ARTICLE 1904 BINATIONAL PANEL REVIEW
PURSUANT TO
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:

Gray Portland Cement and Clinker from Mexico; Final Results of the Seventh Antidumping Administrative Review (August 1, 1996 – July, 31, 1997)

Secretariat File No. USA-MEX-99-1904-03

PANEL:

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COUNSEL:

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I. INTRODUCTION

Pursuant to Chapter 19 of the North American Free-Trade Agreement ("Agreement"), and pursuant to the April 12, 1999 requests of CEMEX, S.A. de C.V. ("CEMEX") and Cementos de Chihuahua, S.A. de C.V. ("CDC"), this Panel was convened to review the March 17, 1999 Final Determination of the United States Department of Commerce ("Commerce") in its seventh administrative review of the antidumping duty order on gray portland cement and cement clinker from Mexico. See North American Free-Trade Agreement, Article 1904, NAFTA Panel Reviews; Request for Panel Review, 64 Fed. Reg. 27517 (May 20, 1999); Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review ("Final Determination"), 64 Fed. Reg. 13148 (March 17, 1999). In addition to CEMEX and CDC, the parties to this proceeding are the Southern Tier Cement Committee ("STCC") and Commerce.

This Panel hereby renders its written decision in accordance with Article 1904.8 of the Agreement and in accordance with Part VII of the Rules of Procedure for Article 1904 Binational Panel Reviews.

II. BACKGROUND

On August 30, 1990, Commerce imposed an antidumping duty order on gray portland cement and clinker from Mexico. Antidumping Duty Order: Gray Portland Cement and Clinker From Mexico, 55 Fed. Reg. 35443 (August 30, 1990). On August 4, 1997, Commerce published in the Federal Register a Notice of Opportunity to Request Administrative Review of this antidumping order. See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review, 62 Fed. Reg. 41925 (August 4, 1997). Pursuant to 19 C.F.R. § 351.213, CEMEX and STCC both requested a review of CEMEX and CDC. See Preliminary Results of Antidumping Duty Administrative Review: Gray Portland

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Cement and Clinker From Mexico, 63 Fed. Reg. 48471 (September 10, 1998). On September 25, 1997, Commerce published a Notice of Initiation of Antidumping Review in which Commerce initiated this seventh administrative review covering the period August 1, 1996, through Jul 31, 1997. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 62 Fed. Reg. 50292 (September 25, 1997). Commerce published its Final Determination for this seventh administrative review on March 17, 1999. See Final Determination, 64 Fed. Reg. 13148 (March 17, 1999). In its Final Determination, Commerce made twelve findings which are at issue in this proceeding:

(1) That CEMEX's home market sales of cement that is physically Type V cement as Type II and Type V cement were outside the ordinary course of trade;

(2) That CEMEX's home market sales of Type V cement sold as Type I cement were outside the ordinary course of trade;

(3) That duties should be assessed on a nationwide basis in this regional industry case;

(4) That an adjustment to CDC's U.S. indirect selling expenses for interest allegedly incurred in financing cash deposits for antidumping duties was not warranted;

(5) That resort to partial adverse facts available for CEMEX's data from the Hidalgo plant (rather than total adverse facts available for CEMEX's entire response) was warranted;

(6) That refusal to revoke the antidumping order based upon alleged defects in the initiation of the original LTFV investigation was warranted;

(7) That CEMEX's bag and bulk cement should be classified as the same like product, and that sales of CEMEX's bag and bulk cement were at the same level of trade;

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(8) That CEMEX's and CDC's U.S. warehousing expenses should be treated as indirect selling expenses;

(9) That CEMEX's home market pre-sale warehousing expenses should not be deducted from normal value;

(10) That certain CDC sales to unaffiliated U.S. customers by CDC's U.S. affiliate should be classified as indirect export price sales, rather than constructed export price sales;

(11) That a difference-in-merchandise ("DIFMER") adjustment to CEMEX's sales for the physical differences between Type I and Type V cement was warranted; and

(12) That an adjustment for CEMEX's freight expenses was warranted.

III. SUMMARY AND CONCLUSIONS

For the reasons discussed below, this Panel affirms Commerce with respect to the following four findings:

(1) That CEMEX's home market sales of cement that is physically Type V cement as Type II and Type V cement were outside the ordinary course of trade;

(2) That an adjustment to CDC's U.S. indirect selling expenses for interest allegedly incurred in financing cash deposits for antidumping duties was not warranted;

(3) That resort to partial adverse facts available for CEMEX's data from the Hidalgo plant (rather than total adverse facts available for CEMEX's entire response) was warranted; and

(4) That refusal to revoke the antidumping order based upon alleged defects in the initiation of the original LTFV investigation was warranted.

This Panel remands the following findings to Commerce for resolution within 90 days from the date of this Panel opinion:

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(1) That CEMEX's home market sales of Type V cement sold as Type I cement were outside the ordinary course of trade;

(2) That duties should be assessed on a nationwide basis in this regional industry case;

(3) That CEMEX's bag and bulk cement should be classified as the same like product, and that sales of CEMEX's bag and bulk cement were at the same level of trade;

(4) That CEMEX's and CDC's U.S. warehousing expenses should be treated as indirect selling expenses;

(5) That CEMEX's home market pre-sale warehousing expenses should not be deducted from normal value;

(6) That certain CDC sales to unaffiliated U.S. customers by CDC's U.S. affiliate should be classified as indirect export price sales, rather than constructed export price sales;

(7) That a DIFMER adjustment to CEMEX's sales for the physical differences between Type I and Type V cement was warranted; and

(8) That an adjustment for CEMEX's freight expenses was warranted.

IV. APPLICABLE LAW AND STANDARD OF REVIEW

A. Governing Law Applicable To Panel Review And Scope of Panel Review

In accordance with NAFTA Article 1904(1), which mandates that binational panel review replace judicial review of final antidumping determinations, this binational Panel is empowered to review Commerce's Final Determination.[1] In

[1] Had NAFTA binational panel review not replaced judicial review, the final determination would be reviewable by the United States Court of International Trade ("CIT"). See 19 U.S.C. § 1516a.

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reviewing this Final Determination, this Panel is limited to reviewing the "administrative record"[2] compiled by Commerce during its seventh administrative review. See NAFTA Article 1904(2). In addition, in reviewing this Final Determination, this Panel is bound by the national law of the United States, including its "statutes, legislative history, regulations, administrative practice and judicial precedents," including decisions of the Court of Appeals for the Federal Circuit ("Federal Circuit") and decisions of the United States Supreme Court. Id.

B. Standard of Review

Pursuant to NAFTA Article 1904(3) and NAFTA Annex 1911, this Panel must apply the standard of review set forth in Section 516A(b)(1)(B) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a(b)(1)(B)), as well as the general legal principles that the CIT would apply in reviewing a final determination by Commerce. Accordingly, this Panel will uphold any Commerce determination, finding, or conclusion unless that determination, finding, or conclusion is either unsupported by substantial evidence on the record, or is otherwise not in accordance with law. See, e.g., Elkern Metals Co. v. United States, 2000 Ct. Intl. Trade LEXIS 17, *13 (Ct. Int'l Trade February 21, 2002) (quoting 19 U.S.C. 1516a(b)(1)(B)(i)) (emphasis added).

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[2] NAFTA Article 1911 defines "administrative record" to mean:

(a) all documentary or other information presented to or obtained by the competent investigating authority in the course of the administrative proceeding, including any governmental memoranda pertaining to the case, including any record of *ex parte* meetings as may be required to be kept;

(b) a copy of the final determination of the competent investigating authority, including reasons for the determination;

(c) all transcripts or records of conferences or hearings before the competent investigating authority; and

(d) all notices published in the official journal of the importing Party in connection with the administrative proceeding.

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1. Substantial Evidence

To determine whether a Commerce determination, finding, or conclusion is unsupported by "substantial evidence," the meaning of substantial evidence must be examined.

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. Federal Martitime Comm'n, 383 U.S. 607, 620 (1966). Because of the "considerable deference . . . [afforded] to Commerce's expertise in administering the antidumping law," SKW Stickstoffwerke Piesteritz GmbH v. United States, 989 F. Supp. 253, 256 (Ct. Int'l Trade 1997), this Panel "may not substitute its judgment for that of . . . [Commerce] . . . when the choice is between two fairly conflicting views, even though . . . [this Panel] . . . would justifiably have made a different choice had the matter been before it *de novo.*" See, e.g., PPG Indus., Inc. v. United States, 708 F. Supp. 1327, 1329 (Ct. Int'l Trade 1989) (citations omitted). "This restricted standard of review is reflective of the legislative intent that courts afford considerable deference to Commerce's expertise in administering the antidumping law." GMN Georg Muller Nurnberg AG v. United States, 763 F. Supp. 607, 611 (Ct. Int'l Trade 1991).

2. In Accordance With Law

To determine whether a Commerce determination, finding, or conclusion is not "in accordance with law," this Panel must undertake the two-step analysis mandated by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

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Under the first step, this Panel must review Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." Id. at 842. "To ascertain whether Congress had an intention on the precise question at issue . . . [this Panel] . . . employ[s] the 'traditional tools of statutory construction.'" Timex V.I., Inc. v. United States, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing Chevron, 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving its plain meaning. Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." Id. (quoted in Windmill Int'l Pte., Ltd. v. United States, 2002 Ct. Intl. Trade LEXIS 14, at *5-6 (Ct. Int'l Trade February 21, 2002)). Beyond the statute's text, "the tools of statutory construction include the statute's legislative history, the statute's structure, and the canons of statutory construction." Steel Auth. of India, Ltd. v. United States, 146 F. Supp. 2d 900, 905 (Ct. Int'l Trade 2001).

If, after undertaking the first step, the panel concludes that the statute is ambiguous with respect to the specific issue, the panel will proceed to the second step. Id. at 906. Under the second step, "the narrow legal question is whether the agency's statutory interpretation is a permissible construction of the statue." Id. This involves an inquiry into the reasonableness of Commerce's interpretation. Windmill, 2002 Ct. Intl. Trade LEXIS 14, at 7. If Commerce has acted rationally, this Panel may not substitute its judgment for that of the agency. Id. Rather, the panel must defer to Commerce's reasonable interpretation, Steel Authority, 146 F. Supp. 2d at 906, and must "sustain the [Commerce's] determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." Windmill, 2002 Ct. Intl. Trade LEXIS 14, at 7. In determining whether Commerce's interpretation is reasonable, this Panel "considers the following non-

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exclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole." Id.

Based on the foregoing principles, the applicable standard of review requires that this Panel uphold Commerce's Final Determination if it is (a) supported by substantial evidence on the record and (b) not contrary to law, even if this Panel would have reached a different conclusion if it had considered the case *de novo*.

C. Standards for Remand

The standards for remand vary depending on Commerce's reason for requesting a remand. There are three possible reasons for requesting a remand: (1) there are intervening events outside Commerce's control, such as a new legal decision or the passage of new legislation; (2) Commerce, without confessing error, intends to reconsider its previous position; or (3) Commerce believes that its original decision was incorrect on the merits and wishes to change the result. See generally SKF USA Inc. v. United States, 254 F.3d 1022, 1028-30 (Fed. Cir. 2001).

When there are intervening events outside Commerce's control, such as a new legal decision or the passage of new legislation [(1) above], a remand is generally required if the intervening event may affect the validity of Commerce's action. Id. at 1028 (citing Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. 1993)) (noting "the tradition of allowing agencies to reconsider their actions where events pending appeal draw their decision in question").

When Commerce, without confessing error, intends to reconsider its previous position [(2) above], the binational panel has discretion over whether to remand. Id. at 1029. In the event Commerce's concern is substantial and legitimate, however, a remand is usually appropriate. On the other hand, a remand may be refused if the agency's request is frivolous or in bad faith. Id.

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When Commerce believes that its original decision was incorrect on the merits and wishes to change the result [(3) above], remand to Commerce is generally appropriate to correct simple errors, such as clerical errors, transcription errors, or erroneous calculations. Id. When Commerce is compelled by the governing statute to reach a different result than the result it reached in error, the binational panel has considerable discretion. Id. It may decide the statutory issue itself or it may order a remand. Id. When Commerce is not compelled by the governing statute to reach a different result, but Commerce still believes that its original decision was incorrect on the merits and wishes to change the results, a remand to Commerce is required, absent the most unusual circumstances verging on bad faith. Id. at 1029-30.

V. DISCUSSION OF THE ISSUES

A. Whether Commerce Properly Determined That CEMEX's Home Market Sales Of Type II And Type V Cement Were Outside The Ordinary Course Of Trade

1. Background

In the seventh administrative review, Commerce determined that CEMEX sold four types of cement in Mexico: Type I, Type II, Type V, and pozzolanic. Commerce further found that CEMEX produces cement that meets the ASTM standards for Type V cement at only two of its cement plants -- Campana and Yaqui -- which are located in the Hermosillo region of Mexico (the Hermosillo plants). CEMEX sold cement that is physically Type V cement as Type I, Type II, or Type V cement because Type V cement meets or exceeds the ASTM standards for Type I and II cement.

Based on its analysis of several factors, discussed below, Commerce determined that CEMEX's home market sales of cement that is physically Type V cement as Type II and Type V cement and that is produced at its Hermosillo plants were outside the ordinary course of trade because they were not representative of CEMEX's other home market sales.

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2. <u>Contentions of the Parties</u>

CEMEX challenges Commerce's determination that home market sales of cement that is physically Type V cement as Type II and Type V cement, produced at its Hermosillo plants, were outside the ordinary course of trade. CEMEX contends generally that Commerce's determination that CEMEX's sales of Type II and Type V were outside the ordinary course of trade (OCT) is contrary to law and is not supported by substantial evidence in the administrative record. CEMEX argues that Commerce failed to consider certain factors that, CEMEX contends, are relevant to an OCT analysis. Moreover, CEMEX maintains, the factors that were considered by Commerce do not support its determination. CEMEX argues that Commerce did not consider the administrative record as a whole, but instead considered only those factors that support Commerce's ultimate conclusion and ignored those factors that detract from that conclusion. Finally, CEMEX adds several factors relied upon by Commerce are irrelevant to the OCT issue. <u>CEMEX's May 21, 2001, Rule 57(1) Brief</u>, at 11-50.

Commerce's most significant error, according to CEMEX, is that Commerce failed to take into account the fact that CEMEX's home market sales of Type V cement were made pursuant to a *bona fide*, legitimate home market demand. Besides this alleged error, CEMEX adds, that Commerce's OCT determination is flawed in the following respects:

> (1) CEMEX contends that home market shipping arrangements for Type V cement to Type II and Type V customers were not outside the ordinary course of trade because CEMEX absorbed pre-sale transportation costs and freight expenses for all customers on all cement types, not just on sales of Type V cement.
>
> (2) Commerce's analysis of the sales volume and value of Type V cement should have been based upon sales as invoiced to home market customers, rather than as produced by CEMEX. In addition, Commerce's volume analysis should not have been conducted solely on a comparative basis, i.e., comparing sales volume of Type I cement with sales volume of Type V cement. Instead, CEMEX contends, sales volume of Type V cement was significant in absolute

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terms and, therefore, was reflective of sales made in the ordinary course of trade.

(3) CEMEX stresses that the differences in profitability between, on the one hand, CEMEX's sales of Type V cement to Type V and Type II customers and, on the other hand, its sales of Type I cement to Type I customers are not of sufficient magnitude to indicate sales outside the ordinary course of trade.

(4) According to CEMEX, the relatively small number and type of customers for Type V and Type II cement, standing alone, are not indicative of sales outside the ordinary course of trade in a case, such as we have here, where the subject merchandise is sold to meet the demand of a *bona fide* home market.

(5) Commerce found that CEMEX did not sell Type V cement in the home market until it began production for export in the mid-1980's, a fact that Commerce characterized as a relatively recent phenomenon. CEMEX counters that when the past sales of a company it acquired in 1989 are considered, the historical sales trend for CEMEX's home market sales of Type II and Type V to Type II and Type V customers are not indicative of sales outside the ordinary course of trade.

(6) CEMEX takes exception to Commerce's characterization of CEMEX's home market sales of Type V cement as being of a "promotional quality," and thus outside the ordinary course of trade. On the contrary, CEMEX argues, all sales of all its cement types have a promotional quality. As a full-service company in a multi-product industry, CEMEX points out, it benefits from a marketing standpoint by the fact that for each product it is trying to sell, it offers every other product in the cement product line. CEMEX's contention notwithstanding, Commerce rejected it relying upon facts available.

See id. at 18-21.

Finally, CEMEX complains that not only did Commerce err in its analysis of the six factors that it did consider, but also that Commerce erred by failing to consider other factors that have been determined to be relevant in other OCT analyses. See id. at 16-17. These other factors include: (1) whether the sales in question were of obsolete, defective, or second-quality merchandise; (2) whether the subject merchandise was export overrun merchandise; and (3) whether sales terms varied by customer rather than by product type.

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Commerce and STCC make the following points in response to CEMEX's contentions. Addressing CEMEX's threshold argument that legitimate home market demand exists for Type II and Type V cement, STCC counters that even if such a demand does exist, that fact does not demonstrate that the sales at issue are made within the ordinary course of trade. The proper inquiry, according to STCC, is not whether CEMEX was meeting a legitimate home market demand, but rather whether it was meeting that demand through sales that were within its ordinary course of trade. See STCC's November 16, 2001, Rule 57(2) Brief, at 65-66.

Turning to the first of the six factors that Commerce considered when making its OCT determination, STCC and Commerce argue that Commerce found that CEMEX's shipping arrangements for Type II and Type V cement (all of which are Type V cement) from the Hermosillo plants are not ordinary because CEMEX shipped these types of cement over considerably greater distances than it shipped other types of cement sold in the home market. These long-distance shipments from Hermosillo in the north to customers in central Mexico were significantly greater than for home market sales of cement produced as Type I cement. The normal practice for CEMEX, according to Commerce and STCC, is to ship cement, a heavy material, over relatively short distances. Moreover, the decision to absorb pre-sale freight charges, rather than pass them on to the customer, should be deemed to be an unusual circumstance supporting the conclusion that the Type II and V sales were not in the ordinary course of trade.

