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

**IN THE MATTER OF:** )  
 )  
**GRAY PORTLAND CEMENT AND** ) **SECRETARIAT FILE NO.**  
**CLINKER FROM MEXICO** ) **USA-97-1904-01**  
**Final Results of the Fifth Antidumping** )  
**Administrative Review (August 1, 1994** )  
**through July 31, 1995)** )

**OPINION AND ORDER OF THE PANEL**

**June 18, 1999**

**Before:**      **Robert E. Lutz (Chairman)**  
                 **Dr. Jorge Adame Goddard**  
                 **Dr. Hector Cuadra y Moreno**  
                 **Harry B. Endsley**  
                 **Dr. Jorge A. Witker Velasquez**

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**NORTH AMERICAN FREE TRADE AGREEMENT  
ARTICLE 1904 BINATIONAL PANEL REVIEW**

_____	)	
<b>IN THE MATTER OF:</b>	)	
	)	
<b>Gray Portland Cement and Clinker</b>	)	<b>Secretariat File No.</b>
<b>from Mexico; Final Results of the</b>	)	<b>USA-97-1904-01</b>
<b>Fifth Antidumping Administrative</b>	)	
<b>Review (August 1, 1994 through</b>	)	
<b>July 31, 1995)</b>	)	
_____	)	

**OPINION AND ORDER OF THE PANEL**

**APPEARANCES:**

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## PANELISTS:

Dr. Jorge Adame Goddard, Dr. Héctor Cuadra y Moreno, Harry B. Endsley, Robert E. Lutz (Chair), and Dr. Jorge A. Witker Velásquez.

## I. SUMMARY OF OPINION OF BINATIONAL PANEL

This binational panel, constituted under Article 1904 of the *North American Free Trade Agreement* (“NAFTA”)<sup>1/</sup> and Title IV of the *North American Free Trade Agreement Implementation Act*,<sup>2/</sup> reviewed issues presented to it arising out of the Department of Commerce’s (“the Department”), Fifth Administrative Review of its August 30, 1990 antidumping order<sup>3/</sup> on Gray Portland Cement and Clinker from Mexico. *Final Results of [the Fifth] Antidumping Duty Administrative Review: Gray Portland Cement and Clinker from Mexico*, 62 Fed. Reg. 17148 (1997), *amended* 62 Fed. Reg. 24414 (1997) (“Final Results”). The period of review (“POR”) for this Fifth Administrative Review was the one-year period commencing August 1, 1994 and ending July 31, 1995.<sup>4/</sup>

Under 19 U.S.C. §1675(a)(1)(B), the Department is required to review an antidumping order if requested to do so by an interested party. The results of such reviews are cognizable under the NAFTA. Pursuant to Article 1904.1 of NAFTA, “each Party shall replace judicial

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<sup>1/</sup> North American Free Trade Agreement (“NAFTA”), *signed* at Washington, D.C., Mexico City, and Ottawa, December 7, 1992; supplemental agreements *signed* September 14, 1993; *reprinted* in H. Doc. 103-159, Vol. I, and in 32 I.L.M. 605 (1993) (*entered into force* January 1, 1994).

<sup>2/</sup> Pub. Law No. 103-182, *approved* December 8, 1993, 107 Stat. 2057; *codified* at various sections of Title 19 and several other titles.

<sup>3/</sup> Gray Portland Cement and Clinker from Mexico, 55 Fed. Reg. 35433 (August 30, 1990); *see* 19 U.S.C. § 1673e(a).

<sup>4/</sup> *See* Initiation of Antidumping and Countervailing Duty Administrative Reviews published in the Federal Register at 60 Fed. Reg. 47930-31 (September 15, 1995).

review of final antidumping ... duty determinations with binational panel review.” “Final determinations” are defined in NAFTA Annex 1911 to include final results of administrative reviews by the Department under 19 U.S.C. 1675(a)(1994).

A Request for Panel Review of the Final Results was filed by Cemex, S.A. de C.V. (“CEMEX”) on May 6, 1997<sup>5/</sup> and a similar Request for Panel Review was filed by Cementos de Chihuahua, S.A. de C.V. (“CDC”) on May 7, 1997.<sup>6/</sup> A Complaint<sup>7/</sup> contesting certain aspects of the Final Results was then filed on June 4, 1997 by CEMEX<sup>8/</sup> and two additional Complaints were filed on June 5, 1997 by CDC<sup>9/</sup> and by the Southern Tier Cement Committee (“Southern Tier”),<sup>10/</sup> which was the Petitioner in the underlying Less Than Fair Value (“LTFV”) investigation. For purposes of Rule 7 of the Rules of Procedure for Article 1904 Binational Panel Review (“Panel Rules”),<sup>11/</sup> the Panel finds that the allegations of errors of fact and law set forth in the Complaints are adequate to permit panel review of such allegations.<sup>12/</sup>

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<sup>5/</sup> On file at the Secretariat, U.S. Section. See Rule 34 of the Rules of Procedure for Article 1904 Binational Panel Review (“Panel Rules”). The Request for Panel Review filed by CEMEX was published in the Federal Register at 62 Fed. Reg. 27238-39 (May 19, 1997).

<sup>6/</sup> On file at the Secretariat, U.S. Section.

<sup>7/</sup> On file at the Secretariat, U.S. Section. See Panel Rule 39.

<sup>8/</sup> The Complaint filed by CEMEX alleges eleven different errors of fact or law with respect to the Final Results. See CEMEX Complaint, pp. 2-6.

<sup>9/</sup> The Complaint filed by CDC alleges three different errors of fact or law with respect to the Final Results. See CDC Complaint, pp. 2-3.

<sup>10/</sup> The Complaint filed by the Southern Tier alleges eight different errors of fact or law with respect to the Final Results. See Southern Tier Complaint, pp. 2-16.

<sup>11/</sup> 62 Fed. Reg. 27238 (May 19, 1997).

<sup>12/</sup> Panel Rule 7(a) states that “[a] panel review shall be limited to [ ] the allegations of error of fact (continued...)

In the (amended) Final Results, the Department calculated the final dumping margin for CEMEX to be 73.69 percent (weighted average).<sup>13/</sup> This was the rate that the Department directed the U.S. Customs Service to apply against both CEMEX and CDC.

### **ISSUES PRESENTED AND DECISION SUMMARY**

In appreciation of the large number of issues presented to the Panel and upon careful consideration of the record in this Fifth Administrative Review, the briefs of the parties submitted in this matter, and the oral hearings conducted on December 14 and 15, 1998 in Washington, D.C., the Panel provides the following summary of its decision:

**A.** Whether the Department's refusal to revoke the antidumping order based upon alleged defects in the initiation of the original LTFV investigation is supported by substantial evidence on the record and is otherwise in accordance with law.

**The Panel affirms the decision of the Department to refuse to revoke said order.**

**B.** Whether the Department's determination that CEMEX's home market sales of Type II cement were outside the "ordinary course of trade" is supported by substantial evidence on the record and is otherwise in accordance with law.

**The Panel upholds the Department's finding that home market sales of Type II cement were outside the ordinary course of trade.**

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<sup>12/</sup> (...continued)  
or law, including challenges to the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review...." *Id.*

<sup>13/</sup> Fin. Res., 62 Fed. Reg. at 24415.

C. Whether the Department’s decision to treat CDC and CEMEX as a single entity (*i.e.*, to “collapse” both producers and calculate a single dumping margin) is supported by substantial evidence on the record and is otherwise in accordance with law?

**The Panel upholds the Department’s decision to collapse CDC and CEMEX.**

D.1. Whether the Department’s determinations with respect to normal value (“NV”) are supported by substantial evidence on the record and are otherwise in accordance with law, as respects certain claims made by CEMEX and CDC, specifically--

D.1.a. Whether the Department’s determination that bagged Type I cement should be included in the calculation of NV as part of the foreign like product is supported by substantial evidence on the record and is otherwise in accordance with law.

**A Panel majority determines that bagged Type I cement should not have been included within the foreign like product and remands the issue to the Department for a determination consistent with this opinion.**

D.1.b. The issues whether the Department properly calculated NV by denying claimed customer categories, by applying its arm’s-length test (except to the extent that it applies to bulk cement), and by denying a freight adjustment for bagged cement, are not addressed by the Panel as a result of its decision regarding the improper inclusion of bagged Type I cement within the foreign like product. To the question of whether the Department properly calculated NV by applying its arm’s-length test to the sales of Type I bulk cement:

**A Panel majority affirms the Department’s application of its arm’s-length test to the sales of Type I bulk cement to determine NV.**



**D.2.** Whether the denial by the Department of a constructed export price (“CEP”) offset to CEMEX and CDC is supported by substantial evidence on the record and is otherwise in accordance with law.

**The Panel remands the Department’s denial of a CEP offset to CEMEX and CDC for a detailed explanation of the questions raised by the Panel.**

**D.3.** Whether the Department’s determinations with respect to NV are supported by substantial evidence on the record and are otherwise in accordance with the law, as respects certain claims made by Southern Tier, specifically--

**D.3.a.** Whether the Department’s allowance of a “difference in merchandise” (“DIFMER”) adjustment to CEMEX is supported by substantial evidence on the record and is otherwise in accordance with law.

**A Panel majority affirms the Department’s DIFMER calculation as supported by substantial evidence and in accordance with law, but remands to the Department for a re-calculation of CEMEX’s DIFMER allowance with respect to only Type I bulk cement (not bagged) consistent with the Panel’s majority finding regarding bulk v. bagged (see D.1.a., supra).**

**D.3.b.** Whether the Department’s allowance of a freight adjustment on bulk cement is supported by substantial evidence on the record and is otherwise in accordance with law.

**The Panel affirms the Department’s allowance of a freight adjustment on bulk cement to CEMEX.**

**D.3.c.** Whether the Department’s adjustment to NV for CEMEX’s rebates and for

“other” adjustments for CDC is supported by substantial evidence on the record and is otherwise in accordance with law.

**The Panel affirms the Department’s adjustments to NV for CEMEX’s rebates and for “other” adjustments for CDC.**

**D.3.d.** Whether the Department’s allowance to CEMEX and CDC of a claimed credit expense adjustment is supported by substantial evidence on the record and is otherwise in accordance with law.

**The Panel affirms the Department’s NV adjustment to CEMEX and CDC of a claimed credit expense.**

**E.** Whether the Department properly determined certain claims by the parties with respect to CEP, specifically--

**E.1.** Whether the Department’s refusal to deduct indirect selling expenses and inventory carrying costs incurred in Mexico on U.S. sales for the purpose of calculating CEP is supported by substantial evidence on the record and is otherwise in accordance with law?

**The Panel affirms the Department’s determination that the Mexican indirect selling expenses should not be deducted from the CEP calculation.**

**E.2.** Whether the Department’s refusal to include indirect selling expenses and inventory carrying costs incurred in Mexico on U.S. sales in “total United States expenses” for purposes of calculating CEP profit is supported by substantial evidence and is otherwise in accordance with law.

**The Panel affirms the Department’s calculations concerning “total United States expenses.”**

**E.3.** Whether the Department’s decision to include movement expenses in “total

expenses” for purposes of calculating CEP is supported by substantial evidence on the record and is otherwise in accordance with law.

**The Panel affirms the Department’s interpretation and application of the statute with respect to movement expenses.**

F. Whether the Final Results require remand to the Department because of certain ministerial errors.

**Pursuant to the Department’s request, and based upon an agreement of all Parties,<sup>14/</sup> the Panel remands to the Department for the correction of certain ministerial errors.**

## II. BACKGROUND

### A. Procedural Background

The initiation of the Department's original LTFV investigation in this matter was announced on October 23, 1989,<sup>15/</sup> based upon a petition filed with the Department and the United States International Trade Commission ("Commission") on September 26, 1989<sup>16/</sup> by counsel on behalf of members of the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray

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<sup>14/</sup> This request was made by the Department and the parties at the oral hearing on December 15, 1998. Hearing Transcript, at 95-98.

<sup>15/</sup> The Department's Notice of Initiation was published in the Federal Register at 54 Fed. Reg. 43190 (October 23, 1989).

<sup>16/</sup> Id. In the Notice of Initiation, the Department stated as follows: “Petitioner has alleged that it has standing to file the petition. Specifically, petitioner has alleged that it is an interested party as defined under section 771(9)(F) of the Act and that it has filed the petition on behalf of a regional U.S. industry producing the product that is subject to this investigation. Any interested party, as described under paragraphs (C), (D), (E) or (F) of section 771(9) of the Act, that wishes to register support for, or opposition to, this petition, must file written notification with the Assistant Secretary for Import Administration.” Id. (Emphasis added).

Portland Cement, representing the regional U.S. "industry."<sup>17/</sup> The original Period of Investigation ("POI") was April 1, 1989 through September 30, 1989, which investigation led to an Antidumping Duty Order issued against CEMEX, Apasco, S.A. de C.V., Cementos Hidalgo, S.C.L., and "all others" effective August 30, 1990.<sup>18/</sup> Since the original Antidumping Duty

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<sup>17/</sup> See Gray Portland Cement and Cement Clinker from Mexico, Inv. No. 731-TA-451 (Preliminary), USITC Pub. 2235, November 1989, at 1. Among other key phrases, the term "industry," as used in 19 U.S.C. § 1673(b)(1) and elsewhere throughout U.S. antidumping law, is defined by 19 U.S.C. § 1677(4)(a) to mean "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." This definition manifestly presumes a *nationwide* market for the domestic like product; nevertheless, there are some industries, cement being a clear example, that are likely candidates for a *regional* industry analysis as defined in 19 U.S.C. § 1677(4)(C) (cement's low value-to-weight ratio, fungibility, and high transportation costs "can make geographic markets isolated and insular.") USITC Pub. 2235, at 8. The question whether an industry is a regional one is closely linked to the determination of whether the industry has been injured and, under U.S. antidumping law, the United States International Trade Commission ("Commission") is the agency assigned responsibility for making such injury determinations. Because of the language of § 1677(4)(C) ("[i]n appropriate circumstances," "may be treated," etc.), the treatment of an industry on a regional basis by the Commission is considered to involve the exercise of substantial discretion. Id., at 6. In its preliminary investigation of Gray Portland Cement and Cement Clinker from Mexico, the Commission considered argument by the petitioner that the Commission should find two separate regional industries (Arizona, New Mexico, and Texas, called the "Southwest" region, and Florida, called the "Florida region"). In the alternative, the petitioner argued that the Southwest/Florida region should be treated as a single non-contiguous region, excluding the Gulf states of Louisiana, Mississippi, and Alabama. Respondents, for their part, proposed that the Commission consider a national cement industry or, alternatively, include the Gulf states and/or California in the region. Id., at 7-8. After deliberation, the Commission tentatively concluded that the appropriate region for the preliminary investigation should be the "southern-tier" region "consisting of the southwestern states of Texas, New Mexico, and Arizona, as well as Florida, the Gulf states of Alabama, Mississippi, Louisiana, and the state of California," indicating that it would revisit the issue in its final investigation when it had more data and information available. In its Final Determination (Gray Portland Cement and Cement Clinker from Mexico, Inv. 731-TA-451 (Final), USITC Pub. 2305 (August 1990)), the Commission reviewed in depth the issue of the appropriate regional industry definition and concluded once again that the southern-tier, including the entirety of the Gulf states and California, should be utilized as the basis for its injury determination. Id., at 16-17.

<sup>18/</sup> The Antidumping Duty Order was published in the Federal Register at 55 Fed. Reg. 169 (August 30, 1990). The order established a cash deposit rate for estimated antidumping duties on entries of cement and clinker from Mexico.

Order, several administrative reviews have been conducted,<sup>19/</sup> the latest of which is the seventh. The concern of this Panel is with the Final Results of the Fifth Administrative Review.<sup>20/</sup> The purpose of such reviews, of course, is to calculate the actual antidumping duties for the period reviewed and to establish a new cash deposit rate for future entries of cement.

On September 15, 1995, at the request of CEMEX and Southern Tier,<sup>21/</sup> the Department initiated the Fifth Administrative Review of its August 30, 1990 antidumping order covering, as indicated above, the period from August 1, 1994 through July 31, 1995. 62 Fed. Reg. 17148 (1995). On October 3, 1996, the Department issued its preliminary results, 61 Fed. Reg. 51676 (1996), and on April 9, 1997 published its Final Results, 62 Fed. Reg. 17148 (1997), setting the antidumping duty margin at 103.82 percent. CEMEX sent letters to Commerce on April 8, 1997 and April 17, 1997 identifying clerical errors in the Final Results and requesting a revision. On May 5, 1997, the Department amended the Final Results, reducing the antidumping duty margin on cement and clinker from Mexico to 73.69 percent. 62 Fed. Reg. 24414 (1997).

## **B. Product**

The product at issue in this matter is cement. Cement is a gray powder consisting

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<sup>19/</sup> An antidumping “proceeding” usually consists of two phases: (1) the original LTFU investigation; and (2) any subsequent administrative review. The amount of duty assessed pursuant to antidumping duty order is established by the Department in such administrative reviews, 19 U.S.C. § 1675 (a)(1)(B), which may occur at least once during each 12-month period measured from the anniversary of the date the antidumping order was published. 19 U.S.C. § 1675(a)(1). As a result of amendments to the law contained in the *Trade and Tariff Act of 1984*, these reviews are no longer mandatory and the sufficiency of a review request lies within the Department's discretion.

<sup>20/</sup> A compilation of the various Federal Register notices for this entire proceeding, accompanied by a summary of the applicable periods of review, is set out in *Appendix A*, attached hereto.

<sup>21/</sup> Initiation of Antidumping Duty Administrative Review, 60 Fed. Reg. 47930 (1995).

primarily of compounds of calcium, silica, and iron oxide. Cement forms the binding agent in concrete. Production of cement begins by grinding together such materials as limestone, clay, and iron ore. The resulting mix is fed into a kiln, where the high temperatures create clinker. The clinker is then ground, and small amounts of other materials, such as gypsum, are added to make the cement product. Cement is a highly standardized product, manufactured according to standards established by the *American Society for Testing Materials* (“ASTM”). When cement is mixed with water, sand and other aggregates, such as gravel or crushed stone, it forms concrete.

All cement sold by CEMEX in the United States during the Fifth Review was Type II cement sold in bulk. All sales in Mexico during the review period were of Type II cement sold in bulk and Type I cement sold in bulk and in bags. Type V and pozzolanic cement<sup>22/</sup> were also sold, but are not a subject of this review.<sup>23/</sup>

### **III. GOVERNING LAW AND STANDARD OF REVIEW**

#### **A. Governing Law**

As has been noted above, NAFTA Article 1904.1 specifies that “each Party shall replace judicial review of final antidumping...duty determinations with binational panel review,” including the final results of administrative reviews conducted by the Department,<sup>24/</sup> as is

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<sup>22/</sup> Portland-pozzolan cement is gray portland cement that contains between 15 to 40 percent pozzolan. Pozzolan is a powdery siliceous or siliceous and aluminous substance that reacts chemically with slaked lime at ordinary temperature and in the presence of moisture to form a cement.

<sup>23/</sup> CEMEX Panel Rule 57(2) Brief, at 53-54.

<sup>24/</sup> 19 U.S.C. §1675(a) (1994).

presented by this case.

The law governing binational panel reviews is the national law of the country in which the review takes place, specifically “the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents *to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.*”<sup>25/</sup> Thus, in this Fifth Administrative Review, review by a binational panel replaces review by the Court of International Trade (“CIT”). In addition, the Panel is bound by judicial precedents of the Court of Appeals for the Federal Circuit (“CAFC”)<sup>26/</sup> and by the United States Supreme Court. CIT decisions, while not expressly binding on this panel, are nevertheless usually given persuasive value, just as a CIT judge would normally respect an earlier decision on the same issue rendered by another CIT judge. One court described the weight to be given to CIT decisions by another CIT court as “valuable, though non-binding, precedent unless and until it is reversed.”<sup>27/</sup> Similarly, a decision of one binational panel is not binding on future panels, although it may be persuasive and acknowledged as precedent by a subsequent panel.<sup>28/</sup>

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<sup>25/</sup> NAFTA, Article 1904.2 (emphasis added). As a consequence, it is quite possible that “different legal principles[,] depending on which NAFTA country is the ‘importing party,’ ...could lead to different results in different NAFTA Parties.” In the Matter of Gray Portland Cement and Clinker from Mexico [Fourth Administrative Review], USA-97-1904-02 (November 23, 1998), at 5. Illustrative of this point are the quite different standards of review under the laws of the three NAFTA countries. See NAFTA, Annex 1911; see also In the Matter of Cold-Rolled Steel Sheet, CDA-93-1904-09 (explaining Canada’s standard of review); and In the Matter of Cut-Length Plate Products from the United States, MEX-94-1904-02 (explaining Mexico’s standard of review).

<sup>26/</sup> The CAFC has exclusive appellate jurisdiction over decisions of the CIT. 28 U.S.C. § 1295(a)(5)(1998).

<sup>27/</sup> See Rhone Poulenc v. United States, 583 F. Supp. 607, 612 (Ct. Int’l Trade 1984).

<sup>28/</sup> See In the Matter of Certain Corrosion-Resistant Carbon Steel Products from Canada, USA-93- (continued...)

## **B. Standard of Review**

The manner in which this Panel performs the reviewing function prescribed by the NAFTA is defined by the standard of review. Not only does the application of the proper standard of review guide the work of the Panel, it appropriately confines its function.<sup>29/</sup> “Panels must conscientiously apply the standard of review,” “must follow and apply the law, not create it,” and “must understand their limited role and simply apply established law.”<sup>30/</sup>

Since this case involves the exercise of the Panel’s reviewing function with respect to a myriad of issues, a clear elucidation of the Panel’s reviewing standard and its limits will explain how the Panel has exercised its reviewing authority. The standard of review required for U.S. Chapter 19 cases is dictated by § 516A(b)(1)(B) of the Tariff Act of 1930,<sup>31/</sup> which requires the Panel to “hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . .”

### **1. Substantial Evidence**

Many U.S. judicial decisions have considered or interpreted the substantial evidence standard and given additional meaning to the statutorily prescribed standard. The Supreme Court

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<sup>28/</sup> (...continued)  
1904-03 (October 31, 1994), at 78 note 254.

<sup>29/</sup> Among the limited grounds for appealing a decision of a binational panel under NAFTA’s Extraordinary Challenge Procedure (see NAFTA, Annex 1904.13), is that the panel “manifestly exceeded its powers, authority or jurisdiction...for example, by failing to apply the appropriate standard of review.” NAFTA, Article 1904.13(ii) (emphasis added).

<sup>30/</sup> In the Matter of Certain Cut-to-Length Carbon Steel Plate From Canada, USA-93-1904-04 (October 31, 1994) and In the Matter of Gray Portland Cement and Clinker from Mexico [Fourth Administrative Review], USA-97-1904-02.

<sup>31/</sup> See NAFTA Annex 1911.



has stated that the standard means that “more than a scintilla [of evidence is necessary],...such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>32/</sup> A later case, Consolo v. Federal Maritime Commission,<sup>33/</sup> elaborated by stating that substantial evidence can be “something less than the weight of the evidence.”

In assessing such “substantiality,” courts and binational panels must consider “the record in its entirety, including the body of evidence opposed to the [agency’s] view.”<sup>34/</sup> Thus, the Panel’s role is “not to merely look for the existence of an individual bit of data that agrees with a factual conclusion and end its analysis at that.”<sup>35/</sup> Rather, the Panel must also take into account evidence in the record that detracts from the weight of the evidence relied on by the agency in reaching its conclusion.<sup>36/</sup>

However, it is clear that the substantial evidence standard does not entitle courts or binational panels to “reweigh” the evidence or substitute its judgment for that of the original finder of fact, the agency.<sup>37/</sup> It is well settled that “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being

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<sup>32/</sup> Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).

<sup>33/</sup> 383 U.S. 607, 620 (1966).

<sup>34/</sup> Universal Camera, 340 U.S. 474, 483-484

<sup>35/</sup> In the Matter of New Steel Rails from Canada, USA-89-1904-09 (August 13, 1990), at 9.

<sup>36/</sup> Universal Camera, 340 U.S. at 488; see also Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984); and Suramerica de Aleaciones Laminadas, C.A. v. United States, 818 F. Supp. 348, 353 (Ct. Int’l Trade 1993).

<sup>37/</sup> In the Matter of Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-11 (August 24, 1990), at 8; see also Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 734 (Ct. Int’l Trade 1989).

supported by substantial evidence.”<sup>38/</sup> The reviewing authority therefore may not “displace the [agency’s] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it *de novo*.”<sup>39/</sup> The reasoning underlying this principle has been expressed by the Supreme Court in the following manner: “[The substantial evidence standard] frees the reviewing [authority] of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute.”<sup>40/</sup>

This split of function --between agency and reviewing tribunal-- casts the reviewing body in the role of determining whether the administrative record<sup>41/</sup> adequately supports the agency’s decision,<sup>42/</sup> which must be adjudged only on the grounds and findings actually stated in its determination,<sup>43/</sup> not on the basis of *post hoc* argumentation of counsel.<sup>44/</sup> In carrying out its review of an agency determination, a court or binational panel must stay strictly within the

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<sup>38/</sup> Consolo, 383 U.S. at 620.

<sup>39/</sup> Universal Camera, 340 U.S. at 488; *accord* American Spring Wire Corp. v. United States, 760 F.2d 249 (Fed. Cir. 1985).

<sup>40/</sup> Consolo, 383 U.S. at 620.

<sup>41/</sup> See NAFTA Art. 1904(2).

<sup>42/</sup> Daewoo Electronics Company v. International Union, 6 F.3d 1511 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 2672 (1994).

<sup>43/</sup> Hussey Copper, Ltd. v. United States, 834 F. Supp. 413, 427 (Ct. Int’l Trade 1985), *citing* SEC v. Chenery, 318 U.S. 80, 87 (1943).

<sup>44/</sup> Maine Potato Council v. United States, 613 F. Supp. 1237, 1245 (Ct. Int’l Trade 1985) (“A counsel’s *post hoc* rationalization cannot substitute for a clear statement by the [agency] as to how it treated [a significant competitive factor].”).

confines of the administrative record already in existence.<sup>45/</sup> In short, binational panels may not engage in *de novo* review<sup>46/</sup> and, consistent with that directive, may not make new factual findings that would amend the agency record. Indeed, the statutory requirement that review be “on the [administrative] record” means that the reviewing court or binational panel is limited to “information presented to or obtained by [the Department]...during the course of the administrative proceeding....”<sup>47/</sup>

In undertaking its review function in U.S. antidumping and subsidy cases, the courts often employ the vocabulary of “deference,” making it clear that the substantial evidence standard generally requires the reviewing authority to accord deference to an agency’s factual findings, its statutory interpretations, and its methodologies. Specifically, with respect to their review of agency fact-finding, courts and binational panels have noted that “deference must be accorded to the findings of the agency charged with making factual determinations under its statutory authority.”<sup>48/</sup>

However, the application of the substantial evidence standard and deference to agency

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<sup>45/</sup> See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-744 (1984). (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.... The task of the reviewing court is to apply the appropriate [ ] standard of review [ ] to the agency decision based on the record the agency presents to the reviewing court.” (citations omitted)).

<sup>46/</sup> Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 965 (Ct. Int’l Trade 1986), *aff’d per curiam*, 810 F.2d 1137 (Fed. Cir. 1987).

<sup>47/</sup> 19 U.S.C. § 1516a(b)(2)(A)(i).

<sup>48/</sup> In the Matter of Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-11, at 6 (*citing In the Matter of Red Raspberries from Canada*, USA-89-1904-01, at 18-19 (Dec. 15, 1989)). *Accord*, N.A.R., S.P.A. v. United States, 741 F. Supp. 936, 939 (Ct.Int’l Trade 1990) (“[D]eference is given to the expertise of the administration agency regarding factual findings.”).

decision-making does not mean abdication of the Panel’s authority to conduct a meaningful review of the agency’s determination.<sup>49/</sup> The reviewing function is not superfluous, nor a rubber-stamp. Accordingly, deference has its bounds. An agency’s decision must have a reasoned basis.<sup>50/</sup> The reviewing authority may not defer to an agency determination premised on inadequate analysis or reasoning.<sup>51/</sup> The extent of deference to be accorded agency determinations is dependent on “the thoroughness evident in [its] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements....”<sup>52/</sup>

To be accorded deference, therefore, there must be a rational connection between the facts found and the choice made by the agency.<sup>53/</sup> A reviewing body may uphold an agency’s decision

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<sup>49/</sup> See Al Tech Specialty Steel Corp. v. United States, 651 F. Supp. 1421, 1424 (Ct.Int’l Trade 1986). (“This deference, however, should in no way be construed as a rubber stamp for the government’s interpretation of statutory provisions.” See also Smith-Corona Group, 713 F. 2d at 1571 (“The Secretary cannot, under the mantle of discretion, violate these standards or interpret them out of existence.”))

<sup>50/</sup> See Softwood Lumber from Canada (injury), USA-92-1904-02, at 15 (July 26, 1993); and American Lamb Co., 785 F.2d at 1004 (*citing* S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 638); see also In the Matter of Fresh, Chilled and Frozen Pork, USA-89-1904-11, at 13 (Aug. 24, 1990).

<sup>51/</sup> Chr. Bjelland Seafoods A/C v. United States, 14 ITRD 2257, 2260, 1992 Ct. Int’l Trade LEXIS 213 (Ct. Int’l Trade 1992); USX Corp. v. United States, 655 F. Supp. 487, 492 (Ct. Int’l Trade 1987).

<sup>52/</sup> Ceramica Regiomontana, 636 F. Supp. at 965 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)), *aff’d*, 810 F.2d 1137 (Fed. Cir. 1987).

<sup>53/</sup> Bando Chem. Indus. v. United States, 787 F. Supp. 224, 227 (Ct. Int’l Trade 1992) (*citing* Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974), and Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)); Avesta AB v. United States, 724 F. Supp. 974, 978 (Ct. Int’l Trade 1989), *aff’d*, 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1308 (1991).

of less than ideal clarity, but its path of reasoning must be reasonably discernible,<sup>54/</sup> and there must be an adequate explanation of the bases for the agency's decision in order for the reviewing authority to meaningfully assess whether it is supported by substantial evidence on the record. The agency must articulate and explain the reasons for its conclusions.<sup>55/</sup>

## 2. In Accordance With Law

With respect to whether an agency has acted according to law, a reviewing tribunal may have greater latitude than in the case of agency fact-finding, depending on the particular of law and facts involved.<sup>56/</sup> On issues of statutory interpretation, “deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law.”<sup>57/</sup> The Supreme Court has stated that “when a court is reviewing an agency decision based on a statutory interpretation, ‘if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a

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<sup>54/</sup> Ceramica Regiomontana, S.A., 810 F.2d 1137, 1139 (Fed. Cir. 1987) (citing Bowman Transportation, 419 U.S. at 286).

<sup>55/</sup> See, e.g., Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 621 (Ct. Int’l Trade 1993); USX Corp., 655 F. Supp. at 490; SCM Corp. v. United States, 487 F. Supp 96, 108 (Cust. Ct. 1980); Maine Potato Council, 613 F. Supp. at 1244-45; Bando Chem. Indus. 787 F. Supp. at 227.

<sup>56/</sup> Alfred C. Aman and William T. Mayton, ADMINISTRATIVE LAW, §§ 13.4, 13.7-13.10 (1993). Professor Ernest Gellhorn and Ronald Levin state in their ADMINISTRATIVE LAW AND PROCESS (4th ed. 1997) “[As a] general rule of thumb. . . a reviewing court will give less deference to an agency’s legal conclusions than to an agency’s factual or discretionary determinations. . . The courts’ relative independence in declaring the law is a natural outgrowth of their traditional role in the American legal system. . . Policy considerations [also] reinforce the courts’ normal practice of giving less deference on legal issues.”

<sup>57/</sup> National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992).

permissible construction of the statute.”<sup>58/</sup> Moreover, the CAFC has emphasized that “[d]eference to an agency’s statutory interpretation is at its peak in the case of a court’s review of Commerce’s interpretation of the antidumping laws.”<sup>59/</sup> As a result of Congress’ “entrust[ing] in the antidumping field] the decision making authority in a specialized, complex economic situation to administrative agencies,”<sup>60/</sup> reviewing courts acknowledge that “the enforcement of the antidumping law [is] a difficult and supremely delicate endeavor [for which] [t]he Secretary of Commerce...has broad discretion in executing the law.”<sup>61/</sup>

Since most cases of the Federal Circuit,<sup>62/</sup> which opinions bind the CIT and binational

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<sup>58/</sup> American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986), *citing* Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, at 843 note 11 (1984).

<sup>59/</sup> Koyo Seiko v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994), *citing* Daewoo Electronics, 6 F.3d at 1516.

<sup>60/</sup> S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 638.

<sup>61/</sup> Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *see also* Consumer Prof. Div., SCM Corp. v. Silver Reed America, 753 F.2d 1033, 1039 (Fed. Cir. 1985).

<sup>62/</sup> *See e.g.,* Timken Company v. United States, 37 F.3d 1470, 1474 (Fed. Cir. 1994). A notable exception to the tendency to follow Chevron is Federal Mogul Corp. v. United States, 63 F.3d at 1579 (“Chevron constitutes a significant inroad into traditional judicial power, and is not lightly to be applied to just any agency decision or litigation position made on behalf of an agency.”) *See also* Lasko Metal Products v. United States, 43 F.3d 1442 (Fed. Cir. 1994), note 3 at 1446 (“Suramerica[de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (Fed. Cir. 1992)] relied on the Supreme Court’s Chevron analysis. In Suramerica, the issue was whether the agency’s official interpretation of its organic legislation was a permissible reading of the statute. The policy underlying the Supreme Court’s grant in Chevron of special deference to agency regulations and similar official agency pronouncements does not extend to every agency action--it would not, for example, extend to *ad hoc* representations on behalf of the agency, such as litigation arguments. In this case the issue much like that in Suramerica--an officially mandated agency methodology considered by the agency to be within its statutorily granted discretion.”)

The generally willing reception of the Chevron approach is not always embraced by other circuits and by commentators. *See e.g.,* Arent v. Shalala, Slip Op. No. 94-5271 (D.C.Cir. 1995, (continued...))

panels,<sup>63/</sup> have tended to follow the case of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,<sup>64/</sup> a brief description of its holding and reasoning is in order. This landmark decision on deference to administrative interpretations of statutes requires, in essence, that federal courts defer to any reasonable interpretation by an agency charged with administration of a statute, provided that Congress did not clearly specify a contrary interpretation.

“When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or

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<sup>62/</sup> (...continued)  
Nov. 14, 1995). (Arent involved an Administrative Procedure Act challenge to regulations of the Food and Drug Administration (FDA) to implement the Nutrition Labeling and Education Act (NLEA), 21 U.S.C. 321 *et seq.* The majority avoided Chevron, applying instead the standard set out in Motor Vehicle Manufacturers Ass’n v. State Farm, 463 U.S. 29 (1983), to uphold the FDA regulation. The Arent majority stated that “Chevron is principally concerned with whether an agency has authority to act under a statute... Thus, a reviewing court’s inquiry under Chevron is rooted in statutory analysis and is focused on discerning the boundaries of Congress’ delegation of authority to the agency; and as long as the agency stays within that delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference....The only issue [in Arent] is whether the FDA’s discharge of [its] authority was reasonable. Such a question falls within the province of traditional arbitrary and capricious review under 5 U.S.C. 706 (23)(A)(1988).”

One commentator has noted that “Chevron []altered the distribution of national powers among courts, Congress, and administrative agencies [putting it into tension with] deeply engrained [principles and ideas, such as the principle of Marbury v. Madison which made it the function of judges to] say what the law is. “Cass R. Sunstein, *Law and Administrative After Chevron*, 90 COLO. L. REV. 2071, 2075 (1990). *See also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 976 (1992).

<sup>63/</sup> *See supra* note 26 and accompanying text.

<sup>64/</sup> 467 U.S. 837 (1984).

ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>65/</sup>

The underlying rationale for the deference required by Chevron is the executive branch's political accountability compared with that of the judiciary's. In the words of the Supreme Court:

"[F]ederal judges--who have no constituency--have a duty to respect legitimate choices by those who do."<sup>66/</sup>

While there will be continuing debate as to the application and scope of the Chevron principle to antidumping cases in which differing contexts of discretion are involved, the case provides a modicum of refuge from challenge, in favor of the Department's expertise in antidumping matters, and poses a significant burden to those arguing against deference for agency decisions.<sup>67/</sup>

Of course, even with Chevron, deference to an agency's interpretation of the statute it is charged with implementing is not unlimited. A reviewing authority may not, for example, permit an agency "under the guise of lawful discretion or interpretation to contravene or ignore the intent of Congress."<sup>68/</sup> The Supreme Court itself has held that "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory

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<sup>65/</sup> Chevron, 467 U.S. at 842-843.

<sup>66/</sup> Id. at 866.

<sup>67/</sup> The Chevron Court is saying that if Congress has not made all the relevant policy choices, courts should uphold the discretion of the executive branch to fill in the policy gaps. This principle is based on the theory that the president is "directly accountable to the people," whereas judges are not.

<sup>68/</sup> Cabot Corp. v. United States, 694 F.Supp. 949, 953 (Ct. Int'l Trade 1988).



language.”<sup>69/</sup> Moreover, the Department’s efforts at statutory interpretation must, when appropriate, take into account the international obligations of the United States.<sup>70/</sup>

Deference may also be given to the methodologies selected and applied by the agency to carry out its statutory mandate,<sup>71/</sup> which a court or binational panel may only review for reasonableness.<sup>72/</sup> Even methodologies selected and applied by the agency to carry out its statutory mandate “still must be lawful, which is for the courts finally to determine.”<sup>73/</sup>

Finally, although there is a presumption of good faith and conscientious exercise of the Department’s responsibilities in an investigation,<sup>74/</sup> the Department has a legal obligation to

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<sup>69/</sup> Public Employees Retirement System of Ohio v. June M. Betts, 492 U.S. 158, 171 (1989). See also Texas Crushed Stone Co. v. United States, 35 F.3d 1535 (Fed. Cir. 1994), note 7 at 1541 (“Prior agency practice is relevant in determining the amount of deference due an agency’s earlier interpretation. An agency’s interpretation of a relevant provision which conflicts with agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” *Citing INS. V. Cardoza-Fonseca*, 480 U.S. 421, 446 note 30, 107 S.Ct. 1207, 1221 note 30, 94 L.Ed. 2d 434 (1987).

<sup>70/</sup> See Alexander Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118, 2 Led. 208 (1804); Weinberger v. Rossi, 456 U.S. 25, 31 (1982); Federal-Mogul Corp., 63 F.3d at 1581-82; Section 114, Restatement (Third) of the Foreign Relations Law of the United States.

<sup>71/</sup> See Brother Industries, Ltd. v. United States, 771 F. Supp. 374, 381 (Ct. Int’l Trade 1991). (“Methodology is the means by which an agency carries out its statutory mandate and, as such, is generally regarded as within its discretion.”)

<sup>72/</sup> Koyo Seiko Co. v. United States, 66 F.3d 1204, 1210-1211 (Fed. Cir. 1995) (“[O]ur inquiry is limited to determining whether Commerce’s model-match methodology...is reasonable.”)

<sup>73/</sup> Brother Industries, 771 F.Supp. At 381. See also Gifford-Hill Cement Co. v. United States, 615 F.Supp. 577, 582 (Ct. Int’l Trade 1985) (“If the use of [a submarket] analysis was improper, then the Commission’s findings would not be supported by substantial evidence.”).

<sup>74/</sup> Saha Thai Steel Pipe Co. v. United States, 661 F.Supp. 1198, 1202 (Ct. Int’l Trade 1987); Librach v. United States, 147 Ct. Cl. 605, 612 (1959). See also Takashima U.S.A., Inc. v. United States, 886 F.Supp. 858, 861 (1995) (“A presumption of regularity attaches to the actions and conduct of government officials in the performance of their lawfully executed duties.”) (*citing Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993).

observe the basic principles of due process and fundamental procedural fairness,<sup>75/</sup> and to justify any departure it makes from settled practice with reasonable explanations that are themselves supported by substantial evidence on the record.<sup>76/</sup>

In sum, the applicable standard of review for this matter requires the panel to uphold the Final Results if they are supported by substantial evidence on the record and are not contrary to law, even if the panel would have reached a different conclusion if it had considered the case *de novo*.

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<sup>75/</sup> See Sigma Corp. v. United States, 841 F.Supp. 1255, 1267-68 (Ct. Int’l Trade 1993); Usinor Sacilor v. United States, 893 F.Supp. 1112, 1141 (Ct. Int’l Trade 1995); and Creswell Trading Co. v. United States, 15 F.3d 1054, 1062 (Fed. Cir. 1994).

<sup>76/</sup> See Western Conference of Teamsters v. Brock, 709 F.Supp. 1159, 1169 (Ct. Int’l Trade 1989); see also National Knitwear and Sportswear Ass’n v. United States, 779 F.Supp. 1364, 1369 (Ct. Int’l Trade 1991).

### III. ISSUES PRESENTED AND DISCUSSION

- A. **Whether the Department's refusal to revoke the antidumping order based upon alleged defects in the initiation of the original LTFV investigation is supported by substantial evidence on the record and otherwise in accordance with law.**

1. **Arguments of the Participants**

CEMEX

CEMEX argues that the Department "does not have the authority to impose"<sup>77/</sup> antidumping duties in this Fifth Administrative Review under the original Antidumping Duty Order because at the time that the LTFV investigation was initiated, the Department had merely "assumed" that the petition had been filed "on behalf of"<sup>78/</sup> the regional industry without

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<sup>77/</sup> CEMEX Panel Rule 57(1) Brief, at 11.

<sup>78/</sup> See 19 U.S.C. § 1673a(1990), which read in part:

**§ 1673a. Procedures for initiating an antidumping duty investigation**

....

**(b) Initiation by petition**

**(1) Petition requirements**

An antidumping proceeding shall be commenced whenever an interested party ... files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of [an antidumping duty under § 1673], and which is accompanied by information reasonably available to the petitioner supporting those allegations ....

....

**(c) Petition determination**

Within 20 days after the date on which a petition is filed ..., the administering authority shall—

(1) determine whether the petition alleges the elements necessary for the imposition of [the antidumping duty requested] and contains information reasonably available to the petitioner supporting the allegations,

(2) if the determination is affirmative, commence an investigation to determine whether the class or kind of merchandise described in the petition is being, or is likely to be, sold in the United States at less than

(continued...)

specifically *measuring* whether a majority of the regional industry had actually supported this decision.<sup>79/</sup> Although CEMEX concedes that the Department's action at this time was in harmony with applicable Federal Circuit law, Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 667 (Fed. Cir. 1992) (upholding the Department's then current practice—of relying upon the petitioner's representation that it had filed the petition "on behalf of" the domestic industry identified in the petition unless it was demonstrated that a majority of the industry actually opposed the petition—as a "permissible construction" of the statute),<sup>80/</sup> it argues that this Panel should be guided by a July 9, 1992 GATT panel interpretation<sup>81/</sup> of the analog

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<sup>78/</sup> (...continued)

its fair value, and provide for the publication of notice of the determination in the Federal Register, and

(3) if the determination is negative, dismiss the petition, terminate the proceeding, notify the petitioner in writing of the reasons for the determination, and provide for the publication of notice of the determination in the Federal Register.

(Emphasis added)

<sup>79/</sup> CEMEX Panel Rule 57(1) Brief, at 11.

<sup>80/</sup> Only when members of the domestic industry opposing the petition provided a clear indication that the petition may not have been brought on behalf of the industry would the Department investigate further to determine whether the industry actually supported the petition. At least this portion of the Suramerica decision has been statutorily overturned by a provision of the *Uruguay Round Agreements Act* ("URAA"), 19 U.S.C. § 1673a(c)(4), which sets out new standing requirements and no longer permits the use of such a "presumption" of support by the domestic industry. The URAA came into force on January 1, 1995 and does not impact this analysis.

<sup>81/</sup> See United States Antidumping Duties on Gray Portland Cement and Cement Clinker from Mexico, GATT Doc. No. ADP/82 (unadopted). CEMEX attached this document to its November 4, 1996 comments following the publication of the preliminary results of the Fifth Administrative Review. See Pub. Doc. 214. The GATT panel determined that the Department's failure to ascertain the requisite level of support for the petition violated the Tokyo Round Antidumping Code and that the order was void *ab initio* and should be revoked.

"standing" requirements set out in Article 5:1<sup>82/</sup> of the Tokyo Round Antidumping Code.<sup>83/</sup> CEMEX asserts that this GATT panel interpretation is "authoritative evidence" (and a correct interpretation) of the "on behalf of" language even as it appears in U.S. law (see fn. <sup>78/</sup> *supra*). Thus, under the Supreme Court's "Charming Betsy" doctrine,<sup>84/</sup> the Panel should interpret the relevant provisions of the comparable U.S. statute in the same manner as the GATT panel in question had interpreted the applicable provisions of the Antidumping Code.

Since the Department "lacked the authority to initiate the original investigation because the plaintiffs did not have standing,"<sup>85/</sup> CEMEX argues that this Panel should "retroactively apply" the correct interpretation of the standing requirement, and suggests that the Panel can invalidate the Antidumping Duty Order (i) *ab initio*, (ii) from the date of the GATT panel report on July 9, 1992, (iii) or from the date of commencement of the Fifth Administrative Review.<sup>86/</sup> CEMEX cites in support of such retroactivity the case of Ceramica Regiomontana, S.A. v. United States, 64 F.3d 1579 (Fed. Cir. 1995), which dealt with Mexico becoming entitled to an "injury" test in countervailing duty investigations and the consequent revocation of an earlier countervailing duty

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<sup>82/</sup> See fn. 23 *infra*. Article 5:1 states: "An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry affected", referencing Article 4 for the definition of "industry."

<sup>83/</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade [Antidumping Code], Doc. No. MTN/NTM/W/232, *opened for signature* April 9, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650, 1160 U.N.T.S. 204, B.I.S.D. 26th Supp. 171-88, *reprinted in* 18 I.L.M. 621 (1979) (*entered into force* January 1, 1980; *superseded on* January 1, 1995).

<sup>84/</sup> In Alexander Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 143 (1804), the Supreme Court stated that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains...."

<sup>85/</sup> CEMEX Panel Rule 57(1) Brief, at 20.

<sup>86/</sup> *Id.*, at 17, note. 12.

order as of the date of such entitlement.

CDC

For its part, CDC argues that the Department "lacks jurisdiction" to impose antidumping duties on the basis of a petition that cannot prove to have been filed "on behalf of" the relevant "industry," as legally required by 19 U.S.C. § 1673a(b)(1).<sup>87/</sup> CDC points to the close statutory nexus between the phrase "on behalf of" and the term "industry," and observes that "a petitioner's standing to request antidumping relief, and the Department's authority to give the relief, depend in large part on how the term 'industry' is defined."<sup>88/</sup>

CDC claims that the antidumping statute prescribes a different method for initiating *regional*, as opposed to *national*, industry cases. In the case of national investigations, the statute contemplates a *dual* definition of products (see 19 U.S.C. § 1677(4)(a) referring to "producers as a whole" *or* producers whose output "constitutes a major proportion of" the domestic like product) whereas in regional investigations, the statute is *unitary* and "does not allow for producers accounting for [simply] a major proportion of production to qualify as the 'industry'".<sup>89/</sup> Consequently, in regional industry cases,<sup>90/</sup> "the statute plainly requires petitions to be filed on

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<sup>87/</sup> See *supra.*, note 17.

<sup>88/</sup> CDC Panel Rule 57(1) brief, at 52.

<sup>89/</sup> *Id.*, at 53-54.

<sup>90/</sup> 19 U.S.C. § 1677(4)(C) states:

**§ 1677(4)(C) Regional industries**

In appropriate circumstances, the United States, for a particular product market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if—

- (i) the producers within such market sell all or almost all

(continued...)

behalf of the producers of *all or virtually all* production in the regional industry."<sup>91/</sup> (Emphasis added). CDC informs the Panel that in this case, the petition was supported by only 62% of the regional production, which falls well below this statutory threshold.<sup>92/</sup> CDC asserts, accordingly, that "the Department conducted the investigation and issued the order in plain violation of the standing requirements under the regional industry provisions of the antidumping statute."<sup>93/</sup>

At oral hearing, CDC argued to the Panel that regional investigations are an "extraordinary exception" to the basic principles of antidumping law; that is, "injury may be found to exist even where a major portion of the *total* domestic industry is not injured."<sup>94/</sup> The exceptional nature of

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<sup>90/</sup> (...continued)

of their production of the like product in question in that market, and

(ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.

