if these imports were found later not be be dumped or to be dumped at significantly lower margins.

"United States - Stainless Steel" panel, that because "standing" was an essential procedural requirement, it could not be cured retroactively. Similarly, in this case, the United States had violated essential requirements under the Agreement. Further, Mexico said that allowing "retroactive curing" would confer the Panel's approval on use of the late-filing "cumulation loophole", and argued that in this case, there was no ground for curing because the Department of Commerce had found substantially lower dumping margins than those alleged by the petitioners, and might have found some Japanese imports not to be dumped at all.

3.4.17 The United States said that it had not argued that the subsequent final determination of Japanese dumping "cured" any defect in the final determination in the Mexican case; rather, the Mexican case required no curing because it conformed to the Agreement. The United States had merely pointed out that to the extent that the Panel were to conclude that the United States had violated a provision of the Agreement, any such violation did not result in an unwarranted finding. Moreover, for the reasons stated earlier, the United States had objected to relying on the report of the "United States - Stainless Steel" panel.

(ii) Cumulation across two different regional markets

3.4.18 Mexico argued that in economic terms, a regional market was an isolated market in that all or almost all of the production and consumption of the product in question had to take place within the designated regional market. Thus, by definition, the regional market defined in terms of Article 4:1(ii) for Japanese imports had to be isolated from the other regional market which was defined for the Mexican case. However, the evidence showed that the add-on effect of Mexican and Japanese imports through cumulation was not restricted to the area where both sets of imports occurred jointly. Such cumulation across non-identical regions contradicted the very principle on which a regional investigation was supposed to rely, namely the concept of isolated market as mentioned in Article 4:1(ii). The mere fact of cumulation would, by itself, presuppose the interconnections in production and trade that this definition denied. It was not possible to sustain that the region was at the same time an "island" and part of the "mainland", particularly for cumulation, which was a doctrine developed to deal with the so-called "hammering effect" of two or more import sources on a single domestic industry. The notion of a single domestic industry in an investigation was certainly behind the whole concept of injury test provided for in the Agreement, and by definition, two isolated markets designated according to the criteria in Article 4:1(ii) contained two different industries. Therefore, the United States had violated the basic principle of Article 4:1(ii) by cumulating across two regional markets.

3.4.19 Mexico claimed that in this case, cumulation across two regions implied a universal averaging that arbitrarily loaded the numbers and ensured apparent joint injury throughout the entire Southern-tier region containing 38 producers, while only 8 of these were in the region covered by the Japanese case, i.e. Southern California. In most of the regions

outside Southern California, the allegedly dumped Japanese imports were not present at all. Thus, cumulation meant an inappropriate analytical exportation of Japanese cement and price effects to the rest of the region.

3.4.20 The United States said that Article 3, which set forth the criteria for injury determinations, was not phrased in terms of country-specific information or determinations. Though the regions were different in the two cases, the industries were not different because the producers were producing the same like product. Moreover, the region in which Japanese imports were concentrated was fully contained within the Southern-tier region, and hence the two were not isolated regions. In the determination before this Panel, there was only one region at issue: the Southern-tier region. This region satisfied the market isolation criteria of Article 4:1(ii), and was the region that the Mexican respondents contended that the Commission should consider. If the region originally proposed by the petitioners had been agreed by the Mexican respondents, then the alleged spread of the effect of Japanese imports would not have occurred. Had the respondents not proposed a region extending across the entire southern United States, the alleged "spread" of the effect of Japanese imports would not have been an issue.

3.4.21 The United States claimed that the effect of cumulating Japanese imports that only entered California was mitigated by application of the regional injury standard that "producers of all or almost all of the production" be injured in this case. In particular, consideration of plant-level and subregional data provided such a mitigating effect. The Commission recognized that the Southern-tier regional industry contained several sub-markets in which producers and imports faced different local market conditions.[1] The Agreement did not stipulate that a regional industry could not contain within its boundaries a subregion which could, in appropriate circumstances, itself qualify as a regional industry pursuant to the Agreement. There was no dispute that Mexican and Japanese imports simultaneously affected producers in California. The concentration of Japanese imports in California did not imply that there was no impact on the Southern-tier region. It only meant that the impact was localized.

3.4.22 The United States also said that imports from Japan and Mexico were not simply averaged. Import volume and market penetration figures for imports from Mexico and Japan were calculated separately and an average figure for cumulated imports was calculated as well.[2] The Commissioners considered both the separate and the averaged data. There was no averaging of import prices. The price statistics were collected separately for different sub-markets and considered separately for each sub-market.

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[1]The United States said that Commissioner Lodwick had specifically discussed the effects of positive local market conditions in his analysis, finding that the producers benefitting from such conditions were nonetheless injured.

[2]Final Injury Determination, pages 33 and 60.

In the case of Japanese imports, the price data was collected only for California.[1] Moreover, as mentioned earlier, Commissioner Brunsdale's analysis was based primarily on data for Mexican imports only.

3.4.23 Mexico clarified that during the administrative proceedings, the Mexican respondents had argued for a national injury investigation and not for a regional industry case involving the Southern-tier. They had acquiesced to the Southern-tier region as an alternative to the two separate regions that had been sculpted by the petitioners. The reason that the Commission did not finally accept the two regions proposed by the petitioners was that the United States' domestic legislation did not allow the handling of a case with two separate regions simultaneously.

3.4.24 Mexico expressed surprise at the United States' position that there was only one region in this case. This was not true because cumulation took place for imports into two regional markets. Mexico contested the United States' assertion that any cumulation flaws had been mitigated by the application of the regional injury standard. Such a standard was an obligation in its own right and not a compensation for anything else. In practice, however, such a higher standard had not been applied by the United States, and the injury analysis as conducted was weak and not well-founded. Mexico said that the only action that would "mitigate" cumulation flaws was an outright revocation of the United States' decision.

3.4.25 Mexico reiterated that the evidence showed that the determination by the two Commissioners was based on cumulated imports and not on Mexican imports alone. Regarding the data to which the United States had referred in order to show that Japanese and Mexican imports had been considered separately across different regions[2], Mexico pointed out that the available information actually provided the opposite picture. The data showed that the Japanese and Mexican imports had been considered separately only for the Southern-tier region as a whole, and not for different subregions of the Southern-tier region. Thus, no distinction had been made between California and other subregions when import volume and import share were cumulated.

(iii) Objective examination on the basis of positive evidence

3.4.26 Mexico argued that the Commission had relied on petitioner's allegations of Japanese dumping (which were "extraordinarily unreliable"), and on the assumption that all the imports from Japan were dumped. Petitioner's allegations could not be considered as "positive evidence". Mexico said that the Department of Commerce had made a cursory finding

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[1]The United States said that the price data could not be revealed because of their confidential nature.

[2]Final Injury Determination, Tables 25 and 27, pages A-65, A-66, A-70 and A-71.

before initiating the investigation that the petition for the Japanese case was in proper form, and this did not constitute a basis for an objective examination of dumping. By cumulating Mexican and Japanese imports to determine injury in this case, the United States had violated the requirements under Article 3:1 of conducting an "objective examination" on the basis of "positive evidence" of the effects of the volume of dumped imports on prices and domestic producers.[1] Moreover, Article 3:2 had been violated because it was an amplification of Article 3:1, and Article 3:4 had been violated because the causal link with injury was made without any positive evidence of Japanese imports being dumped.

3.4.27 In this context, Mexico referred to the Article 3:6 requirement that "[a] determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility ...". Mexico argued that it was not credible that the signatories to the Agreement intended to prohibit reliance on allegations in "threat" cases but to permit it in "injury" cases. Similarly it was not credible that signatories would allow allegations to meet the "positive evidence" standard of Article 3:1 but would distinguish "facts" from "mere allegation" in Article 3:6.

3.4.28 To support its contention, Mexico also referred to advice from the Commission's Office of General Counsel, according to which allegations did not amount to positive evidence.[2] In addition, Mexico quoted former Vice Chairman of the Commission, Ronald Cass, as explaining the Commission view that "[a]lleged margins are, of course, based on unverified information contained in the petition, and they generally can be presumed to represent

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[1]Mexico pointed out that Article 3:1 required that "[a] determination of injury for the purpose of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products" (emphasis added by Mexico).

[2]Mexico quoted from the memoranda as follows: "Commission conclusions regarding intentions must be based on positive evidence tending to show an intention to increase the levels of importation ... Statement of intentions by parties subject to an order, as well as the information submitted by such parties, may be self-serving and subjective" (General Counsel Memorandum, GC-H-322, November 21, 1984, emphasis added by Mexico); "The Commission's conclusions must be based on 'positive evidence' ... The Commission should not base its conclusions on [statements of parties which] ... are likely to be subjective, and may be self-serving" (General Counsel Memorandum, prepared by J.C., GH-H-334, December 4, 1984); "The injury determination shall in all cases be based on positive findings and not on mere allegations or hypothetical possibilities" (Idem., GC-F-345, October 7, 1982).

Petitioners' maximum estimate of magnitude of dumping that has taken place. In most cases, after the alleged margins have been subject to scrutiny by the Department of Commerce, the actual margin turns out to be far lower."[1]

3.4.29 Mexico said that a petitioner's allegations might be used only in limited circumstances, which were set out in Article 6:8 of the Agreement: "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings, affirmative or negative, may be made on the basis of the facts available" (footnote omitted). According to Mexico, these conditions did not apply to the Mexican case, and hence the use of petitioner's allegations was not justified.

3.4.30 The United States argued that Mexico was not correct in asserting that there was no "objective examination" of the injurious effects of dumped Mexican imports in conformity with Article 3. The evidence of injury caused by Mexican imports alone would have sufficed to support an affirmative determination. Most of the evidence concerning price suppression and depression concerned dumped imports from Mexico specifically. The exhaustive opinions of the two Commissioners who formed the majority recited ample evidence to support an injury determination based solely upon Mexican imports. Thus, even assuming that the Commission had erred in considering the impact of Japanese imports, that error could only be considered harmless. Moreover, the Commission already had issued a preliminary determination of material injury in the Japanese case when it issued its final determination of injury in the Mexican case.

3.4.31 The United States said that contrary to Mexico's contentions, there was "positive evidence" of Japanese dumping and the decision to cumulate was not based on "mere allegations". The certified petition in the Japanese case included, in support of dumping allegations, an investigator's report and affidavit concerning Japanese home-market prices and United States export prices. Prior to initiating the Japanese investigation, the Department of Commerce had thoroughly reviewed the petition and supporting data, and had even recalculated the estimated dumping margins. This demonstrated that there was "positive evidence" that the Japanese imports were dumped, because positive evidence meant materials that supported a fact or conclusion, as opposed to mere allegations or arguments.[2] Further, in view of the ultimate finding that Japanese dumping margins were in excess of 64 per cent, Mexico's complaints regarding "mere allegations" rang hollow.

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[1] Certain Telephone Systems and Subassemblies Thereof From Japan and Taiwan, Investigation No. 731-TA-426 and 428 (Final), USITC Publication No. 2237 (1989), page 274.

[2] The United States clarified that it did not maintain that the "positive evidence" submitted in support of a petition in order to warrant initiation was necessarily sufficient to warrant final imposition of anti-dumping duties.

3.4.32 The United States said that memoranda of the Commission's General Counsel cited by Mexico had nothing to do with the circumstances of the Mexican cement investigation. They were over seven years old, and addressed issues entirely distinct from the question of whether cumulation was appropriate in regional investigations or in investigations that were on different procedural schedules. Moreover, contrary to Mexico's implication, those memoranda did not conclude that statements and information submitted by parties were not positive evidence. "Positive evidence" did not mean "proven fact" -- the memoranda indicated that statements and information submitted by parties might be self-serving, and that the Commission should remain aware of that possibility in weighing such statements and information. The United States explained that in one of the memoranda, the referenced text was a quotation from the 1967 Agreement, to which the United States was not a signatory. In the other two memoranda, the referenced statements were quotations from an opinion of the United States Court of International Trade in a decision involving a request by exporters and importers for review of an anti-dumping duty order based on statements of intention which were not supported by any evidence or data. However, in the Japanese case, the petition was very thorough, with several background documents to back the claim. The Department of Commerce had also reviewed it before initiation. The United States noted that it had attempted to provide a reasonable definition of positive evidence, while Mexico had not provided any definition.