Second, regarding the relative sales volume and value of Type II and Type V cement compared to Type I cement, Commerce and STCC contend that record evidence gathered during the period of review supports Commerce's conclusion that CEMEX sold very small amounts of Type II and Type V cement in the home market compared to sales of cement produced as Type I. In response to CEMEX's contention that the sales volume and value of Type V cement should have been based upon sales as invoiced to

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home market customers, rather than as produced by CEMEX, Commerce and STCC counter that it is particularly important to focus on the way the product was invoiced because in some cases cement that was produced to one physical specification, e.g., Type V, was sold as another type, in this case as Type I or Type II cement.

Third, regarding the relative profitability of Type II and Type V sales compared to sales of Type I cement, Commerce and STCC point to record evidence in support of Commerce's conclusion that the profit differential between the various types of cement sold in the home market was significant, indicating that sales of Type II and Type V cement were indeed outside the ordinary course of trade. In response to CEMEX's argument that profits on Type V cement were substantial and significant in absolute terms, STCC responds that the proper inquiry is the relative profit differential, not the absolute differential, when making an OCT determination.

Fourth, regarding the number and type of customers purchasing Type II and Type V cement, Commerce and STCC argue that they differ substantially from customers purchasing Type I cement. Commerce and STCC point out that CEMEX's customers for Type II cement were large industrial contractors, whereas purchasers of Type I cement ranged from individuals to large contractors. Similarly, Commerce and STCC contend, the record evidence supports the finding that the number of customers for Type I cement was substantially greater than the number of customers for Type V cement. In the collective view of Commerce and STCC, the evidence supporting these findings, which CEMEX does not dispute, buttresses Commerce's determination that sales of Type II and Type V cement are outside the ordinary course of trade.

Fifth, regarding the historical sales trend for Type II and Type V cement and whether sales of the subject merchandise have occurred over a "reasonable period," Commerce and STCC contend that the period beginning in the mid-1980's, when CEMEX began selling Type II and Type V cement, has to be juxtaposed to the more

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than ninety years over which CEMEX has produced and sold other types of cement. Measured in relative terms, the brevity of CEMEX's production of Type V cement indicates that sales of Type V cement are outside the ordinary course of trade, according to Commerce and STCC.

Sixth, regarding the promotional quality of CEMEX's Type II and Type V sales, Commerce relied on facts available to conclude that sales of Type II and Type V cement continue to exhibit a promotional quality that is not evidenced by CEMEX's sales of other types of cement. Commerce contends that this factor has been relied upon in past reviews in determining whether home market sales are outside the ordinary course of trade. See Commerce's November 16, 2001, Rule 57(2) Brief, at 63-66. STCC's position on this point differs from that of Commerce. STCC contends that CEMEX did in fact respond to Commerce's request for information, but that its response was self-serving and lacked credibility. STCC concludes that Commerce committed error, but that the error is harmless based on the existence of other record evidence that supports Commerce's determination that sales of Type II and Type V cement are outside the ordinary course of trade. See STCC's November 16, 2001, Rule 57(2) Brief, at 68-73.

Finally, regarding CEMEX's contention that Commerce ignored other factors that have been determined to be relevant in OCT analyses, STCC responds that the factors cited by CEMEX have no relevance given the factual setting of the present administrative review. See id. at 73-81. Therefore, according to STCC, absent a showing by CEMEX that any of the omitted factors it cites is probative with respect to the OCT issue in the instant case, or that a consideration of any of those factors would alter Commerce's determination, Commerce's OCT determination must be affirmed.

3. Analysis

As noted, Commerce determined that CEMEX's home market sales of Type II and Type V cement produced at its Hermosillo plants were outside the ordinary course of

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trade. As a result, Commerce did not include CEMEX's sales of Type II and Type V cement in its calculation of normal value. The antidumping duty law defines normal value as the price "at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). Thus, in order to calculate normal value, Commerce must identify which home market sales were made in the ordinary course of trade. The term "ordinary course of trade" is defined as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." 19 U.S.C. § 1677(15). In making its OCT determination, Commerce must, of course, view the administrative record as a whole. This requirement means that Commerce is required to take into account not only the evidence that supports its conclusion, but also evidence that detracts from it as well. Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1563 (Fed. Cir. 1984).

The purpose of the OCT provision "is 'to prevent dumping margins from being based on sales which are not representative' of the home market." CEMEX, S.A. v. United States, 133 F.3d 897, 900 (Fed. Cir. 1998) (quoting Monsanto Co. v. United States, 698 F. Supp. 275, 278 (Ct. Int'l Trade 1988)). Commerce's OCT inquiry is fact-specific. As observed by the Federal Circuit in the second administrative review of the antidumping order that is the subject of this Panel review – where the Federal Circuit affirmed Commerce's determination that CEMEX's sales of Type II and Type V cement were outside the ordinary course of trade – Commerce is not to evaluate just "one factor taken in isolation but rather . . . all the circumstances particular to the sales in question." CEMEX, supra, 133 F.3d at 900. No one factor in isolation can be considered determinative. Rather, all the circumstances surrounding the sales in question must be examined. When applying this totality-of-the-circumstances test, reviewing courts

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have accorded Commerce great deference regarding its findings. See, e.g., CEMEX, supra; Koenig & Bauer-Albert AG v. United States, 259 F.3d 1341, 1345 (Fed. Cir. 2001); NTN Bearing Corp. v. United States, 155 F. Supp. 2d 715, 732-33 (Ct. Int'l Trade 2001); Timken Co. v. United States, 852 F. Supp. 1122, 1128 (Ct. Int'l Trade 1994). The burden is thus on the party challenging Commerce's determination to demonstrate that it is wrong. While we conclude that CEMEX has not met its burden, this Panel has some reservations regarding Commerce's OCT determination in this review.

In determining whether CEMEX's home market sales of Type II and Type V cement were outside the ordinary course of trade, Commerce considered the following six factors: (1) freight costs and shipping distances for Type II and Type V cement, (2) the volume and value of Type II and Type V cement sales, (3) CEMEX's profitability on Type II and Type V cement, (4) the number and type of customers for Type II and Type V cement, (5) historical sales trends, and (6) the promotional quality of CEMEX's sales of Type II and Type V cement. See Final Determination, 64 Fed. Reg. at 13156-57.

Regarding the first factor, freight costs and shipping distances for Type II and Type V cement, Commerce determined that freight costs and shipping distances for Type II and Type V cement sold in the home market were significantly greater than for home market sales of Type I cement. Commerce found that "the normal practice for CEMEX is to ship cement, a heavy material, over relatively short distances. Over 95 percent of CEMEX's sales of cement in Mexico were shipped less than 150 miles and . . . shipments of cement produced as Type I conformed to this pattern. Shipments of Type II and Type V, however, occurred over vastly greater distances." Final Determination, 64 Fed. Reg. at 13156. While this fact standing alone may not constitute "unusual circumstances," when coupled with CEMEX's decision to absorb freight costs for Type II and Type V cement, these two facts in tandem support Commerce's finding of an "unusual circumstance." As observed by the Federal Circuit when it reviewed this same

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factor, "this departure from the norm could well give rise to Commerce's determination that the sales of Types II and V cements were outside the ordinary course of trade." CEMEX, 133 F.3d at 901.

Although CEMEX takes issue with this conclusion, the pertinent inquiry is whether the conditions and practices are normal for the company under review. In the years preceding the antidumping duty order in this case, it was CEMEX's normal business practice to pass on the full cost of freight charges to purchasers of Type II cement. Given the high freight costs for cement, CEMEX's decision to absorb those costs constitutes "an unusual circumstance" supporting a determination that sales of Type II and Type V cement are outside the ordinary course of trade.

Regarding the second factor, volume and value of Type II and Type V cement sold in the home market, the Federal Circuit affirmed Commerce's practice of examining relative sales volume when making its OCT determination. In CEMEX, the Federal Circuit held that CEMEX's home market sales of Type II and Type V cement during the second administrative review "represent a minuscule percentage of CEMEX's total sales of cement, a fact that indicates that they were not in the ordinary course of trade." CEMEX, 133 F.3d at 901. Although this Panel hesitates to characterize CEMEX's sales of Type II and Type V cement as "minuscule" in either absolute or relative terms, when compared to its home market sales of Type I cement during the period of review, CEMEX's sales of Type II and Type V were substantially less than those of Type I cement.

Regarding the third factor, CEMEX's profitability on Type II and Type V cement, the Federal Circuit noted in CEMEX that "'[A] profit level comparison is probative of the economic reality' of the sales, . . . and therefore the disparity in profit margins is indicative of sales that were not in the ordinary course of trade." Id. at 901, quoting Mantex, 841 F. Supp. at 1308 (upholding Commerce's profitability methodology that

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analyzes profit levels on a relative basis). While the record may support CEMEX's argument that its sales of Type II and Type V cement were profitable in absolute terms, the issue is whether those profits were small when compared to the profits earned on sales of Type I cement during the period of review. On a relative basis the profit differential between sales of Type II and Type V cement and sales of Type I cement was significant, supporting Commerce's conclusion that sales of Type II and Type V cement were outside the ordinary course of trade.

Regarding the fourth factor, the number and type of customers for Type II and Type V cement, Commerce has used this factor in other OCT analyses and the CIT has recognized that the number of buyers in the home market is a relevant criterion. See Laclede Steel Co. v. United States, 18 C.I.T. 965 (1994). Commerce found that the number and type of customers purchasing Type II and Type V cement are substantially different from those whose purchase other cement types. The number of customers purchasing Type II and Type V cement were dramatically less than the number buying Type I cement. Moreover, Commerce found that customers who purchased Type II and Type V cement tended to be large industrial contractors working on a small number of projects, whereas purchasers of Type I cement varied from individual buyers who purchased a single bag of cement to large contractors who bought several tons during the period of review.

CEMEX argues that the simple fact that there are customers, rather than their number or type, is indicative of sales within the ordinary course of trade. However, agency precedent holds that the number of buyers is a relevant factor in an OCT analysis. While this Panel has reservations with Commerce's determination on this point, the fact remains that no single factor is dispositive in an OCT analysis. Accordingly, this Panel is unable to find that Commerce is wrong in its assessment that

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a relatively limited number of customers for Type II and Type V cement supports a conclusion that sales to those customers are outside the ordinary course of trade.

Regarding the fifth factor, historical sales trends, the antidumping duty statute directs Commerce, when it makes its OCT determination, to examine "the conditions and practices" that have existed "for a reasonable time prior to the exportation of the subject merchandise . . ." 19 U.S.C. § 1677(15). Thus, when making its OCT determination, Commerce had to consider the length of time over which CEMEX sold Type II and Type V cement. Commerce requested CEMEX to provide information regarding its historical sales trends, but CEMEX did not respond, according to Commerce. Consequently, Commerce relied upon facts available from the second administrative review where Commerce found that CEMEX did not sell Type II and Type V cement until it began production for export in the mid-1980's. In the sixth review, Commerce characterized CEMEX's sales of Type II and Type V cement as "a relatively recent phenomenon," given that CEMEX had been producing cement in Mexico for nearly 100 years. Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review, 63 Fed. Reg. 12764 (March 16, 1998).

CEMEX challenges Commerce's characterization, arguing that Commerce should have considered the sales of Type V cement that were made over a 25-year period by another Mexican cement company, Tolteca, which CEMEX acquired in 1989. When the sales of Type V cement by Tolteca are considered, CEMEX concludes, CEMEX has been selling Type V cement for a reasonable period of time within the meaning of the statute.

This Panel is unable to conclude that Commerce acted unreasonably in rejecting CEMEX's argument that CEMEX should, in effect, receive credit for sales made by another cement company that CEMEX did not own until 1989. Moreover, Congress has not defined the term "reasonable time" used in 19 U.S.C. § 1677(15), nor does Commerce

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define it through its regulations. Consequently, its application will necessarily vary from case to case depending upon the facts of each case. Hence, in the face of this congressional silence, this Panel must defer to Commerce's interpretation of the term "reasonable time" in this case, unless we find that Commerce's interpretation and application of that term in this case is arbitrary, capricious, or an abuse of discretion. See PPG Indus., Inc. v. United States, 928 F.2d 1568, 1572 (Fed. Cir. 1991) (a court should not disturb agency interpretations of the statute unless it appears from the statute or its legislative history that the interpretation is not one that Congress would have sanctioned). We are unable to conclude, however, that Commerce's interpretation and application of the term "reasonable time" in this review is arbitrary, capricious, or an abuse of discretion.

Regarding the sixth and final factor relied upon by Commerce in its OCT determination – the promotional quality of CEMEX's sales of Type II and Type V cement – the Federal Circuit upheld Commerce's OCT determination in the second administrative review in part because "the evidence before Commerce indicated that the home market sales of Types II and V cements were of a promotional nature; customers of Types II and V cements were more likely to purchase CEMEX's other cement products." CEMEX, 133 F.3d at 901. Commerce maintains that CEMEX's response to Commerce's September 25, 1997, questionnaire did not address the issue of promotional quality. Therefore, relying on facts available, Commerce assumed that the facts regarding this issue had not changed since the second administrative review and concluded that sales of Type II and Type V cement continued to exhibit a promotional quality that is not evidenced in CEMEX's sales of Type I cement.

Both CEMEX and STCC take the position that Commerce used facts available based on Commerce's mistaken belief that CEMEX failed to respond to Commerce's request for information regarding this factor when in fact CEMEX had responded.

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CEMEX's response was in essence that all of its products have what is in effect a cross-promotional quality, that is, sales of Type II and Type V cement promote the sale of Type I cement and vice versa. In other words, according to CEMEX, the promotional qualities of all its cement sales are identical.

The difference between the parties seems to be not whether CEMEX in fact responded, but rather whether CEMEX provided any support for its position that home market sales of Type II and Type V cement do not have a promotional quality, at least not any more so than in the case of its other cement types. Other than its conclusory statement that all of its cement sales have a promotional quality, CEMEX offered no support for this position. Thus, Commerce was justified in rejecting CEMEX's response as essentially unresponsive, thereby forcing Commerce to rely upon facts available.

Even accepting as true CEMEX's assertions that all of its products have a promotional quality, the task confronting this Panel remains unchanged, viz., based on the totality of the circumstances adduced by Commerce during the seventh administrative review, is Commerce's OCT determination unsupported by substantial evidence on the record or is it otherwise not in accordance with law? The factor of promotional quality *vel non* of a product is only one of several factors that Commerce considered and relied upon when making its multifaceted, OCT determination in this review. In the face of a fact-specific test that vests in the agency broad discretionary power to assess the evidence and weigh the various factors, this Panel is unable to answer that question in the affirmative.

Finally, CEMEX challenges Commerce's OCT determination on the ground that Commerce failed to consider a number of other factors, namely, whether the sales in question were of obsolete, defective, or second-quality merchandise; whether the subject merchandise was export overrun merchandise; or whether sales terms varied by customer rather than by product type. The point, however, is not whether Commerce

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overlooked these factors, but rather whether these factors are relevant in the context of this administrative review. Commerce's OCT determination cannot be deemed to be erroneous when none of the conditions identified by CEMEX, e.g., sales of export overrun merchandise, or sales of defective or obsolete merchandise, were in fact present in the instant review. See Mantex, 841 F. Supp. at 1306. CEMEX raised this same argument before the Federal Circuit, which rejected it. See CEMEX, 133 F.3d at 901. The Panel does likewise.

In summary, had the role of this Panel been to determine whether Commerce was correct in its OCT determination in the instant case, a majority of the Panel might well have reached a different determination. But that is not the role of a binational panel. Here, this Panel is asked to determine whether the agency properly applied the governing legal test and whether substantial evidence supports the agency's findings of fact. When, as here, the standard against which the agency's determination is to be measured is a balancing test that is fact-specific and based on the totality of the circumstances, in the absence of a clear abuse of discretion, it is well nigh impossible for any reviewing body to reverse the agency. Referring to the Federal Circuit's CEMEX decision as establishing a baseline, at oral argument counsel for CEMEX asked rhetorically, "But where's the room in the system to accommodate new facts? You shouldn't be trapped by the baseline." Transcript of Oral Argument at 134. Although this Panel understands counsel's frustration with this totality-of-the-circumstances test, it is the test approved by the Federal Circuit whose decisions the Panel is bound to follow.

4. Conclusion

This Panel concludes that Commerce properly determined that CEMEX's home market sales of Type II and Type V cement were outside the ordinary course of trade. Accordingly, Commerce's determination is affirmed.

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B. Whether Commerce Properly Determined That CEMEX's Home Market Sales Of Type V Cement Sold As Type I Cement Were Outside The Ordinary Course Of Trade

1. Background

As noted in the previous discussion concerning CEMEX's sales of Type II and Type V cement, CEMEX produces cement that meets the ASTM physical requirements for Type V cement at only two of its cement plants (Campana and Yaqui), which are located in the Hermosillo region of Mexico. Because Type V cement meets or exceeds the ASTM standards for Type I and Type II cement, CEMEX can and does sell this Type V cement as Type I, Type II, or Type V cement. The Hermosillo plants are the only two CEMEX plants that on a consistent basis produce cement meeting the ASTM standard for Type V cement that is sold as a different ASTM type. All of CEMEX's remaining facilities produce cement that meet the ASTM physical requirements for Type I cement which these plants in turn sell as Type I cement.

In the seventh administrative review, Commerce determined that, based on the factors discussed below, home market sales of Type V cement produced at the Hermosillo plants and invoiced as Type I cement were outside the ordinary course of trade.

2. Contentions Of The Parties

CEMEX challenges Commerce's determination that CEMEX's sales of Type V cement to Type I customers were outside the ordinary course of trade on the grounds that it is not supported by substantial evidence and is otherwise not in accordance with law. CEMEX makes the following specific challenges to Commerce's OCT determination.

As a threshold matter, CEMEX argues that Commerce erred in its OCT analysis when it separated CEMEX's sales of cement on the basis of how the sales were invoiced

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rather than on the basis of the physical characteristics of the cement itself. According to CEMEX, Commerce should have made a unitary OCT determination encompassing all of CEMEX's Type V sales, regardless of how the cement was invoiced. See CEMEX's May 21, 2001 Rule 57(1) Brief, at 44-50.