In such appropriate circumstances, material injury ... may be found to exist with respect to an industry even if the domestic industry as a whole, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of that product, is not injured, if there is a concentration of dumped imports ... into such an isolated market and if the producers of all, or almost all, of the production within that market are being materially injured ... by reason of the dumped imports.... The term 'regional industry' means the domestic producers within a region who are treated as a separate industry under this paragraph.

(Emphasis added).

<sup>91/</sup> CDC Panel Rule 57(1) brief, at 55.

<sup>92/</sup> Id., at 56. This 62% figure appears in the GATT panel report cited in footnote 81, *supra*, but is otherwise not contained in the administrative record of this matter.

<sup>93/</sup> CDC Panel Rule 57(1) brief, at 56.

<sup>94/</sup> Hearing Transcript, at 13. (Emphasis added).

such regional investigations justifies this stricter statutory standing requirement. As a factual matter, CDC also explained that the original petitioner was the *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement*<sup>95/</sup> and that there were no producers included from Alabama, Mississippi, Louisiana or California. Thus, when the Commission chose to "expand" the definition of the regional industry to the full southern-tier of states, the industry under review no longer "matched" the group of producers that had actually filed the petition. In legal effect, therefore, the petitioners had not filed on behalf of *all or virtually all* of the producers in the southern-tier, as required by the statute. The Department, in effect, "ignored the statutory requirement that the petition be filed on behalf of all of the producers in the region."<sup>96/</sup>

In an effort to counter the Department's conclusion that it lacks authority at this time to rescind the original Antidumping Duty Order, since the issue of petitioner's standing was not challenged at the time of the original LTFV investigation,<sup>97/</sup> CDC argues that "standing is a jurisdictional issue" and that it is well settled that "jurisdictional defects can be raised at any time," including in an appeal arising out of the Fifth Administrative Review.<sup>98/</sup> CDC concedes

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<sup>95/</sup> *Cf.*, *supra*, note 17.

<sup>96/</sup> Hearing transcript, at 19. At oral hearing, counsel for Cemex, in considering the "jurisdictional" aspects of this issue, appeared to concede that the logical implication of any decision by the Commission to expand the petitioner's original definition of the regional industry would amount to an "ouster" of jurisdiction of both the Commission and the Department, at least absent some formal amendment of the original petition to reflect the new scope of the regional industry. *See* Hearing Transcript at 48.

<sup>97/</sup> Hearing transcript, at 22..

<sup>98/</sup> CDC Panel Rule 57(1) brief, at 57. As support for its position, CDC cites several Court of International Trade ("CIT") and Federal Circuit decisions, including *Zenith Electronics Corporation v. United States*, 872 F. Supp. 992 (Ct. Int'l Trade 1994); *Gilmore Steel Corp. v. United States*, 585 F. Supp. 670 (Ct. Int'l. Trade 1984); and *Oregon Steel Mills, Inc. v. United States*, 862 F.2d 1541 (Fed. Cir. 1988).



that this jurisdictional challenge was not raised at the time of the original LTFV investigation, but states that it was raised in all subsequent administrative reviews. The Gilmore Steel case<sup>99/</sup> suggests that the Department could raise the issue itself *sua sponte* at any time.

*Southern Tier*

Southern Tier opposes the arguments advanced by CEMEX and CDC on numerous grounds. First, that CEMEX's and CDC's claims are barred by the applicable statute of limitations.<sup>100/</sup> Southern Tier asserts that "it is a jurisdictional requirement that an action be brought within 30 days of the relevant final agency determination."<sup>101/</sup> Under the plain language of the statute, to which there are neither express nor implied exceptions,<sup>102/</sup> CEMEX's and CDC's claims are clearly time-barred.

Second, that CEMEX's and CDC's claims are barred by the doctrine of *res judicata*,

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<sup>99/</sup> See *supra* note 98.

<sup>100/</sup> See 19 U.S.C. § 1516a(a)(2)(A) requiring interested parties to file a summons within thirty (30) days of the date of publication of the Department's determination in Federal Register; see also 19 U.S.C. § 1516a(g)(8)(A)(i) for similar provision regarding NAFTA panel review. The agency determinations reviewable under § 1516a include final affirmative determinations in *original investigations* issued under 19 U.S.C. § 1673d and final results of *administrative reviews* issued under 19 U.S.C. § 1675(a). See 19 U.S.C. § 1516a(a)(2)(B)(i) & (iii). To commence review of either type of determination, "an interested party who is a party to the proceeding in connection with which the matter arises" must file a summons within 30 days of the date of publication in the Federal Register of either the antidumping duty order (in an original investigation) or the final results (in an administrative review). Southern Tier notes for the record that the petitioner did appeal certain aspects of the original Final Determination, but no appeal on any issue was taken at that time by the Mexican producers.

<sup>101/</sup> Southern Tier Panel Rule 57(2) brief, at 167-68.

<sup>102/</sup> See NEC Corp. v. United States, 806 F.2d 247, 249 (Fed. Cir. 1986) ("Conditions upon which the government consents to be sued must be strictly observed and are not subject to implied exceptions") and Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986) (where a party timely files a summons challenging an agency determination in an antidumping case, but fails to file a complaint within the 30-day period prescribed by section 1516a, the action is time-barred).

because they could have been raised in an appeal of the Final Determination in the original LTFV investigation.<sup>103/</sup> Southern Tier cites several cases interposing this general doctrine<sup>104/</sup> and notes that it is applied even in the antidumping context to preclude a claim that could have been raised in earlier, timely litigation.<sup>105/</sup> In the case at hand, since the Federal Circuit has issued its final ruling in the petitioner's appeal of the Final Determination in the original LTFV investigation, Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, 68 F.3d 487 (Fed. Cir. 1995), all potential appeals of the Department's Final Determination have been exhausted and the Federal Circuit's decision must now be considered "conclusive as to all issues that CEMEX and C[D]C could have raised" in that earlier investigation.<sup>106/</sup>

Third, that NAFTA prohibits binational panel review of a determination made prior to January 1, 1994, the date upon which the NAFTA entered into force.<sup>107/</sup> Indeed, NAFTA Article 1906(a) specifically provides that panel review under Chapter 19 "shall apply only prospectively to ... final determinations of a competent investigating authority made after the date of entry into force of this Agreement." Thus, the 1989 initiation procedures employed by the Department in connection with the original LTFV investigation are simply unreviewable by this Panel.

Fourth, that an unadopted GATT panel recommendation is not binding under international

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<sup>103/</sup> Southern Tier Panel Rule 57(2) brief, at 169.

<sup>104/</sup> See, for example, Brown v. Felsen, 442 U.S. 127, 131 (1979) ("*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.")

<sup>105/</sup> See Encon Indus., Inc. v. United States, 18 CIT 867 (Ct. Int'l Trade 1994).

<sup>106/</sup> Southern Tier Panel Rule 57(2) brief, at 171.

<sup>107/</sup> Id., at 172.

or U.S. law.<sup>108/</sup> Further to this point, Southern Tier argues that the original GATT (GATT 1947) and the Tokyo Round Antidumping Code were not *self-executing* under U.S. law;<sup>109/</sup> that the Code has now been terminated and no longer has legal force or effect;<sup>110/</sup> and that an unadopted GATT panel recommendation does not create a binding international obligation.<sup>111/</sup> In this case, therefore, there simply is no "international obligation" that can, or should be, respected or acted

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<sup>108/</sup> Id.

<sup>109/</sup> The legislative history of the *Trade Agreements Act of 1979* which, among other things, implemented in domestic law the international obligations of the United States expressed by its ratification of the Tokyo Round Antidumping Code, make clear that Congress intended the Tokyo Round Codes not to be self-executing. See Statements of Administrative Action, H.R. Doc. No. 96-153, Part II, at 392 (1979); S. Rep. No. 96-249, at 36 (1979); H.R. Rep. No. 96-317, at 41 (1979). This legislative history is enhanced by a direct statute, 19 U.S.C. § 2504(a)(1988), which states: "No provision of any trade agreement approved by the Congress under section 2503(a) of this title, nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States."

<sup>110/</sup> Southern Tier observes that the Tokyo Round Antidumping Code was superseded by the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 negotiated in the Uruguay Round. Southern Tier Panel 57(2) brief, at 179. Although the Committee on Anti-Dumping Practices remained in effect for a transition period to handle some existing disputes (including the unadopted panel recommendation involving the U.S. antidumping order on Mexican cement, see decision of the Committee on Anti-Dumping Practices, ADP/132 (Dec. 8 1994)), this arrangement expired on December 31, 1996. Thus, both the Tokyo Round Antidumping Code and the Committee on Anti-Dumping Practices are now "defunct," providing no remaining rights to Code signatories.

<sup>111/</sup> Southern Tier Panel 57(2) brief, at 179-80. Southern Tier notes that the GATT panel report in question, consistent with its terms of reference and consistent with GATT practice, merely set out its "recommendation" concerning the resolution of the dispute involving the U.S. antidumping duty order on Mexican cement, and that not even this "recommendation" was adopted by the Committee on Anti-Dumping Practices. Citing WTO panel and Appellate Body decisions, as well as the writings of jurists and scholars, Southern Tier argues that "unadopted panel reports have no international or domestic legal effect." Id., at 182. See, e.g., Japan -- Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R & WT/DS11/R (July 11, 1996), at 101 ("unadopted panel reports have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members").

upon under the Supreme Court's Charming Betsy doctrine.<sup>112/</sup>

Fifth, that neither this Panel nor the Department has the statutory authority to redress CEMEX's and CDC's claims, in that the antidumping statute plainly instructs the Department, in an administrative review proceeding, merely to determine the *amount* of duties that will be payable during the POR,<sup>113/</sup> but must take as a given the *existence* of dumping, as determined in the original LTFV determination.<sup>114/</sup> Original antidumping investigations and administrative reviews are different types of proceedings, have different statutory bases, and different objectives.<sup>115/</sup> The decisions cited by CEMEX and CDC to the contrary, administrative reviews simply cannot lawfully be used as a vehicle to retroactively challenge unwelcome aspects of an original final determination.<sup>116/</sup>

Sixth, that CEMEX's and CDC's claims are barred because of a failure to exhaust

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<sup>112/</sup> Id., at 183.

<sup>113/</sup> See 19 U.S.C. § 1675(a)(2)(A) & (C), allowing the Department to determine (i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry.

<sup>114/</sup> Southern Tier explains that during each anniversary month of an antidumping duty order, the Department publishes notice of the opportunity to request an administrative review of the order. 19 U.S.C. § 1675(a)(1); 19 C.F.R. § 353.22 (1995). On the request of an "interested party," as defined by 19 C.F.R. § 353.22(i), the Department will initiate a review. 19 C.F.R. § 353.22(a)(1). "Neither the statute nor [the Department's] regulations provide that [the Department] may revisit its decision to initiate an original investigation in the context of an administrative review commenced under 19 U.S.C. § 1675(a)." Southern Tier Panel Rule 57(2) brief, at 184.

<sup>115/</sup> Id., at 185.

<sup>116/</sup> Southern Tier disputes the relevance of, and distinguishes, the cases of Hormel v. Helvering, 312 U.S. 552 (1941) and Ceramica Regiomontana, S.A. v. United States, 64 F.3d 1579 (Fed. Cir. 1995), cited by CEMEX, and the Gilmore Steel, Zenith Electronics and Oregon Steel Mills cases, cited by CDC.

administrative remedies in the original LTFV investigation.<sup>117/</sup> Reiterating that CEMEX had never challenged the Department's decision to initiate the antidumping investigation during the original LTFV investigation, under accepted principles of administrative law CEMEX clearly failed to "exhaust its administrative remedies prior to contesting that decision before this Panel,"<sup>118/</sup> directly depriving the Department of an opportunity to consider that argument in the original investigation. Southern Tier observes that, as discussed by the CIT in Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1083-84 (Ct. Int'l Trade 1988), had the issue been raised during the Department's investigation, the Department "would have had the opportunity to self-initiate an investigation under 19 U.S.C. § 1673a(a) or to collect additional information regarding the degree of industry support for the petition."<sup>119/</sup> Thus, under "well-recognized U.S. legal principles," CEMEX manifestly failed to exhaust its administrative remedies in the original investigation.

Seventh, that the record of the Department's initiation decision is not before this Panel, and thus the Panel has no factual basis upon to which make a determination.<sup>120/</sup> Southern Tier notes that NAFTA Article 1904.2, consistent with U.S. administrative law generally, requires the Panel to base its review "on the administrative record." Pursuant to NAFTA Article 1911, the administrative record consists of "all documentary or other information presented to or obtained

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<sup>117/</sup> Southern Tier Panel Rule 57(2) brief, at 188.

<sup>118/</sup> Id.

<sup>119/</sup> Id., at 188-89. Relatedly, Southern Tier notes that the petitioner would itself have had the opportunity at that time to solicit support for the petition from additional producers or from labor unions representing workers at plants of producers in the regions identified in the petition.

<sup>120/</sup> Id., at 189.

by the competent investigating authority in the course of the administrative proceeding." In this case, however, the administrative record before the Panel consists of documents filed in the Fifth Administrative Review, not those filed in the original LTFV investigation.

In Southern Tier's view the consequences are clear: "Not only is there no way for the Panel to review the record of the original investigation, but there is no way for the Southern Tier Committee to respond to the merits of CEMEX's claim based solely on evidence in the record of the fifth review, and there is no information in the fifth review record relevant to the initiation decision to which [the Department] could refer in the event of a remand."<sup>121/</sup>

Finally, that the Third Administrative Review Panel decision<sup>122/</sup> should preclude this Panel from reviewing CEMEX's and CDC's claims under the doctrine of *issue preclusion* or *collateral estoppel*. This doctrine "bars parties to a prior lawsuit from relitigating any issues that were actually and necessarily determined by a court of competent jurisdiction in the prior suit."<sup>123/</sup>

In addition to the above arguments, Southern Tier speaks directly to CDC's interpretation of the regional industry statute. Southern Tier directly disputes CDC's argument that the "plain language" of the regional industry provision requires the Department to reject any petition on behalf of a regional industry that is not supported by producers accounting for "all or almost all" of production in the region (CDC argues that the standard for initiating an investigation involving a *regional* industry is, and should be, more rigorous than the standard for initiating an

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<sup>121/</sup> Id., at 190-91.

<sup>122/</sup> In the matter of Gray Portland Cement and Cement Clinker From Mexico, USA-95-190-1904-02.

<sup>123/</sup> See Arkla, Inc. v. United States, 37 F.3d 621 (Fed. Cir. 1994).

investigation involving a *national* industry). Southern Tier notes that 19 U.S.C. § 1673a(b)(1) requires that an investigation "be commenced whenever an interested party ... files a petition with the administering authority, *on behalf of an industry*, which alleges the elements necessary for the imposition" of antidumping duties.<sup>124/</sup> The "on behalf of" language stands alone and there is nothing in that statute, in the regulations, or in the Tokyo Round Antidumping Code that attempts to define it.<sup>125/</sup> Indeed, the Federal Circuit decision in Suramerica expressly held that the phrase "on behalf of" was *not* defined by the statute and that the statute was therefore ambiguous with respect to the degree of industry support necessary for the initiation of an investigation.<sup>126/</sup> On the basis of Chevron, the Suramerica court therefore expressly *upheld* the Department's well-established practice under that statute.

In addition, Southern Tier points out that the "all, or almost all" language referred to by CDC does not appear in 19 U.S.C. § 1673a(b)(1) at all, but in 19 U.S.C. § 1677(4), which relates solely to the definition of injury before the Commission.<sup>127/</sup> The phrase, therefore, has no bearing on the interpretation of the phrase "on behalf of." Thus, the Department's reasonable practice, expressly allowed by Suramerica, of using the same initiation analysis for both national

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<sup>124/</sup> Southern Tier Panel Rule 57(2) brief, at 191. (Emphasis added). See also 19 C.F.R. § 353.12(a).

<sup>125/</sup> Southern Tier observes that "[t]he statutory 'on behalf of an industry' language is identical to the language of Article 5:1 of the [Tokyo Round] Antidumping Code. Neither the Antidumping Code nor Article VI of the GATT 1947 describes how a Code signatory country is to determine whether a petition is filed 'on behalf of an industry,' let alone establish that the standard for initiating an investigation involving a regional industry should be more rigorous than the standard for initiating an investigation involving a national industry. Southern Tier Panel Rule 57(2) brief, at 192.

<sup>126/</sup> Southern Tier Panel Rule 57(2) brief, at 195-97.

<sup>127/</sup> Id., at 199.

and regional industries should be upheld by this Panel.

The Department

The Department largely supports the line of argument drawn by Southern Tier.<sup>128/</sup> Citing Alsthom Atlantique v. United States, 787 F.2d 565 (Fed. Cir. 1986), however, the Department emphasizes that the real thrust of CEMEX's and CDC's challenges (looking at the "contentions as a whole") are against the original LTFV determination and not against the Final Results of the Fifth Administrative Review.<sup>129/</sup> Thus, their challenges to the original LTFV investigation are, by statute, clearly untimely (the 30-day review period allowed by 19 U.S.C. § 1516a(a)(2)(A) having long since passed).<sup>130/</sup> Moreover, CDC's claim that its argument goes to the "jurisdiction" of the Department cannot be supported by any of the Gilmore Steel, Zenith Elecs. Corp., or the Oregon Steel Mills cases, all of which are readily distinguishable.<sup>131/</sup> The

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<sup>128/</sup> The Department does differ as to the applicability of the doctrine of issue preclusion, however. See *supra*, note 123 and accompanying text. See also Department Panel Rule 57(2) brief, at 25, note 39.

<sup>129/</sup> Department Panel Rule 57(2) brief, at 24.

<sup>130/</sup> "CEMEX's request for panel review in the instant case was filed on May 6, 1997. CEMEX's and C[D]C's complaints were filed on June 5, 1997. No legal theory, however creative or novel, can hide the fact that CEMEX's and C[D]C's challenges to the original LTFV investigation are being pressed seven years after the fact. In the United States, that is too late." *Id.*, at 27.

<sup>131/</sup> Gilmore Steel involved a challenge to the termination of a pending investigation based upon information obtained in the course of that investigation. It did not involve an administrative review and, in upholding the Department's determination, the court recognized that administrative officers have the authority to correct errors, such as "jurisdictional defects," at any time during the proceeding. The court did not state or imply that the Department may reverse a decision to initiate the original LTFV investigation in the context of a subsequent administrative review. The Zenith Electronics case, while it did involve an administrative review, merely held that the Department had the authority to determine whether the proceeding from which the appeal was taken—the administrative review itself—was properly initiated. Lastly, the Oregon Steel Mills case involved a challenge to the Department's authority to revoke an antidumping duty order based upon *new facts*, not upon a reexamination of the facts as they existed during the

(continued...)



Hormel decision, cited by CEMEX, is also distinguishable (under the narrow rule of Hormel, a party may raise a new issue on appeal if the applicable law has changed due to a decision that arose *after* the lower court or agency issued the contested determination).<sup>132/</sup>

The Department also makes a series of arguments that parallel those drawn by Southern Tier: First, that the 1990 final LTFV determination is not a reviewable determination under Chapter 19, which operates only prospectively from January 1, 1994.<sup>133/</sup> Second, that CEMEX and CDC have not exhausted their administrative remedies (neither company challenged the Department's determination on industry support for the petition during the original LTFV investigation; indeed, this issue was not raised until the Third Administrative Review).<sup>134/</sup> Third, that CEMEX's challenges are barred by the doctrine of *res judicata* (where a litigant raises a claim which could have been raised previously, it is barred by *res judicata* whether that claim

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<sup>131/</sup> (...continued)

original LTFV investigation. Under these circumstances, the Federal Circuit held that it was lawful for the investigating authority, in the context of a "changed circumstances" review pursuant to 19 U.S.C. § 1675(b), to revoke an order over the objection of one member of the industry. The Court expressly held that it was not ruling on the claim that loss of industry support for an existing order would create a "jurisdictional defect."

<sup>132/</sup> The fact that the Hormel decision permits an appellant to raise a new legal issue based on an intervening change in the law gives no support to CEMEX or CDC. "Here, there has been no change in the applicable law since the Department issued the final results of the fifth administrative review." Department Panel Rule 57(2) brief, at 31. Even if the "change in the law" that CEMEX refers to is the 1992 GATT panel report, that was known to and argued by CEMEX in the third, fourth and fifth administrative reviews and, in any event, is not "law."

<sup>133/</sup> Department Panel Rule 57(2) brief, at 32.

<sup>134/</sup> Id., at 32-34. "Faced with a choice between the exhaustion of their administrative and judicial remedies in the United States and/or a challenge by the Government of the Mexico under the old GATT AD Code, the respondents chose the latter." Id., at 34.

was actually asserted or determined in the prior proceeding).<sup>135/</sup>

The Department also argues that the Charming Betsy case does not require a retroactive reinterpretation of U.S. law which, in any event, would be foreclosed by the Suramerica decision.<sup>136/</sup> Like the GATT 1947 itself, GATT panel reports are not self-executing and have no direct legal effect under U.S. law.<sup>137/</sup> Neither the report in question, nor GATT 1947, nor the Tokyo Round Antidumping Code obligated the U.S. to affirmatively establish prior to the initiation of a regional industry case that *all or almost all* of the relevant industry supports the petition, nor do they suggest that standing requirements in regional industry cases should be more rigorous than the standing requirements in national industry cases.<sup>138/</sup> Moreover, unadopted GATT 1947 panel reports do not confer rights on the winning party or impose obligations on the losing party.<sup>139/</sup> The Department's initiation practice was long-standing and expressly approved in Suramerica, which found that the phrase "on behalf of" was not defined in the statute (giving

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<sup>135/</sup> Id., at 34-37.

<sup>136/</sup> Id., at 49.

<sup>137/</sup> "A self-executing agreement is one that automatically becomes the law of the United States, while non-self-executing agreements do not become the law of the United States, until the necessary enabling legislation has been passed.... It is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States.... [I]n the case of the NAFTA, it was the intent of the parties to require implementing legislation. (Citations omitted) The same was true of the 1947 GATT [citing Footwear Distributors and Retailers v. United States, 852 F. Supp. 1078, 1093 (Ct. Int'l Trade 1994)], the GATT AD Code [citing 19 U.S.C. §§ 2111, 2503, & 2504 (1992)], and GATT panel reports which interpreted the old AD Code [citing Footwear Distributors]." Department Panel 57(2) brief, at 39-40. The Department also notes the self-executing character of international agreements in Mexico. Id., at 31.

<sup>138/</sup> Id., at 42-44.

<sup>139/</sup> Id., at 46.

the Department discretion in selecting and implementing its own interpretation of the statute).<sup>140/</sup>

Finally, the Department agrees that there is nothing on the record of the Fifth Administrative Review which would allow this Panel to make a judgment about the Final Results was supported by substantial evidence on the record and otherwise in accordance with law.<sup>141/</sup> Neither the petition nor the initiation evidence is on the record of this panel.

## **2. Discussion and Decision of the Panel**

The Panel has set out the parties' arguments on this issue at some length as they are their own best evidence. The arguments on both sides are clearly drawn and effectively presented, but the Panel is, with unanimity, persuaded that the views of the Department and Southern Tier are correct.

As the Federal Circuit did in Alsthom Atlantique, the Panel has looked at each of CEMEX's and CDC's contentions, not only in isolation but "as a whole,"<sup>142/</sup> and the Panel is persuaded that the challenges raised by these entities are in fact to the original 1989 LTFV investigation and the resulting Final Determination and not to the Final Results of the Fifth Administrative Review. The bifurcated statutory structure for antidumping cases (which contemplates an original investigation followed by annual administrative reviews),<sup>143/</sup> despite the apparent opportunity that it provides to complainants, does not diminish the clarity of this fact.

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<sup>140/</sup> Id., at 47-51.

<sup>141/</sup> Id., at 54-57.

<sup>142/</sup> Alsthom Atlantique v. United States, 787 F.2d 565, 571 (Fed. Cir. 1986).

<sup>143/</sup> See supra note 19.

Although CEMEX would protest,<sup>144/</sup> the Panel is of the view that administrative reviews are inappropriate vehicles to challenge aspects of the original LTFV investigation which relate solely to that original investigation (specifically, the issue of the standing of the petitioner to file a petition with the administering authority on behalf of an "industry"). This is true whether or not CEMEX and CDC presently offer to limit their proposed remedy to relief as to the duties imposed solely in the Fifth Administrative Review.<sup>145/</sup>

Having drawn this conclusion, the resolution of the issue before the Panel is simple: CEMEX's and CDC's challenges are determined to be time-barred by the applicable statute of limitations;<sup>146/</sup> to be barred by the judicial doctrine of *res judicata*;<sup>147/</sup> to be untimely before this Panel in that these parties failed to comply with the administrative doctrine requiring

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<sup>144/</sup> At the oral hearing, CEMEX emphasized that it was not attacking the original LTFV investigation: "We have stated over and over again in this proceeding that we are protesting and challenging the [Department's] authority to impose antidumping duties in this fifth administrative review." Hearing Transcript, at 33. Thus, petitioner's argument that CEMEX's claim is barred by the statute of limitations is unavailing. *Id.* Similarly, petitioner's argument that the principle of *res judicata* bars CEMEX from re-litigating this issue does not apply because, as admitted by the Department, each administrative review proceeding presents a different "res." *Id.*, at 34-35. Also, petitioner's argument that the Fifth Administrative Review Panel cannot review determinations made before January 1, 1994 is unavailing because the Fifth Administrative Review commenced after that date. *Id.*, at 35. In addition, petitioner's argument that CEMEX failed to exhaust administrative remedies is unavailing since "this case is about the fifth review." *Id.*, at 36. Finally, petitioner's argument that the record of the LTFV initiation is not before the Fifth Administrative Review Panel is unimportant because "CEMEX is not challenging the original investigation before this Panel." *Id.*, at 37.

<sup>145/</sup> "[W]e're here seeking relief with respect to the fifth review period." *Id.*, at 35. *Cf.* fn. 28 and accompanying text.

<sup>146/</sup> See *supra* notes 100 and 130 and accompanying text.

<sup>147/</sup> See *supra* notes 103 and 135 and accompanying text.

exhaustion of administrative remedies;<sup>148/</sup> and to be inappropriately raised at this time in that this Panel may not consider issues arising prior to the date of entry into force of the NAFTA, January 1, 1994.<sup>149/</sup>

Additionally, the Panel rejects the position of CDC and CEMEX that the failure of the initial petition, which provided a geographically limited scope of the relevant regional industry,<sup>150/</sup> to "match" the Commission's subsequently expanded definition of the regional industry, raises a continuing "jurisdictional" issue that can be challenged at any time. The Panel is aware of no Federal Circuit decision which has so held, and we regard the Department's remarks concerning the relevance and reach of the cases relied upon by CDC and CEMEX as well taken.<sup>151/</sup> The Panel also finds no support in the antidumping statute for such position.

Relatedly, the Panel does not concur with CDC's argument that the "all, or almost" language found in 19 U.S.C. § 1677(4)(C) should be utilized to help interpret the "on behalf of" language as it appears in 19 U.S.C. § 1673a(b)(1), effectively arguing for a separate (and more rigorous) standard for the initiation of regional industry cases, as opposed to national industry cases. The vagueness of the statutory language, the policy import of such a change in practice, and the lack of any binding judicial authority for such a rule makes the Panel unwilling to impose it. Indeed, the Panel, as it must, finds itself bound by the determinations of the Federal Circuit in Suramerica with respect to the "on behalf of" language: (i) the language is not defined in the

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<sup>148/</sup> See *supra* notes 117 and 134 and accompanying text.

<sup>149/</sup> See *supra* notes 107 and 133 and accompanying text.

<sup>150/</sup> See *supra* note 17.

<sup>151/</sup> See *supra* note 131.

antidumping statute and is therefore ambiguous; (ii) the Department has wide discretion in whether to initiate and terminate an investigation; (iii) the Department's initiation practice was well-known and of long-standing; (iv) the Department's interpretation of the statute was one of several reasonable alternatives and, under Chevron, must be accepted by a court or panel.<sup>152/</sup>

Therefore, the Panel finds nothing in the argumentation of CDC and CEMEX that would persuade us, on "jurisdictional" grounds, to set aside the conclusion already reached—that the challenges raised by CDC and CEMEX on this issue are now statutorily time-barred or otherwise untimely. Similarly, the Panel is unpersuaded that the Charming Betsy doctrine is applicable in this instance, for the reasons outlined by the Department and Southern Tier, and, in any event, does not believe that this substantive issue of interpretation has survived the procedural obstacles that CDC and CEMEX, in an earlier day, left unaddressed.

**IV.B. WHETHER THE DEPARTMENT'S DETERMINATION THAT CEMEX'S HOME MARKET SALES OF TYPE II CEMENT WERE OUTSIDE THE ORDINARY COURSE OF TRADE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND OTHERWISE IN ACCORDANCE WITH LAW**

**1. Arguments of the Participants**

*CEMEX*

In the Final Results, the Department determined that CEMEX's home market sales of Type II cement, cement identical to that sold in the United States, were outside the "ordinary course of trade" and could not be used as the basis for calculating normal value;<sup>153/</sup> instead, it

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<sup>152/</sup> See *supra* note 64 and accompanying text.

<sup>153/</sup> Fin. Res. at 17151-154, Pub. Doc. 249, The U.S. antidumping statute requires the Department to base the normal value of the *subject merchandise* on "the price at which the *foreign like product* (continued...)

based normal value on the home market sales of Type I cement. Specifically, the Department found that:

(1) The volume of Type II home market sales is extremely small compared to sales of other cement types, (2) shipping distances and freight costs for Type II home market sales were significantly greater than for sales of other cement types, with CEMEX absorbing these costs, and (3) CEMEX's profit on Type II sales is small in comparison to its profits on all cement types. In addition [CEMEX having failed to furnish current information in response to the Department's questionnaire], the Department assumes that the [following] facts have not changed since the second review and that: (a) CEMEX did not sell Type II until it began production for export in the mid-eighties, despite the fact that a small domestic demand for such existed prior to that time; and (b) sales of Type II cement continue to exhibit a promotional quality that is not evidenced in CEMEX's ordinary sales of cement.<sup>154/</sup>

The Department made its ordinary course of trade findings on the basis of the following statutory language:

**19 U.S.C. § 1677(15) Ordinary course of trade**

The term "ordinary course of trade" means 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. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade:

- (A) Sales disregarded [as being below cost] under section 1677b(b)(1) of this title.
- (B) Transactions [between affiliated persons that are] disregarded [for purposes of calculating cost] under section 1677b(f)(2) of this title. (Emphasis added).

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<sup>153/</sup> (...continued)  
is first sold (or in the absence of a sale, offered for sale) 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) (emphasis added). Thus, in calculating normal value, the Department is required to disregard all sales that are not made in the ordinary course of trade.

<sup>154/</sup> Id., at 17153-54.

Reading the statute and the SAA<sup>155/</sup> together, the Department found it—

clear that a determination of whether sales (other than those specifically addressed in section 771(15)) are in the ordinary course of trade must be based on an analysis comparing the sales in question with sales of merchandise of the same class or kind generally made in the home market, i.e., the Department must consider whether certain cement home market sales are ordinary in comparison with other home market sales of cement.<sup>156/</sup>

After concluding that the “sales of Type II cement [were] extraordinary, unusual, and unrepresentative transactions,”<sup>157/</sup> the Department then determined:

As a result, such sales could not constitute the foreign like product. However, sales of Type I cement are usable for identifying the foreign like product, and subsequently in calculating NV [normal value]. In situations where identical product types cannot be matched, the statute expresses a preference for basing normal value on similar merchandise (see section 773(a)(1)(A) of the [Tariff] Act [of 1930] and section 353.46(a) of the Department’s regulations)... [Thus,] the Department has followed the dictates of the statute and our regulations and compared sales of similar merchandise (i.e., Type I cement) to the product sold in the United States, adjusted for DIFMER....”<sup>158/</sup>

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<sup>155/</sup> The SAA, in considering the statutory language, states that “Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market. Examples of such sales or transactions include merchandise produced according to unusual product specifications, merchandise sold at aberrational prices, or merchandise sold pursuant to unusual terms of sale. As under existing law, amended section 771(15) does not establish an exhaustive list, but the Administration intends that Commerce will interpret section 771(15) in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.” SAA, at 834 (emphasis added).

<sup>156/</sup> Fin. Res., at 17153.

<sup>157/</sup> *Id.*, at 17154.

<sup>158/</sup> *Id.*



In its Panel Rule 57(1) brief, CEMEX does not criticize the applicable law but asserts that the Department's decision to reject Type II cement as the basis for price comparisons was "incorrect and improper," it being "apparent that [the Department's] final results did not consider the entire administrative record as a whole, but considered only those factors which supported [the Department's] ultimate conclusion."<sup>159/</sup> CEMEX argues that certain of the factors normally relevant to the ordinary course of trade determination were not considered by the Department, while certain other factors were relied upon by the Department, but should have been considered to be legally irrelevant.

First, CEMEX urges that the shipping terms for all cement types were identical, either FOB CEMEX plant or terminal for truck (bagged) or rail (bulk) transport, or CIF customer's designated delivery point by truck or rail.<sup>160/</sup> There were no delivery terms specific only to Type II cement or any other cement type.<sup>161/</sup> In particular, the pre-sale freight expense absorbed by CEMEX on Type II sales is incurred in "precisely the same manner as pre-sale freight expenses for all other cement types."<sup>162/</sup> This "equality in the treatment of pre-sale freight expenses among all cement types" is a factor that should have been taken into account by the Department in its ordinary course of trade analysis.

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<sup>159/</sup> CEMEX Panel Rule 57(1) brief, at 22.

<sup>160/</sup> Id., at 23-24, note 17. CEMEX clarifies that in the case of FOB plant sales of all cement types, it incurs no pre-sale or post-sale freight expenses; in the case of FOB terminal sales, it incurs pre-sale freight expenses but no post-sale freight expenses; in the case of CIF sales of all cement types, it incurs both pre-sale and post-sale expenses. The end result is that pre-sale transportation costs, if any, are "absorbed by CEMEX for all customers on all cement types." Id., at 24.

<sup>161/</sup> Id., at 23, *citing* Prop. Doc. 6 at B6-B7.

<sup>162/</sup> Id., at 24.

Second, CEMEX urges that the Department “focused exclusively” on the fact that home market sales of Type II cement were shipped over greater distances than other cement types in determining that shipping arrangements for Type II cement were outside the ordinary course of trade,<sup>163/</sup> a fact which CEMEX believes is “not ... relevant” in the ordinary course of trade determination. CEMEX does concede that the shipping distances for Type II cement “were, on average, greater” than Type I cement, but this was due solely to the facts that Type II cement was produced at only one location in Northwest Mexico and that Type I cement was produced at multiple locations throughout Mexico.<sup>164/</sup> Therefore, the “difference in shipping distances is simply a geographic fact, solely the result of customer and plant location, and is therefore not relevant to [the Department’s] ordinary course of trade determination.”<sup>165/</sup>

CEMEX asserts that the Department and reviewing courts have agreed that certain differences among sales are irrelevant to the ordinary course of trade determination,<sup>166/</sup> and that the Department “has never raised shipping distances in the context of an ordinary course of trade determination in any other case....”<sup>167/</sup> Insisting that “[s]hipping distances are a geographical fact and do not relate to conditions, practices or terms of sale of cement in Mexico,” CEMEX

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<sup>163/</sup> Id.

<sup>164/</sup> Id., at 25.

<sup>165/</sup> Id.

<sup>166/</sup> See Antifriction Bearings and Parts Thereof from France, et al., 57 Fed. Reg. 28,360 (1992) (“Thai Bearings”) (bonded and non-bonded warehouse sales both within ordinary course of trade), *aff’d* The Torrington Co. v. United States, 881 F. Supp. 622 (Ct. Int’l Trade 1995).

<sup>167/</sup> CEMEX Panel Rule 57(1) brief, at 27. In Thai Bearings, *supra* note 166, the Department rejected an allegation that so-called “Route B” sales were outside the ordinary course of trade despite the long shipping distances compared with “Route A” sales, *aff’d* The Torrington Co. v. United States, 926 F.Supp. 1151 (Ct. Int’l Trade 1996).

recommends that this Panel should “give no weight” to the shipping distance of Type II cement as compared to other cement types.<sup>168/</sup>

CEMEX also addresses the Department’s suggestion that the shipping arrangements were outside the ordinary course of trade because CEMEX began to absorb freight costs for Type II cement only *after* the imposition of the original antidumping duty order. CEMEX argues that such a “change in practice” should only be criticized if the change results in the sales affected having different conditions and practices as compared to other types of cement. In this case, of course, the change resulted in a consistent practice among all types of cement, thus actually indicative of being within the ordinary course of trade.<sup>169/</sup>

Third, CEMEX urges that the difference in product profitability between Type II and Type I cement was given “undue weight” in the Department’s results.<sup>170/</sup> The Department itself has recognized that divergent profit levels are neither necessary nor sufficient to sustain an outside the ordinary course of trade decision.<sup>171/</sup> Although conceding that relative profitability is a relevant supporting factor, in this instance CEMEX believes that it should not be decisive since

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<sup>168/</sup> CEMEX Panel Rule 57(1) brief, at 29. As a factual matter, CEMEX also explains that there are some major commercial centers which are not in close proximity to any of CEMEX’s cement plants; thus, it is anomalous for the Department to consider that such long-distance sales of Type I cements are *within* the ordinary course of trade, but long-distance sales of Type II cement are *outside* the ordinary course of trade. Id., at 30.

<sup>169/</sup> Id., at 31.

<sup>170/</sup> Id., at 33.

<sup>171/</sup> Citing Certain Welded Carbon Steel Pipe and Tube from India, 56 Fed. Reg. 64,753 (1991) *aff’d Mantex, Inc. v. United States*, 841 F. Supp. 1290 (Ct. Int’l Trade 1993) and Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand, 61 Fed. Reg. 1,328, 1,331 (1996) (“the existence of different price and profit levels does not necessarily indicate that sales are outside the ordinary course of trade.”)

“relative profitability stood alone as a factor supporting a finding that home market sales of Type II cement were outside the ordinary course of trade....”<sup>172/</sup>

Fourth, CEMEX urges that the fact that home market sales of Type II cement promote CEMEX’s corporate image “should not be relevant to [the Department’s] ordinary course of trade determination.”<sup>173/</sup> Indeed, CEMEX argues that “[t]here is no judicial or administrative precedent before or after the final results of the second administrative review in this case which have incorporated this factor into the ordinary course of trade analysis.”<sup>174/</sup>

Fifth, CEMEX believes that the relative volume of Type II cement, as compared to other cement types, is not an indication that Type II sales are outside the ordinary course of trade, particularly on a record that establishes both a significant volume of home market sales of Type II cement in absolute terms and the existence of a *bona fide* home market demand for Type II cement.<sup>175/</sup> CEMEX cites to a number of administrative<sup>176/</sup> and judicial<sup>177/</sup> decisions in

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<sup>172/</sup> CEMEX Panel Rule 57(1) brief, at 35. CEMEX buttresses this argument by noting that (i) there is a long standing home market demand for Type II cement; (ii) the profit differential on sales of Type I and Type II cement are not due to price disparities, but to the higher freight costs associated with Type II cement; and (iii) the fact that CEMEX’s consolidation of the production of Type II cement at one location in Northwestern Mexico, closer to the source of raw materials and the U.S. market, as well as the decision to absorb freight costs in the home market, were legitimate business decisions.

<sup>173/</sup> Id., at 37.

<sup>174/</sup> Id. CEMEX further argues that companies typically manufacture a full product line in order to promote an image of a quality producer and that if the Department’s reasoning “is taken literally, any attempt by a producer to diversify a product line outside of the mass market so as to serve specialized market segments would be indicative of those sales falling outside the ordinary course of trade.”

<sup>175/</sup> Id., at 39. See also Prop. Doc. 1 at 14-15, and Exhibit A1.

<sup>176/</sup> See, for example, Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand, 61 Fed. Reg. 1,331 (1996); Polyvinyl Alcohol from Taiwan, 61 Fed. Reg. 14,064, 14,068 (1996);

(continued...)

support of its view that a “low relative sales volume is a factor indicative of sales outside the ordinary course of trade only in situations where there is no bona fide demand or ready market for the product. Where a market demand for the product exists, as in this case, a low absolute or relative sales volume is not indicative of home market sales being outside the ordinary course of trade.”<sup>178/</sup>

Sixth, noting the relevant statutory language,<sup>179/</sup> CEMEX argues that the historical sales trends indicate that its home market sales of Type II cement were made within the ordinary course of trade.<sup>180/</sup> CEMEX points to the continuous home market sales of the subject merchandise for approximately ten years prior to the review period (and five years prior to the issuance of the original antidumping duty order), which on its face must constitute a reasonable period of time, well within the statutory definition.<sup>181/</sup> On this basis, CEMEX asserts that its “historical sales

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<sup>176/</sup> (...continued)

Electrolytic Manganese Dioxide from Japan, 58 Fed. Reg. 28,551 (1993), Television Receivers, Monochrome and Color, from Japan, 56 Fed. Reg. 24,370 (1991); Tapered Roller Bearings from Japan, 58 Fed. Reg. 64,720 (1993); PTFE Resin from Japan, 58 Fed. Reg. 50,343, 50,345; Tapered Roller Bearings from Japan, 57 Fed. Reg. 4,975, 4,981 (1992); Tapered Roller Bearings from Japan, 56 Fed. Reg. 65,228 (1991); and Internal Combustion Engine Forklift Trucks from Japan, 59 Fed. Reg. 1,374, 1,382 (1994).

<sup>177/</sup> See East Chilliwack Fruit Growers Cooperative v. United States, 655 F. Supp. 499 (Ct. Int'l Trade 1987); NSK, Ltd. v. United States, 825 F. Supp. 315, 321 (Ct. Int'l Trade 1993); Koyo Seiko Co., Ltd. v. United States, 796 F. Supp. 1526, 1530 (Ct. Int'l Trade 1992); Mantex, Inc. v. United States, 841 F. Supp. 1290, 1307 (Ct. Int'l Trade 1993).

<sup>178/</sup> CEMEX Panel Rule 57(1) brief, at 44.

<sup>179/</sup> 19 U.S.C. § 1677(15) refers to “the conditions and practices which, for a reasonable time prior to the exportation of the merchandise which is the subject of an investigation, have been normal in the trade under consideration.”

<sup>180/</sup> CEMEX Panel Rule 57(1) brief, at 46.

<sup>181/</sup> Id. CEMEX emphasizes that its sale and production of Type II cement pre-dated the issuance of  
(continued...)

record is indicative of home market sales of Type II cement made in the ordinary course of trade.”<sup>182/</sup>

Finally, CEMEX argues that there are additional factors, not considered by the Department, which are relevant to the ordinary course of trade analysis.<sup>183/</sup> Citing Monsanto Company v. United States, 698 F. Supp. 275, 278 (Ct. Int’l Trade 1988) (“the commonly understood purpose of the ordinary course of trade provision is to prevent dumping margins from being based on sales which are not representative”), CEMEX argues that the converse is equally true and that the absence of unusual circumstances is in fact indicative that specified sales were made within the ordinary course of trade. In addition, CEMEX argues that its home market sales of Type II cement were sales of first quality merchandise meeting ASTM standards. These were not sales of obsolete, non-standard or second quality merchandise which has in the past supported a finding that their sale was outside the ordinary course of trade.<sup>184/</sup> Similarly, these sales were not made under “unusual circumstances,” or subject to “special agreements” with sales terms different from those to other customers.<sup>185/</sup> Nor were they sample sales, which are often the

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<sup>181/</sup> (...continued)  
the antidumping duty order by approximately five years.

<sup>182/</sup> Id.

<sup>183/</sup> Id., at 47.

<sup>184/</sup> Id., at 47-48.

<sup>185/</sup> Id., at 48. Cf. Sulfur Dyes, Including Sulfur Vat Dyes, from the United States, 58 Fed. Reg. 3,253, 3,258 (1993) and Industrial Nitrocellulose from the Federal Republic of Germany, 58 Fed. Reg. 21,508, 21,509 (1990).

subject of ordinary course of trade determinations.<sup>186/</sup> In CEMEX's view, the record is clear that "Type II cement is not export overrun merchandise and it is used by home market customers for its intended use. Home market sales of Type II cement did not consist of sample sales, sales of off-specification merchandise or sales of obsolete merchandise. They were not spot sales or one time sales but were made on a consistent basis to long standing customers. Moreover, Type II cement was distributed in the same manner and in accordance with the same terms and conditions as other cement types."<sup>187/</sup>

*Southern Tier*

Initially, Southern Tier focuses the Panel's attention on the nature of CEMEX's challenges to the Final Results and on the applicable standard of review. Southern Tier notes, for example, that CEMEX is not actually alleging that the Department committed any legal error in its ordinary course of trade determination;<sup>188/</sup> instead, it is "repeatedly [asking] the Panel to second-guess [the Department's] analysis of the facts of record."<sup>189/</sup> Case law makes it clear, however, that "[w]hether particular sales are outside the ordinary course of trade must be determined on 'an individual basis taking into account all of the relevant facts of each case.' ... Thus, the factors relevant to an ordinary course of trade determination in one case may not be relevant in another case involving a different industry and a different product."<sup>190/</sup> Citing the

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<sup>186/</sup> Cf. Nachi-Fujikoshi Corporation v. United States, 798 F. Supp. 716, 781 (Ct. Int'l Trade 1992).

<sup>187/</sup> CEMEX Panel Rule 57(1) brief, at 50.

<sup>188/</sup> Southern Tier Panel Rule 57(2) brief, at 7.

<sup>189/</sup> *Id.*, at 8.

<sup>190/</sup> *Id.*, at 6, *citing* Nachi-Fujikoshi Corp. v. United States, 798 F. Supp. 716, 719 (Ct. Int'l Trade (continued...))

leading Federal Circuit decision, CEMEX, S.A. v. United States, 133 F.3d 897 (Fed. Cir. 1998), “[d]etermining whether home market sales are in the ordinary course of trade is a question of fact. [The Department] must evaluate not just ‘one factor taken in isolation, but rather ... all the circumstances particular to the sales in question.’”<sup>191/</sup>

From a standard of review viewpoint, Southern Tier argues that the party challenging the Department’s ordinary course of trade determination on appeal—in this case CEMEX—has the burden of showing that the determination is erroneous,<sup>192/</sup> and notes that “[the Department’s] decision of whether an importer’s sales are in the ordinary course of trade is entitled to tremendous deference.”<sup>193/</sup>

Southern Tier then reviews the Department’s decision memorandum on the ordinary course of trade issue (“Ordinary Course Memorandum”),<sup>194/</sup> in which the Department

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<sup>190/</sup> (...continued)  
1992) and Mantex, Inc. v. United States, 841 F. Supp. 1290, 1306 (Ct. Int’l Trade 1993).

<sup>191/</sup> CEMEX, S.A. v. United States, 133 F.3d 897, 900, *quoting* Murata Mfg. Co. v. United States, 820 F. Supp. 603, 607 (Ct. Int’l Trade 1993). Southern Tier also cites CEMEX for guidance as to the purpose of the ordinary course of trade provision, which is “‘to prevent dumping margins from being based on sales which are not representative’ of the home market” *quoting* Monsanto Co. v. United States, 698 F. Supp. 275, 278 (Ct. Int’l Trade 1988).

<sup>192/</sup> See Koyo Seiko Co. v. United States, 932 F. Supp. 1488, 1497 (Ct. Int’l Trade 1996). See also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) (the agency’s decision is “entitled to a presumption of regularity”).

<sup>193/</sup> Timken Co. v. United States, 852 F. Supp. 1122, 1128 (Ct. Int’l Trade 1994); *accord* Laclede Steel Co. v. United States, 19 CIT 1076, 1078 (Ct. Int’l Trade 1995) (“Commerce, in its discretion, chooses how best to analyze the many factors involved in a determination of whether sales are made within the ordinary course of trade.”)