3.4.33 Regarding the views of Vice-Chairman Cass, the United States said that the view of the Commission was only that expressed by the majority, and not that of any individual commissioner.

3.4.34 Mexico said that it did not accept the United States' definition of "positive evidence".[1] Furthermore, it was up to the negotiators to come up with a definition if they so desired.

3.4.35 Mexico disagreed with the United States' view that the petition for the Japanese case was based on positive evidence because it included "an investigator's report and an affidavit" and that the estimated dumping margins were "even recalculated" by the Department of Commerce. Mexico pointed out that in this context, Commissioner Brunsdale had said that "[t]hese recalculations reflect certain refinements to petitioner's original estimates but rely on the basic approach adopted by petitioner rather than the approach the Department of Commerce will ultimately use".[2]

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[1]Mexico indicated that this proposed definition was illustrative of the United States' lax approach to this important element of the Agreement. Mexico said that reflecting such a loose characterization of "positive evidence", the United States had not surprisingly maintained that alleged margins of dumping of Japanese imports did in fact constitute "positive evidence".

[2]Final Injury Determination, page 34, footnote 80.

3.4.36 With regard to the United States' argument that even if there were some errors, they could be considered "harmless", Mexico said that if signatories were allowed to interpret the standards of the Agreement in the lax sense advocated by the United States, they would lose their binding character, being converted into mere formal provisions granting no rights at all. This would not be in conformity with the fact that obligations under the Agreement had to be fulfilled. Investigating authorities were required to fully provide the basis of, and to substantiate, their determinations where the Agreement imposed an affirmative obligation. Further, noting that previous panels had rejected similar allegations of "harmlessness", Mexico quoted from the finding of the panel on "United States - Taxes on Petroleum and Certain Imported Substances" that "[t]he impact of a measure inconsistent with the General Agreement is not relevant for a determination of nullification or impairment by contracting parties ...".[1]

(iv) "Full opportunity" for defence

3.4.37 Mexico said that on account of the United States rules and practice, neither the Mexican respondents nor the Japanese respondents had had any opportunity to challenge the allegations of Japanese dumping prior to the final injury determination in the Mexican case.[2] This was contrary to the requirement of Article 6:7 which stated that "[t]hroughout the anti-dumping investigation all parties shall have a full opportunity for the defence of their interests".

3.4.38 The United States said that while the Commission could not comment on the actual margins of dumping which had been calculated, because those calculations were outside its jurisdiction, Mexico could still have raised its doubts about the use of "unreliable" dumping margins. Had Mexico or any respondent raised such an argument presented here to the Panel, the Commission could have issued an alternative determination regarding the injurious effects of Mexican imports alone, similar to what it had done in other instances. Having failed to take advantage of this opportunity, "for the defence of their own interests" under Article 6:7, Mexico should not now be heard to complain.

3.4.39 Mexico said that the delegation of the United States had stated earlier that it could not speak for the Commission. Therefore, its contention now about what the Commission could have done was speculation. The Panel was asked to see what actually happened and not what could have happened.

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[1] "United States - Taxes on Petroleum and Certain Imported Substances", report of the panel (adopted 17 June 1987), BISD 34S/156, paragraph 5.1.5.

[2] Mexico said that the United States' rules and practice prohibited respondents from challenging petitioner's allegations of Japanese dumping until long after the final determination in the Mexican case (Roses, Inc. v. United States, affirmed, 706 F. 2nd 1563, Fed. Cir. 1983). Respondents also could not challenge the alleged margins in any meaningful way during the proceeding.

(b) The Use of Industry Totals and Averages By the Commission

3.4.40 Mexico argued that the Commission had used averages and aggregate data to determine injury in this case, and by doing so had violated Article 4:1(ii) because the use of such data did not meet the strict regional injury standard that "producers of all or almost all of the production in the region" had to be injured. Moreover, the Commission's attempts to generalize the average result to all or almost all of the production in the region was based on assumptions.

3.4.41 The United States argued that the Commissioners had met the injury standard, especially because they had considered plant-specific information to reach their conclusions. Their findings were not based on assumptions but on an examination of the evidence specifically pertaining to the industry in question.

3.4.42 Mexico said that Article 4:1(ii) of the Agreement imposed a more stringent injury test for the exceptional cases involving regional injury determinations (which were exceptions to an exception, i.e. Article VI), especially in view of the regional injury standard permitting anti-dumping duties to be imposed upon imports into the entire national territory instead of only those entering the region. Mexico argued that the rules pertaining to these exceptions had to be strictly construed and the basic rule was that the dumped imports had to cause injury to "producers of all or almost all of the production" within a region. Mexico said that in this case, the Commission had not met the strict regional industry criteria provided in Article 4:1(ii) because it had used averages and totals to determine injury, and averages and totals did not provide an adequate basis to ascertain that "producers of all or almost all of the production" in the region were injured. In such a situation, the investigating authority had to incorporate some check on the distortions inherent in the use of such a method. As an illustration of this point, Mexico gave an example where averaging masked the fact that not all firms in the industry were suffering losses.[1]

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[1] In Mexico's example, there were five companies, A, B, C, D and E. The respective percentage change in revenue experienced by them was 5, -15, -20, -20 and -25. These companies respectively accounted for 30, 15, 15, 20 and 20 per cent of domestic production. The weighted average revenue loss would be 12.75 per cent and would indicate material injury on average. However, this weighted average did not have the same significance in a regional industry case. Company A which accounted for 30 per cent of domestic production, experienced a gain of 5 per cent and this gain would be masked if only the average results were considered. Although the remaining producers would be materially injured, because they represented only 70 per cent of production it could not be said that the producers of "all or almost all" regional production were materially injured.

3.4.43 In support of its contention, Mexico also stated that the Commission had expressly recognized that its "aggregate" methodology was insufficient to fulfil the standards for a regional investigation[1]; the case law of the Commission portrayed the same view[2]; and in its submissions to the Panel, the United States had itself agreed that "[w]hile not required under either United States law or the Code, the Commission generally considers producer-specific information as a secondary analysis in regional industry cases to ensure that the 'all or almost all' standard is satisfied" (emphasis added by Mexico). According to Mexico, this was an acknowledgement by the United States that aggregate or average data did not meet the "all or almost all" standard, and that a consideration of producer-specific information was relevant to satisfy this standard.

3.4.44 Mexico stated that it was not merely challenging the "analytical method" of the Commission's determination in this case but the evidentiary basis and the assumption-ridden reasoning which failed to meet the specific requirements for regional injury determination under Article 4:1(ii) of the Agreement.

3.4.45 The United States said that it had already presented arguments to show that Article VI was not an exception to the General Agreement, and in its view the regional industry criteria was also not an exception. It was the injury standard applicable in the particular case of a regional industry. Further, the United States pointed out that the Agreement did not dictate any specific methodology for determining injury or causation. Article 4 required an examination of "all or almost all of the production" within the region, not a determination that "all or almost all" individual producers were injured. Likewise, the requirements for injury determination given in Articles 3:1 to 3:3 did not stipulate that a producer-by-producer analysis be conducted. The language of the Agreement did not dictate a company-specific determination of injury and a subsequent mathematical calculation of the percentage of regional production accounted

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[1]Mexico pointed out that Commissioner Brunsdale said that "[t]he evidence discussed thus far would, in a case involving a national market, be sufficient to lead me to conclude that a domestic industry has been materially injured by reason of the subject LTFV [less than fair value] imports ... [H]owever ... because this case involves a regional industry, there is an additional consideration that must be addressed". Final Injury Determination, page 48.

[2]Mexico quoted from the case of Atlantic Sugar v. United States, 2 CIT 295, 301 (1981), the view that "[u]se of aggregate data is permissible if methods of analysis insure that an accurate finding is made, with protection from the possibility of distortion of the representative quality of the data. It is readily conceivable that, absent such safeguards, injury to a region could be found even though indicators for a significant number of individual producers do not show injury, by merely combining these indicators with those from producers who do show losses. This is at variance with the statutory requirement".

for by injured producers. This was analogous to a similar calculation not being required for determining whether a "major proportion" of domestic producers had been injured in a national industry case. Significantly, no other national investigating authority employed a company-specific analysis in determining injury to a regional industry.

3.4.46 The United States said that Mexico's example showed that Mexico had made the mistake of assuming that material injury to a firm always required that it had to incur a loss. This was not envisaged in the Agreement and it was also possible that a firm which had earned positive profits had been materially injured by dumped imports. The United States contended that the Panel's task was not to assess whether a better methodology could be found, but to assess whether the methodology used had met the requirements specified under the Agreement. The United States asserted that the methodology used in this case had met the requirements.

3.4.47 Mexico said that the basic message of the example remained valid, i.e. there could be a diversity of experience regarding injury across firms and a standard of "all or almost all" meant that this dispersion had to be taken into account. Further, Mexico pointed out that Article 4:1(ii), which specified the provisions for a regional industry case, started with the words "in exceptional circumstances", which clearly showed that the regional industry situation was an exception. Mexico agreed that a finding of injury did not require that producers had to be operating at a loss. The question was not what constituted injury, but whether injury was ascertained to have been suffered by producers of "all or almost all" of the production, indeed, including those neglected "isolated groups of producers" mentioned by Commissioner Lodwick. Mexico also agreed that the Agreement did not dictate a specific methodology for determining injury or causation. Mexico clarified that it was neither advocating a specific methodology, nor suggesting that injury had to be found to have been suffered by each individual producer. However, whichever methodology was used by the signatories, it had to be capable of producing a defensible determination (whether negative or affirmative) compatible with the legal standards of the Agreement. Thus, the Panel had to examine whether the methodologies used in this case had met the provisions of the Agreement in connection with the regional industry standard.[1] Mexico said that if aggregate or average data was used to determine regional injury, it needed to be supplemented by an examination of the distribution of the otherwise aggregate effects among the firms under examination, to ensure that larger losses somewhere did not mask the possible absence of losses, or even

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[1]Mexico recalled the finding of the "New Zealand - Electrical Transformers" panel in this regard. The Panel had "noted that Article VI did not contain any specific guidelines for the calculation of cost-of-production and considered that the method used in this particular case appeared to be a reasonable one" (emphasis added by Mexico). BISD 32S/67, paragraph 4:3.

gains, elsewhere in the industry. Further, Mexico pointed out that the phrase "all or almost all" did not refer only to production, as claimed by the United States. The phrase in its entirety was "producers of all or almost all of the production": there was no production without producers, and hence it was important to consider injury to producers. According to Mexico, "all or almost all" meant 100 per cent or a percentage very close to 100 per cent. To support this contention, Mexico quoted from the Commission determination, including opinions of Commissioner Rohr and Commissioner Brunsdale, and pointed out that the Commission had consistently interpreted the phrase 'all or almost all' to require a very high threshold.[1]

3.4.48 The United States said that as in the case of the term "major proportion", the Agreement did not specify a threshold for "almost all", and all that could be gleaned from the Agreement was that "almost all" was something more than a "major proportion". According to the United States, no national investigating authority had adopted a precise benchmark for what constituted a "major proportion" of total domestic production. The proportion varied from case to case and no standard minimum proportion was required in any case. The same conclusions would apply to affirmative determinations in regional industry cases. The practice of contracting parties showed that "major proportion" could be less than 50 per cent. The interpretation of "all or almost all" advanced by Mexico would be inappropriate for the fact-based investigations and determinations required in dumping investigations.