Next, CEMEX contends that Commerce's determination that CEMEX's home market sales of Type V cement produced at the Hermosillo plants and invoiced as Type I cement were outside the ordinary course of trade is not supported by substantial evidence. Specifically, Commerce relied on five factors in reaching its conclusion that sales of Type I cement that is physically Type V cement were outside the ordinary course of trade, none of which, according to CEMEX, is supported by substantial evidence:

> (1) Sales Volume - Commerce relied upon the fact that the volume of sales of Type V cement sold to Type I customers was small in comparison to total sales of Type I cement. CEMEX counters that Commerce failed to consider that the volume was significant in absolute terms.
>
> (2) Number and Types of Customers - Commerce cited the fact that the number and type of Type I customers purchasing cement that was physically Type V were substantially different from customers purchasing Type I cement produced at other CEMEX plants. CEMEX responds that Commerce failed to consider the fact that these sales were *bona fide* sales and that the number and types of customers buying from the Hermosillo plants are consistent with those of other CEMEX plants.
>
> (3) Freight Costs - Commerce considered the fact that freight costs for Hermosillo cement sold as Type I were different from the average freight costs for CEMEX's sales of cement that was physically Type I cement. CEMEX challenges this finding on the ground that no significant disparity exists between freight charges on sales of Type V cement to Type I customers, on the one hand, and on sales of Type I cement sold to Type I customers, on the other.
>
> (4) Relative Profit Levels - Commerce cited the disparity in profitability between sales of Type I cement that is physically Type I, on the one hand, and sales of Type V cement sold as Type I, on the other. CEMEX takes issue with

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> this conclusion, given that sales of Type I cement were highly profitable, regardless of whether the Type I cement was physically Type I or Type V.
>
> (5) Handling Charges - Commerce relied upon the fact that a differential existed between handling charges for Type V cement sold as Type I compared to Type I cement sales to Type I customers. CEMEX observes that not every difference among products necessarily leads to the conclusion that sales of the subject product are outside the ordinary course of trade.

CEMEX's May 21, 2001, Rule 57(1) Brief, at 44-50.

Commerce and STCC take the position that based on the factors identified by Commerce to exist in this case, coupled with the weight that Commerce assigned to each of these factors, the totality of circumstances supports Commerce's determination that sales of Type V cement sold as Type I were outside the ordinary course of trade. Commerce's November 16, 2001, Rule 57(2) Brief, at 69-88; STCC's November 16, 2001, Rule 57(2) Brief, at 81-92.

3. Analysis

Because CEMEX's Hermosillo plants consistently produce cement meeting one ASTM standard that is sold as a different ASTM type, Commerce determined that this factor, along with the five factors discussed below, distinguishes sales of cement that is physically Type V cement but sold as Type I cement from CEMEX's sales of Type I cement produced as Type I cement and sold from its other plants. CEMEX's challenge to Commerce's OCT determination regarding Type V cement sold as Type I is in several respects a reprise of its challenge to Commerce's OCT determination concerning CEMEX's sales of Type II and Type V cement produced at CEMEX's Hermosillo plants, discussed above.

The five factors that Commerce cites in support of its determination that sales of Type V cement sold as Type I cement from the Hermosillo plants were outside the ordinary course of trade are: (1) the disparity in sales volume, (2) the difference in

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freight costs, (3) a comparison of relative profit levels, (4) differences in the number and type of customers, and (5) handling charges associated with both kinds of sales. This Panel addresses each of these factors in turn.

First, regarding the disparity in sales volume, the record developed during the period of review in this case supports Commerce's finding that CEMEX's sales of Type V cement sold as Type I represented a very small percentage of its total home market sales of Type I cement that is physically Type I cement. CEMEX argues that its sales of Type V cement sold as Type I cement are significant in absolute terms because the volume exceeds five percent of its U.S. sales and, therefore, constitutes a viable home market upon which to base normal value. When undertaking an analysis of the viability of the home market in an antidumping duty proceeding, the focus is on a comparison of home market sales to sales of the subject merchandise in the U.S. market. However, even if CEMEX's home market sales of physically Type V cement sold as Type I cement do exceed five percent of U.S. sales, that fact is not responsive to the question whether such sales are in the ordinary course of trade in terms of volume. The OCT analysis focuses instead on the conditions and practices in the home market, not on the volume of home market sales in relation to the volume of export sales to the U.S. market.

Second, regarding the differences in freight costs, Commerce found that freight costs for sales of Type I cement that are physically Type V cement were higher than the freight costs for Type I cement when sold on a CIF basis but less than the freight costs for Type I cement when sold on an FOB basis. Concededly, the differences in freight costs in absolute terms are small and might in fact offset each other if sales under the two different shipping terms were aggregated. However, Commerce determined that such aggregation would preclude an apples-to-apples comparison. Nevertheless, neither in its Ordinary Course of Trade Memorandum dated August 31, 1998 ("OCT Memorandum"), nor in its brief filed with this Panel, does Commerce adequately

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explain why an apples-to-apples comparison is prevented if FOB and CIF sales are aggregated.

Third, regarding a comparison of relative profit levels, Commerce found during the period of review that the profit levels on sales of Type V cement sold as Type I cement and sales of Type I cement that is physically Type I cement differed. Although in its OCT Memorandum Commerce described these profits as "comparable," it still listed this factor as part of the totality of circumstances supporting its conclusion that sales of Type V cement sold as Type I cement were outside the ordinary course of trade. In its brief filed in the panel review, Commerce argues this point with a palpable lack of conviction. In its brief Commerce accurately reports the agency's action, but offers absolutely no explanation as to why the agency acted properly in listing profit disparities as a factor indicating sales outside the ordinary course of trade. See Commerce's November 16, 2001, Rule 57(2) Brief, at 81. In short, Commerce has failed to adequately explain why this factor leads to the conclusion that sales of Type V cement produced at the Hermosillo plants and invoiced as Type I cement were outside the ordinary course of trade.

Fourth, regarding differences in the number and type of customers, Commerce concluded that the number and type of customers who purchase Type V cement that is invoiced as Type I cement is substantially different from the number and type of customers who purchase Type I cement that is physically Type I cement. In addition, average per shipment quantities also differed to customers of Type V cement sold as Type I, on the one hand, and average per shipment quantities to customers of Type I cement that is physically Type I, on the other. We find some merit in CEMEX's observation that by isolating the sales at any one plant and then comparing those sales to the total sales of all other plants, it will often be the case that sales at the isolated plant are made to fewer customers when compared to total sales at all remaining

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plants. Are such sales thus outside the ordinary course of trade? Commerce's response to this question seems to sidestep the issue. Commerce states that OCT determinations are based on the totality of circumstances, "meaning that this factor is not dispositive and by itself does not automatically dictate a finding of sales outside the ordinary course of trade." Commerce's November 16, 2001, Rule 57(2) Brief, at 83.

But the question is not whether any single factor is dispositive, but rather whether a factor is probative of sales outside the ordinary course of trade and, if so, why. Commerce has not adequately answered this question to the satisfaction of this Panel in the case of the number and type of customers for Type V cement sold as Type I cement.

Fifth, regarding handling charges associated with both kinds of sales, Commerce found a disparity in the handling charges associated with sales of the two different Type I cements. This Panel observes as a threshold matter that the agency did not use the correct unit of currency, referring to handling charges in terms of "pesetas per metric ton" (the peseta is the national currency of Spain, not Mexico). We do not know if the agency meant to use "pesos per metric ton" or "centavos per metric ton" as the relevant unit of currency. If it is "centavos per metric ton", then the absolute difference in handling charges between Type V cement sold as Type I, on the one hand, and physically Type I cement sold as Type I, on the other, is minuscule. While it is true that Commerce's regulations direct the agency to evaluate "all of the circumstances particular to the sales in question" to determine whether "such sales or transactions have characteristics that are extraordinary for the market in question," 19 C.F.R. § 351.102(b) (definition of "Ordinary Course of Trade"), the agency is also obligated to adequately explain its decision.

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Lastly, CEMEX contends that home market sales should be based on a comparison of products as produced rather than as invoiced. However, whereas the statute calls for matching based on physical characteristics when comparing U.S. sales with home market sales, see 19 U.S.C. § 1677(16)(A), the correct focus in an OCT determination is to compare the "conditions and practices" of the sales in issue with the usual "conditions and practices" for home market sales generally.

The Final Determination addresses both the Type II and Type V OCT determination and the Type I OCT determination in approximately three and a one-half pages. See Final Determination, 64 Fed. Reg. at 13154-13158. The analysis of Type V cement sold as Type I cement and produced at the Hermosillo plants is limited to one paragraph beginning at page 13157. The sum total of the Type I OCT analysis is as follows:

> With respect to cement from the Hermosillo plants meeting Type V specifications but sold in the HM as Type I, as noted in the memorandum referred to above (August 31, 1998 Memorandum from Ronald L. MacDonald to Joseph A. Spetrini with subject: Seventh Antidumping Administrative Review on Gray Portland Cement and Clinker from Mexico-Ordinary Course of Trade), the record evidence indicates that only at the Hermosillo plants did CEMEX produce consistently a cement meeting on e ASTM standard and sell that cement as a different ASTM type. That factor, and others discussed in that memorandum, distinguishes sales of Type I cement produced at Hermosillo from CEMEX's sales of Type I cement produced as Type I from other production facilities.

Id. at 13157-58.

The analysis of the OCT determination for Type I cement found in the Final Determination is limited to a statement that the record indicates that only Type V cement produced at the Hermosillo plants that is physically Type V cement meets various ASTM standards. The analysis concludes by stating that "[t]hat factor, and others discussed in that memorandum [the OCT Memorandum of August 31, 1998]

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distinguishes sales of physically Type V cement sold as Type I cement and produced at Hermosillo from CEMEX's sales of Type I cement produced as Type I from other production facilities."

The OCT Memorandum in turn analyzes the OCT issue in nine and one-half pages. The first three and one-half pages are introductory. Pages 4 through 7 analyze the OCT determination with regard to Type V cement sold as Type II and Type V cement (discussed previously). While this analysis refers to Type I cement sales, it is not clear that the references are to anything other than Type I cement produced outside Hermosillo. The issue of Type V cement produced at Hermosillo but sold as Type I cement is analyzed separately in a section commencing on page 7 of the Memorandum. The heart of that analysis, which appears to be the reasoning adopted by Commerce, commences on page 8 and reads:

> The record evidence indicates that only at the Hermosillo plants did CEMEX consistently produce a cement meeting one ASTM standard and sell that cement as a different ASTM cement type.

The Memorandum continues:

> These factors distinguish CEMEX's sales of Type I cement produced at and sold from the Hermosillo facilities (those which meet Type V physical specifications) from CEMEX's sales of Type I cement (physically Type I cement) produced at (and sold from) other production facilities.

Thus, the sum total of the reasoning that leads to the agency's OCT determination is the reference to one factor, viz., that only at Hermosillo is a cement produced meeting one ASTM standard, but sold as various types of cements meeting other ASTM standards.

Having concluded that sales of Type V cement sold as Type I cement are not in the ordinary course of trade, the Memorandum goes on to list five other factors. However, given that these factors are mentioned after the OCT conclusion is reached,

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they appear to be more of an afterthought than as support for the OCT conclusion itself. The sentence that introduces these additional factors reads, "In addition, the record indicates that the following factors exist with regard to sales of Type I cement from the other Hermosillo plants . . . ." While one could assume that these additional factors are placed in the Memorandum as support for the conclusion drawn, this assumption is undercut when one considers the analysis accompanying several of the factors. Regarding the difference in freight costs, for example, there is no analysis of why the freight cost differential is calculated on a CIF or FOB basis. Likewise, profit is listed as a factor, but again there is no analysis of why the numbers cited are relevant. This is particularly troubling when one considers that the profit margins are comparable. With respect to the number and types of customers, the number of customers is discussed, but the types of customers are all but ignored. Perhaps this Panel should assume that the types of customers refer to large industrial contractors versus individual consumers. However, this Panel could only make that assumption if we incorporate by reference the analysis at page 6 of the Memorandum where Commerce discusses Type V cement sold as Type II and Type V cement, but not Type V cement sold as Type I cement. Finally, regarding handling charges, we are not told what the relevance of the numbers are, much less why reference is made to the Spanish peseta rather than the Mexican peso.

In short, it appears that while Commerce may have looked at several relevant factors, it has failed to adequately explain their relevance. A remand under these circumstances is entirely warranted. Such a remand is for the purpose of requesting the agency to make its reasoning processes more transparent. Having seen references to relevant factors, this Panel simply cannot take Commerce's word for it that these factors support its OCT determination. Commerce needs to explicate its analysis so that this Panel can discern the path of its reasoning and either affirm or remand for further consideration.

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In view of the foregoing, this Panel is unable to endorse the conclusion reached by Commerce that all of the facts the agency has found support its OCT determination with regard to sales of physically Type V cement sold as Type I cement. Specifically, we have reservations about Commerce's conclusions with respect to (1) differences in freight costs, (2) relative profit levels, (3) number and type of customers, and (4) the disparity in handling charges.

With regard to freight costs, Commerce has not explained why CIF and FOB shipments of Type I cement cannot be aggregated, other than to state in a conclusory fashion that doing so would preclude an "apples-to-apples" comparison. Why does aggregating FOB and CIF shipping costs preclude an apples-to-apples comparison? Commerce should explain why this is the case on remand.

Regarding differences in the number and type of customers, Commerce has not adequately explained why its finding regarding differences in the number of customers supports its OCT determination. As has been pointed out, by isolating the sales of one type of cement sold from any one plant and then comparing those sales to the total sales of that type of cement sold from all other plants, it will often be the case that sales at the isolated plant are made to fewer customers when compared to total sales at all remaining plants. Are such sales thus outside the ordinary course of trade? If so, then Commerce should explain on remand why such sales are outside the ordinary course of trade. Likewise, Commerce has not explained how customers for Type V cement sold as Type I differ in type from customers for its other cement sales. Commerce should do so on remand.

Regarding the disparity in profit levels, Commerce has conceded that profit levels for Type V cement sold as Type I, on the one hand, and for Type I cement that is physically Type I, on the other, are comparable. Yet the agency has not explained why this finding supports the conclusion that sales of physically Type V cement sold as Type

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I are outside the ordinary course of trade. Moreover, Commerce has offered no explanation as to why disparities in profit levels support an OCT determination, when all sales of Type I cement, whether physically Type V or physically Type I, were in fact profitable. Its analysis is this connection is conclusory. Therefore, Commerce should explain on remand why the difference in profit levels supports its OCT determination.

Finally, regarding the disparity in handling charges, Commerce should explain on remand which unit of currency was used to support its conclusion. If handling charges are in fact denominated in centavos rather than pesos, then Commerce should also explain on remand why this minuscule absolute difference in handling charges supports its OCT determination.

This Panel's evaluation of Commerce's OCT determination is not based on any second-guessing of the agency. Rather, our reservations are based on the lack of an adequate explanation of why these various factors support the conclusion that sales of Type V cement sold as Type I cement are outside the ordinary course of trade. This Panel finds Commerce's current explanation to be both confused and poorly organized. In its OCT Memorandum Commerce appears to have blurred and conflated the analysis of the two OCT issues that are presented in this review, i.e., whether sales of Type V cement sold as Type II and Type V cement were outside the ordinary course of trade with whether Type V cement sold as Type I cement were also outside the ordinary course of trade. As we note below in that part of our opinion addressing the regional duty assessment issue, it is a vital and time-honored principle of U.S. administrative law that an agency's ruling in an adjudicative proceeding be supported by reasoned decision-making, with the various connections among the agency's fact findings, its reasoning process, and its conclusion being sufficiently clear. As the U.S. Supreme Court observed in SEC v. Chenery Corp,:

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> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

332 U.S. 194, 196-97 (1947) (quoting United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499, 511 (1935)). In short, an agency's reasoning process must be transparent before a reviewing body can be asked to review an agency decision.

It may be that the totality of circumstances as found and weighed by Commerce supports its determination that CEMEX's home market sales of physically Type V cement sold as Type I cement were outside the ordinary course of trade. However, Commerce's reasoning process in support of that conclusion lacks transparency and requires further explication.

4. Conclusion

We cannot conclude that Commerce properly determined that CEMEX's home market sales of Type V cement sold as Type I cement were outside the ordinary course of trade. This Panel remands to Commerce and instructs the agency to explain why the findings it made regarding the difference in freight costs, the relative profit levels, the number and type of customers, and the disparity in handling charges support the agency's determination that sales of physically Type V cement sold as Type I cement were outside the ordinary course of trade.

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C. Whether This NAFTA Panel Has The Authority To: (A) Review Commerce's Conclusion That The U.S. Statutory Scheme For Assessment Of Antidumping Of Antidumping Duties In Regional Industry Cases Is Consistent With the Obligations of the United States Under The WTO Antidumping Agreement; (B) Review The Questions Raised By CDC Concerning The Interpretation Of The U.S. Constitution As Bearing On The Regional Assessment Issue; and (C) Order Commerce To Revoke The Order Based On An Allegedly Improper Assessment Methodology

1. Background

In the proceeding before Commerce, CEMEX and CDC argued that, in imposing antidumping duties on all imports of the subject merchandise, including those consigned for consumption outside the Southern Tier region, the United States was failing to honor its obligations under Article 4.2 of the WTO Antidumping Agreement and its predecessor, Article 4.2 of the 1979 Tokyo Round Antidumping Code. Article 4.2 of the WTO Antidumping Agreement provides:

> When the domestic industry has been interpreted as referring to the producers in a certain area, *i.e.*, a market as defined in paragraph 1 (ii), anti-dumping duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

CEMEX and CDC argued that Article 4.2 compels Commerce to refrain from assessing duties on subject merchandise destined for consumption outside the Southern Tier. They further argued that there is no U.S. constitutional prohibition against levying antidumping duties on a regional basis. CDC also argued that, in adopting

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Section 218 of the Uruguay Round Agreements Act ("URAA"), the United States implemented Article 4.2 inadequately, in particular by failing to address the situation of producers/exporters who, like CDC, export merchandise into the U.S. both inside and outside of the pertinent U.S. region. CDC asked that Commerce terminate this review and revoke the antidumping order or, alternatively, assess antidumping duties only on CDC's entries of merchandise consumed within the Southern Tier region.