<sup>194/</sup> Ordinary Course Memorandum, Prop. Doc. 85 at 2-3.



summarized the facts found in the Second Administrative Review<sup>195/</sup> as well as the facts found in the Fifth Administrative Review. Southern Tier asserts that “[i]n the fifth review, [the Department] based its determination on the same factors are in the second review and on the basis of a nearly identical factual record.”<sup>196/</sup>

Southern Tier then argues that the Federal Circuit’s ruling in the CEMEX decision effectively disposes of the challenges raised by CEMEX to the Department’s ordinary course of trade determination in this case. Since Southern Tier’s argument on the specific challenges raised by CEMEX draws heavily on the reasoning and conclusions reached by the Federal Circuit in the CEMEX decision (and since the Panel’s determination is similarly impacted), the applicable portion of that decision is quoted without redaction below:<sup>197/</sup>

Commerce determined that sales of Types II and V cements in Mexico were outside the ordinary course of trade and excluded them in favor of Type I cement in computing the dumping margin. CEMEX contends that Commerce erred in concluding that CEMEX’s sales of Types II and V cement in Mexico were outside the ordinary course of trade.

Determining whether home market sales are in the ordinary course of trade is a question of fact. Commerce must evaluate not just “one factor taken in isolation but rather ... all the circumstances particular to the sales in question.” Murata Mfg.

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<sup>195/</sup> Id. In the Second Administrative Review, the Department determined that CEMEX’s home market sales of both Type II cement and Type V cement were outside the ordinary course of trade. Gray Portland Cement and Clinker from Mexico, 58 Fed. Reg. 57, 253, 27,254-55 (1993). In the Final Results of the Fifth Administrative Review, the Department noted “that while our decision is based solely upon the facts established in the record of the fifth review, those facts are very similar to the facts which led the Department to determine in the second review that home market sales of Type II cement were outside the ordinary course of trade.” Fin. Res. at 17154.

<sup>196/</sup> Southern Tier Panel Rule 57(2) brief, at 11.

<sup>197/</sup> CEMEX, *supra* note 191. The reader should note that Type V cement, discussed by the Court in the CEMEX decision, was an issue in the Second Administrative Review but was not an issue in the Fifth Administrative Review.

Co. v. United States, 820 F. Supp. 603, 607 (Ct. Int'l Trade 1993). An analysis of these factors should be guided by the purpose of the ordinary course of trade provision which is "to prevent dumping margins from being based on sales which are not representative" of the home market. *Monsanto Co. v. United States*, 698 F. Supp. 275, 278 (Ct. Int'l Trade 1988). Our task, then, is to discern whether Commerce's determination that the sales of Types II and V cements in Mexico were not in the ordinary course of trade was supported by substantial evidence.

CEMEX argues that Commerce failed to take into account all relevant record evidence and the totality of the circumstances surrounding its home market sales of Types II and V cements when Commerce determined that they were outside the ordinary course of trade. Nevertheless, Commerce did examine several probative factors. First, Commerce noted that Types II and V cements are specialty cements that were sold to a niche market. These sales 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. See *Mantex v. United States*, 841 F. Supp. 1290, 1307-08 (Ct. Int'l Trade 1993).

Further, Commerce found that the shipping arrangements for home market sales of Types II and V cements were not ordinary. In Mexico, industry practice is to limit the distance that cement is shipped from the point of manufacture. In fact, more than ninety-five percent of cement shipments in Mexico fall within a radius of 150 miles from the point of manufacture. During the period of review, however, CEMEX shipped Types II and V cements for the domestic market over considerably greater distances and absorbed much of the freight costs for these longer shipments. CEMEX's shipping arrangements departed significantly from the standard industry practice in Mexico; this departure from the norm could well give rise to Commerce's determination that the sales of Type II and V cements were outside the ordinary course of trade.

In addition, because CEMEX was absorbing extraordinary freight costs for home market sales of Types II and V cements, its profit margin on these types was significantly lower than its profits on other cement types for which large shipping costs were not incurred. "[A] profit level comparison is probative of the economic reality" of the sales, *Mantex*, 841 F. Supp. at 1308, and therefore the disparity in profit margins is indicative of sales that were not in the ordinary course of trade.

Finally, 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. The promotional quality of the sales of Types II and V cements, according to Commerce, differentiated them from CEMEX's other products and therefore rendered them outside the ordinary course of trade. See *Gray Portland Cement and Clinker from Mexico*, 58 Fed. Reg. At 47,255.

Although CEMEX does not dispute any of the factors upon which Commerce based its conclusion regarding Types II and V cements, CEMEX claims that Commerce undertook only a selective analysis of the administrative record and failed to consider several important factors. For example, CEMEX notes that Types II and V cements were not obsolete or defective merchandise, see *Monsanto*, 698 F. Supp. at 278, but were standard grade products containing no unusual specifications, which indicates that the sales were in the ordinary course of trade, see *Polyvinyl Alcohol from Taiwan*, 61 Fed. Reg. 14,064, 14,068 (1996). Further, the cement was not export overrun merchandise, but was sold pursuant to existing home market demand, another factor that CEMEX claims points toward an ordinary course of sale transaction. CEMEX also contends that Commerce should have considered that its sales of Types II and V cements, as well as profits derived therefrom, were significant in absolute terms even if in relative terms they represented only a fraction of CEMEX's domestic cement business. Finally, CEMEX argues that the sales of Types II and V cements were not made under unusual circumstances or subject to special agreements which, if shown, would indicate that the sales were outside the ordinary course of trade. See *Sulfur Dyes from the United States*, 58 Fed. Reg. 3253, 3256 (1993) (stating that because sale was outside the norm in price and quantity and was subject to a special agreement, it was therefore outside the ordinary course of trade). CEMEX explains the unusual shipping arrangement of Types II and V cements by noting that it absorbs shipping costs for its other products. Therefore, according to CEMEX, absorbing shipping costs for Types II and V cements was not unusual.

Although the factors listed by CEMEX are perhaps probative of whether the home market sales of Types II and V cements were in the ordinary course of trade and worthy of consideration, Commerce needs only support its ordinary course of trade determination by substantial evidence. It is clear to us that Commerce's decision that the sales of Types II and V cements were outside the ordinary course of trade was supported by substantial evidence.

Much of the remainder of Southern Tier's Panel Rule 57(2) brief is devoted to a detailed analysis and response to the specific challenges raised by CEMEX in this Fifth Administrative Review, in each instance noting the judicial (including CEMEX) and administrative decisions which run contrary to the positions taken by CEMEX in its brief.<sup>198/</sup> Southern Tier notes that although the Panel's review of this case is based on a different agency record from that reviewed

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<sup>198/</sup> Southern Tier Panel Rule 57(2) brief, at 17-48.

by the Federal Circuit in CEMEX,<sup>199/</sup> CEMEX “has raised the same arguments that it raised before the Federal Circuit”<sup>200/</sup> and, therefore, the Panel should “treat the Federal Circuit’s ruling as dispositive of the ordinary course of trade issue in this case.”<sup>201/</sup> Indeed, “given the identity of the issues and the close similarity of the factual records of the two reviews, [the Department] clearly would have erred by failing to reach the same result in this case that it did in the second review. [The Department] is required to adhere to its precedents in the absence of a well reasoned explanation for the departure.”<sup>202/</sup>

Finally, Southern Tier emphasizes that “[a]side from the presumption that [the Department] considered all the evidence, the record affirmatively establishes that [the Department] did in fact thoroughly consider all relevant factors and evidence, including factors that CEMEX urged it to consider.”<sup>203/</sup>

#### *The Department*

The Department initiates its Panel Rule 57(2) brief by asserting that “[i]n making [its ordinary course of trade] determination, the Department considered, *inter alia*, sales volume, sales history, shipping distances and costs, profitability, promotional quality, and home market demand. In short, it examined all of the facts and circumstances surrounding CEMEX’s home market

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<sup>199/</sup> Id., at 14.

<sup>200/</sup> Id., at 16.

<sup>201/</sup> Id., at 15.

<sup>202/</sup> Id., at 16, *citing* British Steel PLC v. United States, 127 F.3d 1471, 1475 (Fed. Cir. 1997) and Alhambra Foundry Co. v. United States, 685 F. Supp. 1252, 1259 (Ct. Int’l Trade 1988).

<sup>203/</sup> Southern Tier Panel Rule 57(2) brief, at 48.

sales.”<sup>204/</sup> Against this assertion, the Department acknowledges CEMEX’s challenges to the effect that the Department (i) failed to consider all of the circumstances particular to the sales in question; and (ii) ignored the existence of the home market customer demand for Type II cement, which traditionally has been considered to be “indicative” of sales made in the ordinary course of trade.<sup>205/</sup>

The Department argues that the purpose of an ordinary course of trade analysis is to exclude sales that are not representative of normal home market conditions and practices.<sup>206/</sup> In this instance, “the Department’s decision to exclude sales of Type II cement from the calculation of [normal value] centered around the unusual nature and characteristics of these sales compared to the vast majority of CEMEX’s other home market sales.”<sup>207/</sup> Recognizing that, as CEMEX requires, the Department must evaluate not just “one factor taken in isolation but rather ... all the circumstances particular to the sales in question,” its ordinary course of trade inquiry must be far-reaching. Moreover, it must recognize that each company has its own conditions and practices particular to its trade. “In short, the Department examines the totality of the facts in each case to determine if sales are being made for ‘unusual reasons’ or under ‘unusual circumstances.’”<sup>208/</sup>

From a standard of review standpoint, “[r]ecognizing the nature of the ad hoc determination the Department must make each time it faces an ordinary-course-of-trade issue, the

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<sup>204/</sup> Department Panel Rule 57(2) brief, at 58.

<sup>205/</sup> *Id.*

<sup>206/</sup> *Id.*, at 58-59, *citing* CEMEX, 133 F.3d at 900.

<sup>207/</sup> *Id.*, at 59.

<sup>208/</sup> *Id.*, at 59, *quoting* Electrolytic Manganese Dioxide from Japan, 58 Fed. Reg. 28551, 28552 (1993).

courts have accorded the agency great deference regarding its findings.”<sup>209/</sup> For this reason, “the burden is on the party challenging the Department’s determination to demonstrate that it is wrong.”<sup>210/</sup> In the Department’s view, “CEMEX has failed to meet its burden.”<sup>211/</sup>

The Department then devotes the remainder of its Panel Rule 57(2) brief to analyzing the specific factors supporting its decision and the challenges raised by CEMEX to its analysis.

Specifically, the Department finds that the following factors supports its determination:

- C The small volume of Type II sales<sup>212/</sup>
- C The short period of time during which CEMEX sold Type II cement in Mexico<sup>213/</sup>
- C The high relative freight for Type II cement<sup>214/</sup>
- C The low relative profit of Type II cement<sup>215/</sup>
- C The promotional quality of CEMEX’s Type II sales<sup>216/</sup>

In addition, the Department argues, contrary to CEMEX’s suggestion, that it did consider the home market demand for Type II cement, but found that the existence of such

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<sup>209/</sup> Id., at 60, *citing* Timken Co. v. United States, 852 F. Supp. 1122, 1128 (Ct. Int’l Trade 1994); Nachi-Fujikoshi Corp. V. United States, 798 F. Supp. 716, 719 (Ct. Int’l Trade 1992).

<sup>210/</sup> Id., *citing* Mantex, Inc. v. United States, 841 F. Supp. 1290, 1306 (Ct. Int’l Trade 1993) and Monsanto Co. v. United States, 698 F. Supp. 275, 277-80 (Ct. Int’l Trade 1988).

<sup>211/</sup> Id.

<sup>212/</sup> Id., at 60.

<sup>213/</sup> Id., at 65.

<sup>214/</sup> Id., at 66.

<sup>215/</sup> Id., at 68.

<sup>216/</sup> Id., at 70.

demand was outweighed by other circumstances surrounding these sales.<sup>217/</sup> The Department points out that the home market demand factor was considered both at verification<sup>218/</sup> and in the Ordinary Course Memorandum.<sup>219/</sup> However, home market demand is simply “one factor” in the analysis and is not determinative. “In the present case, the existence of home market demand for Type II cement is a factor favoring inclusion within the ordinary course of trade. Weighing against demand, however, is low relative sales volume, very limited sales history, abnormally long shipping distances, high freight expenses, low profitability..., and a promotional quality. These factors support and justify the Department’s determination.”<sup>220/</sup>

## **2. Discussion and Decision of the Panel**

The Federal Circuit’s decision in CEMEX, despite having arisen out of a separate administrative review, is nevertheless binding decisional “law” on this Chapter 19 Panel and is an important baseline for the issue it now addresses. Certain aspects of that opinion, conservatively stated, must be, and are, taken as a given by this Panel:

- C The ordinary course of trade decision by the Department is one based upon “a question of fact.”
- C The factor of small volumes and low relative percentages of sales for Type II sales is factually and legally relevant to the Department’s ordinary

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<sup>217/</sup> Id., at 71.

<sup>218/</sup> Specifically, “the Department verified that a market for this type of cement had existed for some time and that CEMEX’s participation in that market was extremely limited and short-lived.” Id., at 71-72.

<sup>219/</sup> Prop. Doc. 85, at 1.

<sup>220/</sup> Department Panel Rule 57(2) brief, at 74-75 (emphasis in original).

course of trade analysis.

- C The factor of shipping Type II cement long distances and the factor of CEMEX absorbing all or a major portion of the freight costs for these long shipments are factually and legally relevant to the Department's ordinary course of trade analysis.
- C The factor of low relative profit margins on the sales of Type II cement is factually and legally relevant to the Department's ordinary course of trade analysis.
- C The "promotional nature" of home market sales of Type II cement is factually and legally relevant to the Department's ordinary course of trade analysis.
- C The Department must, to be upheld on appeal, support an out-of-the-ordinary course of trade determination by "substantial evidence" which, if present, can overcome other factors potentially probative of sales in the ordinary course.

While the Panel has before it a different administrative record than the record reviewed by the Federal Circuit in CEMEX, the CEMEX decision nevertheless informs us in each of these important respects, particularly in light of the remarkable similarity in the factual record between the Second and Fifth Administrative Reviews<sup>221/</sup> and the similarity, as well, of the challenges

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<sup>221/</sup> In the Final Results, the Department stated: "We note that while our decision is based solely upon the facts established in the record of the fifth review, those facts are very similar to the facts which led to the Department to determine in the second review that home market sales of Type II cement were outside the ordinary course of trade. This determination was ... affirmed by (continued...)"



raised by CEMEX in these two reviews.<sup>222/</sup>

Not only is the CEMEX decision an important baseline for our analysis, but the Panel is bound by the applicable standard of review as well. The Panel accepts that the burden is on CEMEX to demonstrate that the Department has committed error,<sup>223/</sup> and that the courts have accorded the Department considerable deference regarding its interpretation of statutes,<sup>224/</sup> its methodologies,<sup>225/</sup> and, significantly, its findings of fact.<sup>226/</sup>

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<sup>221/</sup> (...continued)  
the CIT in the CEMEX Case”, *citing CEMEX*, Slip Op. 95-72 at 14. ; See Fin. Res., at 17154.

<sup>222/</sup> At the oral hearing, the Panel accepted from counsel for Southern Tier a two-page document comparing the arguments made by CEMEX counsel in its brief to the Federal Circuit in the Second Administrative Review and those made in its brief to this Panel in the Fifth Administrative Review, finding them to be essentially identical.

<sup>223/</sup> Agency determinations are presumed to be correct, and the burden of demonstrating otherwise is on the party challenging a determination. Hannibal Industries, Inc. v. United States, 710 F. Supp. 332, 337 (Ct. Int’l Trade 1989).

<sup>224/</sup> On issues of statutory interpretation, “deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law.” National R. R. Passenger Corp. v. Boston and Maine Corp., 503 U.S. \_\_\_\_, 112 S. Ct. 1394, 1401 (1992).

<sup>225/</sup> “Deference must ... be given to the methodologies selected and applied by the agency to carry out its statutory mandate.” In the Matter of Certain Corrosion-Resistant Carbon Steel Products from Canada, USA-93-1904-03, October 31, 1994, at 7. See Brother Industries v. United States, 771 F. Supp. 374, 381 (Ct. Int’l Trade 1991) (“Methodology is the means by which an agency carries out its statutory mandate and, as such is generally regarded as within its discretion.”)

<sup>226/</sup> The Supreme Court has stated that under the substantial evidence standard “[a] court reviewing an agency’s adjudicative action should accept the agency’s factual findings if those findings are supported by substantial evidence on the record as a whole.... The court should not supplant the agency’s findings merely by identifying alternative findings that could be supported by substantial evidence.” Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992) (emphasis in original; citation omitted). See also FAG Kugelfischer v. United States, 932 F. Supp. 315, 317 (Ct. Int’l Trade 1996), *quoting Timken Co. v. United States*, 699 F. Supp. 300, 306 (Ct. Int’l Trade 1988), aff’d 894 F.2d 385 (Fed. Cir. 1990) (“It is not within the Court’s domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record.”) See also Consolo v. Federal Maritime Commission, 373 U.S. 607, 620 (1966) (“The possibility of drawing two inconsistent conclusions from the

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Like the Department, the Panel is of the view that CEMEX has not met its burden. First, we are unable to agree with CEMEX that the Department “focused exclusively” on the question of shipping distances when both the Final Results and the Ordinary Course Memorandum<sup>227/</sup> plainly show that the Department undertook a much broader examination. Second, we are unable to agree with CEMEX that the issue of shipping distances (including absorption of freight costs) is “not relevant” to the inquiry when the CEMEX decision clearly establishes that it is relevant.<sup>228/</sup> Third, we are unable to agree with CEMEX that the difference in product profitability was given “undue weight” in the Department’s results when there is nothing in the

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<sup>226/</sup> (...continued)

evidence does not prevent the agency’s finding from being supported by substantial evidence.”), Matsushita Elec. Industries Co. v. United States, 730 F.2d 927 (Fed. Cir. 1984) (“ It is not the court’s function to decide that it would have made another decision on the basis of the evidence.”), and Consolidated Edison Cop. v. NLRB, 305 U.S. 197, 59 S. Ct. 206, 216 (1938) (When examining the Department’s factual determinations to decide whether they are supported by substantial evidence, the court must determine whether the record contains “such relevant evidence as a reasonable mind might accept as adequate to support [the Department’s] conclusion.”)

<sup>227/</sup> The Department’s Ordinary Course Memorandum, Prop. Doc. 85, at 3-4, sets out in some detail a series of “facts” that were established by the Department, relating to the volume in metric tons of Type II home market sales (compared to the volume in metric tons of type I sales); the weighted average freight cost per metric ton for Type I and Type II sales; CEMEX’s weighted average profit on Type II sales as compared to Type I sales; and the Department’s findings as to historical sales trends and the “promotional quality” of Type II cement, previously cited as factors in the Second Administrative Review. The calculated comparisons between Types I and II cement for the first three items are proprietary and cannot be revealed in this public opinion; however, the differences in the numbers are striking. At no point in its brief does CEMEX criticize these calculated comparisons as erroneous. CEMEX does argue that the profit disparity figure is now “diminished” from that of the Second Administrative Review, but in general simply criticizes the *use* to which the Department has put this data, criticizing the *interpretations* which the Department has drawn from the data.

<sup>228/</sup> The language of the CEMEX decision even tends to suggest that this factor could be decisive (“this departure from the norm could well give rise to Commerce’s determination that the sales of Type II and V cements were outside the ordinary course of trade”). See text accompanying note 197 *supra*.

Final Results or the Ordinary Course Memorandum that suggests this is the case; when the CEMEX decision agrees that this factor is relevant to the analysis; and when the Department has reached the same conclusion on the issue that it reached in the Second Administrative Review, which conclusion was expressly approved by the Federal Circuit. Fourth, we are unable to agree with CEMEX that the promotional nature of Type II sales is “not relevant” to the analysis when the CEMEX decision clearly establishes that it is relevant. Fifth, we are unable to agree with CEMEX that the Department’s volumes inquiry would “not be relevant” to the analysis (in the case of a record establishing bona fide home market demand) when the CEMEX decision clearly establishes that it is relevant (on a record here which in fact recognizes the existence of such demand). Finally, we are unable to agree with CEMEX that the Department “ignored” other factors that tend to be probative of being within the ordinary course in the face of a standard of review that presumes that the Department examined all record evidence,<sup>229/</sup> a detailed Ordinary Course Memorandum that explores the factual findings in some detail, and a recognition by the Federal Circuit that even if there is evidence on the record running to the contrary, if there exists “substantial evidence” to support the Department’s conclusion, the court or Chapter 19 panel need go no further. As the standard of review requires, this Panel will not re-weigh the evidence or substitute its judgment for that of the Department on matters of fact-finding.<sup>230/</sup>

The Panel also does not agree with CEMEX’s attempt to recast the argument regarding

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<sup>229/</sup> See *e.g.*, Smith Corona Corp. V. United States, 771 F. Supp. 389, 396 (1991) (“[T]he ITA is presumed to have given appropriate consideration to everything brought to its attention and relevant to the issue” (citations omitted); Nakajima All Co., Ltd. v. United States, 744 F. Supp. 1168, 1175 (1990) (“[T]he ITA is expert in enforcing the statute and is presumed, moreover, to have considered all pertinent information sought to be brought to its attention”). (citations omitted).

<sup>230/</sup> See *supra* note 226

ordinary course of trade as to whether CEMEX's decisions to utilize identical shipment terms for all cement types (absorbing the high freight costs on Type II cement) and to consolidate production of Type II cement exclusively at the Hermosillo plants as "reasonable business judgments" and, therefore, legally irrelevant to the ordinary course of trade analysis. Guided by the statute and SAA, the Panel is compelled to agree with the Department that the sole issue is whether the sales under review are in fact *representative* ("normal in the trade under consideration"). If not, they are outside the ordinary course of trade and may not be utilized for purposes of the normal value calculation. As the CIT stated in connection with the Second Administrative Review:<sup>231/</sup>

Whatever the real strategy behind the consolidation in the North, the result was an abnormal shipping arrangement for Types II and V cement, which weighs heavily in favor of a finding of sales made outside the ordinary course of trade.

In short, the Panel has closely examined the Final Results, the Ordinary Course Memorandum, and the briefs and arguments of the Parties and finds no legal error on the Department's part in determining that CEMEX's home market sales of Type II cement were outside of the "ordinary course of trade." This aspect of the decision was in accordance with law and supported by substantial evidence on the record.

Having said this, and noting the connection made by the Department between the Fifth and Second Administrative Reviews in the Ordinary Course Memorandum, it appears that there are fact variables that the Department could have and might have evaluated, consisting of verified information in the record, albeit not furnished by CEMEX in response to the Department's July 9, 1996 questionnaire. These included the factual indications on the record of (a) greater profit margins (b) the same freight

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<sup>231/</sup> Cemex, S.A. v. United States, 19 CIT 587, 591-92 (Ct. Int'l Trade 1995)

terms and conditions for all cement types (c) an increase in Type II cement sales volumes and (d) longer home market historical sales trends.<sup>232/</sup>

#### IV COLLAPSING

**WHETHER COMMERCE'S DECISION TO TREAT CDC AND CEMEX AS A SINGLE ENTITY, I.E., TO "COLLAPSE" BOTH PRODUCERS FOR PURPOSES OF CALCULATING A SINGLE DUMPING MARGIN, IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AND IS OTHERWISE IN ACCORDANCE WITH LAW.**

In the Fifth Administrative Review, the Department determined that CEMEX and CDC should be “collapsed” for purposes of calculating a single dumping margin. Collapsing refers to situations when the Department will treat multiple affiliated producers as a single entity.<sup>233/</sup> The general rule is that: “[i]n determining weighted average dumping margins . . . the administering authority shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.”<sup>234/</sup> Thus, normally the Department will calculate an individual dumping margin for each producer subject to an antidumping order, unless those relevant producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities, and the Department concludes that there is a significant

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<sup>232/</sup> See fiche 180, pp. 46-54; fiche 246, pages 13, 32, 40, 43 and 77.

<sup>233/</sup> Proposed Rules, 61 Fed. Reg. 7,330 (1996).

<sup>234/</sup> 19 U.S.C. § 1677f-1(c)(1) (emphasis added).

potential for the manipulation of price or production.<sup>235/</sup> Thus, the Department's general practice is to collapse related parties “where the type and degree of relationship is so significant that [the Department] find[s] there is a strong possibility of price manipulation.”<sup>236/</sup>

Subsequent administrative determinations reveal, however, that while not the Department's routine procedure, the Department's practice of collapsing in this case is by no means exceptional. Indeed, in the original LTFV investigation and in prior reviews, the Department collapsed CDC and CEMEX each time the Department faced the issue. Notwithstanding the history of collapsing in this matter, the Panel spent considerable time evaluating this issue. The Panel understands the significant impact collapsing has on CDC and the gravity attached to a determination by an administrative agency of a foreign country, which for purposes of calculating a dumping margin, essentially disregards the corporate form. However, given the standard of review which applies to the Panel's work, we cannot say that the Department's determination is not supported by substantial evidence on the record or is otherwise contrary to law. In reaching this decision, the Panel reviewed the extensive proprietary information in the record regarding this issue. Unlike the majority of issues addressed by the Panel in this decision, the issue of collapsing is not easily amenable to discussion without reference to proprietary information. Some of the arguments and many of the supporting facts must necessarily be omitted for proprietary considerations.

As mentioned above, by Departmental policy, the Department will collapse two or more

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<sup>235/</sup> Proposed Rules, at 7,330.

<sup>236/</sup> Antifriction Bearings (Other than Tapered Bearings) and Parts Thereof from the Federal Republic of Germany, 54 Fed. Reg. 18,992, 19,089 (1989).

parties where: (1) the producers are “affiliated”;<sup>237/</sup> (2) the producers have production facilities that are sufficiently similar so that a shift in production would not require substantial retooling; and (3) there exists a significant potential for manipulation of price or production.<sup>238/</sup> Applying these elements requires the Department to consider all relevant factors involved.<sup>239/</sup>

## 1. Arguments of the Participants.

### *The Department*

The Department collapsed CDC and CEMEX for purposes of this Fifth Administrative Review, determining that : “If CDC and CEMEX are not collapsed, there is significant potential for price manipulation which could undermine the effectiveness of the [antidumping] order.”

<sup>240/</sup> In collapsing CDC and CEMEX, the Department specifically found that: (1) CEMEX indirectly owns more than 5% of the outstanding voting shares of CDC; (2) CEMEX is in a

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<sup>237/</sup> By statute, affiliated persons are defined as:

- (A) Members of a family . . .
- (B) Any officer or director of an organization and such organization
- (C) Partners
- (D) Employer and employee
- (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization
- (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person
- (G) Any person who controls any other person and such other person

The statute further provides that “a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.” 19 U.S.C. § 1677(33); Collapsing Memorandum, at 2.

<sup>238/</sup> Fin. Res., 62 Fed. Reg., at 17,155; 61 Fed. Reg. 7,330; Proprietary Memorandum from Roland MacDonald to Joseph A. Spetrini, March 24, 1997 (“Collapsing Memorandum”), at 3.

<sup>239/</sup> Fin. Res., 62 Fed. Reg., at 17,155.

<sup>240/</sup> *Id.*

position to exercise restraint or direction over CDC through its shared directors and joint activities (both CEMEX and CDC manufactured Type I and Type II cement during the review period); (3) because of similar production processes and facilities, a shift in production would not require substantial retooling; (4) the companies have intertwined business operations; and (5) there is a possibility of price manipulation based on the findings identified above.<sup>241/</sup>

The Department vigorously disputes CDC's contention that decision to collapse rests on an incomplete analysis of the record facts.<sup>242/</sup> The Department specifically disputes CDC's argument that CEMEX does not control CDC for purposes of 19 U.S.C. § 1677(33)(G)(1995).<sup>243/</sup> According to the Department, CEMEX managers or directors sit on the board of directors of CDC and/or its affiliated companies.<sup>244/</sup>

Moreover, the Department notes that CDC cites no legal authority for its contention that

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<sup>241/</sup> CDC contends that the Department misstated the applicable collapsing standard and misapplied it to the facts. CDC Panel Rule 57(2) brief, at 2. According to CDC, collapsing is not the Department's normal practice, even "in cases involving affiliated companies." *Id.*, at 5 (emphasis in original). CDC complains that the Department frequently omits mention of the adjective "significant" before the word potential in the statutory language requiring the Department to find a "significant potential of price manipulation" before collapsing. By misstating the standard, CDC claims, the Department confuses the legal standard. *Id.*, at 5-6. Moreover, in the Department's Collapsing Memorandum, CDC argues, the Department "appears to rely heavily on what it considers to be CDC's failure to prove that price and production manipulation is impossible." *Id.*, at 7 (emphasis in original); *see also* Southern Tier Panel Rule 57(1) brief, at 148, 157. "CDC submits that placing the burden on the respondent to prove the impossibility of price and production is unreasonable and certainly a departure from the standards the Department claims to be applying." CDC Panel Rule 57(2) brief, at 7.

<sup>242/</sup> Department Panel Rule 57(2) brief, at 75-76.

<sup>243/</sup> *Id.*, at 81-82.

<sup>244/</sup> *Id.*, at 82.



control can only arise where one party has a majority equity stake in the other party.<sup>245/</sup> “In fact, [argues the Department,] the Department has specifically held that a minority stake, considered in conjunction with other circumstances, can support a finding of control . . .”<sup>246/</sup> The Department claims that there is no floor below which equity interests are insignificant.<sup>247/</sup> In addition, the Department<sup>248/</sup> emphasizes that during the first two months of the review period CEMEX and CDC sold cement to the United States through the same channel of distribution.<sup>249/</sup> The Department also claims that overlapping boards of directors constitute strong evidence that business operations are intertwined and therefore a significant potential for price manipulation exists if CDC and CEMEX are not collapsed. <sup>250/</sup> Moreover, the Department points to a series of business links between CDC and CEMEX as additional evidence of intertwined business operations.<sup>251/</sup>

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<sup>245/</sup> Id.

<sup>246/</sup> CDC argues that it does not dispute the Department’s finding of affiliation based on stock ownership, but objects to the Department’s finding of affiliation based on control. CDC agrees that it is affiliated with CEMEX, but argues that CEMEX does not control CDC, especially for purposes of the Department’s significant potential for price manipulation analysis. Id., at 10. Id., at 82-83; *see Certain Cut-to-Length Carbon Steel Plate from Brazil*, 62 Fed. Reg. 18,486, 18,490 (1997).

<sup>247/</sup> CDC replies that this dismissive argument, i.e., that “the Department has no recognized floor below which equity interests are insignificant,” contrasts sharply with the Department’s stated obligation to “consider the facts of each case very carefully and the factual circumstances have to be evaluated in light of the ‘totality of the circumstances.’” Id., at 17-18.

<sup>248/</sup> Department Panel Rule 57(1) brief, at 87.

<sup>249/</sup> Id., at 84.

<sup>250/</sup> Id., at 88.

<sup>251/</sup> Id., at 89. According to CDC, the Department relies on three specific facts relating to intertwined business operations to support the Department’s finding of a significant potential for  
(continued...)

CDC

CDC challenges the Department's analysis regarding the "affiliated" and "significant potential for manipulation" elements of the collapsing test, while conceding the second element.<sup>252/</sup>

**Affiliation.** CDC explains that indirect ownership interest and overlapping boards of directors are not enough to create the relatively unusual situation which yields a strong possibility of price manipulation.<sup>253/</sup> CDC argues emphatically that while CEMEX and CDC are admittedly affiliated based on indirect stock ownership, they are not affiliated based on control.<sup>254/</sup> Cross-over members of the companies' boards are in the minority.<sup>255/</sup> Further, according to CDC, Mexican law precludes board member participation in any decision where a conflict of interest would arise.<sup>256/</sup> Moreover, CDC asserts that the company's management, not its board

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<sup>251/</sup> (...continued)

price and production manipulation, *i.e.*, (1) the use of the same channel of distribution during the first two months of the period of review; (2) the fact that CEMEX provided some services to CDC during the period of review; and (3) the additional statements. *Id.*, at 21. CDC argues that "in limiting its discussion to these three factors, the Department ignored much record evidence in the administrative proceeding, and did not even respond to many parts of the factual record that CDC mentioned in its Brief." *Id.*, at 21. CDC asserts that "there is no evidence of CEMEX's involvement in CDC's pricing decision; there is no evidence that the two companies share facilities or employees; and while the Department has found transactions between the companies, it has not established a basis for considering these to be 'significant'." *Id.*, at 22.

<sup>252/</sup> CDC Panel Rule 57(1) brief, at 11.

<sup>253/</sup> *Id.*, at 15. Nihon Cement Co v. United States, 17 C.I.T. 400 (Ct. Int'l Trade 1993).

<sup>254/</sup> CDC Panel Rule 57(1) brief, at 19.

<sup>255/</sup> *Id.*, at 21.

<sup>256/</sup> *Id.* For the Panel's decision regarding collapsing, it was unnecessary for the Panel to determine whether CDC correctly characterizes Mexican law on this point or whether a conflict of interest would necessarily be present in a situation where CEMEX influenced or attempted to influence

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of directors, makes all decisions regarding CDC's daily operations, including pricing, sales and production issues.<sup>257/</sup> Management is appointed by the [\_\_%] shareholder (Terrazas/Marquez family) and, CDC claims, corporate control remains in their hands.<sup>258/</sup>

In addition, according to CDC, the Department improperly identified services as "joint activities" that in fact CDC paid CEMEX for at arm's length, as it would any other consultant.<sup>259/</sup> CDC also asserts, that the Department has not explained, and "the record does not support," the conclusion that consulting contracts between the companies permitted CEMEX to control CDC.<sup>260/</sup>

**Significant Potential for Manipulation.** CDC also claims that the Department's finding that the significant potential for manipulation criterion is satisfied because price manipulation is "not precluded" applies the significant potential criterion in a manner contrary to law.<sup>261/</sup> The Department's significant potential analysis, according to CDC, fails to address its arguments regarding common ownership or managerial or board member affiliation.<sup>262/</sup> Moreover, CDC complains that, the only "significant potential" factor analyzed by the

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<sup>256/</sup> (...continued)  
CDC's prices or production.

<sup>257/</sup> Id.

<sup>258/</sup> Id.

<sup>259/</sup> Id., at 22.

<sup>260/</sup> Id.

<sup>261/</sup> Id., at 24 (referencing Fin. Res., 62 Fed. Reg., at 17,155 and Collapsing Memorandum, at 4).

<sup>262/</sup> Id., at 26.

Department in its Collapsing Memorandum is intertwined business operations.<sup>263/</sup> According to CDC, the Department did not discuss any evidence regarding three of the four indicia of intertwined business operations: (1) sharing of sales information; (2) involvement in production and pricing decisions; and (3) sharing of facilities or employees.<sup>264/</sup> Further, CDC argues that in the past the Department has declined to collapse where all of the collapsing criteria were satisfied with the exception of the intertwined business operations factor component of the test.<sup>265/</sup>

According to CDC, record evidence exists that CDC and CEMEX operate as separate and distinct companies that practically speaking cannot manipulate each others pricing and production decisions. “The companies maintain the confidentiality of their sales information from each other.”<sup>266/</sup> In addition, according to CDC, the natural markets of CDC and CEMEX do not overlap and both have their own sales departments, marketing plans and pricing policies.<sup>267/</sup> Further, in the United States market, CDC argues that it has its own

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<sup>263/</sup> Id. The potential for price manipulation factors are: (1) stock ownership; (2) management/director overlap; and (3) intertwined business operations. Fin. Res., 62 Fed. Reg., at 17,154.

<sup>264/</sup> Id. The fourth indicia of intertwined business operations, and the only one CDC claims that The Department addressed, is “significant transactions between the affiliated producers.” Id., at 26-27.

<sup>265/</sup> Id., at 28 (*citing Welded Carbon Steel Pipes and Tubes from Thailand*, 63 Fed. Reg. 16,974, 16,975-76 [April 7, 1998]).

<sup>266/</sup> Id., at 35.

<sup>267/</sup> Id.

distribution,<sup>268/</sup> sales and marketing network, independent from CEMEX.<sup>269/</sup>

CDC also claims that CDC and CEMEX do not coordinate pricing strategies.<sup>270/</sup> As the sales listings for each company demonstrate, says CDC, there is no correlation between the two companies' pricing levels in either the Mexican or United States markets.<sup>271/</sup> Each company, CDC emphasizes, has its own facilities, employees, and accounting records. In addition, CDC's Mexican facilities are all located in the state of Chihuahua and each plant has its own administrative staff and handles its own accounting.<sup>272/</sup> Thus, CDC contends, there is no coordination of accounting or marketing (centralized at the Chihuahua headquarters) services with CEMEX.<sup>273/</sup>

Other relevant considerations CDC argues are: (1) the companies are not billed jointly by suppliers; (2) during the review period, each company had its own sales distribution process in the United States and Mexico and did not use a common United States importer; (3) though the companies' production facilities are similar, the regional nature of the cement industry makes it

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<sup>268/</sup> Two months into the Fifth Review period, CDC acquired its own channel of distribution. Id.

<sup>269/</sup> Id.

<sup>270/</sup> In its reply brief, CDC argues that:

There is simply no evidence on the record that CEMEX and CDC share pricing and production information, or that either company influences the pricing and production plans of the other. Also, the only information that exists on the record as to the potential for such sharing of information suggests that it is not likely to occur. There is no information on the record rebutting these statements, yet the Department infers that the pricing and production decisions can be influenced simply by the CEMEX minority equity stake in the company that controls CDC. CDC Panel Rule 57(2) brief, at 19.

<sup>271/</sup> CDC Panel Rule 57(1) brief, at 36.

<sup>272/</sup> Id.

<sup>273/</sup> Id.

impossible to switch markets, *i.e.*, Chihuahua is landlocked and “it simply is not realistic that CDC could somehow switch its production for the needs of CEMEX’s United States and Mexican customers” and almost all sales in the United States are made within a 300 mile radius; (4) the companies do not supply any material inputs to each other; and (5) the companies have separate listings on Mexico’s stock exchange.<sup>274/</sup>

*Southern Tier*

Southern Tier notes that the focus of the Department’s inquiry is on what *may* occur in the future if affiliated parties are not collapsed—not on present evidence of actual manipulation.<sup>275/</sup> In addition, Southern Tier argues that CDC is incorrect when it claims that the Department’s practice is to treat collapsing as an exceptional practice, reserved for special cases.<sup>276/</sup> Southern Tier, quoting the Department, explains that the Department has expressly rejected CDC’s contention in this regard:

The Department has not adopted the suggestion that it will collapse only in “exceptional” circumstances. A determination of whether to collapse should be based upon an evaluation of the factors listed [. . .], and not upon whether fact patterns . . . are commonly or rarely encountered.<sup>277/</sup>

In addition, Southern Tier argues that court precedent does not support CDC’s belief that collapsing is reserved only for special cases.<sup>278/</sup>

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<sup>274/</sup> Id., at 38-41.

<sup>275/</sup> Southern Tier Panel Rule 57(1) brief, at 134.

<sup>276/</sup> Id., at 135.

<sup>277/</sup> Id., at 135-36.

<sup>278/</sup> Id., at 137-139.

Southern Tier also notes that CDC concedes that it is affiliated with CEMEX based on indirect stock ownership and argues that the Department’s finding of affiliation based on control is an alternative basis, not essential to satisfying the affiliation element of the collapsing test.<sup>279/</sup> Moreover, Southern Tier identifies many cases where the Department has collapsed affiliated companies under circumstances where one party held a minority ownership position in the other party or parties.<sup>280/</sup> Thus, Southern Tier concludes, CEMEX’s percentage of indirect ownership of CDC is more than sufficient to justify the Department’s determination.<sup>281/</sup>

In addition, Southern Tier argues that a single board member is probative evidence that two affiliated companies’ operations are closely intertwined.<sup>282/</sup> “Moreover, [Southern Tier claims,] control of the board of directors is not necessary to collapse affiliated parties, because the focus of the inquiry is on the ‘potential for sharing of information’ about production and pricing.”<sup>283/</sup> Southern Tier elaborated from the proprietary data in this regard, which the Panel considered and agreed was substantial evidence of a significant potential for sharing price and/or production information on the record.

Southern Tier also claims that CDC’s argument that Mexican law prohibits the participation of CEMEX appointed directors in CDC’s commercial policy decisions is premised on the assumption that CEMEX’s directors would necessarily have a conflict of interest in

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<sup>279/</sup> Id., at 143-144.

<sup>280/</sup> Id., at 146.

<sup>281/</sup> Id., at 147.

<sup>282/</sup> Id., at 149.

<sup>283/</sup> Id., (citing Italian Steel, 58 Fed. Reg. 7,102).

participating in CDC's commercial decisions.<sup>284/</sup> Southern Tier opines, however, that if the companies do not compete, as CDC claims, it is unclear how CEMEX's directors could have a conflict of interest in taking part in decisions regarding CDC's pricing or production.<sup>285/</sup> According to Southern Tier, Mexican law does not appear to bar CEMEX's directors from participating in discussions concerning activities that would benefit both CEMEX and CDC.<sup>286/</sup>

Further, Petitioners claim that the administrative record contains substantial evidence of significant transactions between CEMEX and CDC that "demonstrate the extent to which their operations have been intertwined in the past, are currently intertwined, and may become more intertwined in the future."<sup>287/</sup> Southern Tier notes that for the first two months of this review period, CEMEX and CDC sold cement to the United States through the same channel of distribution.<sup>288/</sup> Sales by affiliated companies to a common affiliated importer, Southern Tier claims, constitute significant evidence of intertwined business operations.<sup>289/</sup> Moreover, Southern Tier argues, "[b]ecause there is nothing to prevent this type of marketing cooperation between CEMEX and CDC from resuming in the future, this arrangement is evidence of the potential for manipulation of price or production if the parties are not collapsed."<sup>290/</sup>

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<sup>284/</sup> Id., at 150.

<sup>285/</sup> Id., at 151.

<sup>286/</sup> Id.

<sup>287/</sup> Id.

<sup>288/</sup> Id., at 152.

<sup>289/</sup> Id.

<sup>290/</sup> Id.



Southern Tier also asserts that CEMEX provided CDC with various consulting services during the review period and that these intra-corporate transactions establish precisely the type of relationship in which a significant potential for price or production manipulation exists.<sup>291/</sup> Southern Tier argues that whether these transactions were at arm's length is irrelevant.<sup>292/</sup> Further, Southern Tier suggests that CEMEX's provision of technical assistance to CDC, when CEMEX does not regularly perform such services for unaffiliated producers, is highly probative evidence that the companies are closely intertwined.<sup>293/</sup>

In addition, Southern Tier rejects CDC's assertion (CDC Panel Rule 57(1) brief, at 39-43) that the Department failed to address its argument that no policy reason exists to support collapsing CDC and CEMEX.<sup>294/</sup> Southern Tier argues that the policy justification is the Department's conclusion that if the parties are not collapsed it would "undermine the effectiveness of the [antidumping] order."<sup>295/</sup>

Southern Tier also dismisses CDC's claim that manipulation of price or production is impossible because cement is a regional industry and most sales are made within a 300-mile

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<sup>291/</sup> Id., at 153.

<sup>292/</sup> Id., (citing Asociacion Colombiana de Exportadores de Flores v. United States [Asocolflores], 6 F.Supp 2d 865, 895 ("the collapsing standard does not require The Department to distinguish between different types of inter-company transactions. The Department must only address whether transactions took place between the companies.")).

<sup>293/</sup> Id., at 154.

<sup>294/</sup> Id., at 158.

<sup>295/</sup> Id., at 139; Fin. Res., 62 Fed. Reg., at 17,155.

radius.<sup>296/</sup> According to Southern Tier, CDC and CEMEX could change their shipping patterns if it were in their interest and alter each company's respective market share.<sup>297/</sup> In conclusion, Southern Tier argues that "this case presents precisely the type of situation that the Department's collapsing policy is designed to address: affiliated producers of a fungible commodity product whose businesses are significantly intertwined so as to indicate a significant potential for price or production manipulation if they are not collapsed."<sup>298/</sup>

## 2. Discussion and Decision of the Panel.

The standard prescribed for collapsing two corporate entities takes into account the fact that the Department cannot get into the boardrooms or management offices of foreign companies to observe the day-to-day goings-on that may, or may not, reveal price manipulation. The Department is not required to find evidence of *actual* price or production manipulation. Rather, the Department considers the totality of the factual circumstances in each case, sifting the direct and indirect evidence to reach a determination regarding whether or not to collapse otherwise separate corporate entities.

Importantly, under the Department's current articulation of the collapsing test, the Department must find that a significant potential of price or production manipulation exists before companies will be collapsed for purposes of calculating the dumping margin.<sup>299/</sup> After

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<sup>296/</sup> Southern Tier Panel Rule 57(1) brief, at 159.

<sup>297/</sup> Id., at 160.

<sup>298/</sup> Id., at 161.

<sup>299/</sup> In the Final Results, the Department states that "no aspect of CDCs and CEMEXs affiliation via stock ownership and cross board members, nor the location of their facilities and distribution entwork, precludes the potential for price manipulation." Fin. Res., 62 Fed. Reg., at 17, 155.

(continued...)

carefully considering the record before the Department and CDC's arguments, the Panel affirms the Department's determination to collapse CDC and CEMEX for the Fifth Review.

The test the Department employs for treating two or more parties as a single entity is in three parts:<sup>300/</sup> First, whether the producers are affiliated; second, whether the producers have production facilities that are sufficiently similar so that a shift in production would not require substantial retooling; and, third, whether there is a significant potential for the manipulation of price or production.<sup>301/</sup> Although, all three parts must be satisfied for the Department to collapse parties for purposes of calculating the dumping margin,<sup>302/</sup> only the first and third elements of the test were at issue during the Fifth Administrative Review.

**Affiliation.** CDC admits that CEMEX and CDC are "affiliated" based on indirect stock ownership.<sup>303/</sup> CDC does vigorously dispute the Department's conclusion that CEMEX is "in

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<sup>299/</sup> (...continued)

The question has been raised whether this statement is a faithful application of the Department's articulated collapsing test.

<sup>300/</sup> The principal judicial decision regarding the Department's authority to collapse is Nihon Cement Co., Ltd. v. United States, 17 C.I.T. 400, 426-427 (Ct. Int'l Trade 1993), in which the CIT approved of the Department's policy of collapsing when there is evidence in the record that demonstrates the possibility of price manipulation. Since Nihon, the test has been modified to require a finding by the Department of "significant potential of price manipulation." Proposed Regulations, 61 Fed.Reg. 7308, 7381 (1996). See also Final Regulations, 62 Fed. Reg. 27,296, 27,345 (1997). In Queens Flowers de Colombia, et al. v. United States, 981 F. Supp. 617 (Ct. Int'l Trade 1997), the court approved the Department's use of the "significant potential for the manipulation of price or production" prong of the collapsing test. Id., at 628.

<sup>301/</sup> Fin. Res., 62 Fed. Reg., at 17,155.

<sup>302/</sup> Id.

<sup>303/</sup> CDC correctly points out that percentage of parent/subsidiary ownership, for example, has not been a dispositive indicator of when the Department will determine that collapsing is the Department appropriate. CDC Panel Rule 57(1) brief, at 19, n.76; see Nihon (noting that: "[i]n determining whether to collapse entities, The Department does not focus solely upon the degree  
(continued...)

a position to exercise restraint or direction” over CDC, *i.e.*, able to exercise operational control.<sup>304/</sup> However, the Department is not obligated to find multiple grounds for affiliation when applying its own test. Indirect ownership of CDC by CEMEX satisfies the first element of the collapsing test and affiliation on this basis is undisputed.

**Significant Potential for Manipulation.** The Department considers the following factors when determining whether a significant potential for manipulation of price or production exists. First, the level of common ownership; second, whether managerial employees or board members of one of the affiliated producers sit on the board(s) of directors of the other affiliated party(ies); and third, whether operations are intertwined through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.<sup>305/</sup>

A reviewing body “may uphold an agency’s decision of less than ideal clarity if the

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<sup>303/</sup> (...continued)

of voting control one company may have over another, but upon a broad analysis of the facts in the case”).

<sup>304/</sup> See 19 U.S.C. § 1677(33)(G).