3.4.49 Further, the United States said that while it did not reject a standard which was close to "all of the production", it did reject any standard that required a numerical or percentage benchmark for the determination of whether producers of all or almost all of the production were materially injured. Such a benchmark would be unworkable because it would entail consideration of injury on a producer-specific basis and a subsequent calculation of the percentage accounted for by those producers deemed injured. This was not required by the Agreement and was as a practical matter unworkable because it was not possible to calculate the volume of imports or the level of market penetration of imports (consideration of both of which was mandatory under the Agreement) on a producer-specific basis. Moreover, it would reduce, if not eliminate, the flexibility necessary for national investigating authorities to consider

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[1]Mexico quoted the view of Commissioner Rohr (the dissenting ITC Commissioner in this case) that "[i]n its use by the Commission in applying section 771(4)(C)(i), it is usually related to percentages in excess of 80 percent of shipments. I do not believe, however, that any single number is necessarily appropriate for all indicators in all investigations. For rough parameters, I would view 90 percent as clearly within the meaning of 'all or almost all,' while 80 percent would, absent some special facts, generally be rather too low to be realistically viewed as 'all or almost all'". Final Injury Determination, page 80, footnote omitted.

the complex facts in different investigations and would make impossible the determinations based on assessment of the totality of the relevant information. The United States argued that such a benchmark would undercut the specific direction in Article 3:3 of the Agreement that no single factor was determinative.[1]

3.4.50 With regard to the decision in the Atlantic Sugar case, quoted by Mexico to support its claim regarding the interpretation of "all or almost all", the United States said that Mexico had failed to mention that the language contained in that decision had been discredited by the United States Court of Appeals for the Federal Circuit, the reviewing court for United States Court of International Trade (USCIT) decisions[2], and by another judge of the USCIT in the recently decided challenge to the same determination at issue before this Panel.[3] In the latter case, the USCIT specifically stated that its decision in Atlantic Sugar did not establish any threshold for "all or almost all", and to the extent that some safeguard was required to establish that the regional injury standard was satisfied, the Commissioners' examination of data regarding individual plants in this case was sufficient.

3.4.51 In this context, the United States also pointed out that all the examples given by Mexico of a high threshold being considered for defining "all or almost all" related to a consideration of market isolation or concentration. In fact, even for this purpose, the assessment of whether there was market isolation or concentration was not based on a high "threshold". All that was considered was whether the number in question was high in the circumstances of the particular case. It was relatively easy to get the appropriate data to calculate the proportion of regional production and consumption. However, a similar quantitative exercise could not be performed regarding injury to producers of all or almost all of the production, especially due to the difficulty of quantitatively assessing the effect of the complex factors which contributed to injury. A quantitative benchmark was therefore not appropriate. In fact, the Agreement did not impose any threshold for an injury assessment, which had to be made on the basis of the particular circumstances of the industry

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[1] Regarding Mexico's quotation from the "New Zealand - Electrical Transformers" panel relating to a method being reasonable, the United States replied that as long as a signatory to the Agreement fulfilled the specified requirements in reaching its injury determination, a panel should conclude that the party had acted consistently with the Agreement, and not consider the "reasonableness" of the methodology. A panel should resist any suggestion that it recommend to the signatory any rules, procedures or rights beyond those set forth in the Agreement, because by doing so the panel would usurp the legislative role of the negotiators, and purport to impose upon signatories obligations to which they had never agreed.

[2] Atlantic Sugar v. United States, 744 F.2d 1556 (Fed. Cir. 1989).

[3] CEMEX v. United States, Slip Op. 92-52 (USCIT, 7 April 1992).

concerned. Accordingly, neither the United States nor any other signatory had ever established a threshold for determining whether producers of all or almost all of the production were injured.

3.4.52 Mexico agreed that all the examples it had provided of previous determinations which had interpreted "all or almost all" as requiring a high threshold related to determinations of market isolation or concentration. Mexico clarified that its references to the high threshold for "almost all" used by the Commission ought not to be interpreted as a suggestion by Mexico that the Panel should determine any threshold in this case; this was a matter for the negotiators. Mexico was merely signalling the practice followed by the United States itself that confirmed the firmness with which the standard has been applied in similar cases. In this context, Mexico pointed out that the term "all or almost all" had been used in Article 4:1(ii) twice, once for the purpose of defining an isolated market, and once for the purpose of injury. Legal principles suggested that the same term in the adjacent sentences should be interpreted in the same manner, unless a different interpretation was specifically indicated. In view of the concept of an isolated market defined in Article 4:1(ii), the term "almost all" had to be interpreted as close to "all".

3.4.53 Mexico contended that in this case, the Commission majority employed an aggregate methodology much as it would have applied in a national industry case turning on an entirely different standard, namely whether producers of a "major proportion" of production suffered material injury. Allowing this determination to stand would mean an elimination of the restrictive regional industry criterion of the Agreement that was specifically negotiated and bargained for. According to Mexico, both the Commissioners which gave an affirmative finding had relied on assumptions and extrapolations about regional producers, despite data on the performance of the 38 active cement producer/grinder operations being available. Commissioner Brunsdale had assumed that if producers were injured on average, all had to be injured on account of the substitutability of cement produced by different producers: "In the current case, I find that all of the producers do suffer material injury" (emphasis added by Mexico).[1] This assumption by Commissioner Brunsdale overlooked the large area of the Southern-tier region and the high transport cost involved for marketing cement, and created a per se rule. It was simply not reasonable to assume that 38 producers, spread from Northern California to Southern Florida, were all affected by average results for the 2,500-mile region (a distance equal to that from Madrid to Moscow). Mexico also pointed out in this context that the United States had acknowledged during the consultations that cement was rarely shipped more than 100 miles from the port of entry.

3.4.54 Mexico also criticized the so-called "ripple effect" advanced by Commissioner Lodwick and said that it was an assumption which belied the isolated nature of the regional market. It particularly denied the

[1]Final Injury Determination, page 48.

difference between a regional and a national investigation.[1] Mexico also claimed that Commissioner Lodwick, in his injury analysis, did not take into account some producers who registered positive financial performance.[2] That some groups of producers had positive financial indicators was precisely the sort of information the Commissioner was required to weigh in applying the "all or almost all" standard. For a regional industry standard, before ignoring an individual producer, a judgement had to be made that the producer's contribution to total regional production was so small that it did not have any impact on whether the "all or almost all" standard was met. Mexico contended that Commissioner Lodwick did not make such a judgment.

3.4.55 Mexico said that Commissioner Rohr, who found neither injury nor threat thereof in this case, eschewed the aggregate approach. By only considering a group of producers, he found that producers accounting for a significant proportion of production were not injured. Surely, others would have also found no injury if they had considered each individual producer.[3]

3.4.56 The United States said that the determination of injury by the Commissioners was not based only on the totals and averages for the region. They had considered each of the factors specified in Article 3 for determining injury, and though the Agreement did not require it, had taken account of the plant-specific evidence. The Commission's report contained information reported by each plant in the region for capacity, production, capacity utilization, shipments, inventories, number of production and related workers, hours worked, wages and total compensation paid, and

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[1]According to the United States, the "ripple effect" had arisen due to the competitive pressure of dumped imports which had led to a transfer of some of the traditional sales from a particular market to another adjacent market, thereby transferring the effects of dumped imports from the first market to the second one.

[2]In this regard, Mexico quoted Commissioner Lodwick's statement that "I refuse 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." Final Injury Determination, page 66.

[3]In this regard, Mexico cited Commissioner Rohr's view: "Both the traditional aggregates approach and the percentage of production approach [the one he employed] are based on the same data gathered by the Commission. The data is merely organized in a different manner. When, however, the different organization leads to such strikingly different results, the possibility must be considered that one or another of the approaches distorts the actual conditions of the industry". Final Injury Determination, page 76, footnote omitted.

income-loss experience.[1] Moreover, the parties had presented their arguments and submitted documentary evidence and testimony concerning individual plants, addressing the proposed plant-by-plant analysis and discussing various related issues. The Commissioners based their determination upon evidence contained in the administrative record, in accordance with Article 6 of the Agreement, and after a careful consideration of the arguments and evidence proffered to show that producers of all or almost all of the production were not materially injured, the Commission majority had found that these did not outweigh the information on record supporting the conclusion of material injury.

3.4.57 The United States emphasised that Commissioner Brunsdale had considered all the relevant factors pertaining to this case and her determination did not result in a per se rule for every situation with substitutable products and material injury to the domestic industry on average. She had considered the argument that all or almost all producers were not injured, and had not found it persuasive. She had clearly reviewed the data on plant-level experience to reach her conclusions, and since this data was confidential it could not be mentioned explicitly or in detail in the report.[2] Also, it was incorrect for Mexico to argue that she did not consider the transport costs of cement and the large market area. The estimates of elasticity of substitution used by Commissioner Brunsdale were deliberately reduced by her to account for these factors. Moreover, Mexico was not correct in saying that cement was generally transported only 100 miles from the terminal. The estimates by the Commission staff showed that firms accounting for about two-fifths of domestic production in the region transported cement to distances between 100 and 299 miles, and some producers (accounting for 7 per cent of domestic production) transported it even further. Furthermore, there were several import terminals in the region and these import terminals were close enough to the markets in the region for the dumped cement imports to affect the competitive conditions

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[1]The United States pointed out that such data was given in the Commission's Final Injury Determination in Appendix E (pages B-63-B-64), and in Appendix F (page B-67) which compiled the replies provided by individual plants to the Commission's questionnaire request for a description and explaination of the actual and potential negative effects of imports of cement and cement clinker from Mexico on the producers' existing development and production efforts, growth, investment and ability to raise capital. Information in both these Appendices was confidential, but was provided to the Commissioners.

[2]The United States said that Commissioner Brunsdale's consideration of information concerning individual producers was reflected on pages 50-51 of the Final Injury Determination and in the references to this information made by her at various points: page 19, footnote 36; page 22, footnote 45; and pages 32-33, footnote 75.

in these markets.[1] The United States informed the Panel that answers to the Commission's questionnaires showed that there was no evidence of any specific producer that did not face import competition.

3.4.58 Concerning Commissioner Lodwick's analysis, the United States said that while it was based upon criteria regarding injury for the region as a whole, it also included an examination of the record pertaining to the individual producers in the region.[2] Regarding Mexico's assertion that Commissioner Lodwick did not consider some producers who experienced positive economic conditions, the United States claimed that the statement itself showed that Commissioner Lodwick had considered these producers and then decided not to alter his opinion on account of their experience because though certain producers might have benefited from improving local market conditions, they were nonetheless materially injured due to competition from dumped imports.[3] The United States pointed out that according to the Agreement, no one or several of the factors listed under Article 3 for consideration in a determination of injury necessarily provided decisive guidance. In fact, the investigating authorities retained the discretion to consider factors in addition to those specified and to decide how much weight to accord to any factor. Moreover, while the Agreement required consideration of, inter alia, the profits of the industry, it did not require that an injury record show losses or declining

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[1]The United States presented to the Panel a chart showing the location of the import terminals in the region. Mexico objected to the introduction of this chart on the grounds that it was from an economic paper by the petitioners. Mexico contended that it could also present another chart from a paper by the respondents which could give a different picture of the situation.

[2]The United States said that Commissioner Lodwick explicitly stated that "[i]n making this determination, I have examined the record of individual producers in the region". Final Injury Determination, footnote 53, page 66. Commissioner Lodwick's consideration of individual producers also was reflected on page 65, footnote 51, and page 66, footnote 53. His discussion on pages 65-66 of his opinion, concerning certain isolated groups of producers that might have benefited from positive local market conditions, but were nonetheless injured by dumped imports, reflected his consideration of individual producers.

[3]The United States said that after the statement regarding the producers experiencing positive economic conditions, Commissioner Lodwick went on to say that "[n]or do I believe that increases in production due to increased demand, even if experienced by most of the industry, require a negative determination for the industry as a whole, let alone under circumstances in which the increased demand is limited to local markets. In this case such increased demand is a phenomenon limited to specific local markets. Further, the statute does not require a finding that producers of all or almost all of the regional production are operating at a loss, but only that such a proportion are 'materially injured ... by reason of the subsidized or dumped imports'". Final Injury Determination, pages 66-67.

profits in order to find material injury. In fact, consistent with Commissioner Lodwick's statement, the Agreement did not require a finding of no material injury by reason of dumped imports even when some indicators of the performance of an industry were positive.[1] In the Mexican case, virtually every performance trend was downwards for all producers except those in Florida and California. Producers in these two states had benefited from increased demand in these regions from 1986 to 1989. But even in these two regions, producers suffered significant price depression and price suppression, and lost substantial market share to dumped imports during the period of investigation. The United States emphasized that Commissioner Lodwick had not found that any single producer or any group of producers was not injured.