In the proceeding before Commerce, STCC argued that Commerce had properly assessed antidumping duties on all nationwide entries of the subject merchandise. STCC asserted that the Congress intended U.S. law to prevail in the event of a conflict between U.S. law and the international trade agreements and that, because Commerce's actions were consistent with U.S. law, Commerce did not need to consider the respondents' other arguments. STCC also contended that the provisions of 19 U.S. C. § 1673e(d)(1)-(2) [Section 736 (d)(l)–(2) of the Tariff Act of 1930 ("Act")] and 19 U.S.C. § 1673c(m)(1)-(2) [Section 734 (m) (l)-(2) of the Act], which were added to the Act by Section 218 of the URAA to conform to the regional industry provisions of the WTO Antidumping Agreement, are inapplicable to these respondents and thus confer no authority upon Commerce to refrain from assessing antidumping duties outside the Southern Tier.[3]

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[3] 19 U.S.C. § 1673e(d) provides:

(d) Special Rule for Regional Industries.

(1) *In general.* In an investigation in which the Commission makes a regional industry determination under section 1677 (4)(C) of this title, the administering authority shall, to the maximum extent possible, direct that duties be assessed only on the subject merchandise of the specific exporters or producers that exported the subject merchandise for sale in the region concerned during the period of investigation.

(2) *Exception for new exporters and producers.* After publication of the antidumping duty order, if the administering authority finds that a new exporter or producer is exporting the subject merchandise for sale in the region concerned, the administering authority shall direct that duties be assessed on the subject merchandise of the new exporter or producer consistent with the provisions of section 1675(a)(2)(B) of this title.

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In its Final Determination, Commerce disagreed with the contention of CEMEX and CDC that it should exempt entries of subject merchandise exported into regions other than the Southern Tier from antidumping duties and cash deposits. See Final Determination, 64 Fed. Reg. at 13163-66. It stated that, pursuant to both judicial precedents and Section 102 of the URAA, "even if respondents were correct in asserting that the [U.S.] statutory provisions relating to regional assessment of duties conflicted with the obligations contained in Article 4.2 of the Antidumping Agreement, Commerce must act in conformity with the antidumping statute." Id. at 13165. In this connection, Commerce reasoned, first, that Section 1673e(d)(l) of the Act applies only to investigations initiated on the basis of petitions filed after January 1, 1995, which would not cover CEMEX's and CDC's exports since the original Mexican cement antidumping investigation took place in 1989-90. Id. Second, Commerce determined that, even if the provisions of 19 U.S.C. §1673e(d)(l) and (2) were to be applied to the present review, they would not support the respondents' position about regional assessment. Since CEMEX and CDC did export subject merchandise into the region during the period of investigation, the language of subsection (d)(l) would not exclude

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19 U.S.C. § 1673c(m)(1) and (2)provides:

(m) Special Rule for Regional Industry Investigations.

(1) *Suspension agreements.* If the Commission makes a regional industry determination under section 1677 (4)(C) of this title, the administering authority shall offer exporters of the subject merchandise who account for substantially all exports of that merchandise for sale in the region concerned the opportunity to enter into an agreement described in subsection (b), (c), or (l) of this section.

(2) *Requirements for suspension agreements.* Any agreement described in paragraph (l) shall be subject to all the requirements imposed under this section for other agreements under subsection (b), (c), or (l), except that if the Commission makes a regional industry determination described in paragraph (l) in the final affirmative determination under section 1673d(b) of this title but not in the preliminary affirmative determination under section 1673b(a)of this title, any agreement described in paragraph (l) may be accepted within 60 days after the antidumping order is published under 1673e of this title.

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any of respondents' merchandise from assessment. Id.[4] Moreover, subsection (d)(2) would also be inapplicable to the respondents because neither was a new exporter or producer as described in the provision. Id. Further, 19 U.S.C. §1673c(m), providing exporters the opportunity to enter into suspension agreements, was not applicable because Commerce "cannot enter into a suspension agreement once the 60-day post-order period has passed (and, indeed, seven administrative reviews have passed)." Id. Commerce stated further that, since its actions conformed to the statutory provisions, it did not need to consider further respondents' arguments concerning the United States' implementation of its obligations under the Antidumping Agreement. Nonetheless, invoking the rule of statutory interpretation that, absent express Congressional language to the contrary, a U.S. statute should be interpreted consistently with the international obligations of the U.S., Commerce observed that, "[b]ecause qualifying exporters are given an opportunity for exemption from the assessment of antidumping duties, the statutory scheme described above is consistent with Article 4.2 of the Antidumping Agreement." Id. at 13166. Finally, Commerce stated that it had no authority to terminate the review and revoke the order at this stage. Id.

2. Contentions of the Parties

In the review proceeding before this Panel, CDC urges that Commerce's decision fails to implement the assessment rules applicable to regional industry cases and that this justifies termination of the seventh review and revocation of the underlying antidumping order. It states that, during the seventh review period, CDC sold gray Portland cement both inside and outside the Southern Tier region. Commerce calculated antidumping duty margins on both types of sales. CDC maintains that Commerce's

[4] Commerce stated that, for the same reason, section 351.212(f) of its regulations would not apply to CEMEX and CDC's entries.

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determination regarding sales outside the region is not in accordance with law, and that this Panel should remand the matter to Commerce. CDC argues further that the U.S. Government's failure to implement its assessment obligations in regional industry cases provides additional justification for termination of this review and revocation of the antidumping duty order. CDC's May 21, 2001, Rule 57(1) Brief, at 20-49.

CDC's contention that applicable law required the United States to limit its assessment of antidumping duties to the Southern Tier region, the U.S. region in which the International Trade Commission found material injury to the domestic industry by reason of sales of imported Mexican cement, is premised on the international trade agreements to which the United States is a party. Article 4.2 of the 1979 Tokyo Round Antidumping Code, CDC observes, established the general rule (with an exception) that, in regional antidumping cases, the antidumping duties shall be levied only on merchandise destined for consumption inside the relevant region. This general rule (with an exception), states CDC, was carried over to Article 4.2 of the URAA. Id. at 22-25. However, according to CDC, the rule appearing in Article 4.2 of the Tokyo Round Antidumping Code was not implemented by the United States and it was not until the adoption of Section 218 of the URAA in 1995 that this rule regarding assessment in regional industry cases was implemented in any form by the U.S. Id. at 26.

CDC urges that the United States' implementation of Article 4.2, through the statutory amendments and Commerce's regulations, is "inadequate." Id. at 30. "Most fundamentally [CDC maintains] the U.S. Government has not explained its theory that implementing the general assessment rule would violate the U.S. Constitution . . .." Id. at 31. In CDC's view, the U.S. Constitution does not prohibit the levying of antidumping duties on a regional basis. Therefore, the exception set out in Article 4.2 -- applicable when implementation of the general rule is unconstitutional in the Member country -- does not apply, and the U.S. must comply with the Article 4.2's general rule

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of regional assessment. Id. at 32-33. CDC argues that the "Port Preference Clause" (Article 1, Section 9, Clause 6) and the "Uniformity Clause" (Article 1, Section 8, Clause 1) of the Constitution should not be construed as precluding the assessment of duties consistently with the general rule of Article 4.2 of the WTO Antidumping Code. Id. at 33-41.

CDC argues that, in enacting Section 218 of the URAA, Congress has demonstrated that the U.S. is not one of the WTO Members which has a constitutional prohibition against implementation of the Article 4.2 general assessment rule. Yet Section 218 implements that rule only partially by omitting provision for exporters who export the merchandise for sale both in and out of the region. Id. at 46. CDC also contends that Section 218 is inadequate in that its application is limited to exports for sale in the region during the period of investigation, while the U.S. has enacted no transition rule to comply with Article 4.2 in the assessment stage. Id. at 44-45.

CDC further argues that, even if the Constitution prohibits U.S. implementation of the general assessment rule of Article 4.2, the United States has failed to implement the exception provisions adequately in that the Mexican cement producers have not been offered a "meaningful opportunity to sign the type of suspension agreement required by Article 4.2 of the WTO Antidumping Agreement." Id. at 42. CDC asks this Panel to remand to Commerce with instructions to (a) terminate the seventh review and to revoke the order; or to (b)not assess duties on sales outside the region; or to (c) further consider and explain whether implementing the regional assessment rule of the WTO Antidumping Agreement is inconsistent with U.S. law. CDC's December 14, 2001, Rule 57(3) Brief, at 9-13.

STCC urges that Commerce properly determined, pursuant to the U.S. antidumping statute, that antidumping duties should be assessed on nationwide imports of gray portland cement and clinker from Mexico. STCC's November 19, 2001,

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Rule 57(2) and 56(1) Brief, at 205-35. STCC maintains that the international agreement provisions pressed by CDC have no direct force or effect in United States law and hence do not govern Commerce's determinations. Moreover, states STCC, the collection of antidumping duties on a region-specific basis is unconstitutional, and CDC is not able to invoke the statutory provisions which the Congress has crafted that "provide for the assessment of antidumping duties in regional industry cases in a manner that is in accord with both the constitutional constraints and U.S. international obligations." Id. at 207.

STCC asserts that the Tokyo Round and Uruguay Round trade agreements upon which CDC relies are not self-executing and that, therefore, their legal effect in the United States is wholly dependent upon the implementing legislation enacted by the Congress. STCC points out that both the Trade Agreements Act of 1979 and the URAA specifically provide that any provision of the trade agreement that is in conflict with a U.S. statute shall not be given effect under U.S. law. 19 U.S.C.§ 2504 (3) (a); 19 U.S.C.§ 3512 (a) (1). Id. at 211-12. STCC cites Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660 (Fed. Cir. 1992) as controlling case law in this regard. Moreover, the Tokyo Round Antidumping Code is said to have no effect because it has been superseded by the WTO Antidumping Agreement. Id. at 213-14.

STCC urges that Section 218 of the URAA amended the Tariff Act of 1930 specifically to conform to the regional industry provisions of the WTO Antidumping Agreement. These statutory provisions do not apply in CDC's case for a number of reasons, STCC states. First, by reason of Section 291 of the URAA, the new provisions apply only to investigations initiated on the basis of petitions filed after January 1, 1995. Id. at 215. Second, because CDC exported gray Portland cement to the Southern Tier region during the relevant period, it is subject to antidumping duties on all of its exports to the United States under 19 U.S.C. § 1673e (d) (l). Id. at 216. Third, CDC

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cannot invoke 19 U.S.C. § 1673c(m), under which Commerce must offer certain exporters the opportunity to enter into a suspension agreement, because Commerce lacks the authority to offer suspension agreements at this stage of the proceedings. Id. STCC asserts that Commerce's failure to offer CDC an opportunity for a suspension agreement is barred at this time. STCC also argues that the consistent interpretation of the U.S. Government and the legislative history of the URAA expressly recognize that the U.S. Constitution, by reason of the Port Preference Clause and the Uniformity Clause, does not allow differential duty treatment based on ports. Id. at 222.

Commerce's brief in this Panel review proceeding declares as follows, with respect to the regional assessment issue:

> [T]his Panel does not have the authority to l) review the consistency of U.S. antidumping duty assessment provisions with the United States' obligations under the WTO antidumping duty agreement; 2) review the Department's interpretation of the U.S. Constitution regarding the application of the U.S. antidumping duty assessment provision; or 3) revoke the order based on an allegedly improper assessment methodology.

Commerce's November 16, 2001, Rule 56 (2) Brief, at 89.

Accordingly, Commerce urges that NAFTA Dispute Settlement Panels such as this one do not have the authority to rule on the consistency of U.S. law with the WTO agreements because: (1) Article 1904 (2) of the NAFTA authorizes panels only to "rule on the consistency of Commerce's determination with U.S. law which CDC has not challenged," and (2) 19 U.S.C.§ 3512(c)(1)(B) provides that only the United States may challenge the action or inaction of a U.S. government agency as inconsistent with the WTO Antidumping Agreement. The remedy, if Mexico believes that it has a grievance on this issue, is review by a WTO dispute resolution panel, states Commerce. Id. at 90.

Commerce also maintains that this Panel does not have the authority to consider the questions concerning the interpretation of the U.S. Constitution which CDC has

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raised. In this connection, Commerce relies upon the provision in 19 U.S.C.§ 1516a(g)(4) headed "*Exception to exclusive binational panel review for constitutional issues.*" Commerce asserts that CDC's remedy in this regard is to take its challenge on the interpretation of these constitutional provisions to the CIT after the completion of the panel review process.[5] Id. at 91-92.

Finally, Commerce maintains that this Panel lacks the authority to order Commerce to revoke the order based on incorrect assessment methodology because the Panel's authority is limited to, at most, remanding the issue to Commerce with directions to apply an assessment methodology that is supported by substantial evidence and is otherwise in accordance with law. Id. at 92-93.

In the oral hearing before this Panel, counsel for Commerce reiterated the latter's position that the Panel lacks authority to rule on the issues raised under the U.S. Constitution, and that CDC can present these issues to a three judge panel of the CIT. Transcript of Oral Hearing of February 27, 2002 at 95-99. During the colloquy with the Panel members, counsel for Commerce also stated that Commerce's position that it lacks authority to impose antidumping duties on a regional basis is, in fact, not simply a statutory matter, but is fundamentally predicated upon two provisions of the U.S. Constitution. Id. at 95-96, 98. In its rebuttal presentation during the hearing, counsel for CDC commented upon this statement by Commerce as follows:

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[5] Section 1516a(g)(4)(B)—(C) provides:

(B) Other constitutional review. Review is available under subsection (a) of this section with respect to a determination solely concerning a constitutional issue (other than an issue to which subparagraph (A) applies) arising under any law of the United States as enacted or applied. An action for review under this subparagraph shall be assigned to a 3-judge panel of the United States Court of International Trade.

(C) Commencement of review. Notwithstanding the time limits in subsection (a) of this section, within 30 days after the date of publication in the Federal Register of notice that binational panel review has been completed, an interested party who is a party to the proceeding in connection with which the matter arises may commence an action under subparagraph (A) or (B) by filing an action in accordance with the rules of the court.

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> Mr. Richardson stated today, unequivocally, that the Department does consider itself to be prohibited from assessing duties on a regional basis, and he identified the U.S. Constitution as the source of that prohibition. Now, this is the first time -- the first time -- that we have heard the Department explain its position with respect to regional assessment. The final determination in this review, which is the decision being reviewed by this panel, never states this position.

Id. at 148-49.

3. Analysis

CDC urges this Panel to find that Commerce's decision to assess duties on a nationwide basis in this regional industry case is not in accordance with law. CDC's position is premised on the terms of the WTO Antidumping Agreement to which the United States is a party. Commerce has not presented its arguments on the merits of this issue to us because it maintains that this NAFTA Panel does not have the authority to consider the issue.

We fully accept two propositions pressed on us by Commerce: (1) by virtue of Section 102 of the URAA, in the event of a conflict between a provision of the WTO Antidumping Agreement and any U.S. statute, the former cannot be given effect; and (2) a NAFTA Panel is not empowered to decide whether the United States is in default in the nation's obligations under any of the WTO Agreements.

Our acknowledging these propositions does not, however, mean that we accept that the WTO Antidumping Agreement is irrelevant to our assigned task and that we must shield our eyes from any argument in this review proceeding that refers to the United States' international commitments. As Commerce itself recognized in its Final Determination, the terms of the United States' international obligations may be pertinent to the construction of a U.S. statute because "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains…" 64 Fed. Reg. at 13165-66 (quoting Murray v. Schooner Charming Betsy, 6

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U.S. (2 Cranch.) 64, 118, 2 L. Ed. 208 (1804); citing Restatement (Third) of the Foreign Relations Law of the United States §114 (1987)). "[W]hen an act of Congress and an international agreement…relate to the same subject, the courts, regulatory agencies, and the Executive Branch will endeavor to construe them so as to give effect to both." Id. at § 115, Comment a; Footwear Distributors and Retailers v. United States, 852 F. Supp. 1078 (Ct. Int'l Trade 1994). Absent express Congressional language to the contrary, the statutes of the U.S. should not be interpreted to conflict with the international trade agreements into which the nation has entered. Federal Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995); Fundicao Tupy S. A. v. United States, 652 F. Supp. 1538, 1543 (Ct. Int'l Trade 1987). In sum, in performing our function of reviewing whether Commerce has acted in accordance with law under the statutes which it administers, we are bound to look at those international agreements which, like the WTO Antidumping Agreement, may shed light on the Congressional intent.

We now turn to Commerce's determination on the regional assessment argument made by CDC. Although Commerce's determination rejects CDC's argument on statutory grounds, stating that it does not need to reach CDC's contention based on Article 4.2 of the WTO Antidumping Agreement, the determination does go on to find the statutory scheme to be consistent with Article 4.2. 64 Fed. Reg. at 13165-66.

Article 4.2 provides alternative requirements with respect to the regional assessment of duties, depending on whether or not the constitutional law of the importing country permits the levying of antidumping duties on a regional basis. Where there is no such constitutional bar, the general rule of Article 4.2 applies, requiring that the duties be limited to subject products consigned for final consumption in the specified regional area. On the other hand, where there is such a constitutional prohibition, more detailed rules are prescribed by Article 4.2. The proper application of Article 4.2 in the

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case of the United States, therefore, requires a threshold determination of whether the U.S. Constitution bars the imposition of antidumping duties on a regional basis. Indeed, the respondents and STCC made opposing arguments to Commerce on the constitutional issue, id. at 13164, but Commerce made no findings on the matter. It apparently was not until the oral hearing before this Panel that Commerce gave its opinion that there is a constitutional bar to regional assessment of antidumping duties---and even then Commerce declared its position on this point only in the barest terms.

It is a vital and time-honored principle of U.S. administrative law that an agency's ruling in an adjudicative proceeding must be supported by reasoned decision-making, with the connection between the reasoning process undertaken and the conclusion reached thereby made sufficiently clear. Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 196 (1947) ("If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable…"); Burlington Truck Lines v. United States, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action; Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself…") Accord Elec. Consumers Res. Council v. F.E.R.C., 747 F. 2d 1511, 1513 (D.C. Cir 1984); SKF USA Inc. v. United States, 254 F. 3d 1022, 1028 (Fed. Cir. 2001); Rhodia Inc. v. United States, 185 F. Supp. 2d 1343 (Ct. Int'l Trade 2001); A. Hirsh, Inc. v. United States, 729 F. Supp. 1360, 1362 (Ct. Int'l Trade 1990).