<sup>305/</sup> Collapsing Memorandum, at 3. Other factors relied upon by the Department in collapsing related companies are that (1) the companies are closely intertwined (2) transactions take place between the companies; (3) the companies have similar types of production equipment, such that it could be unnecessary to retool either plant's facilities before implementing a decision to restructure either company's manufacturing priorities; and (4) the companies involved are capable, through their sales and production operations, of manipulating prices or affecting production decisions. Certain Granite Products From Spain, 53 Fed. Reg. 24,335, 24,337 (1988) (final determination); Certain Granite Products From Italy, 53 Fed. Reg. 27,187, 17,189 (1988) (final determination); Steel Wheels from Brazil, 54 Fed. Reg. 8,780, 8,781 (1989) (preliminary determination). All of these factors need not be present as long as the parties are sufficiently related to present the possibility of price manipulation. Cellular Mobile Telephones and Subassemblies from Japan, 54 Fed. Reg. 48,011, 48,016 (1989) (final results). (Emphasis added).

agency's path may reasonably be discerned.”<sup>306/</sup> From both the Department's Federal Register notice and Collapsing Memorandum, the Department had uncontested evidence of, *inter alia*, sales through the same channel of distribution for two months of the reivew period, cross-board membership, indirect stock ownership, and relevant transactions between the companies, such that the Department could reasonably find that a significant potential for price or production manipulation existed if CDC and CEMEX were not collapsed.<sup>307/</sup> Based on the record for the Fifth Review, the Panel finds that the Department's collapsing determination is supported by substantial evidence and is otherwise in accordance with law.

#### **IV.D.1.a. BULK AND BAGGED**

##### **WHETHER THE DEPARTMENT'S DETERMINATION TO BASE NORMAL VALUE ON BOTH BAGGED AND BULK HOME MARKET SALES OF THE FOREIGN LIKE PRODUCT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND OTHERWISE IN ACCORDANCE WITH LAW.**

The Department considers sales in the export country to form a viable market for comparison with sales to the United States under its regulations, if the: “aggregate quantity of the foreign like product sold by an exporter or producer in a country is 5 percent or more of the

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<sup>306/</sup> Ceramica Regiomontana, S.A. v. United States, 810 F.2d 1137, 1139 (Fed. Cir. 1987).

<sup>307/</sup> Since substantially all of the details underlying this evidence is proprietary, the Panel is foreclosed from revealing it. However, the Panel concludes that the record contains such relevant evidence as a reasonable mind might accept as adequate to support the Department's conclusion regarding satisfaction of the “significant potential” prong of the test for collapsing. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoted in Matsushita Elec. Indus. Co.v. United States, 750 F.2d 927, 933 (1984).

aggregate quantity of its sales of the subject merchandise to the United States.”<sup>308/</sup> As explained in the Ordinary Course of Trade section,<sup>309/</sup> Commerce decided to compare Type II United States sales with Type I Mexican sales. <sup>310/</sup> During the Fifth Review, CEMEX requested the Department to limit the comparison only to Type I sales in bulk form, since that was the only form of cement sold in the U.S. by CEMEX during the POR. The Department had followed this procedure in its prior administrative reviews.<sup>311/</sup> The Department, however,

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<sup>308/</sup> 19 C.F.R. §351.404 (b)(2).

<sup>309/</sup> See *supra* at Part IV.B.

<sup>310/</sup> Although not an issue raised in this review, the Panel notes that there is no explanation as prescribed by the statute (19 U.S.C. §1677(16)) in the Final Results as to why Type I cement in general (with no distinction between bulk or bagged) was determined by the Department to be similar or like merchandise. The Department merely states: “However, the Department has followed the dictates of the statute and our regulations and compared sales of similar merchandise (i.e., Type I cement) to the product sold in the United States, adjusted for DIFMER.” Fin. Res. at 17154. Later in the Final Results, when addressing CEMEX’s assertion that the calculation of normal value should be limited to home market sales of bulk cement, the Department assumes without explanation that the foreign like product is Type I cement and asserts that normal value should be calculated by taking into account “the entire universe of Type I sales”, that is, bulk and bagged sales of Type I cement. *Id.* at 17154. It is further noteworthy that the Department offered no explanation in its Preliminary Results of why Type I cement was chosen as the like product: “However in situations where identical product types cannot be matched, the statute expresses a preference for basing NV on similar merchandise [citations omitted]. Therefore we have based NV on sales of Type I cement, since they are representative of CEMEX’s sales of similar merchandise adjusted for ‘differences in merchandise’ (DIFMER) based on the methodology [i.e. DIFMER] above.” Prelim.Res. at 51680.

<sup>311/</sup> In the original investigation, CEMEX’s sales in the U.S. were both bulk and bagged. Thus, the Department “compared U.S. sales of bagged cement to home market sales of bagged cement, and ... compared U.S. sales of bulk cement to home market sales of bulk cement.” 55 Fed. Reg. 29,244 , 29245 (1990). In the first administrative review, there were sales of both bulk and bagged in the U.S.. The Department required transaction-specific data for both, and separately compared U.S. and home market sales of bagged and U.S. and home market sales of bulk. 58 Fed. Reg. 6,113, 6,114 (1993) and 58 Fed. Reg. 25,803 (1993). In the second administrative review, CEMEX sold only bulk Type II cement in the U.S. and the Department determined that Type II cement sold in Mexico was outside the ordinary course of trade. Consequently, the Department compared U.S. sales of bulk cement (Type II) with home market bulk sales of Type I cement, which was affirmed in CEMEX, S.A. v. United States, 20 CIT\_\_\_, aff’d 133 F.3d 897 (continued...)

determined that both bagged and bulk would be used for its calculation of NV. CEMEX challenges this action, and thereby poses the following issue for this Panel to decide: Whether the Department's determination to base normal value on both bagged and bulk home market sales of the foreign like product was supported by substantial evidence and otherwise in accordance with law. A description of the parties' positions is followed by the Panel's decision and analysis.

## 1. Arguments of the Participants

### The Department

The Department claims that it—

included the entire universe of Type I sales in its calculation of normal value because bulk and bagged sales constitute identical merchandise. The only difference between these products is the packaging; therefore the Department has made an adjustment for packaging differences. In addition, as stated in the level of trade section, [312/] the Department has determined that CEMEX sold

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311/ (...continued)

(Fed. Cir.1997). See CEMEX's Panel Rule 57(1)Brief at 57-59. During the POR involved in the third administrative review, the Department did not have CEMEX report home market sales for bagged Type I cement since it was not necessary for comparison purposes. In the fourth review, Commerce accepted the submission by CEMEX of total sales value and sales volume information regarding home market sales of bagged Type I cement, but did not request transaction-specific sales information for bagged Type I cement. CEMEX's Panel Rule 57(1) Brief, at 57-59.

312/ After finding that CEMEX and CDC had only one stage of marketing, the Department:

“examined the selling functions performed by CEMEX [and CDC] with respect to both markets to determine if U.S. sales can be matched to home market sales at the same LOT. For the U.S. market, CEMEX [and CDC] reported that all sales were made on a CEP basis. The level of trade of the U.S. sales is determined for the CEP rather than for the starting price. In the instant review, the CEP sales reflect certain selling functions such as inventory maintenance, pre-sale warehouse expenses, and indirect selling expenses incurred in the home market for the U.S. sale. . . . [T]hese same selling functions are also reflected in CEMEX's [and CDC's] home market sales to end-users and ready-mixers. Therefore, the selling functions performed for CEMEX's [and CDC's] CEP sales are not sufficiently different from those performed for CEMEX's [and

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at one level of trade in the home market; therefore, comparing by discreet channel of distribution is not warranted as there is only one level of trade and one channel of distribution at that level. Therefore we have not calculated normal values for each channel of distribution as requested by CEMEX . . .<sup>313/</sup>

The Department argues that it correctly rejected CEMEX's invitation to limit the universe of home market comparison sales to those made in bulk form. According to the Department, the statute requires comparisons with all sales of the foreign like product and Type I cement sold in bags could not be physically distinguished from Type I cement sold in bulk.<sup>314/</sup> For the Fifth Review, Commerce compared United States sales of bulk cement (the only form sold in the United States) to home market sales of both bulk and bagged cement.<sup>315/</sup> The Department emphasizes that "bulk and bagged sales constitute identical merchandise."<sup>316/</sup>

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<sup>312/</sup> (...continued)

CDC's] home market sales to consider CEP sales and home market sales to be at a different level of trade. Although there may be differences between the marketing stages, these differences are not borne out by an analysis of the selling functions for the home market and CEP sales, which are largely the same. Therefore [Commerce] determined that there are no differences in levels of trade and neither a level of trade adjustment nor a CEP offset was warranted in the instant review."

Fin. Res., 62 Fed. Reg. 17,157.

<sup>313/</sup> Id., at 17,157

<sup>314/</sup> Department Panel Rule 57(1) brief. Commerce notes that it adjusted NV for differences in packaging, and the Department's comparison methodology was consistent with its determination that all CEMEX home market sales were made at the same level of trade. Id.

<sup>315/</sup> According to CEMEX, during the review period, it sold [ ] tons of Type I bagged cement to unaffiliated home market customers and [ ] tons to affiliated customers. As for its Type I bulk sales, CEMEX reported that [ ] tons went to unaffiliated customers and [ ] tons went to affiliated customers. Thus, says Commerce, CEMEX's bagged sales in Mexico were [roughly double] its bulk sales by weight. Department Panel Rule 57(1) brief, at 92.

<sup>316/</sup> Department Panel Rule 57(1) brief, at 93. CEMEX contends that Commerce's conclusion that bulk and bagged cement of the same cement types are identical is incorrect. CEMEX Reply at 40. CEMEX argues that it provided the Department with information establishing that Type I  
(continued...)



Packaging differences, Commerce explains, are the only differences between bulk and bagged cement and the Department has adjusted for these differences.<sup>317/</sup> Moreover, Commerce argues, “the Department has determined that CEMEX sold at one level of trade in the home market; therefore, comparing by discrete channel of distribution [i.e., bagged versus bulk] is not warranted as there is only one level of trade and one channel of distribution in that level.”<sup>318/</sup>

Further, according to Commerce, the statute does not compel CEMEX’s preferred comparison methodology.<sup>319/</sup> The plain language of 19 U.S.C. § 1677(16) (1995), argues Commerce, requires Commerce to base foreign market value on non-identical but similar merchandise (here, Type I cement), rather than on constructed value when sales of identical merchandise have been found to be outside the OCT.<sup>320/</sup> Moreover, contrary to CEMEX’s assertion, the Department argues, it has compared United States sales of cement in bulk form to home market sales in bagged form in other administrative reviews.<sup>321/</sup> In addition, Commerce argues that CEMEX’s contention that the Department has always compared bagged-to-bagged and bulk-to-bulk in the context of the Mexican cement cases is false.<sup>322/</sup> Commerce notes that

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<sup>316/</sup> (...continued)

bagged cement was not “approximately equal in commercial value” to Type I cement sold in bulk. *See* Prop. Doc. # 1 at 10.” CEMEX Panel Rule 57 (2) brief, at 40.

<sup>317/</sup> Department Panel Rule 57(1)brief, at 93.

<sup>318/</sup> *Id.*, (*citing* 62 Fed. Reg. 17, 165).

<sup>319/</sup> *Id.*

<sup>320/</sup> *Id.*, at 94 (*citing* CEMEX, 133 F.3d at 904).

<sup>321/</sup> *Id.*, at 95-96 (referencing Gray Portland Cement and Clinker from Japan, 60 Fed. Reg. 43,763).

<sup>322/</sup> *Id.*, at 98. CEMEX replies that Commerce is: “disingenuous for failing to note that in its final determination in the original investigation the Department rejected CEMEX’s position and

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in the Third and Fourth Reviews the Department used best information available and thus made no comparisons at all.<sup>323/</sup> Commerce asserts that CEMEX’s own submission before the Department supports Commerce’s approach in this case. According to Commerce, CEMEX argues that “whatever price differential exists ‘is due to the fact that distribution expenses, particularly packaging, handling and freight, are greater for bagged cement.’”<sup>324/</sup>

Finally, the Department argues, the panel should reject CEMEX’s “belated attempt to supplement the record with a self-serving reconstruction of its sales data, and should strike this attachment [Exhibit 4 to CEMEX’s brief].”<sup>325/</sup>

CEMEX

All sales of Type II cement by CEMEX in the United States and Mexico during the Fifth Review period were made in bulk form.<sup>326/</sup> Home market sales of Type I cement were made in both bulk and bagged form. <sup>327/</sup> CEMEX argues that “consistent with Commerce price comparisons in the original investigation and the first two administrative reviews, United States

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<sup>322/</sup> (...continued)  
established the principle for this order that “[the Department] compared U.S. sales of bagged cement to home market sales of bagged cement, and [the Department] compared U.S. sales of bulk cement to home market sales of bulk cement.” Id., at 38(citing 55 Fed. Reg. 29,244, 29,245 (1990)).

<sup>323/</sup> Id.

<sup>324/</sup> Id.(citing P.R. 12 at 20)(emphasis by Department).

<sup>325/</sup> Id., at 108. CEMEX replies that Commerce evades the “damning information” contained in Exhibit 4, not by disputing its accuracy, but by simply trying to make it disappear. Id., at 42.

<sup>326/</sup> Id., at 53.

<sup>327/</sup> Id., at 53-54.

sales of bulk cement must be compared only to home market sales of bulk cement.”<sup>328/</sup> CEMEX notes that in other cases Commerce has compared bulk United States sales to bulk home market sales and bagged United States sales to bagged home market sales.<sup>329/</sup>

Moreover, according to CEMEX, home market sales of bagged cement would have been relevant only if there were no home market sales of bulk cement. <sup>330/</sup> “[B]oth home market sales of Type II cement in bulk or Type I cement in bulk provide a viable home market for comparison purposes with United States sales because home market sales of each cement type in bulk are greater than 5% of U.S. sales.”<sup>331/</sup>

CEMEX disputes Commerce’s reasoning that the only difference between bulk and bagged cement is the packaging. <sup>332/</sup> “Data contained on CEMEX’s home market sales tape establish that Commerce’s assumption that the packaging adjustment accounted for any pricing differential between Type I bagged and Type I bulk cement was grossly mistaken.”<sup>333/</sup>

### *Southern Tier*

Petitioners argue that CEMEX does not contest Commerce’s finding that Type I cement

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<sup>328/</sup> *Id.*, at 54. “In comments to the preliminary results, CEMEX argued that regardless of whether Commerce based normal value on home market sales of Type II cement (identical merchandise) or Type I cement (similar merchandise), and regardless of whether Commerce determined that home market and United States sales were made at a single level or at multiple levels of trade, Commerce, in order to ensure fair price-to-price comparisons, should have calculated normal value on the basis of home market sales of bulk cement, because all United States sales of cement were bulk cement sales.” *Id.*, at 55.

<sup>329/</sup> *Id.*, at 59-60.

<sup>330/</sup> *Id.*, at 57.

<sup>331/</sup> *Id.*, at 60.

<sup>332/</sup> *Id.*, at 61.

<sup>333/</sup> *Id.*, at 62-63 (see proprietary data).

sold in bulk and Type I cement sold in bags constitute identical merchandise.<sup>334/</sup> Nor does CEMEX, Petitioners claim, argue that the statute prohibits Commerce from comparing merchandise sold in bulk with merchandise sold in packaged (i.e, bagged) form.<sup>335/</sup> In addition, Petitioners argue, CEMEX “clearly concedes that (1) the statute requires comparing U. S. sales to home market sales of the same merchandise and (2) Type I cement sold in bulk and Type I cement sold in bags are identical merchandise, except for packaging.” <sup>336/</sup> Consequently, concludes Petitioners, “there is no genuine legal issue, and the Panel should affirm Commerce’s determination to include both bulk and bagged Type I cement in the calculation of normal value.<sup>337/</sup>

Petitioners point to the Department’s reasoning in Japanese Cement, 60 Fed. Reg. 43,763 as evidence that Commerce’s decision for the Fifth Review is consistent with its treatment of other similar matters.<sup>338/</sup> Petitioners note that, contrary to CEMEX’s allegations, Commerce reached no definitive conclusion regarding whether to compare United States sales of bulk cement with home market sales of both bulk and bagged sales in the second, third, and

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<sup>334/</sup> Southern Tier Panel Rule 57(1) brief, at 54.

<sup>335/</sup> Id.

<sup>336/</sup> Id., at 55.

<sup>337/</sup> Id. Petitioners stress that it would in fact be contrary to the statute for Commerce to exclude bagged sales from the normal value calculation.

<sup>338/</sup> Id., at 56. Petitioners also cite Calcium Aluminate Cement Clinker and Flux from France, 59 Fed. Reg. 14,136, 14,344 (1994); Gray Portland Cement and Clinker from Venezuela, 56 Fed. Reg. at 56,391; Frozen Concentrated Orange Juice from Brazil, 57 Fed. Reg. 3,995 (1992); and Industrial Phosphoric Acid from Israel, 52 Fed. Reg. 25,440, 25,442 (1987).

fourth reviews. <sup>339/</sup> Petitioners also dispute CEMEX's contention that Commerce's determination to include Type I bagged cement in the calculation of NV was not supported by substantial evidence on the record. <sup>340/</sup> Petitioners note that Commerce's determination was based on two separate and independent findings: (1) that Type I bulk cement and Type I bagged cement are identical merchandise; and (2) that CEMEX sold Type I bulk and Type I bagged cement at the same level of trade.<sup>341/</sup> Because CEMEX, according to Petitioners, has not contested that sales of bulk and bagged cement were made within the same level of trade and the same channel of distribution, the panel should affirm Commerce's determination. <sup>342/</sup>

In addition, Petitioners argue that CEMEX twists Commerce's findings regarding bulk and bagged cement. According to Petitioners, "CEMEX challenges Commerce's supposed 'determination that the price differential between bagged and bulk cement was solely due to packing differences, and that the packing adjustment to normal value eliminated any price differential between bulk and bagged cement.'"<sup>343/</sup> However, Petitioners say, Commerce made no such finding. They argue that "Commerce found that the only difference in the two forms of merchandise was in the packaging. It plainly did not make any finding regarding any price differential between bulk and bagged cement or the reasons why any such differential may have

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<sup>339/</sup> Id., at 57 note 17 (*citing CEMEX* at 57-59).

<sup>340/</sup> Id., at 59.

<sup>341/</sup> Id.

<sup>342/</sup> Id.

<sup>343/</sup> Id., at 60 (*citing CEMEX* at 61).

existed.”<sup>344/</sup> Thus, continues Petitioners, CEMEX’s argument “that the prices of bulk and bagged cement differ for reasons other than packing costs, including ‘differences in distribution and handling expenses due to the fact that bulk and bagged cement required different equipment used to transfer bulk and bagged cement from storage to the customer’” is irrelevant.<sup>345/</sup> Petitioners conclude, Commerce simply made no finding with respect to differences in the prices of bulk and bagged cement.<sup>346/</sup>

## 2. Discussion and Decision of the Panel

In identifying a foreign like product upon which to base NV, the principal objective is to find a product that offers a “fair comparison” between the export price and normal value. This objective of finding as close a match as possible between the U.S. sold product and the one sold in the foreign home market is reflected in the GATT Agreement on Antidumping<sup>347/</sup> as well as the U.S. implementing legislation.<sup>348/</sup> In essence, it is the understanding of the Panel that the goal is not to compare, hypothetically speaking, “apples to apples”, but rather to compare the specific subject merchandise of apples to specific kinds of similar apples in the foreign home market that have the similar purpose, similar prices, etc. The purpose of the “like product”

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<sup>344/</sup> Id., at 61.

<sup>345/</sup> Id., at 62.

<sup>346/</sup> Id. According to Petitioners, CEMEX’s argument makes no sense because Commerce would adjust NV to account for any demonstrated differences in freight and handling expenses between bagged and bulk cement. Id., at 63.

<sup>347/</sup> See Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Antidumping), at Arts. 2.4 and 2.6.

<sup>348/</sup> 19 U.S.C. 1677b provides: “a fair comparison shall be made between the export price or constructed export price and normal value.”

process prescribed by the new GATT Agreement<sup>349</sup>/is to identify merchandise that is as close as possible, if not identical, to the subject merchandise, and then, if just similar, to adjust for differences in order to have as close (and fair) a comparison as possible.

Consistent with this aim of making fair comparisons, 19 U.S.C. 1677(16) provides a three-step hierarchy of possibilities-- from the identical, i.e. identical merchandise, to the similar, to the reasonably comparable merchandise. Most preferred pursuant to this statute is *identical* merchandise, i.e. merchandise in the foreign home market that is the same as that sold in the importing country. 19 U.S.C. 1677(16)(A). When such merchandise is not available, then *similar* or *like* merchandise sold in the foreign home market is sought. 19 U.S.C. 1677(16)(B). Finally, should similar merchandise be unavailable, then the statute prescribes the Department to use *reasonably comparable* merchandise. 19 U.S.C. 1677(16)(C). In each of these categories, the statute specifies criteria. It provides:

The term “foreign like product” means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this title can be satisfactorily made:

- (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
- (B) Merchandise --
  - (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.

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<sup>349</sup>/ See supra notes 347 and 348.

(C) Merchandise --

(i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,

(ii) like that merchandise in the purposes for which used, and

(iii) which the administering authority determines may reasonably be compared with that merchandise

As indicated above,<sup>350/</sup> the Department was unable to use identical merchandise in this case to compare to the subject merchandise because it found that Type II bulk cement sold in Mexico was not sold in the “ordinary course of trade.”<sup>351/</sup> Accordingly, the Department applied part (B) of the statute to find that Type I cement in *both bulk and bagged* presentations was “similar to” or “like” the Type II cement sold *only in bulk* in the United States. In doing so, Commerce stated:

The Department has included the entire universe of Type I sales in its calculation of normal value because bulk and bagged sales constitute identical merchandise. The only difference between these products is the packaging; therefore, the Department has made an adjustment for packaging differences. In addition, as stated in the level of trade section of this notice..., the Department has determined that CEMEX sold at one level of trade in the home market; therefore, comparing by discreet channel of distribution is not warranted as there is only one level of trade and one channel of distribution in that level.<sup>352/</sup>

In reviewing the Department’s decision, we are ever-mindful and even vigilant that the applicable standard of review must be applied properly.<sup>353/</sup> As we stated above<sup>354/</sup> and,

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<sup>350/</sup> See *supra* note 312-314 and accompanying text.

<sup>351/</sup> See *supra* Part IV. B. of this Opinion.

<sup>352/</sup> Fin.Res. at 17165.

<sup>353/</sup> See *supra* Part III.B of this Opinion.

<sup>354/</sup> *Id.*



indeed, as governed by statute,<sup>355/</sup> this Panel will uphold an agency’s decision when it is supported by substantial evidence and otherwise in accordance with law. It will not reweigh evidence or substitute its judgment for that of the agency. The Department is entitled to deference, depending upon the “the thoroughness evident in [its] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements....” We emphasize that the Panel is not a “rubber-stamping” body; if it serves its function as a substitute for a domestic court of review, it must insist on rational connections between the facts and agency choices, as well as adequate explanations of agency decisions. With respect to interpretations of law for which the Department is mandated by Congress to implement, deference is appropriate for “reasonable”<sup>356/</sup> ones, and for “permissible construction[s]”<sup>357/</sup> “if the statute is silent or ambiguous with respect to the specific issue.”<sup>358/</sup> Moreover, the Panel found it helpful to be reminded of its clarification of the standard of review earlier in this opinion:<sup>359/</sup>

“[N]o deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.’ Moreover, the Department’s efforts at statutory interpretation must, when appropriate, take into account the international

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<sup>355/</sup> See NAFTA Annex 1911 and section 516A(b)(1)(A) of the Tariff Act of 1930, as amended, which requires the Panel to “hold unlawful any determination, finding, or conclusion found...to be unsupported by substantial evidence on the record, or otherwise not in accordance with law....”

<sup>356/</sup> See *supra* note 57 and accompanying text.

<sup>357/</sup> *American Lamb Co. v. United States*, 785 F.2d 994,1001 (Fed. Cir. 1986), *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, at 843 note 11 (1984).

<sup>358/</sup> *Id.*

<sup>359/</sup> See *supra* notes 68-70 and accompanying text.

obligations of the United States.” 360/

The case of Koyo Seiko Co., Ltd., v. United States, 66 F. 3d 1204 (Fed. Cir. 1995), has been cited frequently to demonstrate the considerable deference granted by courts to the Department’s exercise of its discretion in devising a methodology for determining the comparability of merchandise. But its frequent invocation to validate the Department’s action here ignores crucial language contained in the very sentence most often cited. That case stated that the Department was entitled to deference for the exercise of its discretion in devising a methodology for determining the comparability of merchandise **“under the statute.”**361/ The Panel 362/ has little difficulty understanding pursuant to our standard of review elucidated above, that the Department is not entitled to deference when it interprets a statutory provision contrary to its unambiguous, plain-reading.363/

The provision in question, §1677(16)(B), prescribes that the merchandise which could be the “foreign like product” is merchandise that is like the subject merchandise (Type II bulk) because it: is produced in the same country; is produced by the same person; has like component

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360/ Id. (citations omitted).

361/ The actual quote is: “We agree with the government that Congress has implicitly delegated authority to Commerce to determine and apply a model-match methodology necessary to yield ‘such or similar’ merchandise **under the statute.**” Koyo Seiko Co., Ltd. v. United States, 66 F.3d at 1209-10.

362/ The Panelists joining in the majority decision are: Panelists Dr. Jorge Adame Goddard, Dr. Hector Cuadra y Moreno, Robert E. Lutz and Dr. Jorge A. Witker Velasquez. Panelist Endsley prepared a dissent.

363/ See supra Part III.B.2 of this Opinion.

materials; is used for like purposes; and is approximately equal in commercial value.<sup>364/</sup> Thus, the statute directs the Department to determine which merchandise is the foreign like product by analyzing the different candidate merchandise that satisfy those requirements and to select among them the one which is, according to these criteria, the most like or similar to the subject merchandise. If Congress had intended to grant the Department unbridled discretion here as suggested by the Department and its misreading of the Koyo Seiko case, <sup>365/</sup> the statute would be silent about any requirement. It is not. The Panel has little trouble discerning from the statutory provision that the Department must establish by substantial evidence that the like product is produced in the same country and by the same person as the subject merchandise, that it is like the subject merchandise in component material(s) and used for similar purposes, and approximately *equal* in price.

Moreover, the Department appears to place the weight of its decision on its finding of the similarity of physical characteristics, and expressly concludes that the only difference between bulk and bagged cement was packaging.<sup>366/</sup> We believe this reliance--for which there has been several cases cited because they “appear”<sup>367/</sup> to give such weight<sup>368/</sup>and therefore support the Department’s discretion to give primary weight to the comparison of physical

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<sup>364/</sup> 19 U.S.C. § 1677(16).

<sup>365/</sup> See supra note 361 and accompanying text.

<sup>366/</sup> Fin. Res., 62 Fed. Reg. at 17165.

<sup>367/</sup> See Dissent by Panelist Harry B. Endsley.

<sup>368/</sup> E.g., United Engineering & Forging v. United States, 779 F. Supp. 1375, 1381-82 (Ct. Int’l Trade 1991); Kerr-McGee Chemical Corp. v. United States, 741 F. Supp. 947, 951-52 (Ct. Int’l Trade 1990); Monsanto Co. v. United States, 698 F. Supp. 275, 277 *et seq.* (Ct. Int’l Trade 1988). Note that none of these decisions binds this Panel.

characteristics of the foreign like product--is unfounded simply on a plain-reading of the statute. While the statute does consider physical characteristics significant as a factor in subpart (A), where the like product has identity with the subject merchandise, subparts (B) and (C) of §1677(16) emphasize other factors. Thus, where the Department is freer to look to comparable, rather than identical, merchandise for the like product, the “purposes” for which the merchandise is used is more relevant than comparability on the basis of component materials or prices. <sup>369/</sup>

The Panel further notes the intent of Congress to prescribe a precise methodology is evident from contrasting §1677(16)(A) and (B) with the requirements of the previous paragraph, §1677(15), which states the methodology for determining if merchandise is “outside the ordinary course of trade.” In §1677(15), the law requires that the subject merchandise should be compared (regarding its sales conditions and practices) with “merchandise of the same class or kind,”<sup>370/</sup> whereas §1677(16)(A) and (B) requires the comparison with merchandise which must meet other requirements.

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<sup>369/</sup> According to subparagraph C of §1677(16), if there is no merchandise that can fulfill the requirement of subparagraph B (i.e. merchandise that could be regarded as “like merchandise” in comparison to the subject merchandise), then the Department may determine the foreign like product with more freedom, taking into consideration merchandise “of the same general class or kind (instead of merchandise alike in component materials). But even in such a case in which the statute grant some discretion to the Department, it notably requires that the merchandise that could be regarded as foreign like product, apart from being produced in the same country and by the same person, should be like the subject merchandise in the purposes for which it is used. Congress emphasized this factor (purposes for which the merchandise is used) as a distinguishing criterion, and indicates that differences in such purposes are more relevant than differences in component materials or prices.

<sup>370/</sup> 19 U.S.C. §1677(15).

Other than the Koyo Seiko case which was distinguished<sup>371/</sup>, none of those cited by the Department and by those who support it on this issue<sup>372/</sup> is binding on this Panel,<sup>373/</sup> and do not address the issue present here: whether the Department properly interpreted and applied the statute in this case. None is dispositive in changing the reality that the plain-meaning of 1677(16) requires the Department to select a like product that satisfies the criteria set forth in (B) of the statute.

Finally, the reliance of the parties on the Chevron case<sup>374/</sup> as compelling deference to the Department's *interpretation* of the applicable statute is simply misplaced. That case, as indicated above, <sup>375/</sup> requires courts to defer to agencies in interpreting statutes they are mandated to implement *when there is ambiguity or confusion*. There is none here--the statute specifically prescribes the satisfaction of certain criteria.

Thus, the question of whether the Department applied this statute "in accordance with

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<sup>371/</sup> See Koyo Seiko discussion, supra note 361 and accompanying text.

<sup>372/</sup> See e.g., United Engineering & Forging v. United States, 779 F. Supp. 1375 (Ct.Int'l Trade 1991), NTN Bearing Corp. Of America v. United States, 747 F.Supp. 726 (Ct. Int'l Trade 1990), Kerr-McGee Chemical Corp. v. United States, 741 F. Supp. 947 (Ct.Int'l Trade 1990), Monsanto Co. v. United States, 698 F. Supp. 275 (Ct. Int'l Trade 1988), Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA-90-1904-01 (Opinion May 15, 1992), Certain Corrosion-Resistant Carbon Steel Products from Canada, USA-93-1904-03 (Opinion October 31, 1994), Certain Cut-to-Length Carbon Steel Plate from Canada, USA-93-1904-04 (Opinion October 31, 1994), Japan Cement, 60 Fed. Reg. at 43,763, Calcium Aluminate Cement Clinker and Flux from France, 59 Fed. Reg. 141,136 (1994), Gray Portland Cement and Clinker from Venezuela, 56 Fed. Reg. 56,391, Frozen Concentrated orange Juice from Brazil, 57 Fed.Reg.3,995 (1992), Industrial Phosphoric Acid from Israel, 52 Fed. Reg. 25,440 (1987).

<sup>373/</sup> See Part III of this Opinion.

<sup>374/</sup> 467 U.S. 837 (1984).

<sup>375/</sup> See supra Part III of this Opinion.

law” is before us. We conclude it did not. In the Fifth Administrative Review, the Department did not observe the comparing methodology specifically prescribed in the law: the Department did not make an analysis of which merchandise could be “like merchandise” according to section §1677(16)(B) or §1677(16)(C). The Department, as cited above,<sup>376/</sup> merely, and deficiently, affirmed that cement Type I (bulk or bagged) was the foreign like product and explained that bulk and bagged Type I are physically the same merchandise. It did not, as prescribed by statute, identify the like merchandise by taking into account the other factors that also need to be satisfied--similarity to the subject merchandise in component material, in the purposes for which the merchandise is used, and in prices.<sup>377/</sup>

According to The Timken Co. v. United States<sup>378/</sup>, the spirit of 1677(16)(B) is that the Agency should determine, among two or more merchandises, which is the **most similar** to the subject merchandise. The court states:

[T]he ITA must determine which of these products is **most similar** to merchandise sold in the United States... The arrangement of definitions in the statute is such that the requirement that the ITA choose merchandise within the first applicable definition amounts to a requirement that it choose the **most similar** merchandise -at least insofar as the broad statutory definitions of “such or similar merchandise” are concerned. The spirit if not the letter of this requirement obligates the agency to also ascertain what constitutes the **most similar** merchandise from within a given definition.<sup>379/</sup>

In the present case, according to that precedent, Commerce should choose between the

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<sup>376/</sup> See *supra* note 350 and accompanying text.

<sup>377/</sup> See also, Timken Company v. United States, 630 F. Supp. 1327 (Ct. Int’l Trade 1986).

<sup>378/</sup> *Id.*, at 1336-38.

<sup>379/</sup> *Id.* (Emphasis added.). Note also pages 1398-1339, where the court again states the need to determine the most similar merchandise.

two merchandises that fall within the requirements of subsection (B), i.e. cement Type I bulk and cement Type I bagged, which of them is the most similar merchandise to cement Type II bulk.

Moreover, pursuant to the criteria found in paragraph B and the scrutiny undertaken by this Panel pursuant to our standard of review, the evidence in the record was insufficient to support the finding by the Department that bagged Type I cement was “like” the subject merchandise. On the other hand, the Panel discerns that the record of this Fifth Review contained sufficient information to make this analysis that bagged cement Type I was different from bulk. Proprietary Document #1 380/ contained information provided by CEMEX and subject to Department verification that there were differences between bulk and bagged cement. Without divulging the proprietary elements, the Panel can reveal that the information contained there indicated that:

- (1) The buyers of these products are not the same. Bulk is bought by ready mixers and end-users, and bagged is sold to distributors. This means that in CEMEX’s domestic level of trade<sup>381/</sup> there are different purposes for which both forms of Type I cement are used: bulk is used for construction or production of concrete, whereas bagged cement is used for resale.
- (2) The prices are different, and they are not due exclusively to packaging. In Proprietary Document #1, there is an indication about the differences in prices and an assertion that there are differences. Also, in Appendix A-4 of CEMEX’s

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380/ Propr. Doc. #1, at 20-21.

381/ The Department determined that there is only one level of trade. See Fin. Res. at 17165.

initial brief, <sup>382/</sup> which this Panel decides is admissible,<sup>383/</sup> the prices of bulk and bagged cement are compared with respect to whether they are with or without packing. This price information is not new,<sup>384/</sup> but rather an elucidation of evidence already in the record, which the Department, as the Investigating Authority, may have examined, but apparently ignored or disregarded.

- (3) Despite the assertion that a number of cases (none of which binds this Panel) have decided that packaging is not a component material of the merchandise,<sup>385/</sup> in this case the component material, packaging, does make the bagged cement significantly different. The compelling logic for this point is the following: the

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<sup>382/</sup> See CEMEX Panel Rule 57(1) Brief, at Appendix A-4.

<sup>383/</sup> Under NAFTA Art. 1904(3), which in turn refers to Annex 11, the Panel is required to apply the standard of review set forth in 19 U.S.C. §1516A(b)(1)(B). That provision, therefore, requires the Panel to “hold unlawful any determination, finding, or conclusion found...to be unsupported by substantial evidence on the record or otherwise not in accordance with law.” (Emphasis added). “On the record” review further means that a Panel is limited in its review to only that “information presented to or obtained by [the Department]...during the course of the administrative proceeding...” 19 U.S.C. § 1516A(b)(2)(A)(i). Finally, the Department’s regulations implementing these provisions with respect to agency consideration or inclusion in the record of “untimely or unsolicited material”, 19 C.F.R. § 351.302(d)(1)(i) states in part that: “the Secretary will not consider or retain in the official record of the proceeding...untimely filed factual information, written argument, or other material...”

The Panel majority determines that Attachment #4 is admissible. Furthermore, it is the opinion of the Panel majority that the evidence contained in that document is evidence previously submitted and part of the record. See *infra* note 384. While the presentation of that evidence (in chart form) was different than provided at the administrative hearing, given the statutory requirement that the Department make its determination of a like product having determined its similarity of commercial value, the fact that CEMEX employed this form to present factual argument supporting its position does not concern the Panel majority with respect to Attachment’s admissibility.

<sup>384/</sup> The Department admitted at the Hearing of the Panel that it “will not argue that the data within Attachment 4 weren’t taken from data presented to the Department....” See Hearing Transcript, at 25.

<sup>385/</sup> See *infra* note 387.



term “merchandise”, used in §1677(16) to describe “foreign like product”, is commercially significant. “Merchandise” is a thing to be sold, and for that purpose, packaging could be of substantial relevance. Although it is obvious that cement Type I, as either bulk or bagged, is the same “thing” or the same product, it is not the same “merchandise.” According to the evidence in the record, Type I bagged is not the same “merchandise” because of the purposes for which it is used, the clients and the prices of bagged cement are different from those of Type I bulk cement. Simply stated, one might argue that if a purchaser of Type I bulk cement received from the vendor Type I bagged cement, he/she could refuse that merchandise as non-conforming merchandise.<sup>386/</sup>

Moreover the Department’s statement that cement Type I bulk or bagged is the same merchandise, and the explanation that packaging does not alter the product are not consistent with its determination (*Final Results*, 62 Fed. Reg. 17165) to make a difmer adjustment for packaging<sup>387/</sup>. According to Commerce Regulations (C.F.R. 353.57(a)(1997)) Commerce “will make a reasonable allowance for differences in the physical characteristics of merchandise”. Thus, when Commerce made the difmer adjustment, it was a recognition that packaging is a

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<sup>386/</sup> See *e.g.*, UCC 2-314(2) indicating that goods are “merchantable” if they are not “adequately contained, packaged and labeled as the agreement may require.”

<sup>387/</sup> In *Gray Portland Cement and Clinker from Japan*, 60 Fed. Reg. a 43763: “[T]here is no physical difference between the bagged and bulk cement sold in Japan”; *Fresh Cut Roses from Ecuador*, 60 Fed. Reg. at 7019, 7022 (1995): “packaging and presentation of roses in bunches and bouquets do not transform the roses”; *Red raspberries from Canada*, 50 Fed. Reg. 19768, 19771(1985): “[t]he product is identical whether packed in drums or pails”. In these statements the essential is the same: the product is not altered by packaging; but when packaging is considered a physical characteristic of the merchandise, as it is when a difmer adjustment is made, then packaging is a distinguishing element and a component of a merchandise.

physical characteristic of bagged cement which distinguishes it from bulk cement.

Accordingly, the Department recognized bagged and bulk cement are different merchandises, although they are the same product. Thus, the administrative determinations cited by the Department are not relevant in this case to support its position that bulk and bagged cement are the same merchandise except for packaging.

Thus, in applying the statute properly given the evidence available on the record, the Panel finds that:

1. Bulk and bagged cement Type I are produced in the same country and by the same person as the subject merchandise Type II bulk cement.
2. Type I cement in bulk is similar in component materials and in the purposes for which it is used. Type I cement bagged is not so similar in material because it has packaging, nor is it similar in the purposes for which it is used within CEMEX's domestic level of trade.<sup>388/</sup>
3. Type I cement bulk is closer in commercial value to Type II cement bulk than Type I cement bagged, since the price of the latter is higher by almost < >%.

This Panel majority, therefore, has no problem concluding, on the basis of the evidence in the record and according to 19 U.S.C. §1677(16), that the foreign like product in this case is Type I cement bulk, not bulk and bagged. In short, the Department's determination that foreign like product was Type I cement in general (both bagged and bulk) is not supported by the evidence in the record in which substantial differences between bagged and bulk cement were demonstrated. In addition, the Department's determination is not in accordance with law since

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<sup>388/</sup> The record indicated that bagged is used for resale; bulk is used for construction or concrete production in the domestic market as well as in the U.S. market. See *supra* notes 326-333 and accompanying text.

two of the three statutory requirements are not met. The argument that both forms of Type I (bulk and bagged) are the “like product” is not persuasive as the statute, as demonstrated by earlier argument, requires consideration of other factors, specifically component materials, purposes and prices. Consequently, this issue is remanded to the Department so that it can re-calculate NV on the basis of the price and sales of Type I cement bulk.<sup>389/</sup>

As a result of this Panel’s decision that NV is remanded to the Department for its calculation on the basis of Type I cement *bulk*, several issues presented by CEMEX become moot and do not require our further consideration, or become partially affected by this decision: (1) the issue of whether the Department improperly failed to compare U.S. and home market sales made to the same class of customers becomes moot,<sup>390/</sup> because the customers for bulk cement Type II (i.e . ready-mixers and final users) are the same as those for bulk cement Type I; (2) the issue of whether the Department’s Final Results failed to deduct from NV verified freight expenses for Type I *bagged* cement becomes moot,<sup>391/</sup> since bagged cement Type I is not being considered in the re-calculation of NV; (3) the issue of whether the Department improperly conducted the “arm’s length” test<sup>392/</sup> is partially affected, since it should now be applied with

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<sup>389/</sup> Of course, it should be pointed out that Type I bulk cement satisfies the Department’s regulations ( 19 C.F.R. 351.404(b)(2))because cement Type I bulk sales represent more than five percent of the U.S. sales of the subject merchandise. In the opinion of this Panel, it also allows for a more fair price comparison, consistent with the underlying purposes of the Uruguay Round Agreement and the U.S. implement law. See supra notes 308 and 310 and accompanying text.

<sup>390/</sup> See CEMEX Panel Rule 57(1)brief, at 72-77.

<sup>391/</sup> See CEMEX Panel Rule 57 (1) brief, at 77-87.

<sup>392/</sup> See CEMEX Panel Rule 57(1) brief, at 88-92.

respect to customers of bulk cement without regard to customers of bagged cement;<sup>393/</sup>and the packaging adjustment to NV made by the Department<sup>394/</sup> is now unnecessary. As noted, Panelist Endsley dissents from each of these conclusions.

#### **IV.D.1.b ARM'S LENGTH**

##### **WHETHER THE DEPARTMENT'S APPLICATION OF THE "ARM'S LENGTH" TEST IN CONNECTION WITH SALES TO THE AFFILIATED PURCHASERS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AND WAS OTHERWISE IN ACCORDANCE WITH LAW.**

The Department's Regulation, 19 C.F.R. & 351.403(c), provides that:

*"Sales to an affiliated party.* If an exporter or producer sold the foreign like product to an affiliated party, the Secretary may calculate normal value based on that sale only if it is satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller."

In addition, the Preamble to Commerce's Final Rules (to section 351.403) states:

*Arm's length test.* The Department's current policy is to treat prices to an affiliated purchaser as "arm's length" prices if the prices to affiliated purchasers are on average at least 99.5 percent of the prices charged to unaffiliated purchasers...

The Department agrees that a proper comparison focuses on the comparability of prices charged to affiliated or unaffiliated purchasers. However, the Department also agrees it should take into account differences in levels of trade, quantities, and other factors that affect price. For example, in comparing prices charged to affiliated and unaffiliated purchasers, we would attempt to make comparisons on the basis of sales made at the same level of trade.

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<sup>393/</sup> See *infra* at Part IV.D.1.b.

<sup>394/</sup> See Fin. Res., at 17,165.

## 1. Arguments of the Participants

### Final Results

In the Final Results, the Department determined that there is only one level of trade within the domestic market, and that “comparing by discreet channel of distribution or customer category is not warranted.”<sup>395/</sup>

### CEMEX

CEMEX asserts that it has three customer categories: distributors, end users and ready mixers, and that prices are different for each category. CEMEX has only affiliated ready mixers. Therefore to make a fair comparison between prices to affiliated and unaffiliated customers, the Department should compare prices to affiliated ready mixers with prices to unaffiliated ready mixers. Instead, the Department compared prices to affiliated ready mixers with an average of prices to all kinds of non affiliated customers. This methodology gives distorted results, as prices to distributors are higher than prices to end users or ready mixers.

CEMEX argues that the methodology employed by the Department in this case is contrary to law as it is against the Department's past administrative practice, in which customer categories were taken in account. This practice is condensed in the Preamble to the Department's Final Rules which indicates that the Department “should take into account... other factors that affect price,” such as customer categories. It also cites two cases: *Certain Pasta From Italy* (1996), which states “it is appropriate to use customer categories in our arm's length test,” and *Certain Hot-Rolled Carbon Steel Products from France* (1993), in which the Department took into account customer categories in applying its arm's length test.

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<sup>395/</sup> Fin. Res., 62 Fed. Reg., at 17169.

### The Department

The Department asserts that as a consequence of the arm's length test, only 6.92% of the sales to affiliated purchasers were disregarded. In addition, the case *Certain Pasta from Italy*<sup>396/</sup> is a LTFV investigation, which has a different methodology than the administrative reviews. The case *Certain Hot-Rolled Carbon Steel from France*<sup>397/</sup> was resolved under the pre-URAA law, according to which the level of trade was considered by customer categories; under the post URAA law, level of trade is determined by selling activities.

The information that CEMEX provides about price differences according to customer categories, as in Exhibit 5 of its brief, should not be considered because it is not in the administrative record.<sup>398/</sup>

## **2. Discussion and Decision of the Panel**

There is no prescription binding the Department to consider customer categories in the arm's length test. The Preamble of the Department's Final Rules does not prescribe the methodology preferred by CEMEX. The two cases cited have no persuasive authority in that sense.

On the other hand, the distorted results that the methodology employed by the Department could give, are minimized once the foreign like product is cement Type I bulk. This cement product is sold in very limited quantities to distributors. Therefore the prices to

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<sup>396/</sup> 61 Fed. Reg. 30326 (1996).

<sup>397/</sup> 58 Fed. Reg. 37,125 (1993).

<sup>398/</sup> In its Reply brief, CEMEX asserts that the information in Exhibit 5 is in the record; it is based on the computerized sales listing provided by Cemex.

affiliated ready mixers are compared mainly with prices to non-affiliated ready mixers and end users, and the differences of prices between these categories are minimal.

The Panel confirms as in accordance with law the methodology employed by the Department in its arm's length test, without regard to customer categories.

#### **IV.D.2 CEP OFFSET**

### **WHETHER THE DEPARTMENT'S DENIAL OF A CONSTRUCTED EXPORT PRICE (CEP) OFFSET TO CEMEX AND CDC WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS OTHERWISE IN ACCORDANCE WITH LAW**

#### **1. Introduction**

The antidumping statute, 19 U.S.C. § 1677b(a)(1)(B), after requiring that “a fair comparison ... be made between the export price or constructed export price and normal value” states that NV shall be the price at which the “foreign like product” is first sold for consumption in the exporting country (i) in the usual commercial quantities, (ii) in the ordinary course of trade, and (iii) “*to the extent practicable, at the same level of trade as the export price or constructed export price...*”<sup>399/</sup> Thus, to the extent practicable, the Department will calculate NV based on sales at the same level of trade as the U.S. sale. However, if the Department is unable to find sales in the comparison market at the same level of trade as the U.S. sale, it will consider sales at different levels of trade, and *may* adjust NV to account for the difference in

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<sup>399/</sup> 19 U.S.C. § 1677b(a)(1)(B). Emphasis added. As stated by the Department in the Preliminary Results, “to the extent practicable, the Department will calculate NV based on sales at the same level of trade as the U.S. sale. When the Department is unable to find sale(s) in the comparison market at the same level of trade as the U.S. sale(s), the Department may compare sales in the U.S. and foreign markets at a different level of trade.” Prel. Res., 61 Fed. Reg. at 51680.

levels of trade between the two markets.<sup>400/</sup> Under Paragraph (A) of 19 U.S.C. § 1677b(a)(7), such adjustments may take the form of either a *Level of Trade adjustment*, if two basic conditions are met, or under Paragraph (B), a *CEP Offset adjustment*, subject to the limitations set out in that provision. Before either adjustment may be taken, however, the Department must find that levels of trade do differ—if it finds that levels of trade do not differ, or if finds that it is able to compare sales at the same level of trade, the Department will not make either a Level of Trade or a CEP Offset adjustment.<sup>401/</sup>

The statute governing Level of Trade and CEP Offset adjustments, 19 U.S.C. § 1677b(a)(7), is complex and therefore is quoted in full below:

**Additional adjustments**

**(A) Level of trade**

The price described in paragraph (1)(B) shall also be increased or decreased to make due allowance for any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise made under this section) that is shown to be wholly or partly due to a difference in level of trade between the export price or constructed export price and normal value, if the difference in level of trade—

- (i) involves the performance of different selling activities; and
- (ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.

In a case described in the preceding sentence, the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined.