3.4.59 Further, the United States said that Mexico's interpretation of Commissioner Lodwick's comment regarding the ripple effect was not correct because the ripple effect did not involve a wholesale shifting of sales across the entire region. Moreover, there was substantial evidence of the ripple effect in the Commission's record and Commissioner Lodwick had mentioned the ripple effect while considering CEMEX's argument that a substantial number of producers in the Southern-tier region were not injured because imports were either not present or were not an important factor in the local marketing areas in which those producers sold cement. More importantly, the ripple effect was a secondary consideration which Commissioner Lodwick found supported his determination that the "all or almost all" standard was satisfied.

3.4.60 The United States also stated that Commissioner Rohr did not eschew the aggregate approach, did not look at groups of producers constituting a significant percentage of production and did not base any conclusions regarding injury on a company-specific basis.

3.4.61 Mexico said that the 100-mile limit mentioned by it was based on the response of the United States to Mexico's questions during consultations. As to the claim by the United States that the Commissioners

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[1]The United States pointed out that, as provided in Article 3:3, an industry that was benefiting from a period of high demand in its local market might nevertheless be injured by dumped imports if these adversely affected the industry's "market share, profits, [and] return on investment" and caused "negative effects on cash flow, ... growth, [and] ability to raise capital or investment". For the cement industry, which experienced cyclical demand following the rise and fall of construction activity, the United States argued that Commisisoner Lodwick found that it would be a mistake to conclude on the basis of a rising demand in some market that the producers in that market were not injured by dumped imports, provided that price suppression and depression in the market, lost market share, depressed profits, and an inadequate return on investment prevented the expansion or modernization of production facilities in the very areas where increased consumption should have heralded improving financial conditions.

considered plant-specific data, Mexico said that the nature and description of Commissioner Brunsdale's analysis demonstrated that she used only totals and averages. Similarly, Commissioner Lodwick's entire analysis of the plant-specific information consisted of the following footnote: "In making this determination I have examined the record of the individual producers in the region". Mexico argued that Commissioner Lodwick failed to provide proper orientation as to how he met the strict regional injury standard. Mexico also contested the United States' claim that these two Commissioners specifically considered the arguments of the respondents relating to regional injury criteria. According to Mexico, the report of the final determination showed that while Commissioner Brunsdale refused to consider the relevant arguments, Commissioner Lodwick dealt with the issue in a cursory manner in a single footnote.

3.4.62 Mexico said that Commissioner Brunsdale's finding of regional injury was based on the assumption of cement being a product substitutable with that produced by other producers in the region, which denied the differences across firms, and the whole point of the "all or almost all" standard was to consider the differences. Guided by her fungibility criteria, Commissioner Brunsdale found that all producers in the region were injured; and Commissioner Lodwick said that some producers did well and then ignored these producers. Mexico asked what the legal basis was for selectively ignoring some producers in the region. Commissioner Lodwick did not use any credible methodology for determining that the "all or almost all" standard was met. For example, it was not clear how he factored in the ripple effect into his analysis; also, why did the ripple effect stop at the border of the Southern-tier region, i.e. what, other than an assumption, stopped the injurious effect of the imports from rippling out of the region? The rippling-out-of-the-region effect would imply that the isolated nature of a regional market would not be maintained. Similarly, the fungibility assumption implied that any injurious effect within the region would not be restricted to it, and if injury was found within the region, this injury would be transferred to the national market as a whole. In this regard, Mexico also asked how firms in particular areas could be injured if there was no competition with imports in those areas.

3.4.63 The United States reiterated that the determination of material injury by the two Commissioners was not based on an assumption. Their analysis took into account the specific conditions of competition in the industry and the plant-level data, and this could be gleaned from their comments. It was not possible for the Commissioners to mention in their comments the details of all the points they considered in reaching their conclusions. Additionally, the plant-level data was confidential and thus, it was not possible for the Commissioners to provide any details in their comments. How the information was considered was clear from Commission practice. The Commission had considered plant-specific information for exactly the same purpose that Mexico argued that some consideration of "distribution" was necessary -- to determine whether the operations of one producer skewed the aggregate data so as to suggest injury where such a conclusion was not warranted.

3.4.64 According to the United States, the consideration of both the detailed information and the arguments regarding the regional injury standard by Commissioner Brunsdale showed that her conclusions were not based on the the assumption of fungibility or substitutability. Moreover, her estimates of fungibility and substitutability of cement were not assumptions, but reflected the actual situation in the cement industry. In fact, even the estimates of elasticities which Commissioner Brunsdale considered in her analysis reflected the particular situation of the industry.[1] Commissioner Brunsdale's comments also showed that she had not rejected the methodology proposed by Mexican respondents to assess injury to producers of all or almost all of the production, but had reviewed it and found that it was not sufficiently transparent to allow assessment of the methodology's correctness and that it was unpersuasive.

3.4.65 Regarding the Mexican point that it was not clear how Commissioner Lodwick had factored in the ripple effect in his methodology, the United States pointed out that details on the information regarding this effect could not be provided (nor mentioned in the comments by the Commissioners) because the information was confidential. There was considerable evidence of the ripple effect in the answers to the questionnaires, in the testimony given at the hearing and in the economic evidence, and the Commission had considered this evidence in reaching its conclusions. Explaining the ripple effect, the United States said that when domestic firms were faced by dumped imports they had the option of trying to maintain prices but lose sales and market share, of reducing prices to maintain sales levels, or of seeking purchasers outside their local marketing areas. The so-called ripple effect was due only to the third option, which not all producers chose. Thus not all the sales were transferred to adjacent markets, and this limited the ripple effect. Also, the transport costs prevented the ripple effect from going far out of the region. The location of the import terminals and the distance covered from the terminals showed that there was a fairly large extent of competition in the different markets, and there were grounds for the ripple effects to occur.

3.4.66 The United States also said that in the Commission's questionnaires, producers were asked whether they did or did not face import competition. The responses showed that there was no evidence of any

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[1] The United States explained that in every case, Commissioner Brunsdale used the same methodology (i.e. elasticity analysis) and considered the same elements, including dumping margins, volume of imports, and market share. In each case, the evidence on each element could be different, and no element would be decisive. For instance, despite a large dumping margin, Commissioner Brunsdale might determine that a domestic industry had not been injured, based on the interaction of all the elements considered. Similarly, a small dumping margin might not necessarily lead to a negative determination, depending on the interaction of the different elements.

specific producer who did not face any import competition. The market in which cement was sold and the location of the producer need not be the same. Thus there could be overlapping competition in markets at a considerable distance from the location of the producers.

3.4.67 Mexico said that the standards imposed by the Agreement could not be met by merely asserting that they had been met. There had to be evidence that the determination met the requisite standard and the available evidence suggested that assumptions rather that a consideration of plant-level data had been the basis of the determination in this case. Otherwise, for example, how would Commissioner Brunsdale find that all producers in the region had been injured?

3.4.68 The United States said that Mexico's insistence on this point was not consistent with the text of the views of the Commissioners in this case. As the United States Court of International Trade (USCIT) had found in considering this very argument[1], "[t]he record indicates that the Commissioners considered appropriate plant-specific information in determining whether producers of 'all or almost all' production were affected by dumped imports. It appears, however, that the Commissioners simply did not accept the argument that certain producers were not injured by the dumped imports".

3.4.69 Mexico said that the USCIT had blindly accepted, without substantiating its ruling, that the Commissioners had considered disaggregated data to make their finding. However, a standard had not been met by simply asserting that it had been met. There had to be evidence of the Commission having considered the relevant plant-level data to reach its conclusions, as the United States had asserted, and the report of the Commission showed a lack of such evidence. Thus, Mexico maintained that it was clear from the Commission's report that the finding of material injury to "all or almost all" in this case was based on assumptions.

3.4.70 The United States rejected Mexico's allegation that the USCIT had blindly accepted the Commission's word that it had considered disaggregated data for its analysis. The Court had access to the entire administrative record, including all confidential data, and it had reached decision on the basis of this record.

(c) Price Comparisons

3.4.71 Mexico said that the United States had made the required price comparisons for imported and domestic cement based upon very different volume levels of imported and domestic product. The Commission's staff had requested United States producers and importers of Mexican cement to supply information about prices for sales in the range of 300 to 700 tons. The reason for this volume specification was apparently the fact that past

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[1] CEMEX v. United States, Slip Op. 92-52 (USCIT, 7 April 1992).

investigations had found volume discounts to be prevalent in the cement industry. While most responses by importers of Mexican cement complied with the Commission's staff request, most responses by United States producers reported prices for sales outside the specified volume range. According to Mexico, the Commission consequently made an "apples-to-oranges" comparison. This wholly invalidated the determination of price undercutting and was hence a violation of Articles 3:1 and 3:2 of the Agreement.

3.4.72 The United States agreed that some domestic producers did give information outside the specified range of 300 to 700 tons. This was because these firms kept data in terms of a different volume range. The Commission had set forth a volume range at the behest of Mexican respondents, and it was not entirely clear why this was suggested. There had been no previous findings of volume discounts being prevalent in the cement industry and a review of the confidential price/volume information in the record indicated that there was little, if any, correlation between the prices charged by either domestic producers or importers of cement and the volume of specific sales. The Commission specifically asked in its questionnaires to cement producers and purchasers that any discounts, allowances or rebates offered on the purchases of cement be listed. No purchaser had reported volume discounts. Also, the respondents had not questioned the volume ranges of sales reported by domestic producers during the administrative proceedings.

3.4.73 Moreover, according to the United States, given the price sensitive, commodity nature of cement sales transactions, the Commissioners did not make a determination that there was significant price undercutting.[1] The Agreement did not require a determination of price undercutting for an affirmative finding of injury. Article 3:2 allowed injury determination on the basis of price suppression/depression also and this was what the Commissioners considered in this case. Both Commissioners found significant price suppression/depression. In any event, there was no evidence of volume discounts in this case, and therefore even if the Commissioners had used price undercutting as a basis for their injury determination, the difference in the levels of volumes considered for price analysis would not have affected the results of the price comparisons.

3.4.74 Mexico recalled that the Commission did prescribe the 300-700 range and that the Commission had found the existence of volume discounts in

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[1]The United States pointed out that in the Final Injury Determination, Commissioner Lodwick said that "petitioners agreed that it was unusual for the data to reveal significant underselling margins given the price sensitivity in the market for such a commodity as cement". Final Injury Determination, pages 62-63, footnote 39.

previous investigations of injury to the cement industry[1], and it was for this reason that the Commission sought price data within a limited volume range in this investigation. There was no evidence in the record that the long-standing practice of granting volume discounts had been discontinued. The evidence suggested that the practice was still in effect and this practice was not properly taken into into account in the Commission's price comparisons. The price comparisons were redone on behalf of Mexican exporters by their lawyers, duly limited to the volume range specified in the questionnaires sent to the producers and importers. These estimates showed that instead of the price undercutting in nine out of ten marketing areas found by Commissioner Lodwick, there was actually overselling in four marketing areas, underselling in three areas and mixed overselling and underselling in two areas. Mexico also said that when it had asked the United States during consultations for some evidence on the statement regarding presence or absence of volume discounts, no such information was provided on the grounds that it was confidential. The issue of volume discounts was a fundamental fact of commercial transactions. Commissioner Lodwick had strongly relied on price undercutting to reach his conclusions and the use of inappropriate data had biased his results in that he found price undercutting where none existed.

3.4.75 Mexico went on to say that that Commissioner Brunsdale had not considered price undercutting at all and had therefore violated the affirmative obligation under Article 3:2 to consider price undercutting. According to Mexico, price undercutting was one of the several factors which the authorities were obliged to consider under the Agreement and because Article 3:2 was an amplification of Article 3:1, the United States action also violated Article 3:1.

