7 September 1992

Trade

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1.4 The Panel met with the parties on 23 and 24 March and 4 and 5 May 1992. On 23 March

than fair value[1]; on 12 April 1990, the Department of Commerce issued its preliminary determination that imports of gray portland cement and cement clinker from Mexico w49e

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

and arguments had to be raised before the national investigating authorities.[1] Article 15:5 of the Agreement 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.[2]

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

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the administrative proceedings.[1] 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

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 a4 706.8 Tm/F33 1

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

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

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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.

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

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 applied, but apparently had not been considered, is that remedial statutes are to be construed liberally. 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 accord with 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, [illegible] be particularly inappropriate to require the United States to [illegible] Mexico's failure to raise issues in a timely manner [illegible] this would have put the United States on [illegible] raise new issues for the first time [illegible] responding party would [illegible] that

(Article 1).[1] Mexico pointed out the drafters had condemned dumping only if

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 demonstBT1 0 0 1 230.64 577.2 Toduce1. 0 0 1 73.68 564.24 Tm0 g /F8BT1 0 0 1 230.64 577.2 Tod

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as establishing a stricter requirement for initiation of investigations would conflict with the language anigations

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 relationto specific matters in dispute"[3]; 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.[4] 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

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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 Mexico and the panel, they would have expressly stated that

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affirmative support by any specific proportion of

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

Further, the United States pointed out that the Agreement expressly provided

of the regional production. This showed that any "standing" 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 availably

3.3.30 The United States said that the Department of Commerce did not monitor "standing" during or after an investigation. The legislative history

(i) No preliminary dumping determination for the Japanese imports

3.4.3 Mexico argued that the Japanese imports which

which

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 cumulat

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.

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.[2] 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). How1 Tf(because) TjETBTdg

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 negotia

investigation was supposed to rely, namely the concept of isol[illegible]. The mere fact of cumulation would, by itself, presup[illegible]erconnections in production and trade that this definition denied. It was not possible to susta[illegible]gion 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 [illegible]markets [illegible] the criteria in Article 4:1(ii) contained two different in[illegible]ore, the United States h[illegible]ed the basic principle of Article 4:1(ii) by cumulating a[illegible] 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

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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.[1] In addition, Mexico quoted former Vice Chairman of the Commission, Ronald Cass, as

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

of this point, Mexico gave an example where averaging masked the fact that not all firms in the industry were suffering losses.[1]

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[2]; the case law of the Commission portrayed the same view[3]; 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

failed

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

specific basis and a subsequent calculation of the percentage accounted for by those

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 ctm11 Tf(Mexico,) TjET/F 346jured

and related workers, hours worked, wages and total compensation paid, and 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

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 Commissi
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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 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

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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

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.TjETBT1 0 0 1 73.ht

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 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,

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.

3.5 Findings sought by the Parties

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.[1]

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.[2]

impaired. In every anti-dumping panel case, the remedy had been a revocation of the duty.[1] A reconsideration would give a chance for the petitioners to "get a second bite at the apple" and would be an injustice to

deadlines for different phases of the anti-dumping

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

it

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 (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

Accordingly, the United States could not

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

of

producers accounting for a majority of the production in a regional market could not be deemed to

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

dispute settlement process.[1] The Panel