**(B) Constructed export price offset**

When normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price, but the data available do not provide an appropriate basis to determine under Paragraph

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<sup>400/</sup> See the Department's February 14, 1996 Supplemental Questionnaire at 2. This introduction to the relevant law is derived from the statute, the regulations, 19 C.F.R. § 351.412, and the convenient summary contained in the SAA, at 159-161.

<sup>401/</sup> SAA, at 159.



b(A)(ii) a level of trade adjustment, normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 1766a(d)(1)(D) of this title.

(Emphasis added)

Thus, in situations where the Department concludes that the U.S. and foreign markets cannot be compared at the same level of trade, Paragraph (A) of the statute permits the Department to adjust NV to account for any differences in prices that are demonstrated to be attributable to differences in the level of trade of the comparison sales in each market. This adjustment may either increase or decrease NV.<sup>402/</sup> It should be emphasized that the Department may grant a Level of Trade adjustment under the statute only where: (1) there *is* a difference in the level of trade, measured by the difference between the *actual selling functions* performed by the sellers at the different levels of trade in the two markets, and (2) such difference *affects price comparability*.<sup>403/</sup> Thus, in terms of analysis, the Department first looks to the question whether there are in fact different levels of trade based on the performance of different selling activities. If the levels of trade do not prove to be different, no level of trade adjustment will be made. If the levels of trade are determined to be different, then the Department will look to the question whether the data establish that there is a pattern of price differences. Again, if such a “pattern of price differences” cannot be established, no Level of

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<sup>402/</sup> Under the regulations, 19 C.F.R. § 351.412(c)(1)(iii), the Department must identify the level of trade for the “foreign like product” by using for NV “the starting price or constructed value.” For the “subject merchandise,” in the case of CEP, the Department must use “the starting price, as adjusted under section 772(d) of the Act.” See 19 C.F.R. § 351.412(c)(1)(ii). The adjustments to the starting price for CEP sales, as set forth in 19 U.S.C. § 1677a(d)(1), include: (1) commissions for selling the subject merchandise in the United States; (2) direct selling expenses (including credit expenses) attributable to U.S. economic activity; and (3) all indirect selling expenses attributable to U.S. economic activity.

<sup>403/</sup> *Id.*, at 159.

Trade adjustment will be granted.<sup>404/</sup>

Under Paragraph (B) of the statute, 19 U.S.C. § 1677b(a)(7)(B), the Department will make a CEP Offset adjustment only if different levels of trade are established (once again by measuring differences in selling functions in the home and U.S. markets),<sup>405/</sup> but “the data available do not provide an appropriate basis” for determining a Level of Trade adjustment. Thus, if the Department is unable to ascertain a consistent pattern of price differences or if other situations occur that limit the data available for analysis,<sup>406/</sup> the CEP Offset adjustment may still be allowed in lieu of a Level of Trade adjustment, although the CEP Offset will be “capped” at the amount of indirect expenses deducted from CEP under 19 U.S. C. § 1677(d)(1)(D). However, another requirement of availability of the CEP Offset is that the NV must be established at a level of trade “more remote” from the factory than the level of trade of the CEP, meaning that the Level of Trade adjustment, if it had been granted, would have resulted in a *reduction* of the NV.<sup>407/</sup>

Finally, as with all adjustments, the respondent bears the burden of establishing entitlement to either the Level of Trade or CEP Offset adjustments, by furnishing sufficient

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<sup>404/</sup> Id., at 160.

<sup>405/</sup> As in the case of the Level of Trade adjustment, the Department’s initial inquiry regarding the availability of a CEP Offset is whether there are in fact differences in the level of trade between the U.S. and home markets, measured by the difference in actual selling functions carried on in the two markets.

<sup>406/</sup> Id., at 160-61.

<sup>407/</sup> Id., at 161.

information to the Department that demonstrates the appropriateness of such adjustment.<sup>408/</sup>

In its Preliminary Results, the Department summarized the requirements for the allowance of a Level of Trade adjustment:

In accordance with section 773(a)(7)(A) of the Act, if we compare sales at one level of trade to NV sales at a different level of trade, the Department will adjust the NV to account for the difference in level of trade if two conditions are met. First, there must be differences between the actual selling functions performed by the seller at the level of trade of the U.S. sales and the level of trade of the NV sale. Second, the difference must affect price comparability as evidenced by a pattern of consistent price differences between sales at the different levels of trade in the market in which NV is determined.

Prel. Res., 61 Fed. Reg. at 51680

With respect to CEP sales, the Department also stated:

When CEP is applicable, section 773(a)(7)(B) of the Act establishes the procedures for making a CEP offset when (1) NV is at a more advanced level of trade, and (2) the data available does not provide an appropriate basis for a level of trade adjustment.

Based upon CEMEX's and CDC's responses to the Department's original Sections A, B and C questionnaire and to its February 14, 1996 supplemental questionnaire (related to level of trade comparisons and adjustments), the Department concluded that the information furnished by CEMEX "was not sufficient to establish that the home market sales used to determine normal value were at a different level of trade than its sales in the United States.... We examined the selling functions performed for each alleged level of trade and found that the selling functions provided by CEMEX were the same for both. Therefore, we determined that the two types of sales did not constitute different levels of trade."<sup>409/</sup>

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<sup>408/</sup> Id., at 161.

<sup>409/</sup> Prel. Res., 61 Fed. Reg. at 51680.

With respect to CDC's claim for a CEP Offset adjustment, the Department similarly found that "the [verified] selling functions performed by CDC to end-users in the home market and by Rio Grande Portland Cement Company [RGPCC] in the U.S., after the CEP deductions, were sufficiently similar to consider them to be at the same level of trade."<sup>410/</sup>

In its Final Results, the Department undertook a much more extensive analysis of the issues, based on the arguments of the parties and otherwise. The Department initially noted that the NV level of trade is that of the starting price in the home market whereas, for both EP and CEP, the relevant transaction for level of trade is the sale from the exporter to the importer.<sup>411/</sup>

To determine whether home market sales are at a different level of trade than U.S. sales, the Department indicated that it examines "whether the home market sales are at different stages in the marketing process than the U.S. sales."<sup>412/</sup> The Department then emphasized the importance of differences in selling functions to the analysis:

Different levels of trade necessarily involve differences in selling functions, but differences in selling functions, even substantial ones, are not alone sufficient to establish a difference in the level of trade. A different level of trade is characterized by purchasers at different places

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<sup>410/</sup> Id.

<sup>411/</sup> Fin. Res., 62 Fed. Reg. at 17156. The Department noted that while the starting price for CEP is that of a subsequent resale to an unaffiliated buyer, under the statute, CEP is calculated "by removing from the first resale to an independent U.S. customer the expenses specified in section 772(d) of the Tariff Act and the profit associated with these expenses." Id. The Department then observed that "[b]ecause the expenses deducted under section 772(d) represent selling activities in the United States, the deduction of these expenses normally yields a different level of trade for the CEP than for the later resale."

<sup>412/</sup> Id. The Department went on to indicate that it reviews and compares "the distribution systems in the home market and U.S. export markets, including selling functions, class of customer, and the extent and level of selling expenses for each claimed level of trade," noting that claimed customer categories such as "distributor," "OEM," or "wholesaler" are useful in that they describe levels of trade but, without substantiation, such categories "are insufficient to establish that a claimed level of trade is valid." Id.

in the chain of distribution and sellers performing qualitatively or quantitatively different functions in selling to them.<sup>413/</sup>

As it did in the Preliminary Results, the Department then noted that it will allow a Level of Trade adjustment only “if [an established] difference in level of trade affects price comparability” or will grant a CEP Offset adjustment to NV “if it is compared to U.S. sales at a different level of trade, provided the normal value is more remote from the factory than the CEP sales, and we are unable to determine whether the difference in levels of trade between CEP and NV affects the comparability of their prices.”<sup>414/</sup>

Based upon this recitation of the law, the Department then appeared to draw two general conclusions concerning the data furnished by CEMEX and CDC in their questionnaire responses. First, raising an issue not raised in the Preliminary Results, the Department indicated that:

[W]e were unable to utilize the analysis submitted by the respondent (CEMEX and CDC) (due to the fact that it reported the selling functions performed by the producer/exporter to the unaffiliated purchaser in the home market, as compared to the selling functions performed by the related reseller to the unaffiliated purchaser in the U.S. market.<sup>415/</sup>

The second general conclusion reached by the Department was that of the selling functions performed by CEMEX and CDC to its customers in the home market, as reported in the variables

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<sup>413/</sup> Id.

<sup>414/</sup> Id. The Department goes on to note that the CEP Offset will be “the lower of the: (1) Indirect selling expenses on the home market sale; or (2) indirect selling expenses deducted from the starting price used to calculate CEP.” Fin. Res., 62 Fed. Reg. at 17156-57.

<sup>415/</sup> Id., at 17157. As to this point, the Department goes on to state that the statute directs it to determine NV at the level of trade of the CEP sales, reflecting any CEP deductions under section 772(d) of the Act, in effect, a price exclusive of those selling expenses and profit associated with economic activities in the United States. Id.

INVCARH, INDIRSH, and DISWARH, and the selling functions performed by CEMEX and CDC on its sales to its affiliated reseller in the United States, as reported in the variables DINVCARH, DINDIRSU, and DISWARU, and none of these were “sufficient to warrant a separate LOT.”<sup>416/</sup>

For purposes of this conclusion, the Department indicated that it found the following selling functions and activities to occur in relation to CEMEX’s and CDC’s sales of cement in both markets: (1) inventory maintenance, (2) presale warehousing, and (3) other indirect selling expenses.<sup>417/</sup>

Focusing specifically on CEMEX, the Department first rejected CEMEX’s argument that there were two levels of trade in the home market and two levels of trade in the U.S. market: “We found that there is one stage of marketing—sales of cement shipped to end-users and ready mixers in bulk and bagged form.”<sup>418/</sup> Since all of CEMEX’s sales were reported on a CEP basis, the Department then examined the record evidence and determined that:

[T]he CEP sales reflect certain selling functions such as inventory maintenance, pre-sale warehouse expenses, and indirect selling expenses incurred in the home market for the U.S. sale. As explained above, these same selling functions are also reflected in CEMEX’s home market sales to end-users and ready-mixers. Therefore, the selling functions performed for CEMEX’s CEP sales are not sufficiently different from those performed for CEMEX’s home market sales to consider CEP sales and home market sales to be at a different level of trade.... Therefore, we have determined that there are no differences in levels of trade and neither a Level of Trade adjustment

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<sup>416/</sup> Id. CEMEX reported inventory maintenance costs in the data fields INVCARH and DINVCARU, pre-sale warehousing in the fields DISWARH and DISWARU, and other indirect selling expenses in the fields INDIRSH and DINDIRSU. See Department Panel Rule 57(2) brief, at 163 note 112.

<sup>417/</sup> Id.

<sup>418/</sup> Id.

nor a CEP offset was warranted in the instant review.”<sup>419/</sup>

With respect to CDC, the Department similarly found that there was only one level of trade in the home and U.S. markets and that the selling functions performed in the two markets—inventory maintenance, pre-sale warehouse expenses, and indirect selling expenses—were the same in both markets. Thus, since there were no differences in the levels of trade in the two markets, neither a Level of Trade adjustment nor a CEP Offset adjustment was warranted.<sup>420/</sup>

## **2. Arguments of the Participants**

### Cemex

In its Panel Rule 57(1) brief, CEMEX informs the Panel that it had claimed a CEP Offset adjustment to NV because its NV level of trade (the sale by CEMEX to its unaffiliated home market customers) was at a more advanced level of trade and included more selling functions and activities than the CEP level of trade (the sale from CEMEX to its affiliated U.S. reseller, Sunbelt Cement, Inc. (“Sunbelt”)).<sup>421/</sup> Indeed, the selling activities undertaken by CEMEX on its home market sales, but not incurred on its U.S. sales to Sunbelt “included customer freight and delivery services (other than the payment of actual freight expenses), advertising and sales promotion, inventory maintenance at distribution terminals, and other sales support and services including sales personnel, technical service personnel, order

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<sup>419/</sup> Id.

<sup>420/</sup> Id., at 17157-58.

<sup>421/</sup> CEMEX Panel Rule 57(1) brief, at 66.

processing personnel, and credit personnel.”<sup>422/</sup> Although noting that the selling functions performed generally in the two markets were similar (with the exception of market research done in the home market but not in the U.S. market), when the necessary deductions made pursuant to 19 U.S.C. § 1677d(d)(1) are taken into account, the home market level of trade was “far more advanced than the CEP level of trade.”<sup>423/</sup> In addition, CEMEX argues that since there was “no level of trade comparable to the CEP level of trade ... in the home market,” it was impossible to quantify any price differential between the NV level of trade and the non-existent CEP level of trade in the home market, satisfying both of the requirements for a CEP Offset adjustment.<sup>424/</sup>

CEMEX criticizes the Final Results, arguing that the Department’s CEP Offset analysis was “incorrectly limited” to those expenses which were incurred in both the home and U.S. markets, and failed to determine whether the home market level of trade was more advanced than the CEP level of trade, containing “substantially different and greater selling functions and activities than the CEP level of trade.”<sup>425/</sup> CEMEX further criticizes the Department’s analysis, stating that it “improperly compared broad categories of expense adjustments relevant to the CEP and home market levels of trade, rather than analyze the actual selling activities and selling functions of the two levels of trade.”<sup>426/</sup> In addition, CEMEX criticizes the

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<sup>422/</sup> Id.

<sup>423/</sup> Id., at 67.

<sup>424/</sup> Id.

<sup>425/</sup> Id., at 68.

<sup>426/</sup> Id., at 69. CEMEX goes on to say that “a similarity of incurred expenses in broadly defined  
(continued...)



Department's focus on expense fields (DINDIRSU, etc.) as opposed to analyzing individual selling functions and sales activities, information which CEMEX asserts that it provided to the Department in its various questionnaire responses.<sup>427/</sup>

CEMEX further avers that once the selling activities attributable to U.S. economic activity are taken out of consideration from the CEP level of trade, as required by 19 C.F.R. § 351.412(c)(ii), "it is apparent that the home market level of trade includes numerous selling functions attributable to market research, after sale services and warranties, technical advice, advertising and most expenses attributable to the domestic sales department (other than freight arrangement and invoicing and order support) that are not provided by CEMEX to the affiliated importer at the CEP level of trade."<sup>428/</sup>

CDC

CDC's Panel Rule 57(1) brief reviews the applicable law but also focuses on the Department conclusion in the Sixth Administrative Review that a CEP Offset adjustment was appropriate, arguing that the Department should have reached the same conclusion in the instant review.<sup>429/</sup> CDC also asserts, however, that it "provided evidence ... in [questionnaire] responses and at verification that the selling functions that CDC provides in the home market are more extensive than the selling functions that it provides to its affiliated importer at the CEP

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<sup>426/</sup> (...continued)  
expense fields cannot serve as a proxy for the required statutory and regulatory analysis of the stage of distribution and specific selling functions and activities incurred in each level of trade."  
Id., at 69-70.

<sup>427/</sup> Id., at 71.

<sup>428/</sup> Id.

<sup>429/</sup> CDC Panel Rule 57(1) brief, at 46.

level of trade in the U.S. (*i.e.*, excluding expenses associated with all functions and services performed by the importer to unaffiliated U.S. customers).<sup>430/</sup> As illustrated in the selling functions chart that CDC submitted to the Department in its March 15, 1996 questionnaire response, CDC states that “the majority of the selling functions performed in the home market were not performed for CEP sales in the U.S. market.”<sup>431/</sup>

CDC further asserts that during the verification process it “explained that: (1) all of the [described] selling functions were performed by CDC in the home market; and (2) CDC did not perform such selling functions for the U.S. market.”<sup>432/</sup> At verification, CDC provided the Department with a number of documents in support of this proposition. At the U.S. verification for RGPCC, similar documentation was provided confirming that CDC performed only “limited selling functions for sales to its affiliated importer RGPCC.”<sup>433/</sup>

Based upon the evidence provided in questionnaire responses and at verification, CDC believes that it “established that it provided significantly more selling functions to its home market customers than to RGPCC, and that RGPCC, rather than CDC, provided these additional selling functions to unaffiliated U.S. customers.”<sup>434/</sup>

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<sup>430/</sup> Id., at 47.

<sup>431/</sup> Id. (Emphasis in original). CDC goes on to state that the selling functions performed in the home market and not in the United States “include market research, technical advice, advertising, customer approval, solicitation of orders/customer visits, sales promotion/discount programs, and computer/legal/accounting/business system development.” Id., at 47-48.

<sup>432/</sup> Id., at 48.

<sup>433/</sup> Id., at 49.

<sup>434/</sup> Id., at 50. CDC goes on to note that when the selling functions by RGPCC are excluded, “it is self-evidence that substantially more selling functions are performed in the home market than in  
(continued...) ”

Southern Tier

In its Panel Rule 57(2) brief, Southern Tier first informs the Panel of the amendments to the statute made by the URAA, changing the old *automatic* ESP Offset adjustment to the new *conditional* CEP Offset adjustment, which is satisfied only if two statutory conditions are satisfied: (1) sales on which the calculation of NV is based must be at a different and more advanced level of trade than the sales on which the calculation of CEP is based, and (2) the available data do not provide an appropriate basis to determine a level of trade adjustment.<sup>435/</sup> Relatedly, Southern Tier cites the general, as well as specific statutory, rule that the burden is on the respondent to demonstrate that a CEP Offset adjustment is warranted.<sup>436/</sup> In particular, if a respondent does not demonstrate that its home market and CEP sales are at different levels of trade, the statute prohibits Commerce from making a CEP Offset adjustment.<sup>437/</sup>

Southern Tier notes that to determine whether sales are made at different levels of trade, “the statute requires Commerce to analyze whether sales at the allegedly different levels of trade involve the performance of different selling functions.”<sup>438/</sup> Certain differences are

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<sup>434/</sup> (...continued)  
the U.S. for CEP sales.” Id.

<sup>435/</sup> Southern Tier Panel Rule 57(2) brief, at 65, *citing* 19 U.S.C. § 1677b(a)(7)(B).

<sup>436/</sup> Id., at 66, *citing* Stainless Steel Wire Rod From Sweden, 63 Fed. Reg. 40,449, 40,455 (1998) (“We note that, of necessity, the burden is on the respondent to demonstrate that its categorizations of [level of trade] are correct”); Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27,296, 27,370 (1997) (“Commerce will grant a CEP offset only where a respondent has succeeded in establishing that there is a difference in levels of trade”); Mechanical Transfer Presses from Japan, 61 Fed. Reg. 52,910, 52,915 (1996) (“the respondent bears the burden of demonstrating that such an offset is warranted”).

<sup>437/</sup> Id.

<sup>438/</sup> Id., at 67, *citing* 19 U.S.C. § 1677b(a)(7)(A)(i).

not included in this analysis, however, as they are accounted for elsewhere in the statute. Thus, in identifying levels of trade, the Department “does not consider differences in movement expenses, packing expenses, or direct selling expenses for which normal value is otherwise adjusted to reflect differences in circumstances of sale.”<sup>439/</sup>

Approving the language of the Final Results, Southern Tier asserts that before the Department may conclude that sales are at different levels of trade, it “must find both that (1) there are purchasers at different stages in the chain of distribution and (2) there are sellers performing [qualitatively or quantitatively] different functions in selling to those purchasers....”<sup>440/</sup>

Focusing on CEMEX’s allegations, Southern Tier notes that the Department had expressly determined that CEMEX performed “largely the same” selling functions with respect to its home market sales and to its sales to Sunbelt, its U.S. subsidiary.<sup>441/</sup> Rejecting CEMEX’s allegation that the Department failed to recognize information on the record supporting its claims of differences in selling functions between the CEP and home market levels of trade, Southern Tier asserts that “the record indicates that the selling functions performed in support of home market sales (reflected by the indirect selling expenses reported in the INDIRSH field) and sales to Sunbelt (reflected by the indirect selling expenses reported

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<sup>439/</sup> Id.

<sup>440/</sup> Id., at 68.

<sup>441/</sup> Id., at 69. Specifically, the Department determined that CEMEX performed pre-sale warehousing, inventory maintenance, and other indirect selling expenses in Mexico in support of both home market sales and sales to Sunbelt.

in the DINDIRSU field) were, as Commerce concluded, ‘largely the same.’”<sup>442/</sup>

Southern Tier indeed goes on to present a side-by-side comparison<sup>443/</sup> of the expenses reported by CEMEX in its INDIRSH field (home market sales)<sup>444/</sup> and in its DINDIRSU field (sales to Sunbelt)<sup>445/</sup> and then argues that “[t]he record evidence indicates that CEMEX incurred indirect selling expenses in virtually the same expense categories and for the same activities in support of both home market sales and sales to Sunbelt.”<sup>446/</sup> Southern Tier also rejects CEMEX’s claim that certain other indirect selling expenses reported in the INDIRSH field were not itemized in its Exhibit SSB-6 (Attachment D), including “customer service, advertising, operation of rebate and discount programs, technical service, warranties, etc.”<sup>447/</sup> Southern Tier argues that there is no evidence to support CEMEX’s claim because CEMEX “failed to itemize any expenses other than those listed in Exhibit SSB-6.”<sup>448/</sup> Based on information reported in the DISWARU field, Southern Tier also discounts CEMEX’s claim that the inventory maintenance and warehouse expenses reported for home market sales and sales to

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<sup>442/</sup> Id., at 71.

<sup>443/</sup> Id., at 72.

<sup>444/</sup> Exhibit SSB-6 to its April 29, 1996 Supplemental Questionnaire Response, Pub. Doc. 123 (Attachment D).

<sup>445/</sup> Page 44 of its March 15, 1996 Supplemental Questionnaire Response, Pub. Doc. 87 (Attachment E).

<sup>446/</sup> Southern Tier Panel Rule 57(2) brief, at 72.

<sup>447/</sup> Id., at 73.

<sup>448/</sup> Id.

Sunbelt were significantly different,<sup>449/</sup> finding them, once again, to be “largely the same.”

Focusing next on the selling function charts and accompanying explanation submitted by CEMEX, <sup>450/</sup> Southern Tier argues that CEMEX did perform substantially similar selling functions for both home market and U.S. sales. For example, the strategic planning, computer/legal/accounting and business systems, advertising, procurement or sourcing services, and communications support all were common to the two markets. On its face, only two functions—market research and personnel training/engineering services/consumer-specific R&D—were performed in the home market but not as to the sales to Sunbelt; however, Southern Tier argues that the latter represents a *manufacturing*, not *selling*, function, while the former is questionable on other grounds.<sup>451/</sup>

Based on the applicable law, which requires that “differences in selling functions must be ‘substantial’ to establish different levels of trade,” Southern Tier finds it clear that the selling function charts submitted by CEMEX do not support a finding of distinct levels of trade.<sup>452/</sup> In sum, Southern Tier argues that “the selling functions on which CEMEX’s claim for a CEP offset is based were either performed in support of sales to both markets, were not performed

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<sup>449/</sup> *Id.*

<sup>450/</sup> Pub. Doc. 87 at G-2-5.

<sup>451/</sup> Southern Tier Panel Rule 57(2) brief, at 75.

<sup>452/</sup> *Id.*, at 75, 76. Consistent with this rule, Southern Tier also discounts the selling functions which CEMEX reported as being “Low” or “Medium,” suggesting that these functions may not comply with the rule which requires that the selling function be applied to “at least the vast majority of customers and sales” in the home market. See *Certain Pasta from Italy*, 61 Fed. Reg. 30,326, 30,338 (1996). Southern Tier further suggests that the one selling function which was reported at the “High” level, freight and delivery arrangements, is not a significant selling function and cannot support a CEP Offset adjustment on its own. *Id.*

with respect to “at least the vast majority of customers and sales” in the home market, or were not sufficiently significant to constitute a meaningful difference in selling activity.

Consequently, none of these selling functions provides a basis for determining that CEMEX’s home market and CEP sales were at different levels of trade.”<sup>453/</sup>

With respect to CDC, Southern Tier disputes the relevance of the Department’s finding in the Sixth Administrative Review,<sup>454/</sup> and argues that CDC, like CEMEX, “did not describe the selling functions on which its claim for a CEP offset adjustment is based in sufficient detail to enable Commerce to ascertain whether they truly involved distinct selling functions. For example, C[D]C provided no explanation of what is meant by the terms ‘market research,’ ‘technical advice,’ ‘customer approval,’ or ‘computer/legal/accounting/business system development.’ Nor did C[D]C explain the significance of each of the alleged ‘selling functions” with respect to home market and U.S. prices.”<sup>455/</sup> Also like CEMEX, Southern Tier argues that CDC has “not demonstrated that the selling functions on which its claim is based were provided to ‘at least the vast majority of customers and sales’ in the home market.”<sup>456/</sup>

Finally, on the basis of the recent decision in Borden, Inc. v. United States, 4 F. Supp.2d 1221 (Ct. Int’l Trade 1998), which held that certain aspects of the Department’s CEP Offset regulations were inconsistent with the plain language of the statute, Southern Tier argues in the alternative that the Panel should issue a remand requiring the Department to make a new

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<sup>453/</sup> Id., at 77.

<sup>454/</sup> Id., at 78-79.

<sup>455/</sup> Id., at 79-80.

<sup>456/</sup> Id., at 80. (Emphasis in original).

determination consistent with the CIT's decision in Borden.<sup>457/</sup>

### The Department

In its Panel Rule 57(2) brief, the Department supports its decision in the Final Results by stating that “the Department reasonably concluded that CdC’s and CEMEX’s NV and adjusted CEP sales were not at different levels of trade, such that no CEP offset was warranted.”<sup>458/</sup> The Department’s brief first reviews the information reported by CEMEX and CDC in their various questionnaire responses, noting that, for purposes of the Preliminary Results, “the information received did not permit a thorough level-of-trade analysis.”<sup>459/</sup> The Department noted that its view did not change for purposes of the Final Results:

[T]he Department explained that both CdC and CEMEX had submitted unusable level of trade information in that both companies had compared the selling functions they performed in the home market with the selling functions their U.S. affiliates and performed in connection with their sales to unaffiliated U.S. customers. [citation omitted] Otherwise stated, neither company had specified exactly what selling functions remained for U.S. sales after adjusting CEP for U.S. economic activity. However, the Department determined on the basis of the parties’ submissions that three distinct selling functions had been performed for both home market and adjusted U.S. sales: inventory maintenance, pre-sale maintenance, and other indirect selling

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<sup>457/</sup> Id., at 82-86.

<sup>458/</sup> Department Panel Rule 57(2) brief, at 158. The Department goes on to state: “The Department: (i) properly performed its level of trade analysis by comparing the NV level of trade to the U.S. level of trade, as adjusted by the deductions to CEP required by 19 U.S.C. § 1677a(d) (1995), and (ii) reasonably determined, with respect to both CdC and CEMEX, that the selling functions performed for their CEP sales were not sufficiently different from those performed for their home market sales to conclude that their U.S. and home market sales were made at different levels of trade. Accordingly, the Department correctly declined to adjust NV with CEP offsets for both companies.” Id., at 158-59.

<sup>459/</sup> Id., at 161.



expenses.<sup>460/</sup>

The Department further argues that it applied the correct level-of-trade analysis under the URAA-amended statute,<sup>461/</sup> that “the existence of different levels of trade is demonstrated by differences in selling functions,” and that “small differences in selling functions do not alter the level of trade.”<sup>462/</sup> Moreover, the Department reaffirms the rule that “an individual selling function is not dispositive in determining the existence of separate levels of trade unless the respondent establishes that ‘the selling function was consistently applied to at least the vast majority of customers and sales in each level of trade.’”<sup>463/</sup>

Despite CDC’s broad asserts that it performed a variety of selling functions in Mexico that it did not perform in connection with its sales to its U.S. affiliate, RGPCC, the Department asserts that “CdC never explained in detail whether certain functions it listed in its submissions -- e.g., ‘computer/legal/accounting/business system development’ -- were indeed meaningful selling functions.... CdC’s mere identification of these functions provided the Department with no meaningful way of assessing their importance, or indeed whether they were ‘consistently applied to at least the vast majority of customers and sales.’”<sup>464/</sup> The data furnished by CEMEX shows similar shortcomings.<sup>465/</sup>

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<sup>460/</sup> Id., at 163.

<sup>461/</sup> Id., at 165.

<sup>462/</sup> Id.

<sup>463/</sup> Id., at 165-66, *citing* Certain Pasta from Italy, 61 Fed. Reg. at 30338.

<sup>464/</sup> Id., at 166.

<sup>465/</sup> Id., at 168-69.

In closing its argument, the Department emphasized that it “does not merely count selling activities, but weighs the overall functions performed at each claimed level of trade. The Department reviews the entire distribution system, including selling functions, class of customer, and the extent and level of selling expenses for each type of sale.... In this case, CdC and CEMEX precluded the Department from conducting the required analysis. While both parties provided generic rosters of selling functions, neither party submitted a meaningful quantitative analysis that would have enabled the Department to assess the magnitude of these functions....”<sup>466/</sup>

### **3. Discussion and Decision of the Panel**

The Panel, after careful consideration of the Final Results as well as the information on the administrative record concerning the level of trade/CEP Offset issue, has decided to remand the issue to the Department for a more detailed explanation of the “qualitative and quantitative” aspects of the data supplied by the CEMEX and CDC as well as, to a more limited extent, certain aspects of the law related to this issue. The Panel appreciates the extensive effort the Department made to explain its position in the Final Results. Nevertheless, the manner in which information was solicited from the parties, and responded to by the parties, has made it difficult for the Panel to “track” the reasoning of the Department in all respects. Moreover, the Department’s comments in the Final Results on “factual issues” was extremely limited. Rather than make an decision based upon a superficial understanding of the record, the Panel prefers to have a more thorough explanation by the Department of its treatment of the information supplied by CEMEX and CDC and, in the course of that explanation, to have the following

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<sup>466/</sup> Id., at 169-70. (Emphasis in original).

specific matters clarified.

*Information on the Record*

The Panel has reviewed the Department's February 14, 1996 supplemental questionnaire concerning the level of trade issue. We note the clear explanation of the relevant law on pages 2-3 of that document. In Part A, however, we note that the Department asked for specific differences and similarities "in selling functions and/or support services" between the various channels of distribution in the home market and in the U.S. A list of 10 different information items is set out. Please indicate whether the Department regards each of these items to be a "selling function." If a legal distinction is to be drawn between "selling functions" and "support services," which are the former and which are the latter? Are all or some of these the "selling activities" referred to in the statute (19 U.S.C. § 1677b(a)(7)(A)(i))?

In Part B, we also note that the Department asked for, among other things, "a chart showing all selling functions provided for each channel of distribution..." A sample chart is set out which lists items which are significantly different, at least in language, than the list set out in Part A. Why is the Part B list different from the Part A list? Is the Part B list the "selling activities" referred to in the statute? If the Part B list is intended to be the same as the Part A list, what is their concordance?

In the Final Results, the Department addresses a number of data fields, including INVCARH, INDIRSH, DISWARH, DINVCARH, DINDIRSU, and DISWARU. How does the information supplied in response to Parts A and B (individually or collectively) relate to these data fields? What is their concordance? Put another way, how do the reported "inventory maintenance costs," "pre-sale warehousing," and "other indirect selling expenses," all of which

were included in an express finding by the Department in the Final Results, relate to Parts A and B?

With respect to the selling functions chart, what legal significance does the Department place on the indicators “M” (moderate degree) or “L” (small degree)? Does these relate, for example, to the requirement that a selling function be applied to “at least the vast majority of customers”? Would an “M” or “L” designation fail that legal standard, and would a “H” indicator (great degree) comply with that legal standard? In addition, how does this legal standard apply in the case of the “Y” indicator, which states only that a selling function “is performed.” Is it expected that a “Y” response would have to be elsewhere quantified, but an “H,” “M” or “L” response would not have to be. More generally, are these indicators intended by the Department to be a complete response to its requested quantification of the selling functions, allowing the respondent the opportunity of a short-form reply, or is additional narrative expected? Since even a minuscule level of activity would justify a “Y” response, does the “Y” indicator actually reflect a meaningful piece of information? Were the selling function charts verified?

It may be worth indicating to the Department that the Panel is tending to the conclusion that the above-referenced questionnaires were quite confusing and that particularly CDC, but probably also CEMEX, in fact responded to the questionnaires to an adequate degree, if not to the best of their ability. More particularly, the respondents appear to have provided the information requested by the Department in the form in which the Department wanted to receive it. The Panel, therefore, will be particularly interested in understanding precisely why the Department believes the two respondents failed in this respect.

In light of the foregoing, please summarize the record evidence concerning the qualitative and quantitative aspects of the selling functions performed by the respondents in the home market and in the U.S. market, as adjusted. Please indicate the selling functions that are not included in the level of trade analysis either because of the adjustments made pursuant to section 772(d) of the Act, or because they are quantitatively insufficient to comply with the standards of the Act, or (if different) because they are not applied to the “vast majority of customers.” Please note the record evidence (or lack thereof) of selling functions which are other than those reported in the data fields for “inventory maintenance costs,” “pre-sale warehousing,” and “other indirect selling expenses.” What data fields, if any, apply to these “other” selling functions? Please confirm, if it is the case, that the Department regards “other indirect selling expenses” as evidence of a *selling* function.

Please address the language contained in the September 27, 1996 Analysis Memorandum which states that “we found no significant differences between customers as well as selling functions performed by CEMEX to end-users in the home market and end-users in the U.S.”<sup>467/</sup> Since the Panel understands that the appropriate comparison on the U.S. side is at the adjusted CEP level (i.e., the sale to the affiliated importer), is this statement consistent with the law? Does the Analysis Memorandum reflect how the Department actually made the comparison in the Final Results?

Please explain and clarify the statement in the Final Results, at p. 17157, as follows: “However, we were unable to utilize the analysis submitted by the respondent (CEMEX and CDC) due to the fact that it reported the selling functions performed by the producer/exporter to

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<sup>467/</sup> Analysis Memorandum, at 9.

the unaffiliated purchaser in the home market, as compared to the selling functions performed by the related reseller to the unaffiliated purchaser in the U.S. market.”

*The Applicable Law*

In order to better understand the applicable law, the Panel would also like to present the following questions.

First, is it the case that the phrase in 19 U.S.C. § 1677b(a)(7)(B) stating “the data available do not provide an appropriate basis to determine under subparagraph (A)(ii) a level of trade adjustment” contemplates a larger universe of possibilities than the phrase in Paragraph (A) stating “[not] demonstrated to affect price comparability”? While the SAA does speak to this point, what situations are likely to be covered by Paragraph (B) but not Paragraph (A)? On the contrary, based on a reading of 19 C.F.R. § 351.412(f)(3), is it to be understood that the Department focuses on “price comparability” in both the situations of Paragraphs (A) and (B), despite the different statutory language used in the two situations?

Second, 19 C.F.R. § 351.412(c)(2) states that “Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing.” This language was repeated in the Preliminary Results. Is this language consistent with the statute, 19 U.S.C. §1677b(a)(7)(A)(i), which speaks to only “selling activities”? If something more than selling activities is required, where does the law define what those might be? What, in the Department’s judgment, could these be?

Third, the SAA, at 159, states that “Commerce will require evidence from the foreign producers that the functions performed by the sellers at the same level of trade in the U.S. and foreign markets are similar, and that different selling activities are actually performed at the

allegedly different levels of trade.” In context, should the word “similar” be changed to “dissimilar”?<sup>468/</sup>

Once again, the Panel greatly appreciates the effort made by the Department in the Final Results to explain its determination, and the excellent briefs presented to the Panel by the Participants, but the review of the administrative record has engendered some measure of confusion and concern and the Panel therefore feels compelled to place this additional burden on the Department to clarify matters.

### **IV.D.3            NORMAL VALUE CLAIMS BY SOUTHERN TIER**

The Panel carefully reviewed each of the NV claims raised by Southern Tier and all of the arguments raised by CEMEX and CDC corresponding to these claims. For the reasons discussed below, the Panel affirms each of the Department determinations for the Fifth Administrative Review regarding these claims.

#### **IV.D.3.a.        DIFMER**

#### **WHETHER THE DEPARTMENT’S GRANTING OF A DIFFERENCE IN MERCHANDISE (“DIFMER”) ADJUSTMENT TO CEMEX WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS OTHERWISE IN ACCORDANCE WITH LAW**

##### **1.            Arguments of the Participants**

The antidumping statute, 19 U.S.C. § 1677b(a)(6)(C)(ii), provides that, when the

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<sup>468/</sup> The point simply being that one cannot demonstrate differences in the level of trade (and the appropriateness of a level of trade adjustment) by showing that the selling functions are “similar.”

calculation of the dumping margin is based on a comparison of prices for *non-identical* merchandise, the Department should adjust NV for “any difference ... between the export price or constructed export price and [normal value] that is ... wholly or partly due to” the difference in the merchandise being compared. The allowance of such a “DIFMER” adjustment is also sanctioned by the Department’s regulations.<sup>469/</sup>

*Southern Tier*

Southern Tier notes that in the Fifth Administrative Review, “it was uncontested that there were physical differences between Type I and Type II cement that caused the variable production cost of Type II cement to differ from the variable production cost of Type I cement.”<sup>470/</sup> In view of the Department’s finding that CEMEX’s home market sales of Type II cement were outside the ordinary course of trade—necessitating that CEMEX’s dumping margin be calculated on the basis of a comparison of prices for Type II sales in the United States with prices for Type I sales in Mexico—an appropriate basis was therefore laid for a DIFMER calculation.

However, Southern Tier emphasizes that the burden of demonstrating that a DIFMER adjustment should be made is on the party claiming the adjustment.<sup>471/</sup> If this burden is

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<sup>469/</sup> 19 C.F.R. § 353.57(a)(1997) provides that the department “will make a reasonable allowance for differences in the physical characteristics of merchandise compared to the extent that the Secretary is satisfied that the amount of any price differential is wholly or partly due to such difference.”

<sup>470/</sup> Southern Tier Panel Rule 57(1) brief, at 19.

<sup>471/</sup> 19 C.F.R. § 353.54. This is consistent with the general rule that the party seeking an adjustment bears the burden of demonstrating that it is entitled to the adjustment. See Fujitsu General Ltd. v. United States, 88 F.3d 1034, 1040 (Fed. Cir. 1996); Koyo Seiko Co. v. United States, 932 F. Supp. 1488, 1492 (Ct. Int’l Trade 1996); Timken Co. v. United States, 673 F. Supp. 495, 513 (Ct. (continued...))



satisfied, the Department will base its DIFMER adjustment on the difference in variable production cost attributable to the *physical differences* in the products compared.<sup>471/</sup> The Department's Import Administration Policy Bulletin 92.2 (July 29, 1992) explains:

[D]iffmer adjustments are based almost exclusively on the cost of the physical difference. We do not make an adjustment because the cost of production is different; we are measuring the difference in cost attributable to the difference in physical characteristics.... Therefore, it is important in any consideration of a diffmer to isolate the costs attributable to the difference, not just assume that all cost of production differences are caused by the physical differences. When it is impossible to isolate the cost differences, we should at least determine that conditions unrelated to the physical difference are not the source of the cost differences, such as when different facilities are used.... If the costs of the physical difference cannot be isolated or it is not reasonably clear that the differences in production cost are related to the physical difference, no adjustment should be made.

The Department's administrative decisions are in accord with this policy statement.

See, *e.g.*, Certain Hot-Rolled Lead And Bismuth Carbon Steel Products From The United Kingdom, 58 Fed. Reg. 6207, 6209 (1993) (denying claimed DIFMER adjustment for differences in labor and overhead costs arising from differences in plant efficiency and the time at which the manufacturing was done, rather than the physical differences in the products), and Generic Cephalexin Capsules From Canada, 54 Fed. Reg. 26,820, 26,822 (1989) (denying claimed DIFMER adjustment for differences in variable factory overhead and direct labor costs because the respondent was unable to show that these differences were "associated with physical differences in the merchandise").

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<sup>471/</sup> (...continued)  
Int'l Trade 1987).

<sup>472/</sup> The Department's regulations prohibit a DIFMER adjustment "when compared merchandise has identical physical characteristics." 19 C.F.R. § 353.57(a)(1995).

Southern Tier does not complain about the statute, regulations or the Department's administrative practice, however; it argues that the Department "granted CEMEX a favorable [DIFMER] adjustment despite the fact that CEMEX had been utterly uncooperative in providing information to justify such an adjustment."<sup>473/</sup> Further, it complains that the Department did not base its DIFMER adjustment by calculating the weighted-average variable cost for all of CEMEX's plants, but instead by "grant[ing] CEMEX an adjustment based solely on the variable cost differences of producing Type I and Type II cement at a single facility, the Yaqui plant."<sup>474/</sup>

Much of Southern Tier's argument rests on its assertion that "CEMEX had been utterly uncooperative [in the Fifth Administrative Review] in providing information to justify [a DIFMER] adjustment,"<sup>475/</sup> thus raising the specter that the Department should have decided the matter on the basis of "best information available" (BIA) or by simply denying the claimed adjustment altogether. Southern Tier finds precedent for these approaches both in the Second Administrative Review<sup>476/</sup> and in the Preliminary Results of this Fifth Administrative

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<sup>473/</sup> Southern Tier Panel Rule 57(1) brief, at 14.

<sup>474/</sup> *Id.*, at 14-15.

<sup>475/</sup> *Id.*, at 14.

<sup>476/</sup> In the Second Administrative Review, the Department "based the difmer adjustment ... on the best information available because it determined that CEMEX failed to provide information to establish a difmer adjustment." *Id.*, at 15-16. See Gray Portland Cement And Clinker From Mexico, Results of Redetermination Pursuant to Court Remand, Court No. 93-10-00659 (February 1, 1996), at 6-13. Southern Tier also noted that the CIT and the Federal Circuit affirmed both the Department's decision to use best information available (BIA) in the Second Administrative Review and its choice of a 20% DIFMER adjustment adverse to CEMEX as BIA. See CEMEX, S.A. v. United States, No. 93-10-00659, 1996 Ct. Int'l Trade LEXIS 147 (August 13, 1996), *aff'd*, 133 F.3d 897 (Fed. Cir. 1998).

Review.<sup>477/</sup>

Southern Tier reviews at some length the Department’s information requests (original and supplemental questionnaires) as submitted to CEMEX and CEMEX’s alleged “unresponsive[ness] to [those] request[s]...”<sup>478/</sup> noting, however, that when the Department issued its Final Results, “it unexpectedly and without explanation excused CEMEX’s failure to cooperate in providing information to justify a difmer adjustment.”<sup>479/</sup> Citing well-established authority, Southern Tier urges that the Department “was obliged to provide a full explanation why it departed from [its earlier] practice.”<sup>480/</sup>

Amplifying on its BIA argument, Southern Tier then asserts that “[t]he statute requires Commerce to rely on the facts available where, among other things, a party withholds information that is requested or fails to provide such information in the form and manner requested.”<sup>481/</sup> Since the Department had found in the Preliminary Results that CEMEX had

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<sup>477/</sup> In the Preliminary Results of the Fifth Administrative Review, the Department stated:

[D]espite our repeated requests for DIFMER based solely on physical differences in merchandise, CEMEX was unwilling to isolate the differences in cost solely attributable to physical differences in merchandise. Therefore, we calculated a weighted-average DIFMER adjustment based on the verified data reported by CEMEX’s affiliate, [CDC], and, as an adverse assumption, a twenty percent upward DIFMER adjustment to normal value (NV). Prel. Res., 61 Fed. Reg. at 51,677 (1996).

<sup>478/</sup> Southern Tier Panel Rule 57(1) brief, at 22.

<sup>479/</sup> *Id.*, at 27.

<sup>480/</sup> *Id.*, at 28.

<sup>481/</sup> *Id.*, at 30, *citing* 19 U.S.C. § 1677e(a) (stating that Commerce “shall ... use the facts otherwise available in reaching” its determination when a party fails to provide information as requested”), *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1991 (Fed. Cir. 1993) (“Congress expressly mandated that the [Department] use the best information available when faced with a  
(continued...)”)

not cooperated in providing requested information, Southern Tier believes that the Department in the Final Results “disregarded, but did not rescind, this finding.”<sup>482/</sup>

Finally, Southern Tier criticizes that Department’s alleged failure to follow its longstanding practice of basing a DIFMER adjustment on the weighted-average variable production costs at all of a respondent’s plants.<sup>483/</sup> In the Final Results, of course, the Department had based its DIFMER adjustment “on the differences between the variable costs incurred by CEMEX in producing Type I and Type II cement at its Yaqui facility.”<sup>484/</sup> Southern Tier argues that this decision was contrary to the Department’s “longstanding and consistent methodology” of basing the DIFMER adjustment on the weighted-average cost for each product at all plants producing that product, but that the Department “provided no explanation why it departed from that methodology in the fifth review.”<sup>485/</sup>

This error, in Southern Tier’s view, was compounded by additional errors in the Department’s methodology for calculating the relevant weighted-average. First, Southern Tier asserts that the Department “based the weight-averaging of the difmer on CEMEX’s and C[D]C’s relative production quantities of Type II cement, the product exported to the United

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<sup>481/</sup> (...continued)  
party who is unwilling or unable to participate in the administrative review proceedings”), and Daido Corp. v. United States, 893 F. Supp. 43, 49 and note 7 (Ct. Int’l Trade 1995) (the “statutory and regulatory language requires Commerce to use BIA under certain circumstances”).

<sup>482/</sup> Southern Tier Panel Rule 57(1) brief, at 31.

<sup>483/</sup> Id., at 33 *et seq.*

<sup>484/</sup> Fin. Res. at 17,158-59.

<sup>485/</sup> Southern Tier Panel Rule 57(1) brief, at 33.

States, rather than Type I cement, the product sold in the home market.”<sup>486/</sup> Second, Southern Tier also asserts that the Department “erroneously used only CEMEX’s production of Type II cement at the Yaqui plant in making this calculation.”<sup>487/</sup>

CEMEX

In its Panel Rule 57(2) brief, CEMEX addresses Southern Tier’s claim that CEMEX was an uncooperative respondent. It reviews the information requests contained in each of the Department’s questionnaires and avers that, in reality, “CEMEX responded to all of Commerce’s information requests and provided Commerce with sufficient factual data to make a DIFMER adjustment based upon verified information from the administrative record.”<sup>488/</sup>

CEMEX also notes that while the Department in the Preliminary Results asserted that CEMEX had “failed to isolate cost differences attributable solely to physical differences in the merchandise”<sup>489/</sup> and therefore applied BIA, in the Final Results the Department reconsidered that decision and based CEMEX’s DIFMER adjustment on the Yaqui plant’s variable cost of

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<sup>486/</sup> Id., at 36-37. Southern Tier goes to note that by statute, the DIFMER adjustment is an adjustment to the starting price used in calculating normal value, not the export price or the constructed export price. 19 U.S.C. § 1677b(a)(6)(C)(ii). Thus, the only appropriate methodology for weight-averaging the difmer adjustment for sales by CEMEX and CDC was to base it on the two companies’ relative production of the product used in calculating NV—the home market comparison product, Type I cement. By failing to base the weight-averaging methodology on the production of that product, the Department “erroneously skewed the weighted average of the difmers for CEMEX and C[D]C.” Southern Tier Panel Rule 57(1) brief, at 37.

<sup>487/</sup> Id., at 37.

<sup>488/</sup> CEMEX Panel Rule 57(2) brief, at 6.

<sup>489/</sup> Id., at 8.

manufacture (VCOM) data.<sup>490/</sup> As stated in the Final Results:

[U]pon review of the administrative record, we found evidence to support CEMEX's claim for a DIFMER adjustment based on cost differences at the Yaqui facility. Evidence on the record shows that CEMEX's Yaqui facility produces both Type I and Type II cement using a single production line. Therefore, consistent with the Department's treatment of CEMEX's affiliated party, CDC, we have allowed CEMEX a DIFMER adjustment based on the differences between the variable cost incurred by CEMEX in producing Type I and Type II cement at its Yaqui facility. Although CEMEX's claimed DIFMER adjustment was based on the weight-averaged difference in variable costs from all its facilities, the DIFMER adjustment utilized in this instant review is based on the differences in the variable cost of manufacturing incurred at a single producing facility. By relying on the differences in variable costs incurred at a single facility, we have accounted for differences in plant efficiencies if they are the source of the cost differences identified by CEMEX. Cost differences at the single facility are more likely to be due to differences in material inputs and the physical differences which result from difference production processes.