3.4.76 The United States replied that Commissioner Brunsdale had considered price undercutting but did not discuss it in the report because she thought that price suppression/depression was the important factor. The report contained data on price comparisons for different subregions and the issue of price undercutting had been discussed during the case. The views of Commissioner Brunsdale as given in the report only reflected the major issues and not all the issues which were discussed, as shown by the large amount of evidence and issues discussed before the Commission but not necessarily mentioned by the Commissioners in their comments.

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[1]Mexico said that the most recent case in which the Commission Staff found that cement prices varied "according to the size of the order", was Portland Hydraulic Cement and Cement Clinker From Mexico, France, Greece, Japan, Columbia, The Republic of Korea, Spain, and Venezuela, USITC Publication No. 1925 (December 1986), page A-45. The second most recent case for which the Commission Staff explicitly found that cement suppliers provided quantity discounts was Portland Hydraulic Cement From Australia and Japan, USITC Publication No. 1440 (October 1983), page A-36.

3.4.77 The United States said that the Commission's attorney had reviewed the analysis of CEMEX regarding price undercutting and had found that there were flaws in that analysis. Concerning the provision of information on volume discounts during consultations, the United States had pointed out that the record of this case contained no evidence on volume discounts. What Mexico had requested during consultations and could not be provided because of its confidentiality, was the percentage of domestic sales reported that fell within, above, or below, the 300-700 ton range requested in the questionnaires.

(d) Related Producers

3.4.78 Mexico argued that the United States had included producers who had benefited from purchasing imports from Mexico, even though these producers could not have been injured by these imports. Since these related producers accounted for a substantial portion of the regional output, their exclusion from the injury analysis would have meant that the "all or almost all" regional injury standard in Article 4:1(ii) would not have been met: ten out of thirty-eight producers within the region actively imported cement into that market; and two of the United States regional producers (who were also petitioners, namely Southdown and Ideal) that had imported Mexican cement and clinker, had represented a substantial portion of total regional production. Thus, by including the related producers in the injury determination, the United States had violated Article 4:1(ii), as well as Article 3:4 which required a causal link between dumped imports and injury. In its argument for the exclusion of related producers in the injury analysis, Mexico emphasized that it was arguing that these producers were not injured, and not that "exclusion" be interpreted as removal of injury finding, i.e. these producers had to be considered in the "all or almost all" injury analysis of the full Southern-tier universe of cement producers.

3.4.79 The United States argued that neither the General Agreement nor the Agreement required the exclusion of related producers from the consideration of injury to domestic industry. The relevant provision of the Agreement, Article 4:1(i), did not impose a mandatory requirement of such an exclusion.[1]

3.4.80 The United States said that the petitioners had requested the exclusion from the domestic industry of two producers which imported cement clinker for grinding. The Commission had considered this argument and had

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[1]The United States said that in its practice, if domestic producers were excluded from the domestic industry, information concerning their production operations was not considered in assessing injury. However, imports made by such domestic producers were nonetheless considered in assessing whether dumped imports were the cause of injury. Neither the General Agreement nor the Agreement differentiated the effects of imports on the basis of the identity of the importer.

determined that exclusion was not appropriate in the circumstances of the case. These companies had also imported clinker from countries other than Mexico and clinker imports from Mexico had declined to very low levels. Moreover, there was nothing in the record to differentiate these companies from other domestic producers who imported cement and cement clinker from Mexico[1], and there was no explanation why petitioners requested exclusion of only these two companies.

3.4.81 The United States said that no party had argued that other producers who imported cement from Mexico, including the company in a joint venture with CEMEX, should have been excluded from the industry. The Commission nonetheless had considered possible exclusion of those related producers and determined that it was neither necessary nor appropriate in the circumstances of this investigation.

3.4.82 The United States noted that respondents had argued that because domestic producers were responsible for a portion of the imports subject to investigation, those imports could not possibly be injuring the domestic industry. The Commission had specifically discussed this argument and had concluded that it was not valid in this case.

3.4.83 Mexico said that its underlying argument was that one could not claim injury when one had actively participated in it. According to Mexico, two of the related producers, Southdown and Ideal, controlled volume and pricing of Mexican imports, and these two had accounted for a substantial portion of total production. Mexico recalled that in a previous anti-dumping case in 1986, one of the reasons for not finding injury was that producers had also imported the product.

3.4.84 Mexico pointed out that the practice of the United States regarding "standing" showed that the United States also agreed with Mexico's views on related producers. In the assessment of "standing" criteria, the United States had acknowledged that it did not consider opposition by importers of the product because of "conflict of interest". If this should affect "standing", then why should it not affect the assessment of injury? In this context, Mexico pointed out that the Agreement required a causal link between dumped imports and injury, and it would not be reasonable to claim that importers of cement in this case were injured by imports which they themselves had purchased.

3.4.85 The United States said that Mexico was not correct in claiming that the Commission had dismissed the 1986 investigation of cement imports on account of related producers. In that case, the Commission had determined

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[1]The United States informed the Panel that six out of thirty-eight producers in the regional industry imported cement or cement clinker from Mexico and one other company participated in a joint venture with the primary Mexican producer, CEMEX, to import cement.

that exclusion of related producers was not warranted. The Commission had made a negative determination of injury because of the consistently high and improving performance levels reported by the industry during the period of investigation. Regarding the question of threat of injury in the 1986 case, however, the Commission had noted that some domestic producers imported cement at least in part to serve markets which could not otherwise be profitably be served from their existing production facilities, but concluded that even if such imports increased in the future, such imports did not threaten material injury to the industry.

3.4.86 The United States said that in the Mexican case, the Commission had determined that exclusion of related producers was neither necessary nor appropriate. The Commission had not found that the related importers had set the dumped price. Therefore, these importers did not contribute to dumping. They had imported because it was cheaper to do so than to produce and sell the product domestically. Commissioner Brunsdale had considered the argument that related producers might not be injured by the dumped imports, and had rejected it. She said that she was "not persuaded that the low price at which unfairly traded Mexican imports could be obtained did not play a role in US firms' decisions to import Mexican cement rather than produce themselves, perhaps by engaging in new investment, rather than purchase from other domestic firms in order to supply customers in regions where they do not have a plant. Therefore, I decline to find that imports by or for domestic producers do not cause injury to the domestic industry in the present case".[1] Commissioner Lodwick concurred with these views.[2] Moreover, for its determination, the Commission considered only the data on domestic production operations and not the data on profits or other advantages derived from importing activities of the domestic producers. To the extent that these importing activities had had any positive influence on production performance, it would have actually decreased the likelihood of finding material injury to "all or almost all" production. Despite that, in this case, the Commission found material injury even after considering the plant-specific information to meet the higher standard of regional injury.

3.4.87 The United States further said that Mexico was raising a new point here. If there were other cogent arguments in this regard, then they should have been raised during the administrative proceedings.

3.4.88 Mexico said that the conflict of interest issue was not new; it had been mentioned in the documents submitted by Mexico requesting conciliation and the establishment of the Panel.

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[1] Final Injury Determination, pages 49-50.

[2] Commissioner Lodwick said: "I concur with Acting Chairman Brunsdale's conclusions that ... no related parties should be excluded from the domestic industry ...". Final Injury Determination, page 53.

3.5 Findings sought by the Parties

3.5.1 Mexico requested the Panel to find that the imposition by the United States of anti-dumping duties on gray portland cement and cement clinker from Mexico was inconsistent with the United States' obligations under the General Agreement and the Agreement. Mexico requested the Panel to recommend that the Committee request the United States to revoke the order and repay the anti-dumping duties.

3.5.2 The United States requested the Panel to conclude that the affirmative injury determination and anti-dumping duty order imposed upon gray portland cement and cement clinker from Mexico were not inconsistent with the Agreement. While the United States requested the Panel to conclude in its favour, it also said that if the Panel report in this case was favourable to Mexico, the Panel should recommend that the United States be allowed to conduct a re-examination of the case to consider an alternative finding taking only Mexican imports into account and also to consider the threat of material injury allegation by the petitioners which the Commission had not considered in this case because it had made an affirmative finding of material injury. According to the United States, this remedy would be particularly appropriate in this case because there was no alleged flaw in the investigation except for three procedural steps, two of which were not even raised during the administrative proceedings. Nothing in the Agreement restricted the types of remedy which panels could recommend. Because the errors, if they existed, were harmless, the Panel should recommend a re-examination.

3.5.3 Mexico said that the United States' presentation of this case in terms of three procedural steps was an oversimplification because all the violations related to affirmative obligations under the Agreement. Objecting to the United States' request, Mexico said that there was no basis in the General Agreement or the Agreement for the United States to request the Panel to recommend the reconsideration of this case by the Commission. It was a well-established practice that measures found to be inconsistent with the provisions of the General Agreement or the Agreement prima facie constituted a case of nullification or impairment of benefits under the General Agreement or the Agreement. The United States' statement requesting the reconsideration of the case by the Commission was both surprising and revealing. Why would the United States foresee an eventual result of "revocation" as being likely in this case if it considered that its measures were consistent with its international obligations? Mexico argued that this request was an express mea culpa on the part of the United States.

3.5.4 According to Mexico, the errors in this case were not harmless but decisive, in that they had resulted in the unjustified imposition of anti-dumping duties. In any case, previous panels had rejected arguments similar to the United States "harmlessness" theory on the grounds that the fact that a measure had no or insignificant effects on trade was not a

sufficient rebuttal against inconsistencies with the General Agreement.[1] In support of its request for revocation and reimbursement of duties, Mexico cited the report of the "New Zealand - Electrical Transformers" panel, which had recommended that the anti-dumping order be revoked and that any anti-dumping duties paid be reimbursed.

3.5.5 The United States claimed that the "New Zealand - Electrical Transformers" panel's conclusions were irrelevant to this case because in that case it was found that there was insufficient evidence to conclude that the New Zealand industry had been materially injured by imports from Finland. In addition, the panel had concluded that the imposition of anti-dumping duties based upon threat of material injury would not have been justified because of the minimal impact of the Finnish imports, the high penetration of the New Zealand market by other imports and the lack of other attempts by the Finnish exporter to sell in New Zealand. In the Mexican case, there was abundant evidence on record of material injury and threat of material injury, even without any consideration of Japanese imports. The evidence also demonstrated the vulnerability of Southern-tier producers to future injury, the increased penetration of Mexican imports in the United States' market, the Mexican producers' excess and increasing production capacity dedicated to the United States export market and the purchase of importing facilities in the United States by the Mexican producers.

3.5.6 The United States claimed that if previous panels had precedental value, the "United States - Pork" panel report would provide more appropriate guidance in this case. That Panel had disagreed with the request for reimbursement and had concluded that the situation in that case was unlike that reviewed by the "New Zealand - Electrical Transformers" panel. The "United States - Pork" panel provided for the option of making a determination which met the requirements of the relevant provisions.[2]

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[1]Mexico quoted from the finding of the panel on "United States - Taxes on Petroleum and Certain Imported Substances": "[t]he impact of a measure inconsistent with the General Agreement is not relevant for a determination of nullification or impairment by CONTRACTING PARTIES ... ". Report of the panel (adopted 17 June 1987), BISD 34S/156.

[2]The United States quoted from the conclusion of the "United States - Pork" panel: "The present Panel had not made any finding that the countervailing duty should not have been levied at all. It merely found that the determination that a subsidy was bestowed on pork production was not made in conformity with Article VI:3. It is not excluded that a subsidy determination meeting the requirements of Article VI:3 leads to the conclusion that the subsidies bestowed on swine producers benefit - at least in part - the production of pork. Under these circumstances it did not seem appropriate for the Panel to recommend that the CONTRACTING PARTIES request the immediate reimbursement of the duties concerned. It therefore decided to recommend that the CONTRACTING PARTIES give the United States the option of either reimbursing the amount of the countervailing duties designed to offset the susidies granted to producers of swine or making a subsidy determination which meets the requirements of Article VI:3 ... ". Doc. DS7/R, page 20.