An agency's failure to meet this standard of reasoned decision-making deprives the parties of their opportunity for a fair and transparent proceeding and makes impossible the task of the reviewing authority. In this case, since Commerce's decision on the regional assessment issue was apparently based, in whole or in part, on its views concerning the dictates of the U.S. Constitution in the matter, those views should have

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been expressed at the time of the agency decision-making. Without the benefit of Commerce's adequately spelled out views on the constitutional issue, respondents cannot have their "day in court", regardless of whether review of the agency's decision on the matter can be performed by this Panel (a question on which we express no opinion at this time) or, instead, is potentially under the jurisdiction of a three judge panel of the CIT as Commerce urges. The Panel finds that Commerce's failure to state its position on the constitutional issues in the course of its decision-making was contrary to law.

4. **Conclusion**

The regional antidumping duty assessment issue is remanded for Commerce to more adequately explicate the basis of its decision, with particular reference to the requirements of the U.S. Constitution. In light of this remand, we find it unnecessary to reach at this time the questions of whether this Panel is authorized to review matters of constitutional interpretation and whether the Panel is empowered to order Commerce to revoke the antidumping duty order based on an allegedly improper assessment methodology.

D. Whether Commerce Properly Denied An Adjustment To CDC's U.S. Indirect Selling Expenses For Interest Allegedly Incurred In Financing Cash Deposits For Antidumping Duties

1. **Background**

During the seventh administrative review, CDC claimed a downward adjustment to its reported U.S. indirect selling expenses for interest allegedly incurred in financing cash deposits for antidumping duties. In its Final Determination, Commerce denied CDC such an adjustment, stating that the denial was consistent with Commerce's analysis of such expenses in the sixth administrative review and the agency's practice as described in Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts

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Thereof from France, et al., 62 Fed. Reg. 54043, 54079 (October 17, 1997). See Final Determination, 64 Fed. Reg. at 13163. In denying CDC the adjustment, Commerce adopted its discussion with respect to this issue set forth in its Sixth Review Final Results, 63 Fed. Reg. 12764 (March 16, 1998). In that review, Commerce noted that the antidumping statute did not contain a precise definition of what constitutes a selling expense. 63 Fed. Reg. at 12782. Instead, Commerce observed that Congress gave it discretion to determine what constitutes a selling expense, and that it was a matter of policy whether Commerce considered there to be any financing expenses associated with cash deposits. Id.

Commerce reasoned that there is a distinction between "business expenses that arise from economic activities in the United States and business expenses that are direct, inevitable consequences of the dumping order," and that an adjustment should only be made for business expenses that are direct, inevitable consequences of the dumping order. Id. Financial expenses, Commerce explained, were not a direct, inevitable consequence of an antidumping order, stating:

> Money is fungible. If an importer acquires a loan to cover one operating cost, that may simply mean that it will not be necessary to borrow money to cover a different operating cost. Companies may choose to meet obligations for cash deposits in a variety of ways that rely on existing capital resources or that require raising new resources through debt or equity. For example, companies may choose to pay deposits by using cash on hand, obtaining loans, increasing sales revenues, or raising capital through the sale of equity shares. In fact, companies face these choices every day regarding all their expenses and financial obligations. There is nothing inevitable about a company having to finance cash deposits and there is no way for the [DOC] to trace the motivation or use of such funds, even if it were.

Id. Based on this rationale, Commerce determined that there was no basis by which to reduce the pool of indirect selling expenses reported to it.

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Commerce also determined that it should not use an imputed amount that would theoretically be associated with financing of cash deposits. Id. at 12783. Commerce reasoned that "[t]here is no real opportunity cost associated with cash deposits when the paying of such deposits is a precondition for doing business in the United States . . . . Companies cannot choose not to pay cash deposits if they want to import nor can they dictate the terms, conditions, or timing of such payments." Id.

2. Contentions of the Parties

CDC claims that Commerce's decision to deny an adjustment to CDC's U.S. indirect selling expenses for interest allegedly incurred in financing cash deposits for antidumping duties was contrary to its prior decisions as well as the decisions of the CIT upholding such adjustments. CDC's May 21, 2001, Rule 57(1) Brief, at 50.

CDC asserts that in its prior decisions, Commerce allowed an adjustment for interest allegedly incurred in financing cash deposits for antidumping duties, and that Commerce noted that such interest expenses were incurred "as a result of the need to pay antidumping duty cash deposits" and thus "were incurred only because of the existence of the antidumping duty order." Id. at 50 (citing Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof from Japan ("TRBs"), 62 Fed. Reg. 11826, 11830 (March 13, 1997)). Further, CDC claims that Commerce stated that "it has been our long-standing practice to not treat expenses related to antidumping proceedings as selling expenses," and that since these expenses are not "incurred in the selling of the subject merchandise," Commerce reasoned that under the statute they should not be deducted from constructed export price. CDC's May 21, 2001, Rule 57(1) Brief, at 50-51. Further, CDC notes that Commerce stated that it was fair to permit the adjustment to compensate companies for the "opportunity cost" associated with financing cash deposits. Id. at 51. CDC argues that because the payment of cash deposits can be

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financed in a number of different ways, making it difficult to trace the actual cost of financing such expenses, Commerce previously has allowed the adjustment regardless of how it is financed, as Commerce has recognized that a company incurs a real expense whether it actually has obtained loans or has diverted funds from other investment activity to finance the antidumping cash deposits and imputed these costs for purposes of reporting the expense to Commerce. Id. at 55-56. In either situation, CDC argues, there is an opportunity cost associated with financing cash deposits. Id. at 56.

CDC also asserts that until a recent decision, NTN Bearing Corp. v. United States, 104 F. Supp. 2d 110, 138 (Ct. Int'l Trade 2000), the CIT consistently supported the position that Commerce should allow an adjustment to CDC's indirect selling expenses for the interest allegedly incurred in financing cash deposits for antidumping duties, and in cases in which it reviewed Commerce's decision to accept or reject the adjustment, the CIT had approved the use of the adjustment either by upholding Commerce's decisions to grant the adjustment, or by remanding Commerce's decisions to deny the adjustment. Id. at 52. In the NTN Bearing case, CDC notes that the CIT found that Commerce "acted rationally in denying NTN's claimed interest-expense adjustment and, therefore, [Commerce's] determination is sustained." Id. CDC, however, dismisses the NTN Bearing case by noting that the case has been appealed to the Federal Circuit, which has not had an opportunity to make a ruling that would bind this Panel. Id. at 56.

Commerce argues that it properly denied an adjustment to CDC's U.S. indirect selling expenses for interest allegedly incurred in financing cash deposits for antidumping duties. Commerce's November Rule 56(2) Brief, at 93. Commerce, citing the TRBs case, recognizes that it had previously allowed for this adjustment. Id. at 95. More recently, however, Commerce notes that it has revised its practice to deny this adjustment, thereby having the effect of not reducing the pool of indirect selling expenses

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for imputed financing expenses associated with payment of cash deposits from U.S. price. Id. The basis for Commerce's revised practice is that Commerce now distinguishes between business expenses that are a direct, inevitable consequence of an antidumping duty order (which Commerce allows an adjustment for) and business expenses that arise from economic activities in the United States (which Commerce does not allow an adjustment for), and that since, according to Commerce, there is nothing inevitable about a company having to finance cash deposits, Commerce should not allow an adjustment for the financing of cash deposits. Id. at 99.

Commerce notes that the CIT has recognized that Commerce is allowed to change its policy, as long as it presents a reasonable rationale for its departure from its prior practice, Id. at 98 (citing Timken Co. v. United States, 989 F. Supp. 234, 250 (Ct. Int'l Trade 1997), vacated in part on other grounds, 1 F. Supp. 2d 1390, 1393 (Ct. Int'l Trade 1998)), and believes that in the Final Determination in this case it did so. Id. at 99 (citing Seventh Review Final Results, 64 Fed. Reg. at 13163 (adopting the discussion set forth in the Sixth Review Final Results, 63 Fed. Reg. at 12782)).

STCC asserts that Commerce is entitled to apply its current policy of denying an adjustment for the financing of cash deposits to the facts of this case. STCC's November 19, 2001, Rule 57(2) Brief, at 148. STCC recognizes that Commerce had, in the past, allowed for an adjustment for the financing of cash deposits, but that a federal agency, such as Commerce, may change its interpretation and application of a statute and regulation as long as the new interpretation and application are consistent with the legislative intent and are reasonably explained. Id. at 149. In addition, STCC points out that that CIT has recognized that "there is no rule of administrative stare decisis." Id. at 149 (quoting Toyota Motor Sales, U.S.A., Inc. v. United States, 585 F. Supp. 649 (Ct. Int'l Trade 1984)).

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STCC also claims that Commerce has no statutory basis to make an adjustment to indirect selling expenses for interest allegedly incurred in financing cash deposits, STCC's November 19, 2001, Rule 57(2) Brief, at 143, and that its denial of an adjustment for financing cash deposits is consistent with both federal statutes and regulations. Id. at 150. According to STCC, if Commerce allowed an adjustment for the financing of cash deposits, then there would be an upward adjustment to export price and constructed export price in every instance that cash deposits were financed. Id. at 151. However, STCC points out that the statute that sets forth the required upward adjustments to export price and constructed export price – 19 U.S.C. § 1677a(c) – makes no reference to cash deposit financing expenses. Id. at 151. STCC asserts that the Federal Circuit "has recognized the basic principle of statutory construction that a statutory enumeration of specific terms – without qualifying language – tends to
indicate a legislative intent to exclude all non-enumerated items." Id. at 152. Thus, according to STCC, the fact that certain upward adjustments to export price and constructed export price are listed in 19 U.S.C. § 1677a(c) indicates that other upward adjustments – such as an upward adjustment for financing of cash deposits – were not intended by Congress. Id.

3. Analysis

The statutory provisions at issue – 19 U.S.C. § 1677a(c) & (d) – do not provide clear guidance with respect to whether there can be an adjustment for interest allegedly incurred in financing cash deposits for antidumping duties. In light of the considerable deference we must afford to Commerce's expertise in administering the antidumping law, the issue for this binational panel is whether Commerce's statutory interpretation is a permissible construction of the statute. Steel Auth. of India, Ltd. v. United States, 146 F. Supp. 2d 900, 905 (Ct. Int'l Trade 2001). We hold that it is, and that Commerce reasonably interpreted the statutory provisions at issue by distinguishing between (a)

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business expenses that are a direct, inevitable consequence of an antidumping duty order, and (b) business expenses that arise from economic activities in the United States, and finding that having to finance cash deposits falls within the former category. We also find that, with respect to imputed interest costs, Commerce reasonably interpreted the statutory provisions at issue in concluding that there is no real opportunity cost associated with cash deposits when the paying of such deposits is a precondition for doing business in the United States. More importantly, that Commerce has changed its practice does not detract from the reasonableness of Commerce's current statutory interpretation. As the CIT recently noted:

> [A]n agency must be allowed to assess the wisdom of its policy on a continuing basis. Under the Chevron scheme, agency discretion to reconsider policies is inalienable . . . Any assumption that Congress intended to freeze an administrative interpretation of a statute would be entirely contrary to the concept of Chevron which assumes and approves of the ability of administrative agencies to change their interpretations.

Koyo Seiko Co., Ltd. v. United States, 2002 Ct. Intl. Trade LEXIS 10, slip op. 2002-11 (February 1, 2002).

We note that this binational panel decision is in accord with the three most recent CIT decisions considering this issue. See Koyo Seiko Co., Ltd. v. United States, 2002 Ct. Intl. Trade LEXIS 10; slip op. 2002-11 (Ct. Int'l Trade February 1, 2002); NTN Bearing Corp. v. United States, 2002 Ct. Intl. Trade LEXIS 8; slip op. 2002-07 (Ct. Int'l Trade January 24, 2002); and NTN Bearing Corp. v. United States, 155 F. Supp. 2d 715 (Ct. Int'l Trade 2001).[6]

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[6] On March 7, 2002, the Federal Circuit heard oral argument on this issue. As of this date, the Federal Circuit has not rendered a decision. See NTN Bearing Corp. v. United States, Docket No. 011328.

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4. Conclusion

Based on the foregoing, Commerce properly denied an adjustment to CDC's U.S. indirect selling expenses for interest allegedly incurred in financing cash deposits for antidumping duties. Accordingly, Commerce's determination is affirmed.

E. Whether Commerce Properly Determined To Resort To Partial Adverse Facts Available For CEMEX's Data From The Hidalgo Plant Rather Than Total Adverse Facts Available For CEMEX's Entire Response

1. Background

With the exception of the reported Hidalgo plant sales and the DIFMER information, Commerce accepted CEMEX's timely reported information, subsequently verified it, and did not resort to total adverse facts available. Instead, Commerce chose to employ partial adverse facts available where necessary, to supplement CEMEX's information, in the determination of the dumping margin. This part of the opinion will address the facts available issue, in the context of the Hidalgo plant sales. The DIFMER issue is subsequently addressed at 96-100.

While Commerce was able to verify most of CEMEX's timely submitted information, it found CEMEX's initially reported information on the Hidalgo plant sales wanting and then rejected CEMEX's subsequently submitted information in this regard. In this context, Commerce made several findings which led it to apply partial adverse facts available regarding the Hidalgo plant sales. Commerce found that CEMEX provided information regarding the Hidalgo sales in an untimely manner and that this fact precluded Commerce from verifying this information. As such, Commerce used facts otherwise available under section 19 U.S.C. § 1677e(a). In addition, it noted that the nature and timing of CEMEX's cancellation of the verification was unprecedented and concluded that CEMEX did not act to the best of its abilities to provide timely and accurate information. As such, it used an adverse inference to determine facts otherwise

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available under 19 U.S.C. § 1677e(b). Therefore, pursuant to 19 U.S.C. § 1677e(d), Commerce used partial adverse facts available to establish the normal value of CEMEX's Hidalgo sales in the home market. In so doing, Commerce substituted the highest calculated normal value in this review for all home market sales of cement produced at Hidalgo. See Final Determination, 64 Fed. Reg. at 13152-53.

In disagreement with STCC, Commerce did not use total adverse facts available in determining a margin. CEMEX's margin of dumping was based on information which was, for the most part, timely submitted by CEMEX and verified by Commerce. Where necessary, this information was supplemented by Commerce using partial adverse facts available. In coming to this conclusion, Commerce claims to have considered several factors. It claimed to have looked at CEMEX's overall degree of cooperation and what it found to be the small proportion of home market sales affected by CEMEX's conduct. Commerce determined that despite some delay, it was able to verify, with the exception of the Hidalgo sales, CEMEX's timely reported data and complete the review within the time limits prescribed by law.

Commerce concluded that in applying the highest calculated normal value to all Hidalgo sales, it would apply facts available in a sufficiently adverse fashion. Commerce noted that its decision establishes a margin which is supported by the record and is adverse to CEMEX's interests, in accordance with the guidance found in the Statement of Administrative Action ("SAA"), Agreement on Implementation of Article VI of the GATT and 19 U.S.C. § 1677e(a). 64 Fed. Reg. at 13148.

2. Contention of the Parties

CEMEX argues that in the Final Determination, Commerce correctly relied on its reported and verified information and correctly resorted to partial rather total adverse facts available for CEMEX's data from the Hidalgo plant. CEMEX contends that

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Commerce's Final Determination, in this regard, was in accordance with law and supported by substantial evidence.

CEMEX claims that the decision of Commerce to use partial adverse facts was in accordance with law on account that both the governing statute - 19 U.S.C. §1677e(b)- and the implementing regulation - 19 C.F.R. §351.308 - are silent as to whether Commerce must use partial or total facts available. CEMEX reasons that the silence is evidence of a legislative intent that this decision is left to Commerce's discretion.

CEMEX cites various cases for the proposition that Commerce has full authority to apply either total or partial facts available, depending on the circumstances of each case. CEMEX argues that the courts have upheld Commerce's policy of applying total facts available only in cases where the respondent submits no evidence or unreliable evidence. CEMEX, furthermore, argues that since it submitted the bulk of the evidence, which was verified, the use of partial adverse facts was a reasonable interpretation of the statute.

CEMEX claims that the use of partial adverse facts in these circumstances is consistent with the directive from the SAA that accompanied the URAA and the statutory purpose of antidumping law. CEMEX alleges that the SAA directs Commerce to use partial facts available to fill "gaps in the record due to the deficient submissions or other causes". CEMEX's November 19, 2001, Rule 57(2) Brief, at 11-12 (quoting H.R. Rep. No. 103-826, at 869 (1994)). CEMEX further argues that the statutory purpose of the antidumping law is to calculate antidumping duty margins as accurately as possible and that Commerce's use of partial facts available and CEMEX's verified information met this objective. Id. at 12. CEMEX argues that Commerce's selection of adverse partial facts available for the missing Hidalgo information was supported by substantial evidence on the record. CEMEX also contends that these factual determinations are to be made on an individual case basis and that the courts have shown great deference to

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Commerce in this context. CEMEX further alleges that in this case, there is sufficient relevant evidence as a reasonable mind might accept as adequate to support the conclusion and therefore urges this Panel to not reweigh the evidence or substitute its judgment for that of Commerce. Id. at 13-14.

CEMEX claims that each of the four reasons cited by Commerce for rejecting the use of total adverse facts available is supported by substantial evidence and in accordance with Commerce's statutory and regulatory responsibilities. Id. at 15. First, CEMEX claims that the record shows that, overall, CEMEX was a "reasonably cooperative participant" in this review, reporting a great deal of information which was, for the most part, verified and found not to have major discrepancies. CEMEX argues that, as neither the statute nor the regulations require perfection, its actions in this review meet the cooperative standard. CEMEX also argues that while allegations of non-cooperation in other reviews are, strictly speaking, irrelevant, they nonetheless evidence an overall level of cooperation. Id. at 16-17.

Second, CEMEX argues that only a very small volume of home market sales was affected by the misreported data. Id. at 17. Thirdly, CEMEX contends that Commerce did, in fact, verify CEMEX's timely submitted data. Id. at 18. Fourthly, CEMEX alleges that Commerce was able to complete its preliminary and final determinations within the statutory and regulatory timelines. Id. CEMEX further argues that Commerce had the resources and expertise to ensure that the verification and other aspects of the review were thoroughly confirmed.

CEMEX submits that Commerce's determination was correct in the circumstances because it sufficiently punished CEMEX's misreporting by applying the highest calculated normal value in this review to all Hidalgo sales and not just the "small number that were inadvertently misclassified." Id. at 20.