Pub. Doc. #249, 62 Fed. Reg. at 17,159

CEMEX, of course, supports this aspect of the Final Results and rejects the view that the concept of BIA or "facts available" is applicable, particularly since the Department "based its DIFMER adjustment upon information provided by CEMEX during the administrative review and subsequently verified by Commerce."<sup>491/</sup> Moreover, the Department's contrary remand results from the Second Administrative Review, based as they were on a different administrative record, are irrelevant to the Final Results in this Fifth Administrative

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<sup>490/</sup> Id., at 10.

<sup>491/</sup> Id., at 11. CEMEX goes on to argue that "[t]he DIFMER information upon which Commerce relied upon was submitted into the administrative record by CEMEX in a timely manner pursuant to a Commerce information request. Prop. Doc. #51 at Exhibit SD-6. By providing VCOM information which enabled Commerce to isolate cost differences reasonably attributable to physical differences between Type I and Type II cement, CEMEX did not 'impede' but rather assisted in the administrative review process." Id., at 12.

Review.<sup>492/</sup>

Finally, CEMEX addresses Southern Tier’s criticism that the Final Results relied on VCOM data from a single plant, arguing that the Department’s “use of plant-specific VCOM data in this case is a reasonable exercise of agency discretion and is fully supported by the administrative record.”<sup>493/</sup> Neither the statute nor the Department’s regulations limit the DIFMER adjustment to a specific methodology and, under Chevron, reviewing courts and NAFTA panels “must give deference to the agency interpretation as long as the statutory interpretation is reasonable.”<sup>494/</sup> The Department’s explanation for its methodology (see excerpt from the Final Results quoted *supra*), “fully explains Commerce’s decision to base CEMEX’s DIFMER adjustment upon Yaqui VCOM data, the only CEMEX plant from which both Type I and Type II cement was sold, rather than weighted average VCOM data from all CEMEX cement plants.”<sup>495/</sup>

### CDC

CDC addresses Southern Tier’s argument that the Department erred by calculating a weighted-average DIFMER adjustment based on CEMEX’s and CDC’s relative production quantities of Type II cement, specifically that any weighting of the DIFMER adjustment should be based on production of Type I cement because, in the statute, the DIFMER adjustment is an adjustment to the starting price used in calculating NV, not export price (EP) or constructed

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<sup>492/</sup> Id., at 13.

<sup>493/</sup> Id., at 14.

<sup>494/</sup> Id., at 14-15.

<sup>495/</sup> Id., at 15.

export price (CEP). CDC urges that under the review standards applicable to the Panel, “[t]he Panel cannot substitute an alternative calculation methodology without finding that the Department’s decision is unsupported by substantial evidence or is otherwise not in accordance with law.”<sup>496/</sup> Thus, the Panel cannot find in support of Southern Tier’s “alternative calculation method” without first establishing that the Department’s methodology is somehow unreasonable.

CDC argues that “[t]he statute is wholly silent on the issue of how the Department should calculate an average DIFMER, and it certainly cannot be read to prohibit the calculation method chosen by the Department.”<sup>497/</sup> Moreover, CDC urges that “[t]he fact that the DIFMER adjustment is made to NV rather than EP or CEP is irrelevant.”<sup>498/</sup>

#### *The Department*

In contrast to the situation existing in the Second Administrative Review, the Department in the instant review found that “CEMEX was able to demonstrate that its cost differences for Types I and II were attributable to physical differences in the merchandise.”<sup>499/</sup> As a result, the Department did calculate a DIFMER adjustment for CEMEX that was based on actual data, not facts available.

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<sup>496/</sup> CDC Panel Rule 57(2) brief, at 4.

<sup>497/</sup> Id.

<sup>498/</sup> Id. CDC goes on to note that “[t]he DIFMER calculation is based on cost information relevant to both products and markets, and the DIFMER percentage is calculated by expressing the absolute cost difference as a percentage of the total cost of manufacturing of the product sold in the U.S. market. Thus, there is no logical justification to use the product sold in the home market for the purpose of calculating a weighted-average. If anything, basing the weighted-average DIFMER on the experience of the product sold in the United States is more logical.” Id.

<sup>499/</sup> Department Panel Rule 57(2) brief, at 115.



The Department emphasizes that its reasoning in the Final Results was based on three key points:

- Ⓒ There was evidence on the record of the Fifth Administrative Review that CEMEX’s Yaqui facility produced both Type I and Type II cement using a single production line;<sup>500/</sup>
- Ⓒ This evidence effectively ruled out the possibility that differences in costs were the result of efficiencies between or among CEMEX’s various plants;
- Ⓒ CEMEX’s cost of producing Type I and Type II cements at the Yaqui facility were verified.

The Department notes that Southern Tier does not challenge its authority to make DIFMER adjustments, nor does it argue that there are no physical differences between Type I and Type II cement. Rather, Southern Tier argues that CEMEX failed to meet its burden of quantifying a DIFMER adjustment and that it failed to cooperate with the Department’s request for DIFMER information.<sup>501/</sup>

Although the Department concedes that “CEMEX unquestionably experienced difficulties in providing [it] with information that could be used to calculate a difmer adjustment,”<sup>502/</sup> which accounted for the use of facts available in the Preliminary Results, the Department emphasizes that “between the preliminary and final results of the review, the

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<sup>500/</sup> Fin. Res., 62 Fed. Reg. at 17,159

<sup>501/</sup> Id., at 116.

<sup>502/</sup> Id., at 117-118.

agency identified two pieces of information which caused it to ‘reconsider’ its treatment of CEMEX’s difmer adjustment.”<sup>503/</sup> Moreover, the Department argues that “the determination of whether a company deserves adverse facts available is a fact-intensive question to be decided by the agency on a case-by-case basis.”<sup>504/</sup> Finally, the Department emphasizes for the Panel’s purposes that the applicable standard of review is whether the agency’s actions “were based on such relevant evidence as a reasonable mind might accept as adequate to support the conclusion.... The Panel should not reweigh the record evidence, substituting its judgment for that of the investigating authority.”<sup>505/</sup>

The Department goes on to explain the specific bases of its calculation of the DIFMER adjustment, noting that it is intended to “reflect[] the net difference in the variable manufacturing costs incurred in producing the differences in physical characteristics.”<sup>506/</sup>

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<sup>503/</sup> Id., at 118. The Department identifies both questionnaire responses and verification exhibits in support of CEMEX’s claim for a DIFMER adjustment. Thus, “in pouring over the administrative record in preparation for the final results, the Department ‘discovered’ evidence which enable it to calculate a difmer adjustment that reflected the difference in cost attributable to the physical differences between Type I and Type II cement, and not efficiencies between (and among) CEMEX’s various plants.” Id. (Emphasis in original).

<sup>504/</sup> Id., at 119. The Department makes a particular point to reject Southern Tier’s argument that it was “required by law” to sanction CEMEX with adverse facts available because the agency had never rescinded its preliminary finding that CEMEX had not cooperated with the Department’s information requests. To quote the Department: “First of all, the use of adverse facts available is a factual question that is committed to the sound discretion of the Department. Section 776(b) uses the permissive term ‘may’ when providing for the use of an adverse inference by the Department. 19 U.S.C. § 1677e(b) (1995). Second, a preliminary determination is, as the name suggests, preliminary. It is subject to change and has no legal effect,” *citing* Technoimportexport v. United States, 766 F. Supp. 1169 (Ct. Int’l Trade 1991). Id., at 119.

<sup>505/</sup> Id., at 120.

<sup>506/</sup> Id., at 121. The Department states that variable manufacturing costs include the cost of materials (*e.g.*, limestone, clay, and silica), labor and variable factory overhead (*e.g.*, grinding the clinker). Id.

Expressed as a formula, the Department subtracts the variable cost to produce the product sold in the home market (*e.g.*, “VCOMH”) from the variable cost to produce the product sold in the United States (*i.e.*, “VCOMU”), and the resulting figure is divided by the total cost of manufacturing the product sold in the United States (“TOTCOMU”):<sup>507/</sup>

$$\mathbf{DIFMER\ PERCENT} = \frac{VCOMU - VCOMH}{TOTCOMU}$$

With this formula in mind, the Department rejects Southern Tier’s initial criticism that the DIFMER adjustment should have been based on the weighted-average cost for each product at all plants producing that product. In the Department’s view, since the DIFMER adjustment is expressed as a percentage, “whether total variable manufacturing costs for the compared merchandise are based upon one plant or a weighted-average cost based upon many plants, the result is still the same—a single percentage applied to NV over a given period of time.”<sup>508/</sup> The Department does concede that where the compared merchandise is produced at more than one plant, it *usually* attempts to avoid distortions by basing its DIFMER adjustment on the weighted-average cost for each product at all plants producing the product. However, where that approach, as here, would itself “engender distortions,” the Department has routinely

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<sup>507/</sup> Id., at 122. On page 121 of its Panel Rule 57(2) brief, the Department inadvertently expresses the formula incorrectly, stating it as (VCOMH minus VCOMU) divided by TOTCOMU. The correct formula is (VCOMU minus VCOMH) divided by TOTCOMU. See Prop. Doc. # 108, at 00015.

<sup>508/</sup> Department Panel Rule 57(2) brief, at 122.

deviated from that practice.<sup>509/</sup> In the instant case, the Department consciously attempted to avoid distortions occasioned by plant efficiencies by isolating the DIFMER calculation to cost differences for the comparable merchandise produced at the Yaqui plant.<sup>510/</sup>

The Department also notes, as did CDC, that the applicable statute is simply silent on the precise question at issue here—whether the Department is required to base its DIFMER adjustment on the weighted-average cost for each product at all plants producing the product. Under Chevron, “the Department’s interpretation of section 773(a)(6)(C)(ii), as permitting it to exclude products from plants that would distort its difmer adjustment, is clearly permissible because there is no indication that Congress intended the agency to follow a contrary approach, let alone the approach advocated by [Southern Tier].”<sup>511/</sup>

Finally, the Department addresses Southern Tier’s additional criticisms of the DIFMER calculation, first, that the average of CEMEX’s and CDC’s DIFMER adjustments should have been weighted based on production of Type I cement sold in Mexico, not their relative production quantities for Type II sold in the United States, and, second, that the agency should not have excluded CEMEX’s production at a certain plant from the calculation. The Department argues that both decisions were reasonable and appropriate under the circumstances.<sup>512/</sup>

## **2. Discussion and Decision of the Panel**

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<sup>509/</sup> Id.

<sup>510/</sup> Id., at 123.

<sup>511/</sup> Id.

<sup>512/</sup> Id., at 124-25.

The Panel has carefully considered Southern Tier’s arguments on the DIFMER issue, but these have not persuaded us that the positions taken by the Department in the Final Results were unsupported by substantial evidence on the record or were otherwise not in accordance with law. As to the application of BIA or “facts available,” the Panel agrees with the Department that the decision to resort to facts available, in the face of an apparently unresponsive respondent, lies largely within the sound discretion of the agency. This view appears to be grounded in express Congressional intent:

**19 U.S.C. § 1677e(b) Adverse inferences**

If the administering authority ... finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority ..., the administering authority ..., in reaching the applicable determination under this subtitle, *may* use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available....

(Emphasis added)

Although the record suggests, and the Department indicates, that CEMEX did experience “difficulties” in furnishing information that could be used for purposes of a DIFMER calculation, such “difficulties” in fact forming the basis for the Department’s use of facts available in the Preliminary Results, the Panel can hardly fault the Department for continuing to review the record in an effort to calculate the dumping margin as accurately as possible,<sup>513/</sup> and ultimately to focus on verified information in the record, supplied by CEMEX, that allowed the Department to calculate a DIFMER adjustment within the standard of accuracy required by the statute. Indeed, the Panel commends the Department for this effort and rejects the notion that a decision made for the purpose of the Preliminary Results must

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<sup>513/</sup> See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (noting “the basic purpose of the [antidumping] statute: determining current margins as accurately as possible.”).

necessarily be repeated in the Final Results.

The Panel emphasizes the extremely broad discretion granted by the courts to the Department both with respect to the issue whether the Department properly *resorted* to BIA or facts available and the separate issue as to the *selection* of an appropriate BIA rate.<sup>514/</sup> The Panel, in fact, is aware of no case wherein the court has held that the Department's *failure* to invoke BIA or facts available was a violation of the statute and, on the record before us, the Panel is disinclined to take such a position in this case.

Finally, the Panel has also considered Southern Tier's argument that the Department should have based its DIFMER adjustment on the weighted-average variable production cost at all of CEMEX's plants, as opposed to isolating the variable production costs of the Yaqui facility. The Panel is unable to say that Southern Tier's position is unreasonable; however, we are also unable to say that the Department's position, which appears quite logical and was very adequately explained in the Final Results, is unreasonable. Under the applicable standard of review, we therefore defer to the Department's expertise and discretion in this aspect of the DIFMER calculation. On a similar basis, we also reject the two additional errors cited by the Southern Tier allegedly committed by the Department in its DIFMER calculation.

In sum, the Department's DIFMER calculation for CEMEX is upheld as supported by substantial evidence on the record and as otherwise in accordance with law. However, a majority of this Panel (excluding Panelist Endsley) has elsewhere determined that the Department committed reversible error in including bagged Type I cement along with bulk

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<sup>514/</sup> See the extensive discussion In the Matter of Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA-9-1904-01 (Opinion May 24, 1991), p. 25 *et seq.*

Type I cement in the “foreign like product” analysis. Consistent with this determination, the indicated Panel majority instructs that this matter be remanded to the Department for a recalculation of CEMEX’s DIFMER allowance consistent with the majority’s “bulk vs. bagged” finding.

#### **IV.3.b. FREIGHT ADJUSTMENT ON BULK CEMENT**

##### **WHETHER THE DEPARTMENT’S ALLOWANCE OF A FREIGHT ADJUSTMENT ON CEMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS OTHERWISE IN ACCORDANCE WITH LAW.**

As the Parties have explained, the cost of cement is largely a function of transporting it from the manufacturing plant to the ultimate customer or a distributor. Thus, freight expenses are a significant consideration in the Department reviews of the dumping order on cement and clinker from Mexico. In the Fifth Administrative Review, the Department considered whether to grant CEMEX a freight adjustment for sales of Type I cement sold in bulk.

Under 19 U.S.C. § 1677b(a)(6)(B)(ii)(1995), the Department was required to adjust NV to account for “expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser.” The burden is on the foreign producer to demonstrate an entitlement to a freight adjustment.

##### **1. Positions of the Department and the Parties**

For the Fifth Administrative Review, the Department granted CEMEX a freight expense adjustment for Type I bulk sales, finding that: (1) reported expenses provided by CEMEX were in accordance with the Department’s methodology; (2) reported expenses provided were consistent with CEMEX’s accounting practices; (3) the expenses reported by

CEMEX were substantiated at verification; (4) the expenses were provided by CEMEX on a company, cement type, and presentation specific basis; and (5) CEMEX tended to understate the per-ton freight amounts deducted from NV.<sup>515/</sup>

The Department fundamentally disagrees with Southern Tier that freight expenses must only be reported on a transaction-specific basis. It explains that allocation techniques used by respondents who do not maintain transaction-specific freight expense records do not necessarily create distorted home market prices.<sup>516/</sup> Moreover, the Department argues, reviewing administrative precedent, that different producers in different countries incur freight charges on different bases and frequently on more than one basis.<sup>517/</sup> In addition, the Department claims that under 19 U.S.C. § 1677m(l), the law specifies when the Department must verify information, not how the Department must conduct the verification.<sup>518/</sup>

According to Southern Tier, CEMEX did not report its home market freight expenses on a transaction-specific, customer-specific, or point-of-sale-specific basis. In addition, Southern Tier claim's that CEMEX did not even report freight expenses on a company-specific basis, as Commerce found for the Fifth Administrative Review.<sup>519/</sup> Moreover, Southern Tier argues that CEMEX's own submissions contradict CEMEX's claims that it reported average

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<sup>515/</sup> 62 Fed. Reg. 17,163.

<sup>516/</sup> Department Panel Rule 57(1) brief, at 132.

<sup>517/</sup> *Id.*, [citation omitted].

<sup>518/</sup> *Id.*, at 133.

<sup>519/</sup> Southern Tier Panel Rule 57(1) brief, at 67.



freight expenses by company, specific to the type of cement sold.<sup>520/</sup> Further, Southern Tier claims, CEMEX failed to demonstrate that freight provided by affiliated companies was at arm's length prices.<sup>521/</sup> In addition, Southern Tier argues that on all NV issues raised by Southern Tier, the Department acted contrary to its own practice and precedent.<sup>522/</sup> Basically Southern Tier concludes that "because CEMEX's average freight cost methodology did not account for differences between sales in terms of distance and modes of transportation, it was necessarily distortive of the transaction specific expense."<sup>523/</sup> Southern Tier also argues that CEMEX's reported data included expenses from cement other than Type I.<sup>524/</sup>

CEMEX disagrees with Southern Tier that because sales of Type I bulk cement were not reported on a transaction-specific basis that they were distortive.<sup>525/</sup> CEMEX argues that it provided information to the Department on the most specific basis, i.e., company-specific, that it could under the circumstances.<sup>526/</sup> In fact, according to CEMEX, its reported freight factors actually understated CEMEX's freight expenses.<sup>527/</sup>

## **2. Discussion and Decision of the Panel**

The Department has considerable discretion to determine whether information

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<sup>520/</sup> Id.

<sup>521/</sup> Id., at 71.

<sup>522/</sup> Dec. 16, 1998 Hearing Tran. at 7.

<sup>523/</sup> Dec. 16 Hearing Tran. at 26.

<sup>524/</sup> Dec. 16 Hearing Tran. at 26-27.

<sup>525/</sup> CEMEX Panel Rule 57(2) brief at 23, and 29-35.

<sup>526/</sup> Id., at 24.

<sup>527/</sup> Id., at 25.

submitted at the Department's request is adequate because of its particular expertise in administering the antidumping law. *See, e.g., SKW Stickstoffwerke Piesteritz GmbH v. United States*, 989 F. Supp. 253, 256 (Ct. Int'l Trade 1997) *quoting* *GMN Georg Muller Nurnberg AG v. United States*, 763 F. Supp. 607, 611 (Ct. Int'l Trade 1991). In permitting the bulk freight deduction for the Fifth Administrative Review, the Department specifically found that: (1) reported expenses provided are in accordance with the Department's methodology; (2) reported expenses provided are consistent with CEMEX's accounting practices; (3) the Department substantiated the expenses at verification (*see* July 22, 1996 Verification Report); (4) expenses were provided on a company, cement type, and presentation specific basis; and (5) CEMEX tends to understate the per ton freight amounts deducted from normal value.<sup>528/</sup>

Southern Tier argues that a freight deduction is permitted only if the expenses are reported based on the actual, transaction-specific expense or on an allocation methodology that does not distort the transaction-specific amount.<sup>529/</sup> However, Southern Tier did not provide sufficient evidence in the Panel's opinion to defeat the Department's finding that CEMEX's data was not significantly distortive.<sup>530/</sup> Inconsistent conclusions from the record may fairly be drawn without finding that the Department's determination was not supported by substantial evidence.<sup>531/</sup> Moreover, the Department has specifically recognized that allocation techniques used by respondents who do not maintain transaction-specific freight expenses do not

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<sup>528/</sup> 62 Fed. Reg. 17,163.

<sup>529/</sup> Southern Tier Panel Rule 57(1) brief at 61.

<sup>530/</sup> *See* excerpt of Commerce's Verification Report, Department Panel Rule 57(1) brief, at 129.

<sup>531/</sup> *See, e.g., Consolo v. Federal Maritime Comm.*, 383 U.S. 607, 619-20 (1966).

necessarily lead to a distortion of home market prices.<sup>532/</sup> For CEMEX's claimed freight adjustment on bulk Type I cement, the Panel cannot say that the Department's determination should be reversed or remanded under the strict standard of review that applies to the Panel's consideration of this issue. Finally, the Panel recognizes that Southern Tier urges our consideration of the final results of the Second Administrative Review in reaching our decision on this issue for the Fifth Administrative Review.<sup>533/</sup> Such consideration, however, would be inappropriate. Each review is based upon independent, albeit sometimes similar, record.

#### **IV.3.c. POST SALE REBATE ADJUSTMENTS**

##### **WHETHER THE DEPARTMENT'S ALLOWANCE OF A POST-SALE REBATE ADJUSTMENT AND CERTAIN "OTHER" ADJUSTMENTS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AND WAS OTHERWISE IN ACCORDANCE WITH LAW**

Rebates and discounts are treated by the Department as an adjustment to price, pursuant to 19 U.S.C §§ 1677a and 1677b (1995), and not as a circumstance of sale adjustment. SKF USA, Inc. v. United States, 19 CIT 654, 662 (1995) and Antifriction Bearings (Other than Tampered Roller Bearings) from the Federal Republic of Germany, 54 Fed. Reg. 18992, 19061 (1989) (final LTFV determination). During the Fifth Administrative Review the Department considered requests from CDC for claimed "other adjustments" and from CEMEX for post sale rebates.

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<sup>532/</sup> Department Panel Rule 57(1) brief, at 132.

<sup>533/</sup> Southern Tier Panel Rule 57(1) brief, at 91, note 78.

#### **IV.3.c.i. CDC's Claimed "Other Adjustments"**

##### **WHETHER THE DEPARTMENT'S ADJUSTMENT TO NV FOR "OTHER" ADJUSTMENTS CLAIMED BY CDC WAS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THERECORD AND WAS OTHERWISE IN ACCORDANCE WITH LAW**

The Department allowed the "other adjustments" claimed by CDC during the Fifth Administrative Review because, according to the Department, they were "reported in accordance with Departmental methodology and substantiated at verification."<sup>534/</sup>

#### **1. Positions of the Department and the Parties**

The Department explains that initially in an administrative review it determines the actual price charged for the comparison merchandise by the respondent. The actual amount charged includes any amounts discounted or rebated to the respondent's customers. To account for these "post-sale price adjustments," the Department treats them as a direct deduction to the price charged to the customer.<sup>535/</sup> Contrary to Southern Tier's suggestion, the Department argues, it was able to verify CDC's post sale adjustments from questionnaire responses submitted on January 30, 1996 and March 15, 1996.<sup>536/</sup> "As part of this process, the Department did not identify any evidence which would suggest that CDC's [post sale price adjustments] were unusual, artificial, or intended to manipulate the Department's dumping margins on particular sales."<sup>537/</sup>

According to Southern Tier, the Department's uniform practice is to disallow a rebate

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<sup>534/</sup> 62 Fed. Reg. 17,164.

<sup>535/</sup> Department Panel Rule 57(1) brief, at 146.

<sup>536/</sup> *Id.*, at 147

<sup>537/</sup> *Id.*

claim unless there is evidence that respondent's customers were aware prior to the sale of: (1) the conditions to be fulfilled to qualify for the rebate, and (2) the amount of the rebate.<sup>538/</sup> Southern Tier argues that CDC failed to demonstrate on the record that its customers knew prior to the sale that they were entitled to a rebate.<sup>539/</sup> In addition, Southern Tier claims that CDC must establish that the rebate was granted pursuant to its standard business practice or under a pre-established program.<sup>540/</sup> Further, Southern Tier argues that the Department, while acknowledging Southern Tier's arguments in the final results, did not even address the issue of customer awareness in its decision to allow CDC's claimed "other adjustments."<sup>541/</sup> Therefore, Southern Tier requests that the panel remand with instructions that the Department deny CDC's claimed "other adjustments" and recalculate the dumping margin or alternatively that the Department be forced to explain its conclusion.

CDC disputes Southern Tier's argument that failure to require CDC to provide documentary evidence of a policy to grant post-sale price adjustments would allow CDC to manipulate the dumping margins.<sup>542/</sup> According to CDC, the Department in Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France et al., 63 Fed. Reg. 33,320, 33,327-28 (June 18, 1998) rejected a similar argument, "finding that there was no evidence on the record that either company [involved in that case] had manipulated its

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<sup>538/</sup> Southern Tier Panel Rule 57(1) brief, at 40.

<sup>539/</sup> Id., at 41.

<sup>540/</sup> Id., at 40.

<sup>541/</sup> Id., at 41.

<sup>542/</sup> CDC Panel Rule 57(2) brief, at 7(citing Southern Tier Panel Rule 57(1) brief, at 38- 54).

adjustments in order to lower or eliminate their dumping margins.”<sup>543/</sup>

## **2. Discussion and Decision of the Panel**

The Department argues that it “had no difficulty in verifying the legitimacy and accuracy of CDC’s [post sale price adjustments because] it provided the details on three [post sale price adjustments] in questionnaire responses submitted on January 30, 1996 and March 15, 1996.”<sup>544/</sup> The Panel carefully reviewed the Department’s verification efforts in this area, which involve facts of a proprietary nature. Significantly, the Panel notes that the Department found that CDC was “able to allocate these [post sale price adjustments] on a customer specific basis for the month in which the sale occurred.”<sup>545/</sup> While the Department’s Federal Register exposition of its determination on this issue is unquestionably less than ideal, given the record evidence the Panel will not disturb the Department’s conclusion.

### **IV.C.3.ii. CEMEX'S POST-SALE REBATES**

#### **WHETHER THE DEPARTMENT'S ADJUSTMENT TO NV FOR CEMEX'S REBATES WAS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AND WAS OTHERWISE IN ACCORDANCE WITH LAW**

The Department granted CEMEX its requested rebate adjustments for the Fifth Administrative Review.<sup>546/</sup> In granting these adjustments, the Department said: “[w]hile the

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<sup>543/</sup> Id., at 8.

<sup>544/</sup> Department Panel Rule 57(1) brief, at 147.

<sup>545/</sup> 62 Fed. Reg. 17,164.

<sup>546/</sup> 62 Fed. Reg. 17,164.

Department prefers that discounts, rebates and other price adjustments be reported on a transaction-specific basis, the Department has long recognized that some price adjustments are not granted to customers on that basis, and thus cannot be reported on that basis.”<sup>547/</sup> The Department accepts rebates if a respondent “in reporting these adjustments, acted to the best of its ability and [the Department determines] that [the respondent’s] reporting methodology was not unreasonably distortive.”<sup>548/</sup>

### **1. Arguments of the Department and the Parties**

The Department essentially briefed this issue to apply both to CDC’s and CEMEX’s post sale adjustments.<sup>549/</sup> With respect to CEMEX specifically, the Department argues that CEMEX provided “ample documentation” of its post sale price adjustments, which the Department was able to verify as to “accuracy and completeness.”<sup>550/</sup>

Southern Tier argues that the Department erred in granting CEMEX’s claimed adjustment for rebates on home market sales for essentially the same reasons that the Department erred with respect to the “other adjustments” claimed by CDC.<sup>551/</sup> In addition, Southern Tier claims that CEMEX failed to provide information requested by the Department sufficient to justify the rebates and that CEMEX had the burden to provide an agreement or other documentary evidence to demonstrate that its customers were aware at the time of the sale

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<sup>547/</sup> 62 Fed. Reg. 17,164.

<sup>548/</sup> 62 Fed. Reg. 17,164.

<sup>549/</sup> Department Panel Rule 57(1) brief, at 146-153.

<sup>550/</sup> *Id.*, at 148.

<sup>551/</sup> Southern Tier Panel Rule 57(1) brief, at 55.

of: (1) the conditions to be fulfilled to qualify for the rebate; and (2) the amount of the rebate.<sup>552/</sup>

The Department asserts that:

the record demonstrates that all of CEMEX's rebates were negotiated on a customer-specific basis. As a result, its customers were fully aware of the discounts for which they were eligible at the time they purchased cement from CEMEX. Moreover, the vast majority of CEMEX's [post sale price adjustments] were made on an individual-transaction basis after the issuance of the invoice.<sup>553/</sup>

In short, the Department argues that "both companies reported their post-sale price adjustments on as specific a basis as their books and records would allow."<sup>554/</sup>

Contrary to Southern Tier's assertion, CEMEX argues, the Department has a long-standing practice of allowing a claimed rebate without documentary evidence that the customer knew of the rebate at the time of sale, provided the rebate is consistent with the company's normal business practices and past dealings with its customers.<sup>555/</sup> The Department noted in Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 56 Fed. Reg. 31,692 (1991), that "such discounts or rebates should be part of a respondent's standard business practice and not intended to avoid potential antidumping duty liability."<sup>556/</sup> According to CEMEX, the company periodically grants credit

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<sup>552/</sup> Id., at 56.

<sup>553/</sup> Department Panel Rule 57(1) brief, at 148.

<sup>554/</sup> Dec. 16 Hearing Tran. at 76.

<sup>555/</sup> CEMEX Panel Rule 57(2) brief, at 17; see Certain Corrosion-Resistant Carbon Steel Flat Products from Japan, 63 Fed. Reg. 47,465 and 47,468 (1998).

<sup>556/</sup> The Departmental policy behind Commerce's preference for predetermined rebate terms "is to  
(continued...)



to customers after the sale has occurred and “rebates are granted over specific invoices according to the same criteria followed by discounts.”<sup>557/</sup> CEMEX also paid rebates by issuing credit memos.<sup>558/</sup> “As was the case with respect to discounts reported . . . , rebates were tied to, and reported on, an invoice specific basis. Rebates were granted for a variety of reasons, including price adjustments made after issuance of the invoice.”<sup>559/</sup>

Finally, CEMEX rejects Southern Tier’s claim that the Department surprised Southern Tier by citing a recently issued notice as support for the Department’s treatment of CEMEX’s rebates.<sup>560/</sup> CEMEX argues that “Commerce normally cites to the most recently published notice for a given proposition. This is simply to evidence that the relevant proposition is still valid.”<sup>561/</sup>

## **2. Discussion and Decision of the Panel**

The Department clearly prefers that, to avoid the distortion attendant to averaging prices, companies report adjustments on a transaction-specific basis. Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From Japan, 62 Fed. Reg. 11,825, 11,837 (1997);

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<sup>556/</sup> (...continued)  
prevent respondents, after they realize that their sales will be subject to administrative review, from granting rebates in order to lower the dumping margins on particular sales.” CEMEX Panel Rule 57(1) brief, at 18 (citing Antifriction Bearings(Other Than Tapered Roller Bearings) and Parts Thereof from France, et al., 60 Fed. Reg. 10,900, 10,930 (1995).

<sup>557/</sup> CEMEX Panel Rule 57(1) brief, at 18.

<sup>558/</sup> Id.

<sup>559/</sup> Id., at 20.

<sup>560/</sup> Id.

<sup>561/</sup> Id., at 23.

Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada, 63 Fed. Reg. 12,725, 12,731 (1998) (noting that the Department’s past policy “only permitted adjustments if they were reported in a transaction-specific basis or granted on a fixed and constant percentage of sales on all transactions which were reported”); 62 Fed. Reg. 17,164. However, where adjustments, such as rebates, are part of respondent’s normal business practice, the Department may permit them on a customer-specific basis, where the risk of distortion is small. Certain Corrosion-Resistant Carbon Steel Flat Products from Japan, 63 Fed. Reg. 47,465, 47,468 (1998); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et al., 62 Fed. Reg. 2081 (1997).

In this case, the Department explained that “the amount of the ‘allocation’ is limited to a few specific transactions, all to the same customer, and typically within a very limited period of time. Thus the danger of unreasonable distortions . . . is extremely limited . . .”<sup>562/</sup> Moreover, the Department found that CEMEX’s method of reporting its rebates is reasonable and should be allowed as a direct adjustment.<sup>563/</sup> Based on the substantial discretion the Department has to determine whether post sale price adjustments should be allowed and the record in this matter, the Panel found no reason to disturb the Department’s determination with respect to CEMEX’s post sale rebates.

#### **IV.3.d. CREDIT EXPENSES**

#### **WHETHER THE DEPARTMENT’S ALLOWANCE TO CEMEX AND**

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<sup>562/</sup> 62 Fed. Reg. 17,164.

<sup>563/</sup> 62 Fed. Reg. 17,164.

**CDC OF A CLAIMED CREDIT EXPENSE ADJUSTMENT IS  
SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AND  
IS OTHERWISE IN ACCORDANCE WITH LAW.**

Circumstances of sale (“COS”) adjustments are common. Under 19 U.S.C. §1677b(a)(6)(C)(iii), the Department may adjust NV for “other differences in the circumstances of sale” than those accounted for specifically by other sections of the statute. COS adjustments are not specifically defined by the statute. Thus, the Department has broad latitude to determine what constitutes a COS.<sup>564/</sup> In addition, “[The Department] has tremendous discretion to decide whether or not to make a COS adjustment. Courts are strongly inclined to rely on [the Department’s] expertise in deciding whether there is a causal nexus between the difference between NV and EP or CEP, on the one hand, and differences in the COS between the home and U.S. markets, on the other hand.”<sup>565/</sup>

**1. Arguments of the Department and the Parties**

The Department allowed CDC and CEMEX their claimed COS adjustments for credit expenses on home market sales. The Department explained that:

[F]or the purpose of calculating imputed credit costs, it is our practice to calculate the number of credit days based on the number of days between the date of shipment and the date of payment. If actual payment dates are not readily accessible, we normally allow respondents to base the number of credit days on the average age of accounts receivables. . . . Based on our findings at verification, the Department determined that respondent’s use of the average age of accounts receivables to

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<sup>564/</sup> Commerce’s regulations specifically identify credit as an expense the Department will “normally” treat as a COS. 19 C.F.R. § 353.56(a)(2)(1995). Sawhill Tubular Div. Cyclops Corp. v. United States, 666 F. Supp. 1550, 1555 (Ct Int’l Trade 1987).

<sup>565/</sup> Raj Bhala and Kevin Kennedy, *WORLD TRADE LAW, THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW* (1998) (“WTL”) at 759.

calculate credit expenses is reasonable.<sup>566/</sup>

While Southern Tier challenges the Department's use of CEMEX's accounts receivable to calculate the number of days payment was outstanding, the Department rejects their suggestion that it acted contrary to the Department's and court precedent.<sup>567/</sup> In particular, the Department disputes Southern Tier's interpretation of NSK Ltd v. United States, 896 F. Supp. 1263, 1274-76 (Ct Int'l Trade 1995).<sup>568/</sup> According to the Department:

[T]he court in the NSK case did not hold that the methodology employed by the Department in the instant case is "legally improper." It merely held that given the facts in that case, is [sic] was permissible for the Department to reject credit expense data that was based upon the respondent's 'ledgers for accounts and notes receivables.' . . . It strains credulity to suggest that the court in NSK defined for all time the scope of [the Department's] discretion when it issued its holding based on the narrow facts of that case.<sup>569/</sup>

Moreover, the Department asserts that its practice for the Fifth Administrative Review comports with the Department's prior practice. Normally, the Department calculates the number of credit days based upon transaction-specific data, i.e., payment date minus shipment date.<sup>570/</sup> "However, where that data is not readily accessible, the Department has exercised its discretion an[d] accepted the average age of accounts receivable, if it had reason to believe that

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<sup>566/</sup> 62 Fed. Reg. 17,163.

<sup>567/</sup> Department Panel Rule 57(1) brief, at 155 (citing Southern Tier Panel Rule 57(1) brief, at 79-86).

<sup>568/</sup> Id.

<sup>569/</sup> Id., at 155-156.

<sup>570/</sup> Id., at 156.

methodology would not lead to unreasonable distortions.”<sup>571/</sup>

According to the Department, for the Fifth Administrative Review, CEMEX reported actual payment dates when they were available. For transactions without payment dates, CEMEX and CDC reported average number of days outstanding based upon data in their home market accounts receivable. Both companies, says the Department, provided worksheets, explaining their methodologies for calculating average number of days outstanding. Southern Tier argues that this data is inherently distortive because it is based on CEMEX’s total sales and total accounts receivable.<sup>572/</sup> “What [Petitioners] ignore, [according to the Department] is that this data is remarkably similar to the average credit days reported on a transaction-specific basis in CEMEX’s home market sales file for Type I cement sold in bulk and bag . . . .”<sup>573/</sup>

According to Southern Tier, the Department normally requires that home market credit expenses be reported on a transaction-specific basis.<sup>574/</sup> Southern Tier admits that sometimes the Department has allowed the use of a customer-specific allocation methodology for home market credit expenses, but only, they claim, in exceptional cases.<sup>575/</sup> Southern Tier argues that

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<sup>571/</sup> Id. For example, the Department argues, in Television Receivers from the Republic of Korea, the Department determined that respondent’s use of the “average accounts receivable turnover ratio” was a “sufficiently accurate measurement” of imputed credit expense. 56 Fed. Reg. 12,701, 12,708 (1991). In addition, the Department notes, in Fresh Cut Flowers from Mexico, Commerce found that “respondents’ methodologies for calculating the average age of accounts receivable were reasonable.” 61 Fed. Reg. 6,812, 6,813 (1996). Department Panel Rule 57(1) brief, at 156.

<sup>572/</sup> Id., at 157 (citing Southern Tier Panel Rule 57(1) brief, at 82-83).

<sup>573/</sup> Id.

<sup>574/</sup> Southern Tier Panel Rule 57(1) brief, at 79.

<sup>575/</sup> Id., at 81.

CEMEX's and CDC's reporting of credit expenses in the Fifth Review did not conform to the Department's requirements, because the reporting was not based on either the transaction-specific or the customer-specific credit expense.<sup>576/</sup> Southern Tier alleges that both CEMEX and CDC used total accounts receivable and total sales for all types of cement and for all customers and thereby distorted the actual credit days outstanding for the individual sales compared. Moreover, they claim this caused "significant inaccuracies" in the calculation of credit expenses.<sup>577/</sup> In addition, Southern Tier argues, the Department acted improperly by permitting an expense amount to be calculated using expenses on merchandise outside the scope of the antidumping order, i.e., merchandise (Type II cement) the Department concluded was outside the ordinary course of trade.<sup>578/</sup>

Southern Tier cites NSK, 896 F. Supp. at 1276, for the proposition that it is legally improper for the Department to base a COS adjustment for home market credit expenses on the aggregate expense of extending credit on all of its home market sales, which may vary greatly from the actual, transaction-specific, expense.<sup>579/</sup> Thus, concludes Southern Tier, the "practice" cited by the Department in the final results for the Fifth Review is not in accordance with law.<sup>580/</sup>

According to CEMEX, the company "calculated home market credit expenses on a

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<sup>576/</sup> Id.

<sup>577/</sup> Id.

<sup>578/</sup> Id., at 84.

<sup>579/</sup> Id., at 84.

<sup>580/</sup> Id.

transaction-by-transaction basis by multiplying the total sales price (net discounts and rebates) of each transaction by the calculated number of days payment was outstanding (the “credit period”) and by CEMEX’s weighted average daily short term interest rate calculated for the period of review.”<sup>581/</sup> CEMEX claims that the length of the credit period for each transaction was calculated by either: (1) where the date of shipment and the date of payment data was available for that invoice, the credit period was calculated on a transaction specific basis; (2) in cases where transaction specific date of shipment and/or date of payment data was not available, CEMEX used as the credit period an average days outstanding based upon all non-governmental sales and non-affiliated party sales of all cement products.<sup>582/</sup>

CEMEX notes that the Department verified both the accuracy of CEMEX’s short-term interest rate and its calculation of the average days outstanding.<sup>583/</sup> The Department also verified that CEMEX could not calculate this figure based on specific cement types because the accounts receivable ledgers were kept by customer and not cement type.<sup>584/</sup> Based on the Department’s verifications and findings, CEMEX argues, the Department properly granted its

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<sup>581/</sup> CEMEX Panel Rule 57(1) brief, at 35.

<sup>582/</sup> *Id.*, at 35-36.

<sup>583/</sup> The Department found:

When there was no pay date available in the system, they derived an average number of days outstanding to use as a substitute. Accounts receivable is taken from the commercial system and used to create a report that states total accounts receivable by region. The six regions are added up and the total sales and accounts receivable are used to calculate turnover for the entire CEMEX group. . .

*Id.*, at 36-37.

<sup>584/</sup> *Id.*, at 37.

claimed credit expenses for transactions utilizing transaction-specific credit periods and for transactions utilizing average credit periods.<sup>585/</sup>

CDC does not dispute Southern Tier’s suggestion that the Department prefers to calculate credit on a transaction-specific or customer-specific basis.<sup>586/</sup> However, CDC believes that the Department has discretion to grant the COS requested.<sup>587/</sup> According to CDC, the Department recognized this flexibility when it decided Color Television Receivers from the Republic of Korea, 62 FR 17163 (“[i]f actual payment dates are not readily accessible, we normally allow respondents to base the number of credit days on the average age of accounts receivables.”)<sup>588/</sup>

In addition, CDC argues that NSK stands for the proposition that the Department has discretion, and not for Southern Tier’s view that the Department acted in the Fifth Administrative Review contrary to the Department’s past practice.<sup>589/</sup> Moreover, CDC notes that it did not participate in the early stage of the original investigation, like the NSK respondent, and therefore was not on notice that its methodology was not preferred by the Department.<sup>590/</sup>

## **2. Discussion and Decision of the Panel**

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<sup>585/</sup> Id.

<sup>586/</sup> CDC Panel Rule 57(1) brief, at 13.

<sup>587/</sup> Id.

<sup>588/</sup> Id., at 14.

<sup>589/</sup> Id.

<sup>590/</sup> Id., at 15.



COS adjustments are common, but the statute, 19 U.S.C. §1677b(a)(6)(C)(iii), provides no specific guidance to the Department regarding COS adjustments for credit expenses. While transaction-specific reporting is clearly preferred, nothing precludes the Department from accepting the information CDC and CEMEX provided during the Fifth Administrative Review and granting a COS for the respective companies' credit expenses. The Department has broad discretion to grant COS adjustments and courts are strongly inclined to rely on the Department's expertise in this area. The Panel does not believe that NSK Ltd v. United States, 896 F. Supp. 1263, 1274-76 (Ct Int'l Trade 1995) changes the Department's basic discretion regarding COS adjustments.

Significantly, the Department explains that both CEMEX and CDC provided the Department with acceptable worksheets explaining their methodologies for calculating average number of days outstanding.<sup>591/</sup> Southern Tier argues that this data is inherently distortive because it is based on CEMEX's total sales and total accounts receivable.<sup>592/</sup> According to the Department, however, CEMEX's data is remarkably similar to the average credit days reported on a transaction-specific basis in CEMEX's home market sales file for Type I cement sold in bulk.<sup>593/</sup>

The COS adjustments requested by CEMEX and CDC were "established to the satisfaction of the administering authority." 19 U.S.C. §1677(a)(6)(C) (1995). The Panel will not disturb the Department's determination regarding credit expenses based on the record for

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<sup>591/</sup> Department Panel Rule 57(2) brief, at 157.

<sup>592/</sup> Southern Tier Panel Rule 57(1) brief, at 82-83.

<sup>593/</sup> Department Panel Rule 57(2) brief, at 157.

the Fifth Administrative Review.

#### **IV.E. CONSTRUCTED EXPORT PRICE (CEP) CLAIMS BY SOUTHERN TIER**

##### **WHETHER THE DEPARTMENT'S REFUSAL TO DEDUCT INDIRECT SELLING EXPENSES AND INVENTORY CARRYING COSTS INCURRED IN MEXICO ON U.S. SALES FOR PURPOSE OF CALCULATING CONSTRUCTED EXPORT PRICE (CEP) WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND OTHERWISE IN ACCORDANCE WITH LAW**

#### **1. Arguments of the Participants**

##### *Southern Tier*

Southern Tier notes that in the Final Results certain *indirect selling expenses* incurred in Mexico [reported in the field DINDIRSU] and *inventory carrying costs* [reported in the field DINVCARU] were not included in the Department's Constructed Export Price (CEP) calculation pursuant to 19 U.S.C. § 1677a(d)(1)(D).<sup>594/</sup> The Department explained in the Final Results that the various Section 772(d) adjustments are "intended to provide for the deduction

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<sup>594/</sup> Southern Tier Panel Rule 57(1) brief, at 86 *et seq.* The Panel notes that in calculating a dumping margin, the Department compares United States price to the normal value of the subject merchandise. United States price is calculated using either an export price ("EP") methodology or a constructed export price ("CEP") methodology. Typically, the Department relies on EP when the foreign exporter sells directly to an unrelated U.S. purchaser. CEP is used when the foreign exporter makes sales through a related party in the United States. When U.S. price is based on CEP, the Department bases its calculations on the price charged to the first *unaffiliated* purchaser, which is the "starting price." The Department then makes certain adjustments to the starting price, including several that are not required for EP sales. These are set out in 19 U.S.C. § 1677a(d). According to the SAA, "constructed export price is ... calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers." H.R. Doc. No. 103-316 at 823 (1994).

of expenses associated with economic activities occurring in the United States"<sup>595/</sup> and that it is its current practice to deduct only indirect selling expenses incurred in Mexico in connection with sales to the *unaffiliated purchaser* in the United States from the CEP calculation, and not to deduct indirect selling expenses incurred in Mexico on the sale to the *affiliated purchaser* from the CEP calculation.<sup>596/</sup> Since the DINDIRSU and DINVCARU data represented Mexican-incurred expenses related to the sale to the *affiliated purchaser* in the United States (*i.e.*, the importer), no deduction was made on this ground to the CEP calculation.<sup>597/</sup>

Southern Tier concedes that this action was consistent with the Department's current practice and regulations<sup>598/</sup> but argues that it is nevertheless contrary to the "plain language" of the applicable provision of the antidumping statute:

**19 U.S.C. § 1677a. Export price and constructed export price**

**(d) Additional adjustments to constructed export price**

For purposes of this section, the price used to establish constructed

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<sup>595/</sup> Fin. Res., at 17168, *citing Certain Pasta from Italy*, 61 Fed. Reg. 30326, 30352 (1996).

<sup>596/</sup> *Id.* The Department stated: "The CEP is, by definition, the price obtained after removing from the first resale to an independent U.S. customer, profit and the activities for which expenses are deducted under section 772(d). Section 772(d) defines expenses to be deducted from CEP as those expenses representing activities undertaken by the affiliated importer to make the sale to the unaffiliated customer. As such they tend to occur after the transaction for which export price is constructed and the Department has properly deducted these expenses in calculating the CEP for comparison purposes. In the instant review, we disagree with petitioners. The Department does not deduct indirect expenses incurred in selling to the affiliated U.S. importer under section 772(d) of the Act. [Citation omitted] As stated clearly in the SAA, section 772(d) of the Act is intended to provide for the deduction of expenses associated with economic activities occurring in the United States. *See SAA* at 823. The Department, upon analysis, has determined that the indirect selling expenses involved in this case relate solely to the sale to the affiliated importer."

<sup>597/</sup> *Id.*

<sup>598/</sup> *See* 19 C.F.R. § 351.402(b)

export price shall also be reduced by—

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporters, or the affiliated seller in the United States, in selling the subject merchandise...—

(A) commissions for selling the subject merchandise in the United States;

(B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

(C) any selling expenses that the seller pays on behalf of the purchaser; and

(D) any selling expenses not deducted under subparagraph (A), (B), or (C);

(2) the cost of any further manufacture or assembly (including additional material and labor),...; and

(3) the profit allocated to the expenses described in paragraphs (1) and (2).  
(Emphasis added).

Southern Tier initially observes that the expenses deducted under subparagraphs (A), (B), and (C) of the above statute concern commissions, direct selling expenses, and expenses assumed by the seller on behalf of the purchaser, and that subparagraph (D) in effect concerns *indirect selling expenses* (those that are directly related to "the sale of the subject merchandise, do not qualify as assumptions, and are not commissions.")<sup>599/</sup>

Parsing the statute as it relates to such indirect selling expenses, Southern Tier argues that the statute plainly uses (i) the term "*any*" (meaning under applicable case law "all" or

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<sup>599/</sup> Citing SAA, at 823.