3.5.7 The United States clarified to the Panel that if a re-examination were to be conducted, it would be highly unlikely that duties would be refunded during the re-examination. There was nothing in the Agreement which said that duties had to be refunded if there was a re-examination of the case.[1] But the United States pointed out that no duties had been assessed as yet; only deposits had been collected. If, after a review of dumping and any judicial challenge to the results of that review, it were found that there was no dumping, then the deposits would be refunded. Similarly, it was difficult to say if the record in this case would be re-opened under a re-examination, but this could not be ruled out.

3.5.8 Mexico argued that the Agreement's injury standards required more than reference to "overwhelming evidence" or "totality of the evidence" of injury or threat of injury. They required the observance of the Agreement's provisions in order to ensure that anti-dumping measures were taken "only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated and conducted in accordance with the provisions of this Code" (Article 1 of the Agreement). Mexico emphasized that where the Agreement imposed an affirmative obligation, the investigating authorities were required to substantiate fully the basis of their determinations. It was mere speculation to assess what would have happened if imports from Mexico had been considered alone. Revocation and repayment of the anti-dumping duties were warranted in this case because Mexico's rights and benefits under the General Agreement and the Agreement had been nullified and impaired. In every anti-dumping panel case, the remedy had been a revocation of the duty.[2] A reconsideration would give a chance for the petitioners to "get a second bite at the apple" and would be an injustice to Mexican respondents in this case. If the Panel accepted the recommendation proposed by the United States, this would imply that whatever the violation, the Panel ought to believe that there was material injury to the domestic industry and thus recommend a re-examination of the case.

3.5.9 The United States said that Mexico was raising new issues, including nullification and impairment. Mexico had not raised nullification and impairment before the Panel until after its first

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[1]The United States said that these provisional measures were consistent with Article 10 of the Agreement, which did not require the suspension or revocation of an anti-dumping duty order pending reconsideration of any aspect of the underlying determinations of injury or dumping.

[2]Mexico said that the only anti-dumping case for which the panel did not recommend a revocation of the duty, in a situation where the entire regulation was challenged in that case, was the panel on "European Economic Community - Regulation on Imports of Parts and Components". Report of the panel (adopted 16 May 1990), BISD 37S/132.

submission and the first meeting with the Panel. The Agreement did not contemplate non-violation nullification and impairment and therefore Mexico had to specify which provisions had been violated. Further, any alleged "flaw" in the determination had no effect on the outcome. Thus, Mexico had failed to establish a prima facie case of nullification or impairment.

3.5.10 Mexico said that it was puzzled by the argument that new issues were being raised. In dispute settlement, by definition, nullification and impairment could not be a new issue, but was precisely the core issue. Mexico had mentioned nullification and impairment in the terms of reference, and had demonstrated to the Panel which obligations under the Agreement had been violated.

4. ARGUMENTS PRESENTED BY THIRD PARTIES

(i) The European Communities

4.1 The European Communities (hereinafter referred to as "the EC") said that Article VI of the General Agreement was not an exception to the GATT principles, but an indispensable condition for the balance of the rights and obligations in the General Agreement. There was nothing in Article VI or the Agreement to justify a conclusion that the text was to be defined any more narrowly than any other General Agreement provision. Moreover, the question of whether Article VI was an exception had been raised in various GATT negotiations and, on each occasion, there was disagreement on this issue and thus no reference had been inserted in the Agreement to classify it as an exception. Regarding the "onus of proof", the EC said that Article 15 of the Agreement clearly stated that the party making the request for a panel had to present and justify its allegation of nullification and impairment. According to the EC, any other course would go against one of the basic principles of applied law, namely that the plaintiff had to prove its case.

4.2 As for "standing", the EC did not accept that the requirement was any stricter for a regional case than for a national case. The requirement of "all or almost all" in a regional case pertained to injury and not to "standing"; there was no requirement in the Agreement that the complaint had to be actively supported by all or almost all of the regional production for the prima facie case to be shown.

4.3 The EC's view regarding cumulation was that the problem in this case was linked to the strict legislative deadlines in the United States anti-dumping procedures. Thus, the United States could not have done what the EC would have done, namely, stay the first case pending a definitive determination of dumping in the second case, and only then cumulate imports subject to investigation in the two cases. Due to its strict time schedule for different phases of the investigation, the United States had to cumulate and to condition the result of the first case on the final outcome of the second case. Taking into account that dumping was determined

definitively against Japanese imports, the end result here did not impair Mexico's interests. Support for the United States' action was also provided by the fact that one of the important objectives of the Uruguay Round negotiations was to tighten the disciplines in terms of deadlines for different phases of the anti-dumping investigation. Moreover, the EC did not see any provision in the Agreement which prevented the United States from cumulating as it did. If the EC had had the same type of deadlines in its own legislation and had been faced with the same situation, it would have acted in the same way as the United States, with a reconsideration of the case if the Japanese imports were later determined to be not dumped.

4.4 Further, the EC said that the cumulation took place after the complaint in the Japanese case had been accepted and the proceedings started. That was already an assessment of the facts of the complaint based upon positive evidence, especially in view of the United States' procedures requiring a sound assessment of the complaint. In support of its contention that information in the petition could provide the basis for there being positive evidence of dumping, the EC said that, for example, the Agreement would not prevent any signatory from imposing provisional measures on this basis.

4.5 The EC considered that Article 4 did not require that injury to each producer had to be examined in order to meet the regional injury criteria. Often it was necessary to determine injury by the use of global data, averages, sampling techniques or other such methods, especially when the number of producers in the industry was large. In the present case too, the use of totals and averages had not violated any of the provisions under the Agreement.

4.6 The EC said that it appeared that Mexico had not raised some arguments during the course of the investigation. In the EC's view, the United States and the petitioners had not been given the opportunity to address these issues. For these points, the Panel proceedings would resemble a court of appeal where the plaintiff, i.e. the petitioner, would be absent and could not make any input. The EC said that the Agreement gave clear guidance on the procedures for anti-dumping investigations. Article 6 gave all parties, including the government of the exporting country, the right to present evidence and arguments to the investigating authorities. Article 15 provided that the basis on which a Panel could decide on any dispute was "a written request of the party making the request [and the] facts made available in conformity with appropriate domestic procedures to the authorities of the importing country". This indicated that only points raised during the course of the investigation could be brought before a panel. The EC wondered why Mexico had not raised the questions earlier, given its status as an interested party throughout the investigation? In this context, the EC also said that all the issues of the case should have been presented by Mexico at least by the consultation phase of the Article 15 dispute settlement procedure.

(ii) Canada

4.7 Canada's view regarding the injury analysis was that the Agreement did not require that each producer within the regional industry be determined to be suffering injury to the same degree as a result of the dumped imports. It hoped that the Panel would reject any arguments that a separate analysis should be conducted to determine if each producer within the regional industry was suffering injury.

4.8 Regarding "standing", Canada was of the opinion that "standing" and injury were linked through footnote 9 to the term "industry" in Article 5:1. This footnote read: "As defined in Article 4". Thus, the term "industry" in Article 5:1 had to be interpreted in terms of the Article 4:1(ii) standard for injury to regional industry, namely "producers of all or almost all of the production" in the region. It was not sufficient that the producers constitute only a "major proportion" of production within such market. In the present case, in keeping with its established practice, the Department of Commerce had not addressed the question of whether the petition was initiated by producers of all or almost all of the production in the alleged regional market. Canada clarified that it was not referring to the question of "standing" in terms of a threshold percentage.

4.9 Canada said that the discussions held during the consultations under Article 15 had to be interpreted pragmatically. During consultations, the issues had to be raised only in terms of their generalities and it was not necessary that a complaining party had to flag all the precise arguments which it would be making in respect of its case later to a panel. Also, Canada did not see any basis in the GATT practice for all issues having to be raised before domestic administrative proceedings if later one wished to bring them before a GATT panel.

4.10 Similarly, Canada said that there was no justification in GATT practice for allowing contracting parties to not observe obligations if the consequences of so doing were only minor. The obligations in the Agreement were to be judged on their merits and not on their trade effects.

4.11 Canada shared Mexico's concern regarding cumulation and said that cumulation should not have taken place in this case because there had not been even a preliminary determination of Japanese dumping when the final injury determination was made in the Mexican case. Reliance by the Commission on mere allegation by petitioners was not in conformity with the requirement under Article 3:1 of the Agreement of an objective examination based on positive evidence. The information in the petition did not constitute positive evidence of dumping and there was clearly a difference between the positive evidence standard for injury determinations and the sufficient evidence standard for initiating an investigation. Canada said that the practice of cumulation by the United States was of concern to it also because of a similar United States anti-dumping petition in a case

against Canada (Wire Rope)[1] where the petitioner sought to cumulate alleged dumped Canadian imports with imports of other countries that were under investigation by the Department of Commerce. Canada said that though this particular matter had been resolved, this issue was still of general concern to it.

4.12 Regarding its own practice, Canada said that it had consistently applied a policy of verifying that the complainants had "standing" before initiating cases. Otherwise, complaints were rejected. Canada gave the example of a recent regional industry case (Beer)[2], for which it had verified whether all producers were injured and were supporting the petition.[3] Similarly, it had verified "standing" in the fertilizer equipment case, inter alia, through discussions with industry before initiating the investigation.

5. FINDINGS

Introduction

5.1 The Panel noted that the issues in this dispute arose from the imposition of an anti-dumping duty order on 30 August 1990 by the United States on imports of gray portland cement and cement clinker from Mexico. On 26 September 1989, the United States Department of Commerce (hereinafter referred to as "Department of Commerce"), received a written request for initiation of an anti-dumping investigation from the Ad Hoc Committee of AZ-NM-TX-FL[4], which represented a number of domestic producers of gray portland cement. The petition alleged that domestic industries in two regions of the United States had been injured or threatened with injury by dumped imports of gray portland cement and cement clinker from Mexico, and asserted that the petitioners accounted for a majority of domestic production of gray portland cement in the markets in those regions. The region ultimately considered for the purpose of final injury determination, the Southern-tier region, included the two regions suggested by the petitioners, plus the States of Alabama, California, Louisiana and Mississippi. On 18 May 1990, the Ad Hoc Committee of Southern California Producers of Gray Portland Cement filed an anti-dumping petition alleging that dumped imports from Japan were causing material injury or threat thereof to an United States industry in the region consisting only of Southern California. The United States International Trade Commission

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[1] Steel Wire Rope from Canada, Investigation No. 731-TA-524, petition filed on 28 June 1991.

[2] Certain Beer Originating In Or Exported from the United States of America, Inquiry No. NQ-91-002 (CITT).

[3] Fertilizer Equipment, Produced Or Exported By Or On Behalf Of Speed King Industries, Inc., Dodge City, Kansas, United States of America, For Use West of Manitoba/Ontario Border, Inquiry No. CIT-3-87.

[4] The abbreviations were for the following States of the United States: AZ = Arizona; NM = New Mexico; TX = Texas; FL = Florida.

(hereinafter referred to as "Commission"), cumulated the imports from Mexico and Japan for the final determination of injury in the Mexican case. An affirmative final injury determination was made in the Mexican case on 13 August 1990. On 20 and 28 August 1990, the questionnaires sent out by the Department of Commerce to gather information for the preliminary investigation of alleged Japanese dumping were filed with the Department of Commerce and a preliminary dumping determination in the Japanese case was made on 31 October 1990.

5.2 Mexico requested the Panel to find that the imposition by the United States of anti-dumping duties on gray portland cement and cement clinker from Mexico was inconsistent with the United States' obligations under the General Agreement and the Agreement. Mexico contended that the United States had initiated the investigation without satisfying the Article 5:1 provision that an investigation to determine the existence, degree and effect of any alleged dumping had to be initiated upon a request by or on behalf of the industry affected.[1] Mexico also argued that the United States' determination of injury in this case was inconsistent with Articles 1, 3:1, 3:2, 3:4, 4:1(ii) and 6:7 of the Agreement.