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In short, CEMEX argues that the situation requiring the application of total adverse facts - gross misreporting, inability to verify and providing purposeful misleading data - are not found in this record. Id. at 18-22.

STCC takes issue with Commerce's application of partial adverse facts available and argues that, under the circumstances, Commerce should have discarded all of the information submitted by CEMEX and should have applied total adverse facts in calculating the margin of dumping rate. In essence, STCC claims that Commerce's decision, in this regard, is not sufficiently adverse to CEMEX's interests. STCC would have Commerce apply total adverse facts which would substantially increase CEMEX's margin of dumping rate.

STCC claims that, given the circumstances, Commerce should have used total adverse facts available to effectuate the purpose of 19 U.S.C. § 1677e(b) which is to provide timely, complete and accurate responses to Commerce's questionnaires.
STCC contends that Commerce should have rejected all the information submitted by CEMEX. STCC argues that this more severe measure was justified as a result of the deficiencies in CEMEX's responses in the present review, and in the context of its behavior in the prior reviews.

STCC claims that CEMEX had persistently, both in the instant review and in the prior ones, supplied inaccurate and at times misleading information and had not been cooperative. It argues that during the present review CEMEX "falsely" claimed that it only produced Type V cement at the Campana and Yaqui plants and that CEMEX took the "unprecedented" step of unilaterally canceling, at the last minute, a planned verification so that it could "highjack" the investigation. It also argues that CEMEX was similarly uncooperative in supplying the requested information in the DIFMER issue.

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STCC contends that nothing in the U.S. antidumping statute forbids Commerce to take into account the respondent's actions in prior proceedings and Commerce's own findings in those proceedings. STCC's December 14, 2001, Rule 57(3) Brief, at 6-7, 7 n.2. STCC concludes its argument by saying that "Given CEMEX's extraordinary lack of cooperation in the seventh review and its similar failure to cooperate in earlier reviews, Commerce's failure to rely on total facts available in the seventh review failed to effectuate the purpose of 19 U.S.C. § 1677e(b), which is to induce respondents to provide timely, complete, and accurate responses to Commerce's information requests." Id. at 6.

STCC also takes issue with Commerce's characterization of CEMEX's shortfall. STCC argues that Commerce did not accurately characterize the extent and seriousness of CEMEX's lack of cooperation. It argued that the "misrepresented" information went to the heart of the review. The information supplied by CEMEX went to fundamental issues of the definition of like product and sales outside the ordinary course of trade. In addition, STCC argues that the misstated Hidalgo information went beyond affecting merely a small percentage of CEMEX's total home market sales. STCC argues that this misstated Hidalgo information amounted to a considerable percentage of CEMEX's previously reported production of Type V cement. Significantly, this product is identical to the cement CEMEX sold in the U.S. STCC also contends that it is also very relevant to the DIFMER calculation. Id. at 8-9.

3. Analysis

This Panel upholds Commerce's acceptance of CEMEX's timely submitted, and subsequently verified reported information, and its reliance upon partial facts available in calculating the dumping margin. We find that this approach is consistent with the dual purpose of use of adverse facts available, which is to encourage cooperation and to assist in calculating as accurate a dumping margin as possible. In these circumstances,

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we find that Commerce's actions achieve the goal of adverse facts available in a far more rational manner than dismissing all of CEMEX's information due to errors in a relatively small portion of the data and resorting to total facts available. Commerce's decision, in this regard, is in accordance with law and supported by substantial evidence on the record.

In reviewing Commerce's decision, we are guided by the teachings of the U.S. Supreme Court. In cases such as this, where Congress has not directly addressed the precise question at issue, "…the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron v. U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). The U.S. Supreme Court has made it clear that the agency's construction need not be the only permissible one, nor even the one which the court may have preferred. Id. The inquiry is one of whether Commerce's exercise of its discretion was reasonable.

The antidumping statute and the regulations grant Commerce considerable discretion in deciding whether to impose partial facts available and then to decide which partial facts available should be utilized. The statute provides that if certain criteria are met, Commerce must resort to facts available. See 19 U.S.C. § 1677e(a). In deciding which facts available to employ, the statute provides that Commerce:

> may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from-
>
> (1) the petition,
> (2) a final determination in the investigation under this subtitle,
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
> (4) any other information placed on the record.

19 U.S.C.§ 1677e(b).

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Thus, the statute permits Commerce much latitude on which adverse facts to employ. While the statute is silent as to whether Commerce must use partial or total facts available, we find that Commerce's preference for partial adverse facts available in this case is supported by the reasoning in Kawasaki Steel Corp. United States, 110 F. Supp. 2d 1029 (Ct. Int'l Trade 2000), in which the CIT stated:

> This court has previously noted the advantage of using partial adverse facts available, as opposed to total adverse facts available, where the respondent has only failed to comply in one respect, because the use of partial adverse facts "furthers the purpose of achieving a reliable accurate margin…[and] also preserve[s] an adverse consequence for the [respondent's] failure to provide information."

Kawasaki, 110 F. Supp. 2d at 1041, n.26 (quoting Ferro Union, Inc. v. United States, 74 F. Supp. 2d 1289, 1297 (Ct. Int'l Trade 1999)).

We find no merit in STCC's argument that Commerce failed to follow its own administrative practice. The practice of Commerce has been to limit the use of total facts available to, for instance, those egregious cases where the volume and extent of information withheld was enormous, where the motivation of the respondent was less than above board, see Elemental Sulphur From Canada: Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 37958, 37968 (July 15, 1997); Elemental Sulphur From Canada: Preliminary Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 969, 970 (Jan. 7, 1997); Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, Partial Recession of Administrative Review and Notice of Determination Not To Revoke Order, 63 Fed. Reg. 50867, 50877 (September 23, 1998), or where Commerce was unable to, or was prevented from, conducting verification, see Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Preliminary Results of Antidumping Administrative Review and Partial Termination of Administrative Review, 62 Fed. Reg.

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36764, 36768 (July 9, 1997); Sweaters Wholly or in Chief Weight of Man-Made Fiber From Taiwan: Preliminary Results of Antidumping Duty Administrative Review, 58 Fed. Reg. 63913, 63915 (December 3, 1993). Having decided to use partial adverse facts available, Commerce then turned to the question of which partial facts available it should employ. In coming to this determination, Commerce examined the overall degree of cooperation received from CEMEX, the volume of home market sales affected, and the ability of Commerce to verify timely submitted data. 64 Fed. Reg. at 13153; CEMEX's November 19, 2001, Rule 57(2) Brief, at 102. In the circumstances, Commerce decided to use the highest calculated normal value in the review for all cement sales produced at the Hidalgo plant because it found it to be "… significantly adverse to CEMEX's interests". 64 Fed. Reg. at 13153.

We find that Commerce's decision in this regard is consistent with the SAA which states that "Commerce . . . may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing adverse inferences, one factor that the agencies will consider is the extent to which a party may benefit from its own lack of cooperation." H.R. Rep. No. 103-826, at 869 (1994).

In determining the reasonableness of Commerce's methodology, we find the reasoning of the Federal Circuit in F.lli DeCecco Di Filippo Fara s. Martino S.p.A. v. United States ("DeCecco"), 216 F.3d 1027, 1032 (Fed. Cir. 2000) and the reasoning of the CIT in Branco Peres Citrus, S.A. v. United States ("Branco"), 173 F. Supp. 2d 1363 (Ct. Int'l Trade 2001), to be instructive and supportive of Commerce's actions. The Federal Circuit in DeCecco held that in cases of uncooperative respondents, the discretion granted by the statute to Commerce was particularly great owing to Commerce's special expertise in making factual determinations regarding antidumping margins. The Federal Circuit held that it was within Commerce's discretion to choose which sources

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and facts it will rely on to support an adverse inference when a respondent had been shown to be uncooperative. The Federal Circuit found Commerce to be in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin. DeCecco, 216 F.3d at 1031.

However, the Federal Circuit also found that Commerce's discretion in these matters is not unlimited and that there are permissible limitations on this discretion. Id. at 1031-33. The Federal Circuit held that the purpose of Section 1677e(b) is to provide respondents with an incentive to cooperate, not impose punitive, aberrational, or uncorroborated margins. The corroboration requirement in Section 1677e(c) is intended to make the adverse facts rate available to be an accurately reasonable estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent for non-compliance. Id. at 1031. The court held that by requiring corroboration, Congress clearly intended that such rates should be reasonable and have some basis in reality. Id. at 1033.

In Branco, one of the questions at issue was whether Commerce's selection of adverse inferences was reasonable. Branco, 173 F. Supp. 2d at 1374-77. The CIT followed the reasoning in DeCecco and held that while Commerce had particularly great statutory discretion in dealing with uncooperative respondents, a rational relationship must exist between the facts chosen and the matter to which they are applied. Id. at 1375.

Commerce's determination is supported by the evidence on the record.[7] Commerce considered CEMEX's overall cooperation in this review. Commerce found that the Hidalgo sales and the DIFMER information, in conjunction, did not make CEMEX

[7] While issue was made of CEMEX's cooperation in the past, Commerce relied on CEMEX's actions in this review to evaluate cooperativeness.

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uncooperative, in the context of the entire review. Commerce held that other than the DIFMER and Hidalgo issues, CEMEX was cooperative in this review. Commerce's November 16, 2001, Rule 57(2) Brief, at 103-05.

Commerce found that CEMEX's error involved a small percentage of CEMEX's total home market sales. The small magnitude of this error and the fact that Commerce fully verified the bulk of CEMEX's responses led Commerce to conclude that the effects of the misreported Hidalgo sales did not undermine the review. Commerce rejected CEMEX's attempts to submit corrected data for the Hidalgo plant, but was able to verify CEMEX's timely submitted responses concerning U.S. sales data, cost data and the home market sales data for CEMEX's other 13 plants with on site verification of 10.

With respect to the integrity of the verification process, we find no support in the record for STCC's argument that CEMEX "hijacked" the process. While the verification process may have been delayed, Commerce did conduct the verification. Commerce examined the preselected sites and selected surprise sales to examine. Verification Report Costs and Sales – Public Document 188, at 9. Moreover, the record does not reveal any major discrepancies between CEMEX's timely submitted data and CEMEX's books and records. Simply put, the verification was not conducted according to the way STCC would have liked. However, as the verification process is properly within the discretion of Commerce we see no merit in STCC's argument.

With respect to Commerce having the resources to conduct the verification, we find that Commerce completed its work within the statutorily mandated times. The preliminary and final determinations were timely. We, therefore, find no issue here on which to remand.

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4. Conclusion

In sum, because of the discretionary nature of the applicable legislation, Commerce practice, relevant judicial holdings, and the deference which is to be afforded to Commerce in the circumstances, we find that Commerce properly determined to resort to partial adverse facts available for CEMEX's data from the Hidalgo plant rather than total adverse facts available for CEMEX's entire response. Accordingly, Commerce's determination is affirmed.

F. Whether Commerce Properly Refused To Revoke The Antidumping Order Based Upon Alleged Defects In The Initiation Of The Original LTFV Investigation

1. Background

During the course of the seventh administrative review, CEMEX and CDC challenged the underlying antidumping order on the ground of an alleged defect in the initiation of the original antidumping investigation. Specifically, the alleged defect goes to the question of whether the petition filed in the original investigation had the requisite regional industry support at the time it was filed. This argument was raised in the third through sixth administrative reviews and was rejected by Commerce in each one. In addition, the binational panels in the third and fifth administrative reviews also considered this argument and ruled against CEMEX and CDC in both instances. See Gray Portland Cement and Clinker from Mexico, USA-95-1904-02 (NAFTA September 13, 1996); Gray Portland Cement and Clinker from Mexico, USA-97-1904-02 (NAFTA June 18, 1999).

2. Contentions Of The Parties

In this Panel review, only CDC contends that Commerce should have terminated the review and revoked the underlying antidumping duty order on the ground that petitioner never demonstrated sufficient support for the petition. Pointing to the

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antidumping duty statute, CDC argues that Commerce may initiate an investigation only when a petition is filed on behalf of an industry. In the absence of the requisite industry support, CDC maintains, the petitioner lacks standing to request antidumping duty relief. See CDC's May 21, 2001, Rule 57(1) Brief, at 57-61.

Turning to the language of the Trade Agreement Act of 1979 (the antidumping duty law in effect at the time the original petition was filed in this case), CDC construes the language of the statute as requiring that a petitioner who files an antidumping duty petition on behalf of a regional industry must have the support of all or almost all of the producers in the region. CDC maintains that there was no showing at the time of the initiation of the investigation that the petition was filed on behalf of all or almost all of the cement producers in the region. On the contrary, CDC points out, the petition had the support of producers accounting for only 62 percent of regional production. Therefore, CDC concludes, Commerce lacked authority to initiate the investigation, to issue an antidumping duty order, as well as to conduct subsequent administrative reviews of that original order.

In its Final Determination in the seventh administrative review, Commerce once again determined that it was under no obligation to revisit the issue of whether a majority of the domestic industry or of the region supported the petition. Final Determination, 64 Fed. Reg. at 13149. Because petitioner's standing to file the original petition was not challenged at the time of the original investigation or in judicial review proceedings following publication of the antidumping duty order, Commerce concluded that the issue is barred from further review. See Commerce's November 16, 2001, Rule 57(2) Brief, at 113-126. STCC echoes the views of Commerce in its response brief. See STCC's November 16, 2001, Rule 57(2) Brief, at 174-205.

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3. Analysis

NAFTA Article 1904(3) provides in part that "[t]he panel shall apply . . . . the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority." NAFTA Article 1911 defines the phrase "general legal principles" and provides a non-exhaustive list that includes principles of "standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies." Other general legal principles not expressly mentioned but which are certainly embraced by the phrase "general legal principles," at least in the case of the CIT, include waiver, limitations periods, and principles of claim and issue preclusion. See Slazengers, Inc. v. United States, 158 F. Supp. 726, 741 (Cust. Ct. 1957) (rules of waiver, estoppel, and res judicata applicable in proceedings involving the United States). Having considered the arguments and contentions of the parties, this Panel rejects CDC's claim.

First, having failed to file a summons and complaint within the applicable period of limitations, CDC is time barred from bringing its claim based on insufficiency of the original petition. As 19 U.S.C. § 1516a(a)(2) plainly states, CDC had 30 days from the date of publication of the original antidumping duty order in which to file a summons with the CIT challenging Commerce's decision to initiate the investigation in this antidumping duty proceeding. This step CDC failed to take. If a party fails to meet this limitations period, which is also jurisdictional, any claims arising out of an investigation are necessarily barred. See Mineaba Co. v. United States, 782 F. Supp. 117 (Ct. Int'l Trade 1992), aff'd, 984 F.2d 1178 (Fed. Cir. 1993).

Second, consideration of CDC's claim in the instant panel review is foreclosed on the grounds of waiver, claim preclusion, and issue preclusion.[8] Characterizing the

[8] Principles of res judicata have their limits in the CIT. For example, assume A and B import the same goods. A engages in litigation with the United States and obtains a favorable tariff classification

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alleged defect with the petition and original investigation as "jurisdictional," CDC places heavy reliance upon the CIT's decision in Gilmore Steel Corp. v. United States, 585 F. Supp. 670 (1984). The court in Gilmore held that Commerce was not prohibited from reconsidering its decision to initiate an investigation on the ground of inadequate industry support for the petition, even after the statutory 20-day window for initiating an investigation has closed. The court in Gilmore, however, did not hold that such agency power is without temporal limits. Nor did the court hold that the question can be revisited *ad infinitum*. Indeed, in the Gilmore case itself the issue of whether adequate support existed for the petition was raised during the course of the original investigation, not years later in the course of a subsequent administrative review or judicial review thereof.

To suggest, as CDC does here, that the right to raise alleged jurisdictional defects is without temporal boundaries borders on the frivolous. It is fundamental that unless a party raises legal objections to a proceeding in a timely manner, those objections are waived and/or barred under the doctrine of res judicata. See Stearn v. Dep't of Navy, 280 F.3d 1376, 1379 (Fed. Cir. 2002) (because petitioners did not raise the issue at any point during the initial proceedings before the administrative law judge, nor in their petition for review of the resulting initial decision, res judicata thus was available to the Navy as a defense to all three enforcement actions); Interactive Gift Express, Inc. v. Compuserve, Inc., 256 F.3d 1323, 1344 (Fed. Cir. 2001) (it is a long-standing rule that, in order to be reviewable on appeal, a claim or issue must have been pressed or passed upon below); Finch v. Hughes Aircraft Co., 926 F.2d 1574 (Fed. Cir. 1991) (argument on

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ruling. B later litigates with the United States and receives an adverse tariff classification decision on the same goods. Giving permanent preclusion effect to A's judgment will give A a permanent competitive advantage over B. Consequently, the question of the tariff classification of A's imports may be revisited by the courts. See United States v. Stone & Downer Co., 274 U.S. 225 (1927).

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appeal barred on grounds of waiver and res judicata; imposition of double costs for bringing frivolous appeal).

Jurisdictional objections are no different in this regard. Federal courts, which are courts of limited subject-matter jurisdiction, are precluded under principles of res judicata from revisiting the issue of their subject-matter jurisdiction in a subsequent collateral proceeding when in an earlier proceeding a party either raised the jurisdictional issue or appeared in the original proceedings but failed to raise it. See Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) (when a federal court proceeds to final judgment on the merits, the issue of its subject matter jurisdiction is res judicata even though it was not litigated); Hodge v. Hodge, 621 F.2d 590, 592 (3d Cir. 1980) (the interests of finality demand that "even the issue of subject matter jurisdiction must at some point be laid to rest"); Slazengers, Inc. v. United States, 158 F. Supp. at 741 (challenge to court's subject matter jurisdiction waived by a failure to make timely and specific objection to the supposed lack thereof).

In short, having failed to raise the issue of the adequacy of support for the petition either in the course of the original investigation or in judicial review proceedings of that investigation, CDC's claim is foreclosed on the grounds of waiver, claim preclusion, and issue preclusion.