"every")<sup>600/</sup> and the term "*expenses*", and (ii) makes *no geographical or other distinction* as to where those expenses happen to be incurred or on whose behalf ("regardless of where they are incurred and regardless of whether they relate to the sale to the affiliated importer or the importer's sale to its U.S. customer").<sup>601/</sup> It follows, therefore, that—

[n]othing in the language of the statute limits the 'plain and expansive' meaning of the term 'any.' Section 772(d)(1)(D) directs [the Department] to deduct all indirect selling expenses incurred by CEMEX and C[D]C that are attributable to U.S. sales. Thus, [the Department] is clearly required to deduct those indirect expenses that were incurred in Mexico and on CEMEX's and C[D]C's sales to affiliated importers.<sup>602/</sup>

Southern Tier cites recent Supreme Court cases (based on Chevron) to the effect that the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case";<sup>603/</sup> and where the Congressional intent "has been expressed in reasonably plain terms, that language must

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<sup>600/</sup> Southern Tier argues that "U.S. courts have interpreted the term 'any,' when used in similar statutory contexts, to mean 'all' or 'every.'" Southern Tier Panel Rule 57(1) brief, at 88, *citing* United States v. Rosenwasser, 323 U.S. 360, 362-63 (1945) (term "any employee" in Fair Labor Standards Act includes all employees unless specifically excluded); Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 115 (3d Cir. 1992), *cert. denied*, 507 U.S. 1005 (1993) (term "any person" in product liability statute includes all persons meeting the conditions of eligibility); Niece v. Fitzner, 941 F. Supp. 1497, 1506 (E.D. Mich. 1996) (terms involving "any" to be interpreted broadly), and *quoting* from a recent Federal Circuit decision as follows: "The 'word *any* is generally used in the sense of *all* or *every* and its meaning is most comprehensive.' (Citation omitted) This word does not introduce ambiguity into the pricing provision, it gives it breadth." Barsebäck Kraft AB v. United States, 121 F.3d 1475, 1481 (Fed. Cir. 1997). Southern Tier also argues that a broad, all-inclusive reading of the term "any" is "especially appropriate where the statute being construed is remedial in nature." Southern Tier Panel Rule 57(1) brief, at 89. The U.S. antidumping statute is considered to be remedial. *See* Chaparral Steel Co. v. United States, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990).

<sup>601/</sup> Southern Tier Panel Rule 57(1) brief, at 88.

<sup>602/</sup> *Id.*, at 90.

<sup>603/</sup> Robinson v. Shell Oil Co., 519 U.S. 337, 117 S. Ct. 843, 846 (1997)

ordinarily be regarded as conclusive."<sup>604/</sup> On this basis, Southern Tier argues that the Department has no authority to interpret or apply the statute contrary to its plain meaning.<sup>605/</sup>

Southern Tier does argue, however, that the legislative history actually corroborates its position, stating that the predecessor statute<sup>606/</sup> "did not restrict the deduction of expenses to those incurred in the United States or those relating to sales to unaffiliated purchasers."<sup>607/</sup> Indeed, the Department's previous practice (before the advent of the URAA) was to deduct such expenses (*i.e.*, indirect selling expenses incurred in both Mexico and the United States) from Exporter's Sales Price (ESP), a practice specifically upheld by the courts.<sup>608/</sup> Southern Tier then points to a URAA House Report stating that "[n]ew sections 772(d)(1) and 772(d)(2) *retain current U.S. law* with respect to the deduction made for direct and indirect expenses...."<sup>609/</sup> In

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<sup>604/</sup> Negonsott v. Samuels, 507 U.S. 99, 104 (1993), quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982).

<sup>605/</sup> "[The Department] has no authority to interpret the statute contrary to its plain language.... Resort to any aids to construing a statute, such as legislative history or the SAA, is unnecessary where the Congressional intent is clear, as it is in this instance." Southern Tier Panel Rule 57(1) brief, at 91.

<sup>606/</sup> The predecessor statute, 19 U.S.C. § 1677a(e)(2) (1994) provided:

(e) **Additional adjustments to the exporter's sales price.**— For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

...

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise.

<sup>607/</sup> Southern Tier Panel Rule 57(1) brief, at 92.

<sup>608/</sup> Id., at 92-93.

<sup>609/</sup> Id., at 94, citing H.R. Rep. No. 103-826, at 79 (1994). (Emphasis added).

Southern Tier's view, neither this House report nor the analogous Senate report<sup>610/</sup> "evidences any intent to limit the deduction of indirect selling expenses to expenses incurred in the United States or to expenses relating to sales by affiliated importers to unaffiliated purchasers."<sup>611/</sup> Finally, Southern Tier finds support for its position in the SAA, which states that the Department will deduct *direct* selling expenses from CEP to the extent they are "incurred after importation," but does not make a similar statement with respect to *indirect* expenses.<sup>612/</sup>

In its Panel Rule 57(3) brief, Southern Tier had the opportunity to cite and argue upon a recent CIT decision, Mitsubishi Heavy Industries, Ltd. v. United States, 15 F.Supp.2d 807 (Ct. Int'l Trade 1998), in which "the court agreed that the plain language of the statute requires the Department to deduct from CEP all indirect selling expenses that relate to sales to the U.S."<sup>613/</sup> Specifically, the court held:

The statute contains a list of mandatory deductions, which includes selling expenses incurred in selling the subject merchandise. The statute does not specify as to the location of the activities generating these expenses. Here, Commerce deducted all indirect selling expenses related to respondents' United States sales. This action was consistent with the statutory CEP provision.<sup>614/</sup>

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<sup>610/</sup> S. Rep. No. 103-412, at 64 (1994).

<sup>611/</sup> Southern Tier Panel Rule 57(1) brief, at 95.

<sup>612/</sup> Id. Compare discussion of Section 772(d)(1)(B) ("... will deduct [direct selling expenses] to the extent they are incurred after importation") and of Section 772(d)(1)(D). SAA, at 153-54.

<sup>613/</sup> Southern Tier Panel Rule 57(3) brief, at 52.

<sup>614/</sup> Mitsubishi Heavy Industries, Ltd. v. United States, 15 F.Supp.2d 807, 818 (Ct. Int'l Trade 1988). The Panel notes that in this case, the court was reviewing a situation wherein the Department had included as part of the indirect selling expenses those indirect selling expenses incurred in the exporting country (Japan) in support of U.S. sales. As a result, the Department had reduced the price of the first sale to an unaffiliated customer in the United States by the indirect selling  
(continued...)

(Emphasis added)

In Southern Tier's view, Mitsubishi confirms the argument that the plain language of the statute *mandates* that the Department deduct *all* indirect selling expenses associated with U.S. sales, "including those expenses incurred in the country of exportation."<sup>615/</sup> Southern Tier also used its Panel Rule 57(3) brief to distinguish the recent case of Timken Co. v. United States, 16 F. Supp.2d 1102 (Ct. Int'l Trade 1998), relied on heavily by the Department. Southern Tier finds the Timken decision not to be controlling since Southern Tier's argument is based on the "plain language" principle while Timken involved an argument based on legislative history.

Finally, Southern Tier addresses language contained in the SAA and also heavily relied upon by the Department as informing its current practice:

Additionally, under new section 772(d), constructed export price will be calculated by reducing the price of the first sale to an unaffiliated customer in the United States by the amount of the following expenses (and profit) associated with economic activities occurring in the United States.<sup>616/</sup>

(Emphasis added)

Southern Tier states: "This ambiguous phrase does not lead to Commerce's conclusion that only those expenses related to sales by the affiliated importer to unaffiliated purchasers may be deducted from CEP...." Indeed, "indirect selling expenses incurred in the country of exportation on U.S. sales are plainly expenses 'associated' with economic activities in the U.S.,

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<sup>614/</sup> (...continued)

expenses incurred in Japan since they related to the sale to an *unaffiliated* purchaser.

<sup>615/</sup> Southern Tier Panel Rule 57(3) brief, at 54.

<sup>616/</sup> SAA, at 153 (emphasis added).



*i.e.*, U.S. sales."<sup>617/</sup>

CEMEX

CEMEX argues briefly that Southern Tier is simply rehashing old arguments that the Department has consistently rejected, and cites recent administrative proceedings showing that the Department only deducts indirect selling expenses incurred in the home market if they are related to sales to the *unaffiliated* purchaser.<sup>618/</sup> See, for example, Porcelain on Steel Cookware from Mexico, 63 Fed. Reg. 38373, 38381 (July 16, 1998):

With regard to indirect selling expenses incurred in Mexico in support of sales to the United States, we agree with the respondents that such expenses do not relate to economic activity in the United States. The Department's current practice, as indicated by the preamble to the Department's New Regulations [published 62 Fed. Reg. 67276-27424 (May 19, 1997)], is to deduct indirect selling expenses incurred in Mexico from the CEP calculation only if they relate to sales to the unaffiliated purchaser in the United States. We do not deduct from the CEP calculation indirect selling expenses incurred in Mexico on the sale to the affiliated purchaser.

and similar decisions.<sup>619/</sup> Moreover, the new regulations, 19 C.F.R. § 351.402(b) expressly codify this principle ("The Secretary will make adjustments for expenses associated with

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<sup>617/</sup> Southern Tier Panel Rule 57(3) brief, at 59-60.

<sup>618/</sup> CEMEX Panel Rule 57(2) brief, at 41.

<sup>619/</sup> See also Collated Roofing Nails from Taiwan, 62 Fed. Reg. 51427, 51430 ("[W]e make deductions under § 772(d) of the Act only for selling expenses that relate to economic activity in the United States, which we deem to be expenses associated with the sale to the unaffiliated U.S. purchaser and not the sales to the unaffiliated U.S. importer."), Certain Fresh Cut Flowers from Colombia, 62 Fed. Reg. 53287, 53294 ("We agree with Asocolflores that selling expenses incurred in the home market that are not associated with U.S. economic activity should neither be deducted from CEP nor included in the basis for calculating CEP profit."), and PET Film, Sheet and Strip from the Republic of Korea, 62 Fed. Reg. 38064, 38066 ("In establishing CEP under § 772(d) of the Tariff Act, the Department's new regulations codify this principle, stating that "the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid.")

commercial activities in the United States that relate to the sale to an unaffiliated purchaser").

CEMEX argues that the Department's interpretation of the statute is reasonable, in accordance with its own regulations and administrative practice, and should be accorded the usual deference under the second prong of Chevron<sup>620/</sup> and the numerous other cases that grant the Department "broad discretion in executing the [antidumping] law."<sup>621/</sup>

CDC

CDC also argues that the Department's approach is consistent with the statute, the SAA, and the recent codification of its practice in its regulations.<sup>622/</sup> CDC places particular emphasis on the language of the SAA (expenses and profits "associated with economic activities occurring in the United States") and the language of the regulations ("commercial activities in the United States"), and that the Department has consistently followed its present practice since enactment of the URAA ("deduct from CEP the expenses associated with commercial activity in the United States which relate to the resale to an unaffiliated purchaser").<sup>623/</sup>

CDC notes that this new practice was a change from pre-URAA law. In Tapered Roller Bearings from Japan,<sup>624/</sup> the Department stated:

"[I]t is clear from the SAA that under the new statute we should

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<sup>620/</sup> CEMEX Panel Rule 57(2) brief, at 42-43.

<sup>621/</sup> Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

<sup>622/</sup> CDC Panel Rule 57(2) brief, at 17.

<sup>623/</sup> Id., at 17-18.

<sup>624/</sup> 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, 63 Fed. Reg. 2558, 2575 (January 15, 1998).

deduct from CEP only those expenses associated with economic activities in the United States. The SAA also indicates that 'constructed export price is now calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers.'

The Department

For its part, the Department agrees that it should, indeed, be entitled to the usual amount of deference:

As the CIT recently recognized, new section 1677a(d)(1)(D) does not specifically mandate the deduction of indirect selling expenses incurred outside the United States, and the Department is due considerable deference where, as here, the statute does not specify a precise methodology. See The Timken Company v. United States, [16 F.Supp.2d 1102, 1105-06 (Ct. Int'l Trade 1998)]. Further, the Department's interpretation of section 1677a(d)(1)(D) is directly supported by the SAA.<sup>625/</sup>

The Department argues that it must, as the SAA requires, limit CEP deductions under Section 1677a(d)(1) to those that are "associated with economic activities occurring in the United States".<sup>626/</sup> In this respect, the Department believes that Southern Tier's contention that Congress intended the Department's pre-URAA practice to continue unchanged under the new statutory authority is "flawed" ("the URAA introduced important changes that render the calculation of CEP markedly different from the calculation of ESP").<sup>627/</sup> The Department also

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<sup>625/</sup> Department Panel Rule 57(2) brief, at 171.

<sup>626/</sup> Id., at 173.

<sup>627/</sup> Id., at 173-74. The Department disputes Southern Tier's interpretation of the House and Senate reports, See fn. \_\_\_ *supra*, ("Neither of those documents specifically states that the Department must always deduct indirect selling expenses incurred outside of the United States, and both recognize that the URAA introduced overarching changes in the calculation of CEP"). Department Panel Rule 57(2) brief, at 176, fn. 119.

cites Article 2.4 of the new Antidumping Agreement (make "allowances for costs, including duties and taxes, incurred between importation and resale...")<sup>628/</sup> and the SAA ("constructed export price is now calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers")<sup>629/</sup> as essential support for its position. Based on the above language of the SAA, the Department reasons that if this were an EP, as opposed to a CEP transaction, the indirect selling expenses contemplated in this case would not be subtracted from the calculation of the Export Price; similarly (in a CEP transaction), they should not be subtracted here either.<sup>630/</sup> The applicable provision, § 1677a(d)(1)(D), only requires the Department to subtract indirect selling expenses if they occur after the affiliated sale or transaction has taken place (*i.e.*, only if in connection with the sale to the *unaffiliated* purchaser).

The Department agrees that the language of § 1677a(d)(1)(D) "is ambiguous as to exactly what indirect selling expenses incurred in connection with CEP sales should be deducted."<sup>631/</sup> The recent Timken decision stated that

[t]his language does not specifically state that selling expenses incurred in the home market should be included in U.S. indirect selling expenses. Rather, at most, it indicates that Congress did not intend Commerce to change substantially what it includes as such expenses. Although the Court is concerned with

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<sup>628/</sup> A fuller statement of the relevant language of Article 2.4 of the new Antidumping Agreement is as follows: "A fair comparison shall be made between the export price and the normal value.... In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made...."

<sup>629/</sup> SAA, at 153.

<sup>630/</sup> Department Panel Rule 57(2) brief, at 174.

<sup>631/</sup> Id., at 175.

Commerce's sudden change in practice, Commerce is afforded significant deference in its statutory interpretation.<sup>632/</sup>

As also emphasized by the court in Timken,<sup>633/</sup> the Department believes that the SAA sets out the governing principle ("associated with economic activities occurring in the United States") and emphasizes that the SAA is the "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act."<sup>634/</sup>

The Department concedes that under the pre-URAA statute it deducted *all* expenses associated with ESP sales, but states that it now deducts only those "expenses representing activities undertaken to make the sale to the unaffiliated customer in the United States" and states, further, that it "has applied this principle consistently and repeatedly since adoption of the URAA."<sup>635/</sup> The Department argues that it should be "afforded significant deference in its statutory interpretation," which has been specifically upheld in the Timken decision.<sup>636/</sup> The Department also cites its new regulations in support, even though they technically do not govern this Fifth Administrative Review.<sup>637/</sup>

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<sup>632/</sup> Timken, 16 F.Supp.2d, at 1106.

<sup>633/</sup> Id.

<sup>634/</sup> See Section 102(d) of the URAA ("the Statement of Administrative Action approved by the Congress under section 101(a) shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.")

<sup>635/</sup> Department Panel Rule 57(2) brief, at 177.

<sup>636/</sup> Id., at 179.

<sup>637/</sup> Section 351.402(b) of the Department's new regulations provides in full:

(continued...)

## 2. Discussion and Decision of the Panel

The Panel appreciates the clarity of the parties' argument on this issue, which is not without difficulty. Southern Tier urges the Panel to resolve this issue by examining the language of the statute itself, which does appear to state that "any [indirect] selling expenses" should be deducted from the starting price, without regard for a distinction based on geography or on the affiliated or unaffiliated nature of the relationship of the parties.

To view once again the critical language:

### 19 U.S.C. § 1677a. Export price and constructed export price

#### (d) Additional adjustments to constructed export price

For purposes of this section, the price used to establish constructed export price shall also be reduced by—

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporters, or the affiliated seller in the United States, in selling the subject merchandise...—

(D) any selling expenses not deducted under subparagraph (A), (B), or (C);  
(Emphasis added)

On its face, this language says nothing about a geographical distinction, nor does it say anything about a distinction based upon "the relationship between the foreign exporter and the

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637/ (...continued)

**Additional adjustments to constructed export price.** In establishing constructed export price under section 772(d) of the Act, the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid. The Secretary will not make an adjustment for any expense that is related solely to the sale to an unaffiliated importer in the United States, although the Secretary may make an adjustment to normal value for such expenses under section 773(a)(6)(C)(iii) of the Act. (Emphasis added).

importer...".<sup>638/</sup> Moreover, Southern Tier certainly cannot be faulted in its observations on statutory interpretation, based on the first prong of Chevron, to the effect that if a statute is plain on its face, no resort to legislative history or interpretive aids is necessary or appropriate.

Indeed, if one starts from the premise that the above statute is free from ambiguity, a faithful application of Chevron would appear to require a court or panel to *reject* the language of the SAA ("associated with economic activities in the United States") since that language would not be operating to clarify an ambiguity in the statute—instead, that language would in effect be introducing or *creating* an ambiguity which, because the statute itself is plain, the court or panel should, under Chevron, ignore. This Panel, for example, does not understand the Chevron principle as allowing the Department to "bootstrap" a favored interpretation of the law by (i) interpreting a statute in a manner inconsistent with the plain language of that statute; (ii) reaching into the SAA (or other legislative history source) to find ambiguous but supporting language in the legislative history which doesn't appear in the statute itself; and then (iii) relying on the numerous "deference" decisions of the Federal Circuit and the Court of International Trade to resolve that "found" ambiguity in its favor. Even if the Department's favored rule is demonstrably superior to that of the plain language of the statute,<sup>639/</sup> the latter must still

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<sup>638/</sup> Mitsubishi, *supra* note 614, at 813. The Panel notes that the phrase set off by commas—", or the affiliated seller in the United States,"—does not create such a geographical distinction. The SAA makes it clear that this language is merely intended to describe where the affiliated seller is located. See SAA, at 822 ("If, before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the producer or exporter or by a seller in the United States who is affiliated with the producer or exporter, then Commerce will base its calculation on constructed export price." (Emphasis added)) Manifestly, if one then backs out of the statute the language referring to producer or exporters or the affiliated seller, no language remains that is even suggestive of a geographical distinction.

<sup>639/</sup> See Zenith Electronics Corp. v. United States, 633 F. Supp. 1382 (Ct. Int'l Trade 1986), *appeal* (continued...)

prevail, at least until the Congress is persuaded to write a better rule.

Nevertheless, the Panel must legitimately inquire whether the above statute is really as free from doubt as Southern Tier has suggested. The Court of International Trade, speaking in the Timken case, turned its attention to this very issue. In commencing its analysis of the matter, the Timken court first noted that:

[t]he pre-URAA statute provided for the reduction of exporter's sales price ("ESP") by the amount of "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise." 19 U.S.C. § 1677a(e)(2) (1988). Although the statute was silent as to whether indirect selling expenses incurred *outside* the United States should be categorized as U.S. indirect selling expenses, [the Department] chose to adjust U.S. price for such expenses. See 19 C.F.R. § 353.41(e)(2) (1994); ITA Antidumping Manual, Ch. 7, at 11 (rev. ed. July 1993).

As revised by the URAA, the statute states that constructed export price ("CEP"), the post-URAA equivalent to ESP, is to be reduced by the amount of any "expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States" including "any selling expenses not deducted under subparagraph (A) [commissions], (B) [direct selling expenses], or (C) [selling expenses assumed by the seller on behalf of the purchaser]." 19 U.S.C. § 1677a(d)(1) & (d)(1)(D) (1994). In the Final Results, [the Department] revised its previous practice and limited Koyo's U.S. indirect selling expenses to those expenses specifically associated with commercial activities in the United States.<sup>640/</sup>

Plaintiff, The Timken Company, then argued, as Southern Tier argues here, that Congress intended for the Department to continue the practice of including in U.S. indirect selling expenses the home market selling expenses attributable to export sales.<sup>641/</sup> The

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<sup>639/</sup> (...continued)  
*dismissed*, 875 F.2d 291 (Fed. Cir. 1989) (*Zenith I*).

<sup>640/</sup> Timken, *supra*.

<sup>641/</sup> Id.



Department responded by arguing that "the new statutory language does not define the types of expenses to be included as U.S. indirect selling expenses"<sup>642/</sup> and that the Department's focus on "the sale to the first unaffiliated customer" was reasonable.<sup>643/</sup>

In resolving this issue, the Timken court then stated:

The Court first notes that, although the statutory language has changed, neither the pre-URAA statute nor the newly-amended statute address whether U.S. indirect selling expenses incurred outside the United States should be categorized as U.S. indirect selling expenses. Rather, in limiting Koyo's U.S. indirect selling expenses to those incurred in the United States, [the Department] has chosen to alter its treatment of such expenses.... Consequently, the issue for the Court is whether [the Department's] interpretation of the newly-amended statute is reasonable. As no relevant case law exists and the statutory language does not specifically address this issue, the Court must examine the reasonableness of [the Department's] interpretation in light of the legislative history and the SAA.

The legislative history specifically states that it intends subsection 1677a(d)(1)(D) to, '*as under the current practice*, encompass those expenses that do not result from, or cannot be tied directly to specific sales, but that may reasonably be attributed to such sales.' S. Rep. No. 412, 103d Cong., 2d Sess. 65 (1994) (emphasis added). This language does not specifically state that selling expenses incurred in the home market should be included in U.S. indirect selling expenses. Rather, at most, it indicates that Congress did not intend [the Department] to change substantially what it includes as such expenses."<sup>644/</sup>

While the Panel has some concern whether the Timken court accurately states the Department's full position on the issue of indirect selling expenses,<sup>645/</sup> it does generally accept

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<sup>642/</sup> Id., at 1105-06.

<sup>643/</sup> Id., at 1106.

<sup>644/</sup> Id.

<sup>645/</sup> Repeating a segment from the above quotation, the Timken court elsewhere states that "[the Department's] decision to limit U.S. indirect selling expenses to those expenses incurred in the United States is supported by substantial evidence and fully in accordance with law." Id. (Emphasis added). The Panel understands that the Department must, in these cases, grapple (continued...)

the court's analysis that the statutory language in question is in fact not free from doubt, and that the appropriate procedure for this Panel would be, therefore, to assess the reasonableness of the interpretation drawn by the Department, both substantively and in the light of the applicable legislative history.<sup>646/</sup>

As discussed above, the Department appears to have largely informed its practice based on language of the SAA ("associated with economic activities in the United States") which language, of course, it is not free to ignore. While this language is hardly a model of clarity, it does appear to the Panel to be reasonably supportive of the Department's current rule and practice. The Panel thus concurs with the Timken court in this respect, and is not persuaded that the Mitsubishi decision represents a distinctly contrary point of view.<sup>647/</sup> The Panel also accepts that the Department's rule, as applied in this case, is consistent with its other post-URAA administrative decisions and is consistent as well with its new regulations.<sup>648/</sup>

Considering further whether the word "any" in the statute should be taken as meaning "all" or "every," as Southern Tier suggests, the Panel also makes these additional observations.

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<sup>645/</sup> (...continued)  
with two variables, not just one. They are: (1) the geographical location of the expenses; and (2) whether the expenses relate to the sale to the *affiliated* importer or to the *unaffiliated* importer. If the Panel understands the Department's practice correctly, it is the latter distinction that is the most important, despite what the preceding quote from Timken might otherwise imply (*i.e.*, the Department will take account of indirect selling expenses incurred in the home market if they relate to the sale to the *unaffiliated* importer).

<sup>646/</sup> See Part III.B. of this Opinion.

<sup>647/</sup> The Department in Mitsubishi included (not, as here, failed to include) the home market indirect selling expenses, but did so on the basis that they were related to the sale to the *unaffiliated* importer. Thus, from Southern Tier's standpoint, the ruling of Mitsubishi was *obiter dicta*. Moreover, the ruling of Mitsubishi does not appear to the Panel to be inconsistent with the Department's current rule and practice.

<sup>648/</sup> See administrative decisions quoted in CEMEX.

First, the Panel notes that the pre-URAA statute cited by the Timken Court above, 19 U.S.C. § 1677a(e)(2), required that there be deducted from ESP “expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise.” In the face of an argument that respondent’s antidumping duty related *legal fees* should be included within this all-encompassing phrase, the Court of International Trade issued a firm denial—“legal fees do not qualify as selling expenses.”<sup>649/</sup> In the parlance of the current statute, this ruling could be taken as the functional equivalent of “any” not meaning “any.”

Second, the Panel believes that it is always worthwhile to take a second glance at such all-inclusive phraseology, particularly in the context of a statute that an agency with specialized expertise is responsible for administering, and where “[d]eference to [the Department’s] interpretation and implementation of the antidumping laws is grounded in express congressional intent.”<sup>650/</sup> In these contexts, it is not surprising that Congress would utilize highly general language in the antidumping arena to express a guiding principle, with this broad statutory statement to be followed by either express statutory exceptions or with the general expectation

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<sup>649/</sup> Daewoo Elecs. Co. v. United States, 712 F. Supp. 931, 947 (Ct. Int’l Trade 1989). See also Federal-Mogul Corp. v. United States, 813 F. Supp. 856, 871 (Ct. Int’l Trade 1993) and Federal-Mogul Corp. v. United States, 824 F. Supp. 215, 220 (Ct. Int’l Trade 1993)

<sup>650/</sup> Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA-90-1904-01 (FTA Panel May 24, 1991), at 16. Congress has stressed, in this connection that in the antidumping field it has “entrusted the decision-making authority in a specialized, complex economic situation to administrative agencies.” S. Rep. No. 249, 96th Cong., 1st Sess. 248 (1979). Reviewing courts, in turn, have acknowledged that “the enforcement of the antidumping law is a difficult and supremely delicate endeavor. The Secretary of Commerce ... has broad discretion in executing the law.” Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*. 465 U.S. 1022 (1984).

that the Department will develop its own “reasonable interpretation” of the statute.<sup>651/</sup>

Third, the Panel notes that if the Congress truly intended that the word “any” mean “all” or “every,” it would have been appropriate to include words such as “without exception” in the sentence. The Panel recognizes that one can approach this argument from either of two directions, but it does seem fair to acknowledge that if the Congress strongly desired that this particular statute be all-encompassing in nature, its draftsmen would have had to take only a modest additional step to readily accomplish that intent.

Finally, the Panel notes that that the Department also incidentally cited Article 2.4 of the new Antidumping Agreement in support of its position. The Panel not only agrees but in fact gives significantly greater weight to this WTO authority than does, apparently, even the Department. The Panel has already noted that the language of the SAA on which the Department relies is hardly a model of clarity. Indeed, it can be contrasted with the excellent clarity of the relevant WTO language. The expression in Article 2.4 of the Antidumping Agreement—“allowances for costs, including duties and taxes, incurred between importation and resale...”—can, in the view of the Panel, only be understood as a reference to costs incurred in connection with the sale to the *unaffiliated* importer in the United States. What the SAA does with ambiguity, therefore, the Antidumping Agreement does with clarity, and it is the view of the Panel that the current practice of the Department—to deduct only those expenses representing activities undertaken to make the sale to the *unaffiliated* customer in the United States, irrespective of when the expenses are incurred and where they are paid—is well supported by this WTO language.

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<sup>651/</sup> See Chevron.

More to the point, the Panel finds that the rule advanced by Southern Tier (to deduct all home market indirect selling expenses whether or not related to the unaffiliated importer) would in fact be *inconsistent* with Article 2.4 of the Antidumping Agreement whereas the rule advanced by the Department is quite clearly *consistent* with that article. Since it is the purpose of the Charming Betsey doctrine to help ensure consistency between the content of domestic statutes and the international obligations of the United States, the Panel, as additional support for its determination, therefore invokes that doctrine at this time to determine that the Department's refusal to deduct indirect selling expenses and inventory carrying costs incurred in Mexico with respect to sales to the affiliated U.S. importer for purpose of calculating CEP, was supported by substantial evidence and was otherwise in accordance with law.

#### **IV.E.2. CALCULATING CEP PROFIT**

##### **WHETHER THE DEPARTMENT'S REFUSAL TO INCLUDE INDIRECT SELLING EXPENSES AND INVENTORY CARRYING COSTS INCURRED IN MEXICO ON U.S. SALES IN "TOTAL UNITED STATES EXPENSES" FOR PURPOSES OF CALCULATING CEP PROFIT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND OTHERWISE IN ACCORDANCE WITH LAW**

#### **1. Arguments of the Participants**

##### *Southern Tier*

Southern Tier notes that 19 U.S.C. § 1677a(d)(3) requires the Department, in calculating Constructed Export Price (CEP), to deduct from the starting price in the U.S. market the amount of profit allocable to the expenses associated with U.S. sales ("CEP Profit").<sup>652/</sup>

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<sup>652/</sup> Southern Tier Panel Rule 57(1) brief, at 97.

Under the statute's special rule for determining profit (19 U.S.C. § 1677a(f)), this CEP Profit amount is determined by multiplying the "total actual profit" by a ratio derived by dividing the "total United States expenses" by the "total expenses". The statutory language for the CEP Profit provision, as well as certain additional language, appears below:

**19 U.S.C. § 1677a. Export price and constructed export price**

**(f) Special rule for determining profit**

**(1) In general**

For purposes of subsection (d)(3) of this section, profit shall be an amount determined by multiplying the total actual profit by the applicable percentage.

**(2) Definitions**

For purposes of this subsection:

**(A) Applicable percentage**

The term "applicable percentage" means the percentage determined by dividing the total United States expenses by the total expenses.

**(B) Total United States expenses**

The term "total United States expenses" means the total expenses described in subsection (d)(1) and (2) of this section.

**(C) Total expenses**

The term "total expenses" means all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise: ...

**(D) Total actual profit**

The term "total actual profit" means the total profit earned by the foreign producer, exporter, and affiliated parties described in subparagraph (C) with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph.

As Southern Tier further explains, this calculation essentially involves three steps.<sup>653/</sup> First, the Department calculates the "total actual profit" earned by the foreign producer, exporter, and affiliated parties for all sales of the subject merchandise in the United States and all sales of the foreign like product in the exporting country. Second, the Department calculates the "applicable percentage," that is, the ratio of "total United States expenses" to the "total expenses." Third, the Department allocates profit to each CEP sales transaction by multiplying the total profit for that sale by the "applicable percentage."

Expressed as a formula, the calculations can be set out as follows:

$$\mathbf{CEP\ PROFIT} = \frac{\mathbf{Total\ U.S.\ Expenses}}{\mathbf{Total\ Expenses}} \times \mathbf{Total\ Actual\ Profit}$$

Under the special rule for CEP Profit, the "total United States expenses" are, *by definition*, to include all those expenses set out in 19 U.S.C. § 1677a(d)(1) and (2). These, of course, include commissions, direct selling expenses, expenses assumed by the seller on the

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<sup>653/</sup> *Id.*, at 98.

buyer's behalf, indirect selling expenses, and the costs of further manufacturing in the U.S. Thus, *any* expense that is properly deducted from CEP should be included in the "total United States expenses" calculation.<sup>654/</sup>

In this case, Southern Tier argues that the Mexican indirect selling expenses on U.S. sales should properly have been deducted from CEP, pursuant to 19 U.S.C. § 1677a(d)(1)(D), and, as a direct consequence, should also then be included within the "total United States expenses" calculation under the special rule for CEP Profit.<sup>655/</sup> Southern Tier recognizes that the two issues are inextricably linked and that the Panel's decision on the first issue will necessarily decide the second.

#### CEMEX

CEMEX briefly notes that Southern Tier's arguments are contrary to "Commerce's consistent practice and must be rejected by this panel. The reason [Southern Tier] failed to cite to a single determination supporting its argument is due to the fact that [the Department's] decisions have consistently rejected similar arguments."<sup>656/</sup>

#### CDC

CDC also argues that Southern Tier's argument should be dismissed and that it necessarily will be decided by a correct interpretation of the first issue (*i.e.*, calculation of CEP). "[O]nly expenses associated with economic activities in the U.S. are deducted pursuant to these statutory provisions. Therefore, *per* the definition in section 772(f), these expenses also are not

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<sup>654/</sup> Id.

<sup>655/</sup> Id., at 98-99.

<sup>656/</sup> CEMEX Panel Rule 57(2) brief, at 44.



included in total U.S. expenses used to calculate CEP profit. The Department specifically has confirmed this treatment in recent cases."<sup>657/</sup>

*The Department*

The Department noted that "[i]n its final results, the Department's CEP calculations included adjustments for profit pursuant to 19 U.S.C. §§ 1677a(d)(3) and (f)(1995). These provisions—entirely new under the URAA—require the Department to identify the amount of profit associated with any selling, distribution, or further processing activities between importation and resale to the unaffiliated U.S. customer, and to deduct this profit amount from the CEP starting price as well. Because the Department did not reduce CEP by the expenses reported under DINDIRSU and DINVCARU—that is, indirect selling expenses and inventory carrying costs incurred in Mexico—it also did not attribute a U.S. profit amount to these expenses."<sup>658/</sup>

In addition, the Department stated that "the indirect selling expenses and inventory carrying costs incurred by CEMEX and CDC in Mexico should not be deducted from the CEP starting price. Logically, these same expenses cannot be included in the Department's CEP profit calculation.... If the Panel correctly determines that the Department properly declined to deduct the indirect selling expenses and inventory carrying costs at issue from the CEP starting price, it must also determine that the Department correctly excluded these expenses from its CEP profit calculation."<sup>659/</sup>

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<sup>657/</sup> CDC Panel Rule 57(2) brief, at 21.

<sup>658/</sup> Department Panel Rule 57(2) brief, at 184.

<sup>659/</sup> *Id.*

## **2. Discussion and Decision of the Panel**

All parties recognize that this issue is strictly definitional and that the Panel's decision with respect to the CEP issue will also control the Panel's decision with respect to the CEP Profit issue. Since the Panel has determined to reject Southern Tier's argument concerning the calculation of CEP, it must necessarily reject its argument concerning the calculation of CEP Profit. Accordingly, the Panel determines that the Department's refusal to include indirect selling expenses and inventory carrying costs incurred in Mexico on United States sales in "total United States expenses" for purposes of calculating CEP Profit was supported by substantial evidence and otherwise in accordance with law.

### **IV.E.3. CALCULATING DENOMINATOR OF CEP PROFIT WHETHER THE DEPARTMENT'S DECISION TO INCLUDE MOVEMENT EXPENSES IN "TOTAL EXPENSES" FOR PURPOSES OF CALCULATING CEP PROFIT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND OTHERWISE IN ACCORDANCE WITH LAW**

#### **1. Arguments of the Participants**

##### *Southern Tier*

In its Panel Rule 57(1) brief, Southern Tier cites to a recent decision of the Court of International Trade, U.S. Steel Group v. United States, 15 F.Supp.2d 892 (Ct. Int'l Trade 1998), adopted July 7, 1998, which expressly determined that the Department had erroneously interpreted and applied the statute by including movement expenses in the calculation of "total expenses" for purposes of determining CEP Profit.<sup>660/</sup>

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<sup>660/</sup> Southern Tier Panel Rule 57(1) brief, at 99.

In that case, as in the instant one, the Department had calculated the numerator of the equation ("total United States expenses") by adding together U.S. commissions, U.S. direct expenses, U.S. indirect expenses, and U.S. inventory carrying costs (see 19 U.S.C. §§ 1677a(d)(1) and (d)(2)). *Movement expenses*, which are addressed in 19 U.S.C. § 1677a(c)(2)(A), were *not* added to this calculation because the statute clearly keeps them separate. As for the denominator in the equation ("total expenses"), the Department added together the respondent's total cost of goods sold, total U.S. and home market selling expenses, and total U.S. and home market movement expenses.

Expressed as a formula, the Department's methodology is as set out below:

$$\mathbf{CEP\ PROFIT} = \frac{\mathbf{Total\ U.S.\ Expenses}}{\mathbf{Total\ Expenses}} \times \mathbf{Total\ Actual\ Profit}$$

where *Total U.S. Expenses* = Total U.S. Commissions  
 + Total U.S. Direct Expenses  
 + Total U.S. Indirect Expenses  
 + Total U.S. Inventory Carrying Costs  
 ... ~~Total U.S. Movement Expenses~~ <sup>661/</sup>

where *Total Expenses* = Total Cost of Goods Sold  
 + Total Selling Expenses  
 + Total Movement Expenses<sup>662/</sup>

As summarized by Southern Tier, the U.S. Steel Court held that the inclusion of

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<sup>661/</sup> As noted in the text, under current Department practice, the calculation of *Total U.S. Expenses* (the numerator in the ratio involved) does *not* include U.S. movement expenses since movement expenses are addressed separately by 19 U.S.C. § 1677a(c)(2)(A) and are clearly not referenced in the controlling statute, 19 U.S.C. §§ 1677a(d)(1) and (d)(2). Southern Tier does not contest this aspect of the calculation.

<sup>662/</sup> Under current Department practice, *Total Expenses* (the denominator in the ratio involved) *includes* U.S. and home market movement expenses. The U.S. Steel decision ruled that this was improper.

movement expenses in this latter calculation was contrary to statute.<sup>663/</sup> The decision emphasized that the statute defines "total expenses" as "*all* expenses ... with respect to the *production and sale* of [subject] merchandise".<sup>664/</sup> Thus, the Court found that the limitation of "total expenses" to expenses relating to "production and sale" of the merchandise was intended to include the *same types of expenses* that are included in the calculation of the numerator (Total U.S. Expenses), all of which relate either to production or sale of the merchandise and exclude movement expenses.<sup>665/</sup>

The Court rejected the Department's argument that the statute required the inclusion of "all expenses," and that the reference to "production and sale" was no more than a general requirement that the expenses be linked to the subject merchandise.<sup>666/</sup> In doing so, the Court was unwilling not to give natural effect to the limitation expressed in the "production and sale"

<sup>663/</sup> Southern Tier Panel Rule 57(1) brief, at 100.

<sup>664/</sup> U.S. Steel Group v. United States, 15 F.Supp.2d 892, 896 (Ct. Int'l Trade 1998). (Emphasis added). 19 U.S.C. § 1677a(f)(2)(C) states in full:

**Export price and constructed export price**

„ „ „

**(f) Special rule for determining profit**

„ „ „

**(2) Definitions**

For purposes of this subsection:

„ „ „

**(C) Total expenses**

The term "total expenses" means all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise: ... (Emphasis added).

<sup>665/</sup> Southern Tier Panel Rule 57(1) brief, at 100. See U.S. Steel.

<sup>666/</sup> See U.S. Steel.

language. In addition, the Court found the Department's interpretation unreasonable since "it conflicts with [the Department's] past practice of consistently distinguishing between movement and production or selling expenses in other circumstances" (citing several administrative decisions).<sup>667/</sup> The Court also felt that proportionality must logically exist between the Total U.S. Expenses (the numerator) and Total Expenses (the denominator). As the Court stated, "[l]ogically, the numerator and the denominator of this ratio should be drawn from the same pool of expenses,"<sup>668/</sup> and the Department offered no convincing argument to the contrary.

### CEMEX

CEMEX asserted in its Panel Rule 57(2) brief that Southern Tier had failed to raise this argument before Commerce and is therefore barred from raising it before this Panel under the doctrine of exhaustion of administrative remedies ("It is well settled that a party may not raise an issue for the first time on an appeal when it could have raised the issue before the

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<sup>667/</sup> Id., at 898. Specifically, the Court stated that "Commerce's interpretation is unreasonable because it conflicts with its past practice of consistently distinguishing between movement and production or selling expenses in other circumstances. See, e.g., Furfuryl Alcohol from the Republic of South Africa, 62 Fed. Reg. 61,084, 61,091 (Dep't Commerce 1997) (final results) (classifying expenses incurred for shipping insurance purposes as movement expense and not a direct selling expense); Silicon Metal from Brazil, 62 Fed. Reg. 47,441, 47,444 (Dep't Commerce 1997) (amended final results) ("inland freight is a movement expense, and not a selling expense"); Certain Stainless Steel Wire Rods from France, 62 Fed. Reg. 7206, 7212 (Dep't Commerce 1997) (final results) (warehousing is a movement expense and not a selling expense)."

<sup>668/</sup> Id. The Court stated: "Second, Commerce incorrectly discounts the proportionality that must logically exist between the total and total U.S. expenses. Total U.S. expenses over total expenses constitutes the applicable percentage. 19 U.S.C.A. § 1677a(f)(1). Logically, the numerator and the denominator of this ratio should be drawn from the same pool of expenses. The SAA implies that such a proportionality should exist. It indicates that the CEP profit deduction should reflect 'the proportion which the U.S. manufacturing and selling expenses constitute of the total manufacturing and selling expenses.' [SAA, at 824]. Accordingly, the same types of costs should be used in both sides of the ratio.

administrative authority").<sup>669/</sup>

CEMEX also cites to the Department's Import Administration Policy Bulletin (No. 97/1) of September 4, 1997 in which it is expressly stated that "movement charges do not appear under either of these subsections [referencing 19 U.S.C. §§ 1677a(d)(1) and (d)(2)]. Instead they are described under section 772(c)(2)(A) [19 U.S.C. § 1677a(c)(2)(A)] and, thus, would not be included in total U.S. expenses for purposes of computing CEP profit."<sup>670/</sup>

As to the U.S. Steel decision, CEMEX notes that the decision itself is not final and the Department has not indicated that it intends to abandon its prior policy and adopt the CIT's decision. Thus, "it is not binding on the Panel."<sup>671/</sup> CEMEX argues that the court "failed to give the deference required to Commerce's statutory interpretation of the law it is charged to administer."<sup>672/</sup>

#### CDC

CDC believes that the U.S. Steel case is "contrary to the Department's interpretation of the statute—*i.e.*, that total expenses includes all expenses, including movement expenses."<sup>673/</sup> CDC argues that the Department's interpretation is reasonable.<sup>674/</sup> Moreover, the Department

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<sup>669/</sup> CEMEX Panel Rule 57(2) brief, at 45.

<sup>670/</sup> Id.

<sup>671/</sup> CEMEX Panel Rule 57(2) brief, at 46.

<sup>672/</sup> Id.

<sup>673/</sup> CDC Panel Rule 57(2) brief, at 22.

<sup>674/</sup> Id., at 23.

may decide to appeal the issue to the Court of Appeals for the Federal Circuit.<sup>675/</sup>

*The Department*

For its part, the Department also argues in its brief that Southern Tier is precluded by law from challenging aspects of its determination that it opted not to address before the agency ("a litigant is barred from raising issues on appeal that were never raised during the administrative process").<sup>676/</sup> However, the Department addresses the substantive issue as well.

The Department argues that the term "total expenses" under 19 U.S.C. § 1677a(f)(2)(C) means "all expenses" and "does not preclude the inclusion of movement expenses in the 'total expenses' component of CEP [P]rofit as [Southern Tier] believes."<sup>677/</sup> If anything, the Department believes that the term "all expenses" is clear but there may be some ambiguity as to the word "total." In any event, "[g]iven this absence of a clear definition, the decision to define the universe of 'total expenses' for purposes of calculating CEP profit lies within the Department's sound discretion."<sup>678/</sup>

In terms of the overall structure of the statute, the Department notes that the definition of "total United States expenses" contained in the numerator of the equation "is clearly limited in a manner that 'total expenses' is not.... Congress placed no similar restrictions upon the definition of 'total expenses.'" Therefore, it is reasonable to assume that Congress did not intend

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<sup>675/</sup> Id.

<sup>676/</sup> Department Panel Rule 57(2) brief, at 186.

<sup>677/</sup> Id., at 188.

<sup>678/</sup> Id.

to exclude movement expenses in the identification of total expenses. Given the significant differences in the structure of the statute in defining 'total expenses' and 'total United States expenses,' there is no basis for contending that these groups of expense must be 'proportional.'"<sup>679/</sup>

Indeed, the Department argues that it makes more sense to look for proportionality between the definitions of "total expenses" and "total actual profit," both of which are drafted all-inclusively and without any restriction.<sup>680/</sup>

Finally, as a matter of policy, the Department argues that its Import Administration Policy Bulletin 97/1 (September 4, 1997)<sup>681/</sup> and at least one prior administrative decision<sup>682/</sup> have included movement expenses in total expenses.

Amplifying on the Department's discussion of the cited Policy Bulletin (97/1), the Panel notes that this document states that "[d]etermination of the amount of profit to deduct from all CEP transactions is essentially a two-step process. In the first step, we calculate the 'total actual profit' for all sales of the subject merchandise and the foreign like product. In the second step, we allocate the total profit derived in step one to individual CEP sales transactions based on the 'applicable percentage,' which we compute as the ratio of total U.S. expenses to

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<sup>679/</sup> Id., at 189.

<sup>680/</sup> Id.

<sup>681/</sup> See [http://www.ita.doc.gov/import\\_admin/records/policy/bull97-1.htm](http://www.ita.doc.gov/import_admin/records/policy/bull97-1.htm)

<sup>682/</sup> See *Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea*, 62 Fed. Reg. 38064, 38066 (1997) (final admin. Review) (the Department corrected the CEP total profit calculation to reflect "international movement expenses").



total expenses.”<sup>683/</sup>

In step 1, therefore, the Department seeks to combine the respondent’s U.S. and home market profits, in the following manner:

U.S. Market Sales Revenue .....
Home Market Sales Revenue .....
Total Revenue for Both Markets .....
Cost of U.S. Merchandise .....
Cost of Home Market Merchandise .....
U.S. Selling Expenses .....
Home Market Selling Expenses .....
<i>U.S. Movement/Packing Costs</i> .....
<i>Home Market Movement/Packing Costs</i> .....
Total Expenses for Both Markets .....
TOTAL PROFIT for Both Markets .....

In terms of step 1 of the calculation (determining the “total actual profit” for sales of the subject merchandise and the foreign like product), therefore, the Department clearly *includes* movement expenses. Moving on to step 2 of the calculation (determining the amount of the profit to deduct from the CEP starting price based on the “applicable percentage”), the Department determines, as the statute requires, the “total U.S. selling expenses” (Sec. 772(f)(2)(B)) and the “total expenses (Sec. 772(f)(2)(C)),<sup>684/</sup> divides the former by the latter, and multiplies the resulting percentage times the total actual profit calculated in step 1.

In further explaining its methodology, the Department notes that the “total U.S.

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<sup>683/</sup> See Policy Bulletin No. 97/1.

<sup>684/</sup> *Id.*, at 3.

expenses” numerator (which it earlier referred to as “total U.S. selling expenses”) *excludes* all movement charges.<sup>685/</sup> Simply put, the Department regards this exclusion as a creature of the statute. In its note concerning the interpretation of “total expenses” denominator, however, the Department returns to the statutory language but, in effect, emphasizes the “all expenses” language.<sup>686/</sup> Implicitly, in the Department’s view, the phrase “all expenses” should *include* movement expenses as that brings the total formula (steps 1 and 2) closer together. Movement expenses are accounted for in step 1 of the formula and should be accounted for in the ratio for step 2 as well (specifically, the “total expenses” denominator).

The Department believes that the court in the U.S. Steel case failed to examine the legislative history of the statute, as contained in the SAA, particularly the requirement that "constructed export price is now calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers."<sup>687/</sup> The exclusion of movement expenses from "total expenses" would tend to violate this objective, by distorting the percentage of a firm's total expenses represented by CEP expenses. The exclusion of movement expenses from the denominator would lead to a higher percentage, which would artificially

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<sup>685/</sup> Id., at 6, n. 7 (“The total U.S. expenses used to compute CEP profit excludes all movement charges. Section 772(f)(2)(B) provides that, in deriving the applicable percentage under section 772(f)(1), the term ‘total United States expenses’ means the total expenses described under section 772(d)(1) and (2). Movement charges do not appear under either of these subsections. Instead, they are described under section 772(c)(2)(A) and, thus, would not be included in total U.S. expenses for purposes of computing CEP profit.”)

<sup>686/</sup> Id., at n. 8 (“Section 772(f)(2)(C) provides that in calculating CEP profit, the term “total expenses” refers to all expenses incurred by or on behalf of the foreign producer and exporter and the affiliated seller in the United States with respect to the production and sale of the first of the following alternatives which applies [list omitted].”)