5.3 Mexico requested the Panel to recommend that the Committee request the United States to revoke the order and repay the anti-dumping duties.

5.4 The United States requested the Panel to find that the United States' imposition of anti-dumping duties on imports of gray portland cement and cement clinker from Mexico was not inconsistent with the United States' obligations under the Agreement. Further, the United States argued that Mexico should, in any event, be barred from raising the issues relating to initiation of the investigation and cumulative injury assessment because neither of these issues had been raised during the investigation conducted by the United States' authorities in this case (hereinafter referred to as "the domestic administrative proceedings"), and the former issue had not been the subject of consultations under Article 15 of the Agreement.

5.5 The United States also requested that the Panel recommend, should it rule in favour of Mexico, that the United States be allowed to conduct a re-examination of the case and to make an alternative finding taking only Mexican imports into account, and also to consider the threat of material injury allegation by the petitioners which the Commission had not considered in this case because it had made an affirmative finding of material injury.

Preclusion of Certain Issues

5.6 The Panel first took up the argument of the United States that Mexico should be barred from raising the issues relating to initiation of the investigation and cumulation of Mexican and Japanese imports because Mexico had not raised either issue during the domestic administrative proceedings and had not raised the issue relating to initiation during consultations under Article 15 of the Agreement. According to the United States, the

[1]Referred to by the two parties as the issue of "standing".

principle of exhaustion of administrative remedies was manifest in several provisions of the Agreement, namely Articles 3 to 6 and 15. The United States similarly argued that Article 15 set up a hierarchy for dispute resolution, starting with consultations, and that to be effective, this process required that all issues be raised at the outset.

5.7 The Panel recalled the Mexican argument that the Agreement imposed obligations, the fulfilment of which was not contingent upon a private party or the government of the exporting country raising particular issues during the domestic administrative proceedings. Mexico also argued, with respect to the issue of initiation, that it had consulted with the United States during the consultation phase prior to requesting the Committee for conciliation under Article 15. Moreover, the two parties had discussed the issue in a meeting of the Committee during the conciliation phase and during that meeting Mexico had stated its readiness to consult on any issue, in particular the issue relating to initiation of the investigation.

5.8 The Panel noted that its terms of reference covered both issues said by the United States to be not properly before the Panel (ADP/71, ADP/66) and that the two parties had proceeded to conciliation on both of these issues (ADP/59, ADP/66).

5.9 The Panel further noted that in respect of the domestic administrative proceedings in the United States, there was nothing in the Agreement which explicitly required the exhaustion of administrative remedies, i.e. that for an issue to be properly before a Panel, it would have had to have been raised in the domestic administrative proceedings. The Panel considered that if such a fundamental restriction on the right of recourse to the Agreement's dispute settlement process had been intended by the drafters of the Agreement, they would have made explicit provision for it. The Panel noted that Article 15:5 provided that the Committee "shall ... establish a panel to examine the matter, based upon: ... (b) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing country". The Panel observed that this provision did not require the exhaustion of administrative remedies, but provided that the matter examined by the Panel would have to be based on facts raised in the first instance, in conformity with the appropriate domestic procedures, in the administrative proceedings in the importing country.

5.10 The Panel considered that certain provisions of the Agreement mentioned by the United States in the context of exhaustion of administrative remedies were designed to ensure that the investigating authorities in the importing country afforded adequate procedural opportunities to foreign suppliers and other interested parties to present evidence and defend their interests. As examples of such provisions, the Panel made reference to Articles 6:1, 6:2 and 6:7. In particular, Article 6:7 provided: "Throughout the anti-dumping investigation all parties shall have a full opportunity for the defence of their interests". The Panel was of the opinion that the obligations set out in these provisions would be met if the investigating authorities provided procedural opportunities including the opportunity to submit certain facts, but that these provisions did not establish a principle of exhaustion of administrative remedies.

5.11 Accordingly, the Panel found that even if the issues relating to initiation and cumulation had not been raised during the domestic administrative proceedings, these issues could be considered by the Panel.

5.12 In respect of consultations under Article 15:2, the Panel noted that Mexico and the United States did not agree as to whether or not the issue relating to initiation had been part of the matter discussed during a consultation meeting. The Panel considered that a Party should have the opportunity to consult bilaterally on a matter before having it submitted to multilateral conciliation. The Panel noted in this connection that Article 15:2 provided for bilateral consultations "with a view to reaching a mutually satisfactory resolution of the matter ... ", and that where a Party considered that such consultations failed to achieve a mutually agreed solution it could, pursuant to Article 15:3, "refer the matter to the Committee for conciliation". In the present case, however, the Panel noted that the issue relating to initiation of the investigation had been raised by Mexico prior to the conciliation phase. This was evident from a letter dated 21 May 1991 from the Mexican authorities to the United States. In this letter, one of the specific questions put to the United States by Mexico pertained to the issue of initiation of the investigation. Mexico's request for conciliation was made in a letter dated 20 June 1991. Accordingly, the United States could not properly claim that it had not had an opportunity for bilateral consultations on the matter prior to multilateral conciliation.

5.13 The Panel thus concluded that the issues of initiation and cumulation could be considered by the Panel.

Initiation of Anti-Dumping Investigation

5.14 Regarding the initiation of investigation, the Panel noted that the main point of dispute between the two parties related to the interpretation of the term "by or on behalf of the industry affected" in Article 5:1.

5.15 Mexico maintained that Article 5:1 obliged the investigating authorities to satisfy themselves, before initiation, that a written request for initiation of the investigation (hereinafter referred to as "petition") was by or on behalf of the industry affected. Mexico claimed that the term "on behalf of" in Article 5:1 implied a notion of agency or representation, and that for an investigation relating to an isolated market within a territory of a Party as defined in Article 4:1(ii) (hereinafter referred to as "regional market"), Article 4 provided that a petition had to be made by or on behalf of "producers of all or almost all of the production within such market". Mexico contended that the United States had not ascertained, prior to initiation, that this requirement had been met. Mexico also contended that any information on the level of industry support for the petition which had been gathered by the Commission during the investigation, had not been available to the Department of Commerce. Moreover, Mexico maintained that even this information showed that producers accounting for only about 62 per cent of the production in the regional market supported the petition, and this level of support did

not meet the requirement that the petition be made by or on behalf of the producers of all or almost all of the production in the regional market. Thus, Mexico contended that the United States' initiation of the investigation in this case was inconsistent with Article 5:1.

5.16 The United States contended that in Article 5:1, "on behalf of" was not defined in terms of any affirmative demonstration of support by any specific proportion of the industry, and that Article 5:1 did not impose any obligation on the investigating authorities to ascertain the level of support for a petition. The United States further contended that while there was no requirement of any affirmative demonstration of support for the petition by any specific proportion of producers of the like product, if the Panel interpreted Article 5:1 as containing such a requirement, this requirement had to be the same for investigations relating to a regional market as for those relating to the territory of a Party as a whole (hereinafter referred to as "national market"). Accordingly, the United States argued that support by a "major proportion" of the industry would satisfy such a requirement for both a regional market and a national market.

5.17 The Panel first considered Article 5:1 of the Agreement, which stated in relevant part:

> "An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry[9] affected. ..." (Footnote 9 declared: "As defined in Article 4.")

According to Article 5:1, therefore, the petition had to be "by or on behalf of the industry affected", the definition of the term "industry" in this context being provided in Article 4. Further, the Panel noted that the term "normally" denoted that the normal procedure was for the investigation to be initiated on the basis of a petition by or on behalf of the industry affected, the exception to this procedure, which was given in the third sentence of Article 5:1, being the possibility of the government initiating an investigation without any petition from the industry affected.

5.18 The Panel observed that it was accurate, as the United States contended, that the Agreement did not define the term "on behalf of". Thus, following the general rules of treaty interpretation, the term "on behalf of" had to be interpreted in accordance with its ordinary meaning in the context of the Agreement, and in light of the object and purpose of that Agreement. The Panel noted that the term "on behalf of" could mean either "acting as an agent or representative of (i.e. with the authorization or approval of) the industry affected" or "acting in the interest of".

5.19 Observing that in Article 5:1, the term "on behalf of" appeared as an alternative to "by", the Panel considered that the petition had to represent the view of the industry affected. The Panel noted that if the

term "on behalf of" was interpreted as "acting in the interest of", then an investigation could be initiated on the basis of a petition by producers accounting for a level of production lower than that sufficient to qualify as the industry affected. In the view of the Panel, the Agreement's provisions in Article 4 relating to the level of production of the domestic industry which had to be affected would become meaningless if a petitioner could represent the view of the industry affected merely by claiming to be filing in the interest of a larger group, irrespective of any evidence of that group's authorization or approval. The text of Article 5:1 and the context in which it appeared thus indicated that the interpretation of "on behalf of" could not be "acting in the interest of".

5.20 Accordingly, the Panel found that in Article 5:1, the term "on behalf of" involved a notion of agency or representation, and that a petition had to have the authorization or approval of the industry affected, the term "industry" being defined in Article 4.[1]

5.21 The Panel then considered the definition of the term "industry" in Article 5:1. It noted that the definition of this term was provided in Article 4, paragraph 1 of which read as follows:

> "In determining injury the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that ...
>
> (ii) in exceptional circumstances the territory of a Party may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major proportion of the total domestic industry is not injured provided that 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."

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[1]The Panel recalled that in interpreting "on behalf of" in Article 5:1, the panel on "United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden" (the report of which was as yet unadopted), had reached the conclusion that "in its ordinary meaning this term was used to refer to a situation where a person or entity acted on the part of of another involving the notion of agency or representation ... [and] 'a request ... on behalf of the industry affected' implies that such a request must have the authorization or approval of the industry affected ... ". Doc. ADP/47, paragraph 5.9.

5.22 The Panel noted that in Article 4:1, for the exceptional circumstances of a regional market, the definition of industry was provided in sub-paragraph 4:1(ii). Within this sub-paragraph, it was stated that if the requisite conditions for considering two or more competitive markets in the territory of a Party were satisfied, then "the producers within each market may be regarded as a separate industry". If this were in fact the definition of industry, a petition for initiating a regional market investigation would have to be made by or on behalf of "the producers" in the regional market, i.e. all those producing the like product in the regional market. However, the Panel considered that defining industry in this way would be unreasonable in view of the Article 4:1(ii) provision that a finding of material injury to industry in a regional market required, inter alia, that "the dumped imports are causing injury to the producers of all or almost all of the production within such market". Defining the industry as "the producers" would imply that the request for initiation would require the authorization or approval of even those producers who might not even consider themselves to be injured by dumped imports, and thus would prevent the consideration of a petition supported by the producers to whom it would be sufficient to find injury for the purposes of Article 3.

5.23 The Panel therefore considered that "the producers of ... almost all of the production within such market" would satisfy the definition of "industry" for the purpose of initiation.

5.24 The Panel also considered that there were other factors suggesting that the term "industry" in a regional market was to be interpreted as "producers of all or almost all of the production within such market". The Panel observed that there was a logical link between Articles 3 and 4 of the Agreement: both these Articles pertained to a determination of injury, and whereas Article 3 provided the factors to be considered in any determination of injury, the purpose of Article 4 was to provide the definition of industry for the purpose of determining injury. This was expressly evident by the initial phrase in Article 4, which stated that "In determining injury the term 'domestic industry' shall be interpreted ... ." The lead-in phrase, i.e. "In determining injury", thus applied to the definition of industry in both a national market and a regional market, and the Panel noted that according to footnote 9 in Article 5:1, the definition of industry was the same for initiation and for injury determination in the case of a national market. The Panel could see no reason why the definition of industry for initiation and for injury determination should not be the same also in respect of a regional market.

5.25 The Panel recalled the United States' argument that if the Panel considered, contrary to the United States' position, that Article 5:1 required an affirmative demonstration of support for a petition, then the requirement would be the same for both a national and regional market, and support by a "major proportion" of the industry affected would satisfy this requirement. The United States maintained that the uncertainty about the coverage of the regional market at the time of initiation of an investigation also argued in favour of the initiation requirement being the same for both a national and a regional market.