Third and finally, this Panel addresses CDC's claim as if it were being raised for the first time. As noted above, CDC has pressed this claim before two other binational panels. The panel in the third administrative review heard CDC's standing claim and rejected it on three grounds: (1) the claim was barred by the applicable statute of limitations, (2) the claim was barred by res judicata, and (3) the panel lacked the authority under NAFTA Article 1906 to review or alter Commerce's decision to initiate the investigation because that decision predated the effective date of NAFTA. See Gray Portland Cement and Clinker from Mexico, USA-95-1904-02 (NAFTA Sept. 13, 1996).

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Similarly, the panel in the fifth administrative review heard CDC's standing claim and rejected it on the same three grounds, adding the fourth ground of failure to exhaust administrative remedies. See Gray Portland Cement and Clinker from Mexico, USA-97-1904-02 (NAFTA June 18, 1999).

In the interests of judicial economy, this Panel sees no reason to revisit the prior panels' grounds for rejecting CDC's claim or the panels' well-reasoned opinions in support of those grounds. Accordingly, for this aspect of its opinion, this Panel adopts the views of the third and fifth review Panels' on this claim.[9] See Gray Portland Cement and Clinker from Mexico, USA-95-1904-02 (NAFTA September 13, 1996); Gray Portland Cement and Clinker from Mexico, USA-97-1904-02 (NAFTA June 18, 1999).

4. **Conclusion**

The question of whether Commerce properly initiated the original investigation in this matter is barred by the applicable statute of limitations, res judicata, NAFTA Article 1906, and failure to exhaust administrative remedies. Therefore, we find that Commerce properly determined to refuse to revoke the antidumping duty order based upon alleged defects in the initiation of the original LTFV investigation. Accordingly, Commerce's determination is affirmed.

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[9] CDC's persistence in pursuing this claim after having had it rejected by two previous panels highlights for the panel one of the shortcomings of the binational panel review process, namely, the lack of an effective sanctioning mechanism for deterring unwarranted and frivolous claims. See CIT Rule 11(b).

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G. Whether (a) Commerce's Classification of CEMEX's Bag and Bulk Cement As The Same Like Product and (b) Commerce's Decisions That Sales Of CEMEX's Bag And Bulk Cement Were At The Same Level Of Trade Is Supported By Substantial Evidence.

1. Background

During the seventh review period, all of CEMEX's U.S. sales were of Type V cement in bulk form, while its sales in the home market included Type V cement in bulk, Type II cement in bulk, and Type I cement in both bag and bulk. CDC's sales were entirely Type II cement, both in bulk and in bags. STCC's May 21, 2001, Rule 57(1) Brief, at 92. Because Commerce determined that all of CEMEX's home market sales of Type V cement and Type II cement were made outside of the ordinary course of trade, it defined the foreign like product as similar merchandise. Gray Portland Cement and Clinker From Mexico, 66 Fed. Reg. 13148, at 13156. Therefore, as in other reviews of this case, Commerce determined that Type I cement sold in the home market was the most similar merchandise to CEMEX's U.S. sales of Type V cement and to CDC's U.S. sales of Type II cement. Id. Also, Commerce found that bag and bulk forms of Type I cement were physically identical merchandise, and therefore Commerce included all of CEMEX's and CDC's home market sales of Type I cement in its calculation of normal value regardless of packaging form. Commerce's reasoning for this treatment was that form of presentation (packaging) is not a criterion to be considered when identifying the foreign like product pursuant to 19 U.S.C. § 1677(16). Commerce did make an adjustment to normal value to account for differences in packing costs between the comparison market and U.S. sales.

This form of analysis came into question in the fifth NAFTA panel review in which the panel concluded that a strict reading of 19 U.S.C. § 1677(16) requires that Commerce compare U.S. sales to the identical foreign like product as a first priority, if that product is available for comparison. The panel concluded that although both bulk and bagged

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cement are the identical "product" they are not the identical "merchandise" because the type of customers, pricing, and the uses for bulk cement are different than for bagged cement. The panel then overturned the decision of Commerce to use as the comparison product, a combination of bag and bulk sales and required Commerce to compare U.S. bagged sales to home market bagged sales and U.S. bulk sales to home market bulk sales. Gray Portland Cement and Clinker From Mexico, USA-97-1904-01 at 103-104 (NAFTA June 18, 1999).

The fifth panel review is now under an extraordinary challenge review under NAFTA Chapter 19 Annex 1904.13 and therefore was not binding on Commerce in the seventh review. There still resides the conflict that Commerce's methodology poses. In the meantime Commerce is wrestling with this question and has asked this Panel to remand this issue for further analysis and resolution by Commerce.

2. **Contentions Of The Parties**

CEMEX and CDC contend that there is a consistent pattern of differences in the price of cement sold in bulk and bags and that information contained in the record establishes that the difference in the price of cement packed in bags or sold in bulk confirmed that such sales were made at a different level of trade. See generally CEMEX's May 21, 2001, Rule 57(1) Brief, at 50-58.

In the original investigation in this case, CEMEX's U.S. sales consisted of both bagged and bulk cement. In that investigation Commerce compared sales of bagged cement in the U.S. to home market sales of bagged cement and U.S. sales of bulk cement to home market sales of bulk cement. Gray Portland Cement and Clinker From Mexico, 55 Fed. Reg. 29244, at 29245 (July 18, 1990). This pattern or methodology continued until the fifth review, in which Commerce suddenly changed its prior administrative practice and required CEMEX to report both sales of bulk and bagged Type I cement and

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calculated normal value on the basis of both bagged and bulk sales. In the fifth NAFTA panel review the panel rejected this methodology as contrary to 19 U.S.C. § 1677(16).

The NAFTA panel remanded the case to Commerce with instructions that Commerce recalculate normal value using only sales of the most similar product, which is Type I sold in bulk. On February 17, 2000, the NAFTA panel affirmed the Commerce's remand calculation of normal value based solely on the Type I cement sold in bulk. On March 23, 2000, the U.S. Government filed a request for an extraordinary challenge committee to overturn the panel determination. See Secretariat File No. ECC-2000-1904-01 U.S.A.

CEMEX contends that bagged cement does not satisfy the statutory definition of similar merchandise. In the Final Determination of the seventh review Commerce stated that the only difference between cement sold in bag and in bulk was the packaging. This was the same argument that was rejected by the NAFTA panel in the fifth review. Consistent with the goal of making fair price comparisons, 19 U.S.C. § 1677(16) sets forth a three step hierarchy for determining which products are to be used for a fair price comparison. These are A) identical merchandise, B) similar merchandise, and C) reasonably comparable merchandise. Commerce used the similar merchandise criteria but failed to satisfy the three prongs of the subsection B test (19 U.S.C. § 1677(16)(B)(i)-(iii)). Under this test, similar merchandise is defined as merchandise which is:

> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.

CEMEX also contends Commerce did not address the question as to whether the "packaging" was an inherent and functional part of the product. Simply labeling the bags

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as packaging without analysis is not enough. Merely discounting the cost of the bag does not account for the difference in commercial value between bulk and bagged cement. The products have different commercial values because they are different products and are used by different types of customers.

Finally, CEMEX argues that Commerce failed to determine if bag and bulk cement are approximately equal in commercial value. There are different handling measures for bag and bulk, different sales volumes, different uses, different pricing structures that are not solely due to the price of packaging, and different types of customers.

STCC contends that Commerce was correct in its analysis in accordance with their practice in prior reviews. See generally STCC's November 19, 2001, Rule 57(2) Brief, at 92-142. Commerce found that bulk and bagged cement were physically identical merchandise, and therefore included all of CEMEX's and CDC's sales of Type I cement. Commerce has consistently determined that it is appropriate to include all bulk and bagged sales in the foreign like product because form of presentation (packaging) is not a criterion to be considered when identifying the foreign like product pursuant to 19 U.S.C. § 1677(16). Additionally, the fifth review panel decision, on which both CEMEX and CDC rely heavily, is not binding, not precedent, and is not even persuasive authority.

Furthermore, STCC also contends that 19 U.S.C. § 1677(16) does not mention packaging as a criterion to be considered in defining foreign like product. Packaging is mentioned in 19 U.S.C. § 1677b(a)(6)(A) & (B) which requires Commerce to make an adjustment to normal value for the cost of packaging. Given the substance of this section, it must be contemplated that there might be comparisons of merchandise where the packaging is different and the only remedy is to deduct the cost of the packaging.

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STCC further argues that Commerce has repeatedly determined that packaging is simply a form of presentation of merchandise and not a component material of the product. Therefore this fact is irrelevant to selecting the foreign like product. See, e.g., Gray Portland Cement and Clinker from Japan, 60 Fed. Reg. at 43763; Fresh Cut Roses from Ecuador, 60 Fed. Reg. 7019, 1022 (February 6, 1995); Red Raspberries from Canada, 50 Fed. Reg. 19768, 19771 (May 10, 1985). Commerce bases its analysis of whether products are "approximately equal in commercial value" on variable costs of production.[10] As CEMEX and CDC do not claim a difference in variable cost between bulk and bagged cement, the commercial value of both forms of presentation must be equally similar to that of the merchandise sold in the United States.

Consequently, STCC continues, there is no basis for excluding a portion of the foreign like product from the normal value calculation based on packaging. Given that Type I cement otherwise satisfies the criteria specified in 19 U.S.C. § 1677(16), Commerce properly determined that all home market sales of Type I cement should be included in the foreign like product, and thus in the normal value calculation.

STCC admits that Commerce did use bag-to-bag and bulk-to-bulk comparisons in the original investigation which CEMEX and CDC actually opposed stating that "[t]here is no basis in the statute or the regulations for comparing only packed product to packed product, and bulk to bulk product…."

Commerce reached no conclusions about bag to bag and bulk to bulk sales in the second, third and fourth reviews. Commerce did not ask for data on bagged sales in the

[10] See Commerce Policy Bulletin 92.2 (July 29, 1992) at 2 ("When the variable cost difference exceeds 20%, we consider that the probable differences in values of the items to be compared is [sic] so large that they cannot reasonably be compared. Since the merchandise is not identical, does not have approximately equal commercial value, and has such large differences in commercial value that it cannot be reasonably compared, the merchandise cannot be considered similar under section 771(16)(A), (B), or (C) of the statute.").

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second review because Type I cement, bulk or bagged, was not going to be used for matching purposes. In the third and fourth reviews, Commerce did ask CEMEX and CDC for information on sales of bagged and bulk Type I cement. However, that information on bagged sales was not provided by CEMEX or CDC and therefore the margin of dumping was based on facts available. See Gray Portland Cement and Clinker from Mexico, 60 Fed. Reg. 26865, 26867 (May 19, 1995) (third review); Gray Portland Cement and Clinker from Mexico, 62 Fed. Reg. 17581, 17584 (April 10, 1997) (fourth review).

In the fifth, sixth, and seventh reviews, Commerce determined that CEMEX's home market sales of Type II and Type V cement were outside the ordinary course of trade. In these three reviews, Commerce calculated normal value on the basis of sales of similar merchandise, namely Type I cement. Commerce found consistently in these reviews that bulk and bagged sales of Type I are the same merchandise. Gray Portland Cement and Clinker from Mexico, 62 Fed. Reg. 17165 (April 9, 1997) (fifth review) and Gray Portland Cement and Clinker from Mexico, 63 Fed Reg. at 12777 (March 16, 1998) (sixth review). This same reasoning was followed in Gray Portland Cement and Clinker from Japan, 60 Fed. Reg. 43761, 43763 (August 23, 1995). STCC also points out that the NAFTA panel decision in the fifth review is flawed because the NAFTA panel violated the applicable standard of review by undertaking a *de novo* review of the matching issue and failing to remand to Commerce for further consideration. The standard of review applicable in these cases is whether Commerce's decision is "unsupported by substantial evidence on the record, or otherwise not in accordance with law". 19 U.S.C. § 1516a(b)(1)(B)(i). STCC also argues that the panel improperly reviewed this issue *de novo* rather than review Commerce's decision to determine whether Commerce's decision was supported by substantial evidence on the record.

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According to STCC, the panel in the fifth review did not rely on the arguments raised by CEMEX. Instead, the panel decision was based on several new interpretations of the statute that had not previously been argued by CEMEX. These interpretations are inconsistent with both the statute and Commerce's practice. Further, the panel's decision to adopt the new and fallacious interpretations of 19 U.S.C. § 1677(16) completely blindsided Commerce and STCC who were deprived of any opportunity to rebut those interpretations. In reversing Commerce on this question, the panel violated the principal doctrine regarding review of administrative decisions set forth in Chevron U.S.A., Inc. v. National Resources Defense Council Inc., 467 U.S. 837 (1984) which bestows ample deference to administrative interpretations that are subject to judicial review and "…that considerable weight should be accorded to an executive Commerce's construction of a statutory scheme it is entrusted to administer…." Chevron, 467 U.S. at 844.

STCC also argues that the panel misinterpreted the requirement that comparison products be similar in the purposes for which they are used, pointing out that the panel confused types of buyers with purposes for which the product is used and they are not synonymous. It is inconsistent to characterize resale buyers or end users as a use. The term "use" can only refer to the application to which a product is put (for example in the case of cement, to make concrete), not to the stages in the chain of distribution through which the product passes before it is put to the intended application. See, e.g., Final Determination of Sales at Less Than Fair Value: Calcium Aluminate Cement, Cement Clinker and Flux from France, 14136, 14141 (March 25, 1994).

Another point that STCC makes is that the panel misinterpreted the requirement that comparison products be approximately equal in commercial value. Commerce is required to focus on differences in commercial value between home market merchandise and merchandise sold in the United States, not differences among products sold in the

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home market. See 19 U.S.C. § 1677(16)(B)(iii). The panel failed to make any findings with respect to the commercial value of the product sold in the United States and thus failed to comply with the statute.

3. Analysis

The question for this Panel is whether the agency's answer is based on a permissible construction of the statute.

The panel decision in the fifth review – which required Commerce to compare U.S. bagged sales to home market bagged sales and U.S. bulk sales to home market bulk sales -- provides some insight and understanding of this issue.

It is true, as STCC so forcefully advances, that the panel decision in the fifth review is not binding on this Panel; it is not precedent; and it is currently the subject of an extraordinary challenge proceeding. It is, however, a source of information and analysis stemming from an almost identical fact situation involving the same parties that we have here, and is useful in our own independent analysis of the issue.

This Panel, however, declines to get involved in a lengthy analysis of this issue in light of (a) Commerce's request for a remand for further consideration and explanation of the classification of bulk and bag cement as the same foreign like product, see Commerce's November 16, 2001, Rule 57(2) Brief, at 126-27, and (b) the decision that CEMEX's home market sales of bagged and bulk cement were made at one level of trade. Commerce explains that the Final Determination does not address relevant issues and facts CEMEX and CDC raised in the administrative proceeding, such as commercial value, and the alleged past administrative practice of Commerce to compare bagged to bagged sales and bulk to bulk sales. Id.; Gray Portland Cement and Clinker From Mexico, 66 Fed. Reg. at 13166.

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4. Conclusion

Given the importance of the foregoing issues and the need to have a clear understanding of Commerce's position in this matter, we hereby grant a remand without instructions so that this matter may be further considered and addressed by Commerce.

H. Whether Commerce's Treatment Of Warehousing Expenses As Indirect Selling Expenses Is Supported By Substantial Evidence

1. Background

In its Final Determination, Commerce treated CEMEX's and CDC's U.S. warehousing expenses as indirect selling expenses, without addressing whether CEMEX's and CDC's U.S. warehousing expenses should, in fact, be treated as indirect selling expenses, or whether they should be treated as movement expenses. Commerce's November 16, 2001, Rule 57(2) Brief, at 127.

2. Contentions of the Parties

Commerce acknowledges that it did not address in the Final Determination whether CEMEX's and CDC's U.S. warehousing expenses should be treated as indirect selling expenses, or whether they should be treated as movement expenses. Commerce's November 16, 2001, Rule 57(2) Brief, at 127. Accordingly, Commerce, without confessing error, requests a remand so that it can consider and explain how CEMEX's and CDC's U.S. warehousing expenses should be treated. Id.

STCC agrees that the failure of Commerce to address whether CEMEX's and CDC's U.S. warehousing expenses should be treated as indirect selling expenses, or whether they should be treated as movement expenses, requires a remand. STCC's May 21, 2001, Rule 57(1) Brief, at 77. STCC points out that Commerce has "a statutory obligation to provide an explanation of 'the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the . . . review.'" Id. (citing 19 U.S.C. § 1677f(i)(3)(A)). STCC also notes Commerce "must specifically

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reference in [its] determinations factors and arguments that are material and relevant, or must provide a discussion or explanation in the determination that renders evident the agency's treatment of a factor or argument," quoting SAA at 892.

In addition, STCC argues that Commerce's failure to treat CEMEX's and CDC's U.S. warehousing expenses as movement expenses was contrary to law and the evidence of record. Id. According to STCC, the antidumping statute, the SAA accompanying the URAA, and Commerce's regulations and practice all require Commerce to treat CEMEX's and CDC's U.S. warehousing expenses as movement expenses, as opposed to indirect selling expenses. Id. at 76. Therefore, STCC requests a remand with instructions for Commerce to treat CEMEX's and CDC's U.S. warehousing expenses as movement expenses. Id. at 80.

CEMEX claims that in accordance with 19 C.F.R. § 351.401(e)(2), Commerce properly treated its U.S. warehousing expenses as indirect selling expenses, as "the expenses were incurred at the [CEMEX] plant rather than a remote warehousing facility." See CEMEX's November 19, 2001, Rule 57(2) Brief, at 32. CEMEX also points out that in the sixth administrative review Commerce treated CEMEX's warehousing expenses as indirect selling expenses. Id. at 34. According to CEMEX, the administrative record in the seventh administrative review establishes that the factual situation remains unchanged from the sixth administrative review, and as such, Commerce should continue to treat CEMEX's warehousing expenses as indirect selling expenses. Id. at 34.

CEMEX further acknowledges that Commerce did not address in the Final Determination whether CEMEX's and CDC's U.S. warehousing expenses should be treated as indirect selling expenses, or whether they should be treated as movement expenses. Id. at 33. Hence, CEMEX argues for a limited remand with instructions for

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Commerce to confirm the reasoning of its continued classification of CEMEX's warehousing expenses as indirect selling expenses.