5.26 The Panel again noted that the term "on behalf of" involved a notion of agency or representation and that Article 4 provided the definition of the term "industry" in Article 5:1, on behalf of which the petition had to be made. In the case of a national market, one of the two definitions of industry according to Article 4:1 was domestic producers whose collective output of the like products constituted a major proportion of the total domestic production of those products. Thus, in a national market, evidence of "support by a major proportion" would meet the requirement under Article 5:1 because there would be evidence of support for the petition by the industry concerned. However, the Panel considered that in view of the fact that Article 5:1 required that an industry in a regional market be defined as "producers of all or almost all of the production within such market", support for a petition by producers accounting for a major proportion of the production in that market would not be adequate to satisfy the requirement that a petition had to have the authorization or approval of the producers of all or almost all of the production in the regional market.

5.27 The Panel then turned to the United States' contention that for certain industries in a regional market, if the requirement was that the petition had to be made with the authorization or approval of the producers of all or almost all of the production in that market, such a requirement would be difficult if not impossible for the petitioners to meet, particularly where the industry was composed of many small producers. The Panel observed that similar difficulties could also arise in a national industry case with many small producers. The Panel considered that such difficulties did not justify that the interpretation of the term "on behalf of" in the case of a regional market differ from the interpretation of that term in the case of a national market, and that in both cases it involved a notion of agency or representation.

5.28 Accordingly, the Panel concluded that the producers in a regional market in respect of whom injury had to be found, namely "the producers of all or almost all of the production within such market", were the producers by or on behalf of which the request for initiating an anti-dumping investigation in a regional market had to be made under Article 5:1.

5.29 The Panel then examined whether the investigating authorities had to satisfy themselves prior to initiation that the petition was by or on behalf of the industry affected. The Panel noted that Article 5:1 required that the "investigation ... <u>shall</u> normally be initiated <u>upon</u> a written request by or on behalf of the industry affected" (footnote omitted, emphasis added). The Panel observed that the term "upon" in Article 5:1 denoted that a petition by or on behalf of the industry affected had to precede the initiation of the investigation, i.e. a petition by or on behalf of the industry affected was a prerequisite for the investigation to be initiated. Moreover, the use of the term "shall" in Article 5:1 meant that this was a mandatory requirement and that the investigating authorities had to satisfy themselves, prior to initiation, that the petition was by or on behalf of the producers of all or almost all of the production.

5.30 In this context, the Panel recalled the United States' argument that the coverage of the regional market might not be determined prior to initiation and thus it might be impossible to satisfy a requirement, prior to initiation, relating to an industry in that market. The Panel observed, however, that the plain language of Article 5:1 indicated that the requirement that the petition be by or on behalf of the industry affected had to be met prior to initiation. The Panel recognized that, as in the case of a national market investigation, the coverage of an industry could change during the investigation but considered that the investigating authorities would still need to assess whether the requirements for initiation of an anti-dumping investigation were satisfied with respect to the regional market specified in the petition.

5.31 Therefore, the Panel concluded that in order to meet the requirement that the petition be by or on behalf of the industry affected in a regional market investigation, the investigating authorities had to satisfy themselves, prior to initiating the investigation, that the petition was made with the the authorization or approval of producers of all or almost all of the production within such market.[1]

5.32 The Panel then considered whether the above initiation requirements had been met in this case. The Panel noted that prior to initiation of the investigation, the Department of Commerce had received a certified petition which stated that the petitioners accounted for a majority of the production in the relevant region. The petition also contained a list of other producers of the like product in the region, but there was no indication of the position (i.e. approval or disapproval) of these producers regarding the petition. The Panel also noted that the United States had stated that the Department of Commerce did not make any attempt to verify or ascertain the level of support or approval for the petition; indeed, the policy was to presume that there was requisite support or approval for the petition unless a majority of the domestic industry affirmatively opposed it, and the notice by the Department of Commerce which sought the opinion of the industry regarding the petition was also the notice of the initiation of the case. Thus, the only evidence relied upon by the Department of Commerce regarding the extent of the industry which approved the petition prior to initiation was that contained in the petition, namely the petitioner's certified claim that they represented a majority of the regional production. The Panel considered that "almost all" of the production had to mean something close to "all" of the production. It also noted that the parties to the dispute did not disagree with this view. The Panel considered that producers accounting for a majority of the production in a regional market could not be deemed to represent "producers of all or almost all of the production" in that market, and since the Department of Commerce had made no effort to ascertain the extent of approval for the petition prior to initiation, the

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[1]The Panel recalled that the panel on "United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden" had reached a similar conclusion with respect to the national market. Doc. ADP/47, paragraph 5.10.

Department of Commerce could not have had adequate grounds to believe that the petitioners, prior to initiation, had the authorization or approval of the producers of all or almost all of the production in the regional market.

5.33 The Panel recalled that the information gathered by the Commission during the investigation had shown that producers accounting for about 62 per cent of the production in the regional market (as finally determined) had supported the petition, and producers accounting for 4 per cent of the production in that market had opposed it; those opposing the petition were related producers. The Panel observed that the information on the extent of support was not available to the investigating authorities prior to initiation and in fact had not been sought by the Department of Commerce or been provided to it by the Commission at any time during the investigation.

5.34 Accordingly, the Panel concluded that United States' initiation of the anti-dumping investigation on gray portland cement and cement clinker imported from Mexico was inconsistent with Article 5:1 because the United States' authorities did not satisfy themselves prior to initiation that the petition was on behalf of producers of all or almost all of the production in the regional market. In view of the inconsistency of the United States' action with Article 5:1, the Panel further concluded that the imposition of the anti-dumping duty order was inconsistent with Article 1.

5.35 The Panel considered that in view of its finding that the United States' initiation was inconsistent with the Agreement, the need to make further findings on the other issues raised by Mexico relating to actions taken by the United States' authorities subsequent to initiation depended on the recommendation of the Panel to the Committee, in particular whether the recommendation would be to request re-examination of the case by the United States' authorities or revocation of the anti-dumping duty order.

5.36 The Panel recalled that Mexico requested the Panel to recommend to the Committee that it request the United States to revoke the anti-dumping duty order and reimburse all anti-dumping duties pursuant to that order. The United States argued that, in the case of a finding by the Panel that the United States acted inconsistently with its obligations under the Agreement, the Panel should recommend that the Committee request the United States to conduct a re-examination of the case.

5.37 The Panel first examined whether it should recommend that the duty be revoked or that the case be re-examined. The Panel noted that under Article 1 of the Agreement, "an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement". This provision made clear that no provision other than Article VI of the General Agreement was available to justify anti-dumping duties and that an anti-dumping duty

could be imposed under the Agreement only if the initiation of the investigation conformed to the relevant requirements of the Agreement. The Panel considered that a failure to observe the requirements in Article 5 could not be remedied by action subsequent to the initiation of the investigation because the very purpose of these requirements was to ensure that certain conditions be met before the initiation was decided upon (see paragraph 5.29 above). The Panel was therefore of the view that the United States could not now bring itself into conformity with the requirements of Article 5:1 of the Agreement through a re-examination of the case; a re-examination could only take place in the context of a new initiation meeting the requirements of the Agreement. The Panel noted in this context that, just as the determination of the responsibilities of a Party that had acted inconsistently with the Agreement could not narrow the scope of the legal options available to that Party, it could also not widen that scope beyond the options available under the Agreement because that determination had to respect the rights of other Parties to the Agreement. The Panel concluded from these considerations that no action was available to the United States through which the imposition of anti-dumping duties on imports of gray portland cement and cement clinker from Mexico could now be rendered consistent with the United States' obligations under the Agreement.

5.38 In light of these considerations, the Panel concluded that it was appropriate to recommend that the Committee request the United States to revoke the anti-dumping duty order on imports of gray portland cement and cement clinker from Mexico. In view of this conclusion, the Panel also considered that it was not necessary for it to make findings on the other issues raised by Mexico.

5.39 The Panel then proceeded to consider whether it should also recommend that the Committee request the United States to reimburse all anti-dumping duties[1], as requested by Mexico, and examined this question in the light of the specific context of the Agreement.

5.40 The Panel noted that the Agreement provided for the reimbursement of anti-dumping duties in the following four provisions: Article 8:3, 8:4[2], 11:1(i) and 11:3. The Panel further noted that under these above provisions the Parties to the Agreement had committed themselves to

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[1]By the term "anti-dumping duties", the Panel would in this context include any cash deposits paid pending the final assessment and collection of anti-dumping duties.

[2]The Panel noted that the Committee had adopted an Understanding on Article 8:4 in October 1981 pursuant to which the Committee decided, in view of the ambiguities in the Article, that Article 8:4 should "not provide the basis for any anti-dumping investigation or for imposition and collection of anti-dumping duties". BISD 28S/52. However, the Panel further noted that this decision of the Committee did not concern the provision in Article 8:4 relating to the reimbursement of anti-dumping duties.

reimburse legally imposed duties when these exceeded the dumping margins, when there was a negative determination of dumping or when the final finding was negative. The Panel considered that in determining the responsibilities of a Party that had imposed anti-dumping duties illegally, these provisions and their rationale had to be taken into account. In its view, the existence of the obligation to reimburse duties imposed consistently with the Agreement strongly suggested that the responsibility of a Party having imposed a duty inconsistently with the Agreement comprised the reimbursement of such duties.

5.41 The Panel also noted that a recommendation for the reimbursement of anti-dumping duties appeared in the panel report on "New Zealand - Anti-Dumping Duties on Imports of Electrical Transformers from Finland".[1] This report related to a dispute brought under the provisions of the General Agreement and had been adopted by the GATT Council on 18 July 1985. In addition, another panel under the General Agreement, "United States - Countervailing Duties on Pork from Canada"[2], had recommended that the United States be requested to either revoke and reimburse the duties paid or reconsider its determination of the existence of a countervailable subsidy. The report of this panel was adopted by the GATT Council on 11 July 1991. The Panel noted that reimbursement of anti-dumping duties also had been recommended in another panel report which was still pending before the Committee on Anti-Dumping Practices.[3] A similar recommendation had been made in a panel report still pending before the Committee on Subsidies and Countervailing Measures.[4]

5.42 The Panel further noted that the 1979 Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance, to which the Panel was directed by Article 15:7 of the Agreement, only provided that the withdrawal of the inconsistent measures "usually" was "the first objective" of the dispute settlement process.[5] The Panel therefore considered that the 1979 Understanding did not preclude the possibility of reimbursement.

5.43 The Panel recognized that there might be situations in which such reimbursement would be excessively onerous for the Party concerned and should therefore not be requested of it. In the view of the Panel, such situations might include those where the measure had not been challenged

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[1] BISD 32S/55, 70.

[2] Doc. DS7/R, 18 September 1990, paragraph 4.11.

[3] "United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden", Doc. ADP/47, 20 August 1990 (not yet adopted).

[4] "Canada - Countervailing Duties on Manufacturing Beef from the EEC", Doc. SCM/85, 13 October 1987 (not yet adopted).

[5] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Annex, paragraph 4, BISD 26S/210, 215-216.

for an extended period of time and where the reimbursement would therefore cause particular difficulties. However, the Panel considered that no such difficulties existed in the present case. The Panel noted that Mexico had promptly initiated the dispute settlement procedures under the Agreement and that the United States had therefore been advised in a timely fashion that Mexico was challenging the consistency of the anti-dumping duties with the Agreement. The Panel therefore concluded that reimbursement would not be excessively onerous in the present case.

5.44 In the light of the above considerations taken together, the Panel concluded that the United States had the responsibility to reimburse the anti-dumping duties on gray portland cement and cement clinker from Mexico.

6. CONCLUSIONS

6.1 The Panel concluded that the United States had initiated the investigation on grey portland cement and cement clinker from Mexico inconsistently with Article 5:1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.

6.2 The Panel recommends that the Committee request the United States to revoke the anti-dumping duty order on grey portland cement and cement clinker from Mexico and to reimburse any anti-dumping duties paid or deposited under this order.