CDC claims that Commerce properly included its warehouse expenses in U.S. indirect selling expenses. CDC asserts that it demonstrated to Commerce in the seventh review that its U.S. warehousing expenses included a significant selling expense component and Commerce verified that these expenses were associated with making sales in the U.S. during the seventh review. CDC also notes that STCC made the same argument in the sixth review and it was rejected by Commerce. CDC's November 19, 2001, Rule 57(2) Brief, at 5-6. In addition, CDC claims that Commerce's decision to treat CDC's warehousing expenses as indirect selling expenses was consistent with Commerce's position in the sixth (as well as the fifth) administrative review. Id.

3. Analysis

As to the treatment of CEMEX's and CDC's U.S. warehousing expenses, Commerce, without confessing error, requests a remand so that it can consider and explain how these expenses should be treated. When Commerce, without confessing error, wishes to reconsider its previous position, the reviewing body has discretion over whether to remand. See, e.g., SKF USA, Inc. v. United States, 254 F.3d 1022, 1029 (Fed. Cir. 2001). When Commerce's concern is substantial and legitimate, a remand is usually appropriate, while on the other hand, a remand may be refused if Commerce's request is frivolous or in bad faith. Id.

We hold that Commerce's request for a remand in this instance is, in fact, substantial and legitimate. As Commerce, STCC, and CEMEX all acknowledge, Commerce simply did not address in its Final Determination whether CEMEX's and CDC's U.S. warehousing expenses should be treated as indirect selling expenses, or whether they should be treated as movement expenses. Under this circumstance, Commerce's request for a remand to consider and explain how CEMEX's and CDC's U.S.

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warehousing expenses should be treated is substantial and legitimate. Accord Southwestern Bell Tel. Co. v. FCC, 10 F.3d 892, 896 (D.C. Cir. 1993) (noting that the court had previously allowed a remand to the FCC where the FCC sought voluntary remand "to give further consideration to the matters addressed in the [FCC's] orders"), cert. denied, 512 U.S. 1204 (1994); Wilkett v. ICC, 710 F.2d 861, 863 (D.C. Cir. 1983) (noting that the court had granted the Commission's motion for remand for purposes of reconsideration); see also Anchor Line Ltd. v. Federal Maritime Comm'n, 299 F.2d 124, 125 (D.C. Cir.) (noting that "when an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency"). Therefore, we grant the request for a remand on this issue.

In remanding this case, in light of Commerce's expertise in administering the antidumping law, we decline to remand with instructions as requested by both STCC and CEMEX. See GMN Georg Muller Nurnberg AG v. United States, 763 F. Supp. 607, 611 (Ct. Int'l Trade 1991).

4. Conclusion

This Panel remands to Commerce, with no instructions, the issue of whether CEMEX's and CDC's U.S. warehousing expenses should be treated as indirect selling expenses, or whether they should be treated as movement expenses.

I. Whether Commerce's Treatment Of CEMEX's Home Market Pre-Sale Warehousing Expenses As Indirect Selling Expenses Is Supported By Substantial Evidence

1. Background

In the Final Determination, Commerce refused to deduct CEMEX's home market pre-sale warehousing expenses from normal value. Final Determination, 64 Fed. Reg. at 13169. Commerce's refusal was based on Commerce's understanding, at the time, that "CEMEX did not, as in prior reviews, submit its data in accordance with the

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Department's instructions," and "[b]ecause there were no changes in CEMEX's reporting methodology from previous reviews, we again denied the adjustment." Id.

If these data were, in fact, submitted in accordance with Commerce's instructions, Commerce would have been required by U.S. antidumping law to deduct the home market pre-sale warehousing expenses from normal value. Specifically, 19 U.S.C. § 1677b(a)(6)(B)(ii) provides that normal value shall be --

> reduced by . . . the amount . . . attributable to any additional costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser . . . .

Therefore, if CEMEX submitted home market pre-sale warehousing expenses in accordance with Commerce's instructions, Commerce would have been required as a matter of law to deduct home market pre-sale warehousing expenses from normal value. 64 Fed. Reg. at 13168. This deduction would have reduced the normal value, and in turn, would have reduced CEMEX's dumping margin.

2. Contentions of the Parties

CEMEX argues that Commerce's determination that CEMEX did not submit its home market pre-sale warehousing expense data in accordance with Commerce's instructions was factually incorrect. CEMEX's May 21, 2001, Rule 57(1) Brief, at 68. CEMEX claims that its home market pre-sale warehousing expense data meet all of Commerce's criteria, and thus requests a remand so that Commerce can account for CEMEX's home market pre-sale warehousing expenses. Id. at 72.

Commerce states that it "has reviewed the record and determined that CEMEX had indeed submitted the data in the required manner and that CEMEX is entitled to the pre-sale warehousing adjustment." Commerce's November 16, 2001, Rule 57(2) Brief, at 128. Therefore, Commerce also requests a remand so that it can "make the

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appropriate pre-sale warehousing expense adjustment to CEMEX's normal value calculation." Id.

STCC claims that Commerce correctly refused to deduct CEMEX's home market pre-sale warehousing expenses from normal value. According to STCC, CEMEX reported home market pre-sale warehousing expense data "in exactly the same manner as it did in the sixth review," and that "CEMEX reported precisely the same information – for the same types of expenses and derived from the same accounting codes – that it did in the sixth review." STCC's December 14, 2001, Rule 57(3) Brief, at 31. Accordingly, STCC argues that this Panel should reject Commerce's request for a remand with respect to this issue.

3. Analysis

In this situation, Commerce realizes that it made an error. Commerce, upon review of the record, has determined that CEMEX did, in fact, submit its home market pre-sale warehousing expense data in the manner Commerce required, and thus, CEMEX is entitled to the pre-sale warehousing adjustment.

When an administrative agency makes an error, the Federal Circuit has held that "[r]emand to an agency is generally appropriate. . . absent the most unusual circumstances verging on bad faith." SKF USA Inc. v. United States, 254 F.3d 1022, 1029-30 (Fed. Cir. 2001). In this situation, we find that there are no unusual circumstances verging on bad faith that would result in this Panel not remanding the case. Therefore, this is a situation where remand is appropriate. Commerce, upon review of the record, has realized that CEMEX has submitted its pre-sale warehousing expense data in the required manner, and now intends to make the appropriate adjustment to CEMEX's normal value calculation. Considering Commerce "expertise in administering the antidumping law," GMN Georg Muller Nurnberg AG v. United States, 763 F. Supp. 607, 611 (Ct. Int'l Trade 1991), we will remand this issue to Commerce so

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that Commerce, pursuant to 19 U.S.C. § 1677b(a)(6)(B)(ii), can indeed make the appropriate adjustment to CEMEX's normal value calculation.

4. Conclusion

This Panel remands this issue to Commerce, with no instructions, so that Commerce can make the appropriate adjustment to CEMEX's normal value calculation, accounting for CEMEX's home market pre-sale warehousing expenses.

J. Whether Commerce's Decision To Classify Certain CDC Sales As Indirect Export-Price Sales Is Supported By Substantial Evidence

1. Background

Commerce classified certain sales to unaffiliated U.S. customers by CDC's U.S. affiliate as indirect export price sales, rather than constructed export price sales. The classification of sales impacts the determination of the dumping margin because the statute provides for certain deductions from constructed export price that are not deducted from export price. Therefore, the use of constructed export price will usually result in a higher margin of dumping. AK Steel Corp. v. United States, 226 F.3d 1361,1364, 1365 n.4 (Fed. Cir. 2000).

2. Contentions Of The Parties

STCC argues that Commerce's classification was not in accordance with law and was not supported by substantial evidence on the record. STCC's May 21, 2001, Rule 57(1) Brief, at 65; STCC's December 14, 2001, Rule 57(3) Brief, at 22. STCC argues that AK Steel Corp. v. United States, 226 F.3d 1361 (Fed. Cir. 2000), issued subsequent to the Final Determination, supports its view because it overruled Commerce's Export Price/Constructed Export Price Test. STCC argues that Commerce is now obligated to treat all of CDC's sales as constructed export price sales and make the necessary deductions from the U.S. price.

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Commerce agrees that the Export Price/Constructed Export Price test used in this case has been overruled by the Federal Circuit in AK Steel. Commerce has subsequently asked for a remand to apply the new Export Price/Constructed Export Price Test developed in light of AK Steel.

3. Analysis

This Panel has reviewed Commerce's decision in this regard and agrees that AK Steel is supervening legal authority which rejects Commerce's Export Price/Constructed Export Price Test.

4. Conclusion

This Panel remands to Commerce for a determination of whether CDC's U.S. sales are to be based on export price or constructed export price in light of the AK Steel decision.

K. Whether Commerce's Difference-In-Merchandise ("DIFMER") Adjustment Is Supported By Substantial Evidence

1. Background

When similar, rather than identical merchandise, is being compared, the antidumping statute authorizes Commerce to make a difference-in-merchandise ("DIFMER") adjustment to normal value to account for differences in the physical characteristics of the merchandise being compared. In the Final Determination, Commerce made a DIFMER adjustment to CEMEX's sales for the physical differences between Type I and Type V cement. 64 Fed. Reg. at 13158-59. This DIFMER adjustment was based upon partial facts available because Commerce determined that CEMEX did not comply with Commerce's requests for data demonstrating the cost differences between Types I and V cement resulting from their physical differences. Id. at 13159. The DIFMER adjustment increased CEMEX's normal value, and thus, increased CEMEX's dumping margin.

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2. Contentions Of The Parties

Commerce, for two reasons, requests a remand of CEMEX's DIFMER adjustment. Commerce's November 16, 2001, Rule 57(2) Brief, at 129. First, Commerce acknowledges that it made certain errors with respect to this issue in the Final Determination. Id. at 130. To this end, Commerce states that "[u]pon review of the record, some of the Department's assertions in the Final Results appear to be inaccurate." Id. Second, Commerce requests a remand "to further consider and explain its DIFMER decision" in light of the fact that in a subsequent segment of the proceeding – the ninth administrative review of the antidumping duty order on Mexican cement -- Commerce has held that where there are physical differences in merchandise, but no associated cost differences, no adjustment is necessary.

CEMEX supports Commerce's request for a remand. CEMEX's December 14, 2001, Rule 57(3) Brief, at 60, 64. CEMEX believes that a remand is necessary so that Commerce can correct certain assertions it erroneously made. Id. at 60-61. In addition, CEMEX believes that it necessary for Commerce to further consider and explain its DIFMER decision in the seventh review considering that it is at odds with Commerce's regulations and its normal administrative practice, under which Commerce will not make a DIFMER adjustment where there are physical differences in merchandise but no associated cost differences. Id. at 60-64.

STCC argues that Commerce's determination to make a DIFMER adjustment is fully supported by substantial evidence and that this Panel should affirm that determination. STCC's December 14, 2001, Rule 57(3) Brief, at 16. However, STCC asserts that this Panel should still remand Commerce's determination on this issue since STCC believes that the choice of facts available that Commerce used was not sufficiently adverse to CEMEX to serve the statutory purpose of inducing CEMEX's future cooperation. Id. Specifically, STCC argues that this Panel should remand on this issue

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with the instruction that Commerce use a more adverse – rather than less adverse – partial facts available than in prior administrative reviews. STCC's May 21, 2001, Rule 57(1) Brief, at 52. STCC contents that at the very least, this Panel should instruct Commerce to use a 20 percent upward DIFMER adjustment as facts available, which would be consistent with the final remand results of the second administrative review. Id.

3. **Analysis**

Commerce asserts two reasons for a remand: (1) it made errors, and (2) it wishes to further consider and explain its DIFMER decision. Both reasons require that we remand to Commerce on this issue.

In terms of making errors, Commerce acknowledges that it made errors in making some assertions on the DIFMER adjustment. When an administrative agency makes an error, the Federal Circuit has held that "[r]emand to an agency is generally appropriate . . . absent the most unusual circumstances verging on bad faith." SKF USA Inc. v. United States, 254 F.3d 1022, 1029-30 (Fed. Cir. 2001). In this situation, we find that there are no unusual circumstances verging on bad faith that would result in us not remanding the case. Therefore, we hold that remand is appropriate so that Commerce can correct its error.

In terms of wishing to further consider and explain its DIFMER decision, when Commerce, without confessing error, wants to reconsider its previous position, the reviewing body has discretion over whether to remand. See, e.g., SKF USA, Inc. v. United States, 254 F.3d 1022, 1029 (Fed. Cir. 2001). When Commerce's concern is substantial and legitimate, a remand is usually appropriate, while on the other hand, a remand may be refused if Commerce's request is frivolous or in bad faith. Id. We hold that Commerce's request for a remand to further consider and explain its DIFMER decision is substantial and legitimate. This is particularly the case inasmuch as

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Commerce has taken various positions as to whether a DIFMER adjustment is warranted when there are physical differences in merchandise but no associated cost differences.

In light of the above, we grant Commerce and CEMEX's request for a remand on the DIFMER issue.

In remanding this case, in light of Commerce's expertise in administering the antidumping law, we decline to remand with the instruction requested by STCC. See GMN Georg Muller Nurnberg AG v. United States, 763 F. Supp. 607, 611 (Ct. Int'l Trade 1991).

4. **Conclusion**

This Panel remands the DIFMER issue to Commerce. In so doing, we decline to give the instruction requested by STCC.

L. Whether Commerce's Decision To Allow CEMEX An Adjustment For Freight Expenses Is Supported By Substantial Evidence

1. **Background**

In the proceeding below, the petitioner contended that Commerce should deny CEMEX's reported adjustment for home market freight expenses. Petitioner argued that such movement expenses are allowable only if they are reported based on the actual, transaction-specific expense or on an allocation methodology that is not distortive. It argued that CEMEX had failed to provide freight expense information on a transaction-specific basis, had failed to demonstrate why it could not do so and had provided allocation methodology that did not meet the requisite standard. 64 Fed. Reg. at 13167. CEMEX argued that Commerce deducted its home market freight expense from normal value properly because it reported the freight in the most specific manner permitted by its record-keeping system and that its methodology was not distortive. It also contended,

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contrary to petitioner's position, that it presented adequate evidence that the expenses for freight provided by affiliated parties were made at arm's length. Id. at 13167-68.

Commerce determined, based on its findings at verification, that CEMEX's reported freight costs for Type I cement had been reported on as specific a basis as was feasible given CEMEX's accounting system and that they provided a reasonable estimate of actual transaction-specific freight expenses. Commerce also determined that the expense for freight provided by CEMEX's affiliated parties was at arm's length. Commerce also rejected petitioner's argument that CDC had failed to demonstrate entitlement to a freight expense adjustment for sales made by its affiliate Construcentero. Id. at 13168.

2. Contentions Of The Parties

In the proceeding before this Panel, STCC urges that Commerce's allowance of a deduction from normal value for CEMEX's reporting of freight expenses for its home market sales was not supported by substantial evidence and was otherwise not in accordance with law. STCC points out that CEMEX did not report its freight expenses on a transaction-specific basis, as Commerce prefers, and instead averaged freight costs for each of its subsidiary operating companies. Nor did CEMEX report its freight expenses in a manner specific to the product type. Moreover, there was an "egregious discrepancy" between CEMEX's reported shipment volume and the sales volume for Type II sales which Commerce did not address. STCC asks that the Panel remand to Commerce for a recalculation of normal value without deducting CEMEX's claimed freight expenses. STCC's May 21, 2001 Rule 57(1) Brief, at 80-88; STCC's December 17, 2001 Rule 57(3) Brief, at 26-30.

Commerce notes that STCC was challenging its determination on this issue on the basis that an unresolved discrepancy in some of the volume data for Type II cement may have resulted in an inaccurate or distorted freight allocation. On the ground that it had

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not addressed this discrepancy/distortion argument in the Final Determination, Commerce asks that the freight issue be remanded to Commerce for further consideration and explanation. Commerce's November 16, 2001, Rule 57(2) Brief, at 130.

CEMEX argues that Commerce had made a correct deduction of home market freight expenses from the sales price. CEMEX asserts that it reported its freight expenses in the most specific manner permitted by its accounting records and that its allocation of actual costs to specific sales was done in accordance with Commerce's usual methodology. CEMEX's November 19, 2001, Rule 57 (2) Brief, at 35-42.

3. Analysis

As noted above, Commerce has asked the Panel to remand this issue to give Commerce the opportunity to consider aspects of the matter further and to explain the agency's decision further. Where an agency's concern in obtaining a remand of an issue, so that it may reconsider and explicate its position, is (1) substantial and legitimate, and (2) there are no indications that the remand request is frivolous or in bad faith, the remand should be granted. SKF USA Inc. v. United States , 254 F. 3d 1022, 1029 (Fed. Cir. 2001). We find that this standard has been met on the freight adjustment issue at hand and order the remand.

4. Conclusion

This Panel remands this issue to Commerce.

VI. CONCLUSIONS

For the reasons discussed above, this Panel affirms Commerce with respect to the following four findings:

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(1) That CEMEX's home market sales of cement that is physically Type V cement as Type II and Type V cement were outside the ordinary course of trade;

(2) That an adjustment to CDC's U.S. indirect selling expenses for interest allegedly incurred in financing cash deposits for antidumping duties was not warranted;

(3) That resort to partial adverse facts available for CEMEX's data from the Hidalgo plant (rather than total adverse facts available for CEMEX's entire response) was warranted; and

(4) That refusal to revoke the antidumping order based upon alleged defects in the initiation of the original LTFV investigation was warranted.

This Panel remands the following findings to Commerce for resolution within 90 days from the date of this Panel opinion:

(1) That CEMEX's home market sales of Type V cement sold as Type I cement were outside the ordinary course of trade;

(2) That duties should be assessed on a nationwide basis in this regional industry case;

(3) That CEMEX's bag and bulk cement should be classified as the same like product, and that sales of CEMEX's bag and bulk cement were at the same level of trade;

(4) That CEMEX's and CDC's U.S. warehousing expenses should be treated as indirect selling expenses;

(5) That CEMEX's home market pre-sale warehousing expenses should not be deducted from normal value;

(6) That certain CDC sales to unaffiliated U.S. customers by CDC's U.S. affiliate should be classified as indirect export price sales, rather than constructed export price sales;

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(7) That a DIFMER adjustment to CEMEX's sales for the physical differences between Type I and Type V cement was warranted; and

(8) That an adjustment for CEMEX's freight expenses was warranted.

May 30, 2002, Date Issued.

Louis S. Mastriani, Chairman
Louis S. Mastriani, Chairman

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