<sup>687/</sup> Department Panel Rule 57(2) brief, at 189; *citing* SAA at 153.

inflate the amount of CEP Profit (resulting in an increase in the dumping margin). This effect would be particularly severe in the instant case, since movement expenses for cement are significant in relation to the value of the subject merchandise.<sup>688/</sup> Thus, the Department argues that the total expenses over which CEP Profit is allocated should not be artificially limited.<sup>689/</sup>

The Department also argues that the court in U.S. Steel clearly "failed to accord the substantial weight to the Department's interpretation that was due under the law."<sup>690/</sup> A court can "reject an agency interpretation that contravenes clearly discernable legislative intent, but 'its role when that intent is not contravened is to determine whether the agency's interpretation is 'sufficiently reasonable.'"<sup>691/</sup>

## **2. Discussion and Decision of the Panel**

The arguments raised by Southern Tier were subject in the briefs and at oral argument to the objection that Southern Tier failed to exhaust its administrative remedies, not having previously raised the issue with the Department at the administrative level. However, the Panel recognizes that on July 24, 1998, less than three weeks after the CIT issued its decision in the U.S. Steel case, Southern Tier filed a motion asking for leave of the Panel to amend its Complaint to add this claim.<sup>692/</sup> This motion was not responded to by the Panel and was ultimately withdrawn. Moreover, the Panel does recognize that an exception to the principle of

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<sup>688/</sup> Department Panel Rule 57(2) brief, at 190.

<sup>689/</sup> Id.

<sup>690/</sup> Id.

<sup>691/</sup> Id.

<sup>692/</sup> On file at the Secretariat, U.S. Section.

exhaustion of administrative remedies does lie in situations where there has been a judicial interpretation of existing law after the decision below by the administrative agency and pending appeal, and where the judicial decision, if applied, might materially alter the result.<sup>693/</sup> Accordingly, the Panel gave Southern Tier leave at the oral hearing to pursue this line of argument.<sup>694/</sup>

Having considered the substance of the arguments in detail, this Panel is inclined not to follow the U.S. Steel decision. While the Court’s analysis is well drawn and, within its four corners, persuasive,<sup>695/</sup> it does appear to the Panel that if the decision is appealed, it is potentially subject to criticism by the Federal Circuit. First, as the Department has argued, there is some concern whether the Court gave the correct amount of deference to the Department’s interpretation of the statute. Under the applicable standard of review, when the meaning of a statute is not plain, as the Court specifically found to be true in that case, the court (or panel) is required to consider only whether the Department’s interpretation of the statute is a *reasonable* one, and must not substitute its judgment for that of the Department, even if the court (or panel) might have preferred, in the first instance, an alternative explanation or interpretation of the statute.

The Panel notes in this connection that the applicable rule of statutory interpretation is designed to give preference to the Department’s interpretations, not our own. The Federal

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<sup>693/</sup> See, Hormel.

<sup>694/</sup> Hearing Transcript, at 113 *et seq.*

<sup>695/</sup> The Panel would be equally troubled by any interpretation of the “production and sale” language as mere surplusage and would be troubled also by the potential illogicality of including different groups of expenses in the numerator and denominator of the applicable ratio.

Circuit has stated that “[a]n agency’s interpretation of a statute which it is authorized to administer is ‘to be sustained unless unreasonable and plainly inconsistent with the statute, and [is] to be held valid unless weighty reasons require otherwise.’”<sup>696/</sup>

Second, the U.S. Steel Court might be faulted for failing to recognize, or at least discuss, the “proportionality” which *does* exist in the total formula (*i.e.*, movement expenses being included in the “total actual profit” calculation as well as in the “total expenses” denominator). Perhaps this element of “proportionality” is not as logical as the proportionality that the U.S. Steel Court argues must exist in the ratio of “total U.S. expenses” to “total expenses;” nevertheless, the Panel cannot say that it is unimportant or that it does not tend to support the reasonableness of the Department’s methodology.

Third, the U.S. Steel Court might be faulted for failing to consider, or at least discuss, the applicable legislative history<sup>697/</sup> and the virtue, if not necessity, of the Department’s developing methodologies which will be reasonably non-distortive and supportive of the principle that CEP should be calculated, “as closely as possible”, to EP.

The Panel fully understands and respects the line of reasoning set out in the U.S. Steel decision; yet, the Panel is unable to say that the statute is so clear<sup>698/</sup> and the Department’s

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<sup>696/</sup> ICC Indus., Inc. v. United States, 812 F.2d 694, 699 (Fed. Cir. 1987), *quoting* Melamine Chems., Inc. v. United States, 732 F.2d 924, 928 (Fed. Cir. 1984). See also Chevron, 467 U.S. at 843, n. 11 (“The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”).

<sup>697/</sup> See SAA (“constructed export price is now calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers.”).

<sup>698/</sup> Panelist Endsley is particularly willing to admit that Southern Tier has made in its brief and at the hearing a strong case for the proposition that the statutory language, on its face, is clear.

(continued...)

interpretation of the statute is so unreasonable that it should be set aside. The Department has advanced an interpretation that does find support in the statutory language (“all expenses”); that does respect proportionality (between the elements of the “total actual profit” calculation and the calculation of the “total expenses” denominator), assuming that proportionality is a legitimate criterion for a court or panel to apply; and that does appear to respect both the applicable legislative history and an important policy objective.

The Panel does not know what the Federal Circuit would do with an appeal of the U.S. Steel decision, nor do we need to know. The Panel simply declines to follow that decision and therefore it determines that the Department’s decision to include movement expenses in “total expenses” for purposes of calculating CEP profit was supported by substantial evidence and was otherwise in accordance with law.

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698/ (...continued)

However, his own attempts at a straight-forward reading of both the current statute and the predecessor statute do not appear to comport with either the Department’s position or Southern Tier’s position. For example, he reads the predecessor statute (“exporter’s sales price shall ... be adjusted by ... expenses generally incurred by or for the account of the exporter in the United States....”) as strongly suggesting that the appropriate adjustments should only be those which occur *after importation*. (This interpretation comports with the current language of the Antidumping Agreement.) In other words, the predecessor statute specifically *included* a geographical distinction; in practice, however, the Department made no such distinction and Southern Tier appears to believe that this was appropriate. In the current statute, however, the phrase “in the United States” is used very differently; it is set off by commas and, according to the SAA, clearly is *not* used to create a geographical distinction as to the location of the expenses, but to specify the location of the affiliated purchaser. See SAA. In practice under the current statute, however, the Department now appears to *make* such a geographical distinction. This confusion (no doubt on his part, not the Department’s or Southern Tier’s) has influenced Panelist Endsley to conclude that the ostensibly clear language of the statute is not as clear in practice as might otherwise be imagined.

#### **IV.F. MINISTERIAL ERRORS**

##### **WHETHER THE FINAL RESULTS REQUIRE REMAND TO THE DEPARTMENT BECAUSE OF CERTAIN MINISTERIAL ERRORS**

By stipulation between CEMEX and the Department announced at the hearing on December 15, 1998,<sup>699/</sup> the Panel remands the final results of the Fifth Review to the Department for the purpose of correcting the ministerial errors identified by CEMEX in its May 9, 1997 letter to the Department. On remand, the Department shall correct the errors identified by CEMEX in its May 9, 1997 letter to the Department identified as Number 1, A and B, and Number 2. CEMEX has agreed to abandon its claim for ministerial error identified in its May 9, 1997 letter to the Department as Number 3. Pursuant to the stipulation, once the ministerial errors are corrected, the Department shall publish in the Federal Register notice of the corrections and then instruct the U.S. Customs Service to give effect to the corrections.

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<sup>699/</sup> See Hearing Transcript, at 95-98.

## **APPENDIX A**

### **FEDERAL REGISTER NOTICES**

Initiation of Antidumping Duty Investigation (October 23, 1989) 54 Fed. Reg. 43190

Preliminary LTFV Determination (April 12, 1990) 55 Fed. Reg. 13817

Final LTFV Determination (July 12, 1990) 55 Fed. Reg. 29244

Final ITC Determination (August 29, 1990) 55 Fed. Reg. 35371

Antidumping Duty Order (August 30, 1990) 55 Fed. Reg. 35443

Preliminary Results of First Administrative Review (January 26, 1993) 58 Fed. Reg. 6113

Final Results of first Administrative Review (April 28, 1993) 58 Fed. Reg. 25803

Preliminary Results of Second Administrative Review (June 15, 1993) 58 Fed. Reg. 33071

Final Results of Second Administrative Review (September 8, 1993) 58 Fed. Reg. 47253

Preliminary Results of Third Administrative Review (June 3, 1994) 59 Fed. Reg. 28844

Final Results of Third Administrative Review (May 19, 1995) 60 Fed. Reg. 26865

Initiation of Fifth Administrative Review (September 15, 1995) 60 Fed. Reg. 47930

Notice of Court Decision (October 12, 1995) 60 Fed. Reg. 53163

Preliminary Results of Fourth Administrative Review (May 14, 1996) 61 Fed. Reg. 24283

Preliminary Results of Fifth Administrative Review (October 3, 1996) 61 Fed. Reg. 51676

Amended Final Results of First Administrative Review (February 7, 1997) 62 Fed. Reg. 5800

Final Results of Fifth Administrative Review (April 9, 1997) 62 Fed. Reg. 17148

Final Results of Fourth Administrative Review (April 10, 1997) 62 Fed. Reg. 17581

Amended Final Results of Fifth Administrative Review (May 5, 1997) 62 Fed. Reg. 24414

Request for Panel Review (Fourth Administrative Review) (May 19, 1997) 62 Fed. Reg. 27238



Request for Panel Review (Fifth Administrative Review) (May 19, 1997) 62 Fed. Reg. 27238  
Preliminary results of Sixth Administrative Review (September 10, 1997) 62 Fed. Reg. 47626  
Final Results of Sixth Administrative Review (March 16, 1998) 63 Fed. Reg. 12764  
Request for Panel Review (Sixth Administrative Review) (May 1, 1998) 63 Fed. Reg. 24163  
Amended Final Results of Sixth Administrative Review (May 4, 1998) 63 Fed. Reg. 24528  
Preliminary Results of Seventh Administrative Review (September 10, 1998) 63 Fed. Reg. 48471  
Final Results of Seventh Administrative Review (March 17, 1999) 64 Fed. Reg. 13148

**Period of Investigation (POI) and Periods of Review (POR)**

POI April 1, 1989 -- September 30, 1989  
1st POR April 12, 1990 -- July 31, 1991  
2nd POR August 1, 1991 -- July 31, 1992  
3rd POR August 1, 1992 -- July 31, 1993  
4th POR August 1, 1993 -- July 31, 1994  
5th POR August 1, 1994 -- July 31, 1995  
6th POR August 1, 1995 -- July 31, 1996  
7th POR August 1, 1996 -- July 31, 1997

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

<b>IN THE MATTER OF:</b>	)	
	)	
<b>GREY PORTLAND CEMENT AND</b>	)	<b>SECRETARIAT FILE NO.</b>
<b>CLINKER FROM MEXICO</b>	)	<b>USA-97-1904-01</b>

**REMAND ORDER**

The Panel ORDERS the United States Department of Commerce to make determinations on remand consistent with the instructions and findings set forth in the Panel's opinion. The Department shall allow an appropriate period of time for parties, CEMEX, S.A. de C.V. and Cementos de Chihuahua, S A. de C.V., and petitioners, Southern Tier Cement Committe, to comment on the proposed remand result. The final determination on remand shall be issued within ninety (90) days of the date of this Order.

ISSUED ON June 18, 1999

SIGNED IN THE ORIGINAL BY:

Robert E. Lutz, II  
Robert E. Lutz, II, Chairman

Dr. Jorge Adame Goddard  
Dr. Jorge Adame Goddard

Dr. Hector Cuadra y Moreno  
Dr. Hector Cuadra y Moreno

Harry B. Endsley  
Harry B. Endsley

Dr. Jorge A. Witker Velasquez  
Dr. Jorge A. Witker Velasquez

**DISSENTING VIEWS OF PANELIST ENDSLEY CONCERNING THE ISSUE WHETHER THE DEPARTMENT'S DETERMINATION TO BASE NORMAL VALUE ON BOTH BAGGED AND BULK HOME MARKET SALES OF THE FOREIGN LIKE PRODUCT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS OTHERWISE IN ACCORDANCE WITH LAW**

As noted above, the Panel has determined that CEMEX's home market sales of Type II cement were outside the "ordinary course of trade." However, a Panel majority has determined that the Department committed reversible error in selecting all Type I cement as the "similar merchandise;" instead, the majority believes that the Department should have self-selected only bulk Type I cement as the comparator to the "subject merchandise," eliminating from consideration the home market sales of bagged Type I cement. Panelist Endsley dissents from this view.

**1. Arguments of the Participants**

CEMEX

In the Final Results, the Department specifically rejected CEMEX's argument that the comparison merchandise should be limited to home market sales of *bulk* cement:

The Department has included the entire universe of Type I sales in its calculation of normal value because bulk and bagged sales constitute identical merchandise. The only difference between these products is the packaging; therefore, the Department has made an adjustment for packaging differences. In addition, ... the Department has determined that CEMEX sold at one level of trade in the home market; therefore, comparing by discreet channel of distribution is not warranted as there is only one level of trade and one channel of distribution in that level. Therefore, we have not calculated normal values for each channel of distribution as requested by CEMEX and have used our standard methodology for comparing normal value to U.S. price for purposes of this final results of review.<sup>1/</sup>

In its Panel Rule 57(1) brief, CEMEX noted that all home market sales of Type II cement

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<sup>1/</sup> Fin. Res., 62 Fed. Reg., at 17,165.

(found by the Department to be outside the “ordinary course of trade”) were made in bulk, while home market sales of Type I cement (used in lieu of sales of Type II cement) were made both in bulk and in bags.<sup>2/</sup> In its Section A questionnaire response,<sup>3/</sup> CEMEX asserted that bulk and bagged cement represented both different channels of trade and different levels of trade in Mexico. Whereas cement in bulk was sold directly to end users, ready mixers and distributors, the “vast majority” of bagged cement was sold only to distributors.<sup>4/</sup> CEMEX also used its Section A response to argue that, consistent with the Department’s price comparison methodology used in the original LTFV investigation and in the first two administrative reviews, U.S. sales of bulk cement should be compared only to home market sales of bulk cement.<sup>5/</sup> In both the preliminary and Final Results, however, the Department compared U.S. sales of Type II bulk cement with home market sales of Type I *bulk and bagged* cement and, in addition, found only one *level* of trade and one *channel* of trade in that level.

CEMEX argues that regardless of whether the Department bases its normal value calculation on the home market sales of Type II cement (the *identical* merchandise) or Type I cement (*similar* merchandise), and regardless of whether the Department determines that there is a single or multiple levels of trade in the U.S. and home markets, “to ensure fair price comparisons, the calculation of normal value must be limited to home market sales of bulk cement.”<sup>6/</sup> To include home market

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<sup>2/</sup> CEMEX Panel Rule 57(1) brief, at 53-54.

<sup>3/</sup> Prop. Doc. 1.

<sup>4/</sup> *Id.*, at 21.

<sup>5/</sup> CEMEX Panel Rule 57(1) brief, at 54, *citing* Prop. Doc. 16, at 8.

<sup>6/</sup> *Id.*, at 56.

sales of bagged cement in the calculation of normal value, when CEMEX's U.S. sales were exclusively made in bulk form, represents a departure from past administrative practice, both in this case and in others.<sup>7/</sup> Indeed, CEMEX asserts that in cases where U.S. sales were limited to bulk cement, the Department "has uniformly limited its price comparisons to home market sales of bulk cement."<sup>8/</sup>

CEMEX finds additional support for its position in the "viable home market" statute, 19 U.S.C. § 1677b(a)(1)(C), arguing that "both home market sales of Type II cement in bulk or Type I cement in bulk provide a viable home market for comparison purposes with U.S. sales because home market sales of each cement Type in bulk are greater than 5% of U.S. Sales."<sup>9/</sup>

Finally, CEMEX asserts that the Department erred in its finding in the Final Results that "the only difference between these products [Type I bagged cement vs. Type I bulk cement] is the packaging."<sup>10/</sup> CEMEX argues that "[t]he administrative record establishes that there are significant price differences between bagged and bulk cement due to reasons other than the differences in

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<sup>7/</sup> Id. CEMEX argues that the Department's methodology in the First Administrative Review is "inconsistent with its own determinations in the original [LTFV] investigation and in the first, second, third and fourth administrative reviews...." See id., at 59. CEMEX also argues that "[i]n other cement cases [the Department], where possible, has similarly compared bulk U.S. sales to bulk home market sales and bagged U.S. sales to bagged home market sales. Thus, when U.S. sales were limited to bulk sales, [the Department] has not required the respondent to report home market sales of bagged sales, as long as home market sales could be used for comparison purposes", citing Gray Portland Cement and Clinker from Venezuela, 56 Fed. Reg. 56,390 (1991), Gray Portland Cement and Clinker from Japan, 56 Fed. Reg. 12,156 (1991) and Gray Portland Cement and Clinker from Japan, 60 Fed. Reg. 43,761 (1995).

<sup>8/</sup> Id., at 56-57.

<sup>9/</sup> CEMEX Panel Rule 57(1) brief, at 60, citing also Department Regulation § 351.404(b)(2).

<sup>10/</sup> Fin. Res., 62 Fed. Reg., at 17,165.

packing expenses incurred by bulk and bagged cement.”<sup>11/</sup> As factual support for this proposition, CEMEX urges once again that “home market sales of bagged Type I cement are made through different channels of distribution than home market sales of bulk cement.”<sup>12/</sup> In comparison, “the vast majority of bulk cement sales were made directly to end users,” at different pricing levels (the average price per ton of bulk cement being less than the average price per ton of bagged cement).<sup>13/</sup>

While CEMEX concedes that the price differential was “in part” due to differences in packing expenses, CEMEX urges that the administrative record discloses that the price differential was also due to factors other than packing.

To explain or highlight the underlying facts (which CEMEX alleges to be in the administrative record), CEMEX offered to the Panel<sup>14/</sup> an “Exhibit 4,” which it stated to be “a comparison calculation of the weighted average home market cement prices for Type I cement, bagged and bulk (net of discounts, rebates, freight, and packing expenses) as derived from CEMEX’s home market sales tape.”<sup>15/</sup> On the basis of the data shown in this Exhibit 4, CEMEX argues to the Panel that the Department’s “assumption that the packing adjustment accounted for any pricing differential between Type I bagged and Type I bulk cement was grossly mistaken.”<sup>16/</sup>

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<sup>11/</sup> CEMEX Panel Rule 57(1) brief, at 62.

<sup>12/</sup> Id., citing Prop. Doc. 1, at 21.

<sup>13/</sup> Id.

<sup>14/</sup> This document is not contained in the administrative record.

<sup>15/</sup> Id.

<sup>16/</sup> Id., at 62-63. CEMEX goes on to assert: “Plainly, [the Department’s] determination that the entire price differential between bulk and bagged cement was due to packing is directly contradicted by information contained in the administrative record.... [C]ontrary to the position  
(continued...)”

Southern Tier

Southern Tier, by contrast, concludes that the Department’s “determination to include all sales of Type I cement in the calculation of normal value was consistent with the statute, [the Department’s] practice, and the evidence in the fifth review.”<sup>17/</sup> Initially, Southern Tier notes that CEMEX does not even attempt to argue that the Department’s determination in this matter was inconsistent with the statute, since the statute requires that U.S. sales be compared with the “foreign like product,” and except in the specific instances prescribed by the statute,<sup>18/</sup> the Department “may not exclude sales of the foreign like product from normal value.”<sup>19/</sup> Second, Southern Tier notes that CEMEX is not contesting the Department’s finding that Type I cement sold in bulk and Type I cement sold in bags “constitute identical merchandise.”<sup>20/</sup> Third, CEMEX does not argue that the statute *prohibits* the Department from comparing merchandise sold in bulk with merchandise sold in bagged form.<sup>21/</sup> Thus, Southern Tier is skeptical that a legal issue even remains for this Panel to decide.<sup>22/</sup>

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<sup>16/</sup> (...continued)  
taken by [the Department] in the final results, the administrative record establishes that a significant difference in pricing exists for bulk and bagged cement that is not accounted for by reported and verified packing expense.” *Id.*, at 63.

<sup>17/</sup> Southern Tier Panel Rule 57(2) brief, at 53.

<sup>18/</sup> See 19 U.S.C. § 1677b(a)(1)(A) & (B), § 1677b(a)(2), and § 1677b(b), referencing sales outside the ordinary course of trade, sales below cost, and sales to a fictitious market.

<sup>19/</sup> Southern Tier Panel Rule 57(2) brief, at 54.

<sup>20/</sup> *Id.*, *citing* Fin. Res., at 17,165.

<sup>21/</sup> *Id.*

<sup>22/</sup> *Id.*, at 55 (“CEMEX clearly concedes that (1) the statute requires comparing U.S. sales to home market sales of the same merchandise and (2) Type I cement sold in bulk and Type I cement sold  
(continued...)”)

Southern Tier also argues that the alleged consistent Department practice to the contrary is illusory. Indeed, in the very Japanese Cement decision cited by CEMEX, the Department's methodology was identical to that taken in this case.<sup>23/</sup> Southern Tier cites other decisions, over a period of many years, that are also consistent with this practice.<sup>24/</sup> Finally, Southern Tier counters the assertion made by CEMEX that the Department had, in the original LTFV investigation and in all subsequent reviews, adopted a methodology contrary to that used in the Fifth Administrative Review, particularly so in the case of the Third and Fourth Administrative Reviews where CEMEX's refusal to report home market sales of Type I bulk cement required the Department to use "best information available."<sup>25/</sup> Even if there was a change in methodology, the applicable standard of review does not prevent an administrative agency "from changing its practice or departing from its precedent as long as it provides a satisfactory explanation for the change."<sup>26/</sup>

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<sup>22/</sup> (...continued)  
in bags are identical merchandise, except for packaging. Consequently, there is no genuine legal issue, and the Panel should affirm [the Department's] determination to include both bulk and bagged sales of Type I cement in the calculation of normal value.")

<sup>23/</sup> See Japanese Cement, 60 Fed. Reg., at 43,763 ("There is no physical difference between the bagged and bulk cement sold in Japan. The only difference is the manner in which the merchandise is packed. Since packing is not a criterion for comparability, and because there is no physical difference between bulk and bagged cement sold in the home market, we did not exclude home market sales of bagged cement from our calculations of [normal value].")

<sup>24/</sup> Southern Tier Panel Rule 57(2) brief, at 56, *citing* Calcium Aluminate Cement Clinker and Flux from France, 59 Fed. Reg. 141,136, 14,143-44 (1994) (comparing U.S. bulk sales to home market bagged sales); Gray Portland Cement and clinker from Venezuela, 56 Fed. Reg., at 56, 391 (comparing Caribe's U.S. bulk and bagged sales to its home market bagged sales); Frozen Concentrated Orange Juice from Brazil, 57 Fed. Reg. 3,995 (1992) (comparing U.S. packed sales to home market packed and bulk sales); Industrial Phosphoric Acid from Israel, 52 Fed. Reg. 25,440, 25,442 (1987) (comparing U.S. bulk sales to home market sales in drums).

<sup>25/</sup> *Id.*, at 57, note 17.

<sup>26/</sup> *Id.*, at 58, *citing* British Steel, PLC v. United States, 127 F.3d 1471, 1475 (Fed. Cir. 1997).



As to the latter point, Southern Tier notes that CEMEX “has not even bothered to claim that [the Department] failed to provide a reasoned explanation for the alleged change in practice,”<sup>27/</sup> particularly in the face of the Department’s express findings that (1) bulk and bagged sales of Type I cement are identical merchandise and (2) CEMEX sold Type I cement at only one level of trade,<sup>28/</sup> which findings are clearly supported by substantial evidence.

Southern Tier emphasizes that “CEMEX ... has not challenged [the Department’s] finding of only one level of trade in the home market and its finding of only one channel of distribution within that level of trade.”<sup>29/</sup> In its April 2, 1997 calculation memorandum for the Final Results,<sup>30/</sup> the Department specifically *rejected* CEMEX’s and CDC’s claim that there were separate levels of trade in the home market for sales of bulk and bagged cement. The Department determined that there was only one stage of marketing—“sales of cement shipped to end-users and ready-mixers in bulk and bagged form.” The Department also found that there was “one distinct set of selling functions performed for both ready-mixer and end-user sales by CEMEX and CDC which reflect the one stage of marketing determined by the Department. Thus, we determined that CEMEX and CDC sell at one level of trade in the home market.”<sup>31/</sup>

Finally, Southern Tier argues that much of CEMEX’s challenge to the Department’s finding that bulk and bagged Type I cement were “identical” involves the creation, and slaying, of a straw

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<sup>27/</sup> Id.

<sup>28/</sup> Id., at 58-59.

<sup>29/</sup> Id., at 59, *citing* Fin. Res., 62 Fed. Reg., at 17,157, 17,165.

<sup>30/</sup> Prop. Doc. 101, at 9.

<sup>31/</sup> Southern Tier Panel Rule 57(2) brief, at 53, note 15.

man. CEMEX, in effect, criticizes findings that the Department demonstrably never made. The Department “plainly did not make any finding regarding any price differential between bulk and bagged cement or the reasons why such differential may have existed.”<sup>32/</sup> Indeed, the Department found, simply, “that the only difference in the two forms of merchandise was in the packaging.”<sup>33/</sup> Thus, the Department’s “determination to include both types of merchandise in the calculation of normal value was not based on a determination that they were similarly priced, but on the uncontested conclusion that they were identical except for packaging.”<sup>34/</sup> This determination was, of course, plainly consistent with the statute since there is no provision in the statute that requires, or even suggests, that the decision to include particular sales in the calculation of normal value should be based on *price similarity*.<sup>35/</sup> Price similarity (or dissimilarity) is statutorily irrelevant, and thus the Department could not have erred by “failing to take evidence regarding pricing into account in making its determination.”<sup>36/</sup>

*The Department*

For its part, the Department notes that it properly rejected CEMEX’s request “to limit the universe of home market comparison sales to those made in bulk form. The Department correctly rejected this request, explaining that the statute required comparisons with all sales of the foreign like product, and that Type I cement sold in bags could not be physically distinguished from Type

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<sup>32/</sup> *Id.*, at 61.

<sup>33/</sup> *Id.*

<sup>34/</sup> *Id.*

<sup>35/</sup> *Id.*

<sup>36/</sup> *Id.*, at 62.

I cement sold in bulk. The Department further noted that it had adjusted its NV [normal value] calculations for differences in packaging, and that its comparison methodology was consistent with its determination that all of CEMEX's home market sales were made at the same level of trade."<sup>37/</sup>

The Department also notes, as did Southern Tier, that CEMEX does not reference the statute in arguing that the Department erred; does not challenge the Department's specific finding that bagged and bulk Type I cement are physically identical; and similarly does not contest the finding that CEMEX sold both forms of the foreign like product at the same home market level of trade.<sup>38/</sup>

Moreover, "CEMEX simply ignores the many administrative determinations in which the Department has compared subject merchandise to differently packaged forms of the foreign like product."<sup>39/</sup> In the end, CEMEX challenges the Final Results simply because it prefers a different methodology than the one selected by the Department.

The Department focuses initially on the fact that the statute clearly does not *compel* CEMEX's preferred comparison methodology. Under the statute,

The term 'foreign like product' means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:

(A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

(i) produced in the same country and by the same person as the subject

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<sup>37/</sup> Department Panel Rule 57(2) brief, at 91.

<sup>38/</sup> *Id.*, at 92.

<sup>39/</sup> *Id.*

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.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,  
(ii) like that merchandise in the purposes for which used, and  
(iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16) (1995) (emphasis added)

In this case, since the Department found that it could not compare U.S. sales to home market sales of the “identical” merchandise (Type II cement), as contemplated by Part (A) of the statute, it had to compare U.S. sales to home market sales of similar or “like” merchandise (Type I cement), pursuant to Part (B).

A separate statute then defines the price basis of the comparison, requiring the Department to base product comparisons on—

the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price ....

19 U.S.C. § 1677b(a)(1)(B)(i) (1995)

In this case, the Department was required by its *ordinary course of trade* finding to compare U.S. sales of Type II cement to Mexican sales of Type I cement, the variant which was most similar “in component material” to Type II cement and which otherwise met the Part (B) standards. However, “[n]othing in the statute required, or even authorized, the Department further to limit the universe of the foreign like product due to differences in packaging.”<sup>40/</sup>

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<sup>40/</sup> *Id.*, at 95.

The Department finds CEMEX’s assertion that, in other cases, it has “uniformly limited its price comparisons to home market sales of bulk cement”<sup>41/</sup> to be “startling,” particularly in the context of several recent administrative reviews involving a Japanese cement producer in which the Department compared sales in bulk form to home market sales in bagged form.<sup>42/</sup> In those reviews, the Department specifically *rejected* the type of argument made by CEMEX here, stating that “packing is not a criterion for matching types of cement...”<sup>43/</sup>

The Department argues that CEMEX “cannot alter the fundamental fact that Type I cement sold in bags is *identical* to Type I cement sold in bulk. Again, the *only* difference is packaging, for which the Department has adjusted.”<sup>44/</sup> The Department cites in this connection other recent determinations involving roses (“packaging and presentation of roses in bunches and bouquets do not transform the roses”)<sup>45/</sup> and raspberries (“[t]he product is identical whether packed in drums or pails”).<sup>46/</sup> Likewise, “the mere bagging of Type I cement does not transform its chemical composition or other properties.”<sup>47/</sup>

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<sup>41/</sup> CEMEX Panel Rule 57(1) brief, at 56.

<sup>42/</sup> Department Panel Rule 57(2) brief, at 95.

<sup>43/</sup> Gray Portland Cement and Clinker from Japan, 60 Fed. Reg., at 43763 (“[B]ecause the cases cited by [respondent] do not stand for the proposition that the Department must always compare bulk-to-bulk and bag-to-bag sales, and because packing is not a criterion for matching types of cement, we compared sales of bulk cement in the United States to sales of both bulk and bagged cement in the home market, and made the appropriate adjustments to reflect the packing costs associated with bagged cement.”)

<sup>44/</sup> Department Panel Rule 57(2) brief, at 97-98 (emphasis in original).

<sup>45/</sup> Fresh Cut Roses from Ecuador, 60 Fed. Reg. 7019, 7022 (1995).

<sup>46/</sup> Red Raspberries from Canada, 50 Fed. Reg. 19768, 19771 (1985).

<sup>47/</sup> Department Panel Rule 57(2) brief, at 98.

From a standard of review perspective, even if it could be argued that the Department’s methodology in the Fifth Administrative Review differs from that utilized previously, the Department clearly “has the flexibility to change its position providing that it explains the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence.”<sup>48/</sup> Therefore, to the extent that the Department *excused* CEMEX from reporting home market sales in bagged form in prior segments of the proceedings, “it was not precluded from adopting other reasonable comparison methodologies”<sup>49/</sup> and there is no question that the Department provided “a reasoned basis” for its decision to compare U.S. sales to all home market sales, however packaged.<sup>50/</sup>

Finally, the Department argues that CEMEX has “impute[d] two findings to the Department, and then allege[d] that these findings are not supported by substantial record evidence.”<sup>51/</sup> However, the Department never made the findings suggested by CEMEX and, indeed, found only that “bulk and bagged sales constitute identical merchandise” and that it was appropriate to adjust for packaging differences.<sup>52/</sup> Moreover, CEMEX’s reliance on the language of its own Section A questionnaire response may be misplaced since that response (in language ignored by CEMEX in its briefs to the Panel) states that whatever price differential exists “is due to the fact that distribution

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<sup>48/</sup> Id., at 99, *quoting Cultivos Miramonte v. United States*, 980 F. Supp. 1268, 1274 (Ct. Int’l Trade 1997).

<sup>49/</sup> Id.

<sup>50/</sup> Id.

<sup>51/</sup> Id., at 100.

<sup>52/</sup> Id. See Fin. Res., 62 Fed. Reg., at 17,165.

expenses, particularly packing, handling and freight, are greater for bagged cement.”<sup>53/</sup>

The Department also strongly objects to CEMEX’s attempt to supplement the record by its “Exhibit 4” to its Panel Rule 57(1) brief. The Department indicates that the belated introduction of this document, after the record was closed, is a manifest violation of case law<sup>54/</sup> and of the Department’s regulations.<sup>55/</sup> “CEMEX could have presented the data set in its ‘Attachment 4’ to the Department before the time period for the submission of factual information expired; but it chose not to. The Panel should not countenance CEMEX’s belated effort to present data that neither the Department nor the domestic industry can comment on or check for accuracy.”<sup>56/</sup>

Setting aside this “red herring,” the Department summarizes the situation by noting that “[t]here is simply no statutory requirement that the Department artificially limit the universe of comparison market sales in the self-serving manner suggested by CEMEX; nor is the Department required to exclude a major subset of the foreign like product due to alleged price differences. Moreover..., the Department offered a reasoned explanation for its comparison methodology...: U.S.

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<sup>53/</sup> Id. See Prop. Doc. 12, at 20.

<sup>54/</sup> Kerr-McGee Chemical Corp. v. United States, 955 F. Supp. 1466, 1472 (Ct. Int’l Trade 1997) (Barring exceptional circumstances, “the scope of the record for purposes of judicial review is based upon information which was ‘before the relevant decision-maker’ and was presented and considered ‘at the time the decision was rendered.’”)

<sup>55/</sup> 19 U.S.C. § 1516a(b)(2)(A) (1997) states that the record shall consist of:

(i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and

(ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

<sup>56/</sup> Department Panel Rule 57(2) brief, at 101.

sales should be compared to home market sales in both bagged and bulk form because (1) bagged and bulk cement ‘constitute identical merchandise’ and (2) the decision to use both forms for comparison purposes advances the separate determination that CEMEX sold both forms at the same level of trade in the home market.”<sup>57/</sup> There is “no provision in the statute, no judicial precedent, and no statements of policy by the [Department to] support [CEMEX’s] argument.”<sup>58/</sup>

## **2. Discussion and Views of Panelist Endsley**

Considering both the challenges raised by CEMEX and the replies by Southern Tier and the Department, I have little difficulty in finding that the Department’s determination to base normal value on both bagged and bulk home market sales of the “foreign like product” was supported by substantial evidence and otherwise in accordance with law, and I fear that my colleagues have gone substantially astray—in their application of the standard of review, in their interpretation of the statute, in their wholesale dismissal of the applicable case law (including the binding decisional law of CEMEX), and in their disregard of the relevant rules of procedure.

Focusing first, as we must, on the applicable standard of review, the Federal Circuit decision in Koyo Seiko Co., Ltd. v. United States, 66 F.3d 1204, 1209-10 (Fed. Cir. 1995) has set the inalienable baseline for this Panel:

The statutory provision defining “such or similar” merchandise is silent with respect to the methodology that Commerce must use to match a U.S. product with a suitable home-market product. See 19 U.S.C. § 1677(16) (1988). This is not surprising, given that the model-match methodology for comparing one type of product, such as TRBs, would not be relevant to the model-match methodology for other products, such as motorcycles or paint. Congress has not addressed in the statute the issue of how Commerce is to match U.S. TRBs with “such or similar” home-market TRBs.... We agree with the government that Congress has implicitly delegated authority to

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<sup>57/</sup> Id., at 102.

<sup>58/</sup> Id.



Commerce to determine and apply a model-match methodology necessary to yield “such or similar” merchandise under the statute. This Congressional delegation of authority empowers Commerce to choose the manner in which “such or similar” merchandise shall be selected. Chevron applies in such a situation.... Thus, our inquiry is limited to determining whether Commerce’s model-match methodology...is reasonable.

With clarity and economy, the Federal Circuit has thus made it clear that (i) the statute at issue here is *silent* as to how the Department must conduct its “such or similar” merchandise [“foreign like product”] or product concordance analyses;<sup>59/</sup> and (ii) the applicable standard of review (based on the second prong of Chevron) is whether the model-match or comparison methodology selected and applied by the Department is “reasonable” given the nature of the product in question and the record evidence. Congress’s statutory silence in effect means that this task has been left to the technical expertise and discretion of the Department. In such situations, the agency’s interpretation of the statute should be sustained whenever permissible. Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190, note 9 (Fed. Cir. 1990) (*quoting* Chevron, 367 U.S. at 842-45 (1984)).

The CIT has added significantly to this analysis by making it quite clear that the Department’s duties in this respect are both statutory and *non-delegable*. In Timken Company v. United States, 630 F. Supp. 1327, 1338 (Ct. Int’l Trade 1986), the CIT indicated that the model-match issue is too critical to the dumping margin calculation to be left (solely) to the discretion of a respondent whose choices clearly may be guided by self-interest.<sup>60/</sup>

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<sup>59/</sup> The collective matching of the U.S. products to the home market products is referred to as a “concordance.”

<sup>60/</sup> The Timken court stated:

It is of particular importance that the administering agency itself make

(continued...)

In keeping with the standard of review, therefore, unless the Department's conclusions on the model-match issue are unreasonable based on the record evidence, the Panel simply is not allowed to displace the Department's judgment with its own.

Turning now to the question of how the courts and Chapter 19 panels have implemented this standard of review, it is clear that both have consistently *upheld* the Department's determinations regarding such or similar merchandise ["foreign like product"], in a broad array of circumstances and with respect to both Parts (B) and (C) of the statute. See, e.g., U.H.F.C. Co. v. United States, 916 F.2d 689, 691, 697 (Fed. Cir. 1990) (*upholding* the Department's determination that numerous different grades of animal glue sold by Dutch manufacturer "in widely varying applications such as general adhesives, abrasives or sizing agents" could nevertheless "reasonably be compared" under Part (C) of the statute based on their many "common uses"); United Engineering & Forging v.

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60/ (...continued)

the required determination of what constitutes the most similar merchandise, rather than delegating that responsibility to an interested party, considering that the issue may be a complex one on which reasonable minds could differ. For example, of two potentially "similar" foreign market products, one product could be most similar to merchandise sold in the United States in its use, while the other might be more similar in its materials. It is the administering agency rather than an interested party that should make the determination as to what "similar" characteristics are of the most significance. Additionally, it is hard to imagine that a foreign manufacturer, given the option of selecting what constitutes similar merchandise, and assuming that there exists more than one product from which such a choice can be made, would not make the choice of merchandise most advantageous to itself.

If, for example, there were two foreign market products that could be considered "similar" but which differed in value, a foreign manufacturer would have an incentive to select as "similar" the product that was of lower value, as such selection could result in lower margins. Congress could not have intended that an interested party be accorded so much control over a determination of such importance.

630 F. Supp., at 1,338 (Emphasis added).

United States, 779 F. Supp. 1375, 1381-82 (Ct. Int'l Trade 1991) (*upholding*, in case of UK-manufactured crankshaft models, the Department's determination of similarity under Part (B) of the statute despite the fact that one of the selected home market comparators was significantly different in end use, volume of sales, and commercial value from the subject merchandise);<sup>61/</sup> NTN Bearing Corp. Of America v. United States, 747 F. Supp. 726, 735-36 (Ct. Int'l Trade 1990) (*upholding* the Department's determination of criteria for assessing similarity of merchandise under Part (C) of the statute where the Department found that it was not possible to measure similarity of home market and U.S. TRBs in terms of their respective commercial values);<sup>62/</sup> Kerr-McGee Chemical Corp. v. United States, 741 F. Supp. 947, 951-52 (Ct. Int'l Trade 1990) (*upholding* the Department's

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<sup>61/</sup> In United Engineering, respondent argued that the Department had erred in focusing simply on the similarity of the physical characteristics between the U.S. model and the UK comparator and that the Department should instead have considered all relevant factors in making the model selection, including non-physical differences such as the purposes for which the merchandise is used and its commercial value. 779 F. Supp., at 1,380. In response, the CIT stated that the “[r]eality is that the agency has broad discretion in the administration of the antidumping law” and found that record evidence clearly pointed to “substantial similarity of physical characteristics between the U.S. model and the UK comparator....” *Id.*, at 1,381. Relying on Timken, the CIT appeared even to discount the need to consider *non-physical* criteria in making its selection and, citing other cases, stated: “In the light of such cases, this court cannot conclude that it was not in accordance with law for the agency to have looked to the physical characteristics of the merchandise at issue herein.” *Id.*, at 1,382.

<sup>62/</sup> In NTN Bearing, the court reaffirmed the applicable standard of review:

Commerce has traditionally been granted broad discretion in the selection of methodology implemented to achieve its mandate. Hence, absent a showing of unreasonableness on the part of the agency, its choice of methodology shall be sustained. [citation omitted] Moreover, it is the administering agency rather than an interested party that should make the determination as to what methodology should be used. [citation omitted] In the case at bar, plaintiffs have not provided any evidence of unreasonable behavior on the part of Commerce. The Commerce Department was not required to adopt the methodology advanced by plaintiffs. Furthermore the record supports Commerce's contention that its methodology was unreasonable.

747 F. Supp., at 736.

determination of similarity under Part (B) of the statute for purposes of home market viability of two different grades—alkaline and zinc—of *Electrolytic Manganese Dioxide* (EMD), despite their different characteristics and end-uses);<sup>63/</sup> and Monsanto Co. v. United States, 698 F. Supp. 275, 277 *et seq.* (Ct. Int’l Trade 1988) (*upholding* the Department’s finding of similarity, in connection with an investigation of cyanuric acid and its chlorinated derivatives [CA & CD] for use in the swimming pool trade, between home market granular CA & CD used both inside and outside the swimming pool trade and the granular CA & CD used in the U.S. within that trade).<sup>64/</sup>

Chapter 19 Panels have been equally willing to recognize and uphold the Department’s exercise of discretion in selecting and employing model-match methodologies. See, e.g., Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA-90-1904-01, Opinion May 15, 1992, at 66 *et seq.* (*upholding* the Department’s determination of similarity of paving equipment parts despite evidence that the specific parts being compared were not similar either in their material composition or in their configuration, could not, in a narrow sense, have identical purposes since the parts themselves were not physically identical, and that there were

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<sup>63/</sup> In Kerr-McGee, plaintiffs argued that the Department should have calculated home market sales viability with respect to alkaline EMD by using only alkaline home market sales as the comparator. The Department rejected the argument and aggregated the home market zinc and alkaline EMD sales, the end result of which was to confirm home market viability. In its Final Determination, the Department noted that both zinc and alkaline EMD were produced from the same ingredients and used the same production processes (differing only in final finishing). Even though they differed in ultimate use (alkaline EMD being used for alkaline batteries and zinc EMD for zinc batteries), both types of EMD performed the same essential battery filler function (*i.e.*, both were used to produce dry cell batteries). 741 F. Supp., at 952.

<sup>64/</sup> In upholding the Department’s methodology, the Monsanto court appeared to minimize the effect of any market or use limitations: “The answer here is that apples are apples no matter who buys them and that a market or use limitation on the subject class, by itself, does not restrict the basis for the fair market calculation if all the merchandise included is physically identical.” 698 F. Supp., at 278.

significant price dissimilarities between the comparators even in cases where the physical characteristics and the costs of production were similar); Certain Corrosion-Resistant Carbon Steel Products from Canada, USA-93-1904-03, Opinion October 31, 1994, at 85, 87 (*upholding* the Department’s determination to accept certain product matches reported by Canadian steel producer that did not conform to strict application of the Department’s prescribed model match hierarchy: “The Department retained its discretion in matching products even after a product characteristic hierarchy was established”); and Certain Cut-to-Length Carbon Steel Plate from Canada, USA-93-1904-04, Opinion October 31, 1994, at 12 *et seq.* (“Commerce has discretion in the establishment of a product characteristic hierarchy as an aid in its selection of product matches”).

As both Southern Tier and the Department have noted, numerous administrative decisions also support the notion of substantial discretion on the part of the Department in this area and, indeed, specifically support the methodology selected and employed by the Department in this very case. See, e.g., Japanese Cement, 60 Fed. Reg., at 43,763 (included both bulk and bagged cement as the “foreign like product”); Calcium Aluminate Cement Clinker and Flux from France, 59 Fed. Reg. 141,136, 14,143-44 (1994) (compared U.S. bulk sales to home market bagged sales); Gray Portland Cement and Clinker from Venezuela, 56 Fed. Reg., at 56,391 (compared U.S. bulk and bagged sales to home market bagged sales); Frozen Concentrated Orange Juice from Brazil, 57 Fed. Reg. 3,995 (1992) (compared U.S. packed sales to home market packed and bulk sales); and Industrial Phosphoric Acid from Israel, 52 Fed. Reg. 25,440, 25,442 (1987) (compared U.S. bulk sales to home market sales in drums).

Not unexpectedly, the Federal Circuit’s binding decision in CEMEX, discussed in the ordinary course of trade section of the Panel’s opinion, also sheds considerable light on the subject

and manifestly supports the above authorities. In considering the “such or similar merchandise” provision against an argument by CEMEX that the Department should have utilized *constructed value* as the comparator in the home market, as opposed to using *Type I cement*, the Court said as follows:

Therefore, the initial consideration for Commerce is whether, under section 1677b(a)(1), the sales are ‘in the usual commercial quantities and in the ordinary course of trade.’ 19 U.S.C. § 1677b(a)(1). If the sales are not in the ordinary course of trade, then Commerce should exclude that specific class of merchandise (here, Types II and V cements) because a determination of the antidumping duty cannot be made. Commerce should then examine the next available class of merchandise (here, Type I cement) to determine if it matches any of the section 1667(16) categories of ‘such or similar merchandise.’ In this case, Type I cement meets the section 1677(16)(B) requirements because it is produced in the same country and by the same person as Types II and V cements, it is like Types II and V cements in composition, and it is approximately equal in commercial value to Types II and V cements. Therefore, Type I cement becomes the ‘such or similar merchandise’ upon which foreign market value is based. The plain language of the statute requires Commerce to base foreign market value on nonidentical but similar merchandise (here, Type I cement)....”<sup>65/</sup>

In the clearest possible terms, therefore, the Federal Circuit has interpreted the very statute at issue here, finding that it is the “class” of merchandise that the statute is intended to address (*e.g.*, Type I cement vs. Type II cement), not the *form of presentation* of one of those classes (*e.g.*, Type I cement in bags vs. Type I cement in bulk).

Having been unable to find any support whatever for the majority’s position in the standard of review (which requires only that the Department’s methodology be of its own making and reasonable in nature), in the general judicial or Chapter 19 cases (which consistently uphold the Department’s reasonable exercise of discretion), or in the binding decisional law (CEMEX demonstrably runs expressly counter to the majority’s position),<sup>66/</sup> I now turn to the possibility that

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<sup>65/</sup> CEMEX, at 903-04 (Emphasis added).

<sup>66/</sup> With a wave of its hand, the majority dismisses the entire line of five consistent CIT cases and  
(continued...)

a parsing of the statute itself might be found to support the majority's view. Regrettably, this is not the case.

As has been discussed previously, the relevant statutes require the Department to compare the export price to the price at which the "foreign like product" is first sold for consumption in the exporting country.<sup>67/</sup> Congress then defines the term "foreign like product" according to a descending hierarchy of possibilities, starting with the *identical* merchandise (Part (A)), then to *similar* or like merchandise (Part (B)), and then to *reasonably comparable* merchandise (Part (C)). In this case, of course, since the Department found that home market sales of Type II cement (the *identical merchandise*) were not in the ordinary course of trade, the Department was compelled to use as the "foreign like product" the *similar or like merchandise*, as stated in Part (B) of the statute.

Once again, that statute reads:

The term 'foreign like product' means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:

" " "

(B) Merchandise—

- (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.

19 U.S.C. § 1677(16) (1995) (emphasis added)

To select similar or like merchandise under Part (B), therefore, the Department is required

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<sup>66/</sup> (...continued)  
three consistent Chapter 19 panel opinions as "not binding on the Panel," without offering a single decision in support of its own position. The majority's strategem with respect to the binding decisional law of CEMEX is different: this case is simply ignored.

<sup>67/</sup> See 19 U.S.C. § 1677b(a)(1)(B)(i). Of course, the Department must take into account the issues of level of trade, usual commercial quantities, etc. See n 18 *supra* and accompanying text.

to *consider* three elements: (i) the selected foreign like product should be produced in the same country and by the same person as the subject merchandise; (ii) the selected foreign like product should be similar to the subject merchandise “in component material or materials” and in the purposes for which used; and (iii) the selected foreign like product should be approximately equal in commercial value to the subject merchandise. In “considering” each of these elements, the case law seems to make it clear that the Department is not required to “weight” each one equally. Indeed, the United Engineering, Kerr-McGee and Monsanto cases, discussed above, all appear to recognize that the Department may give primacy to the *physical characteristics* of the “foreign like product” comparator and significantly less weight to the other statutory factors (end use and commercial value) and, presumably, even less (or no) weight to non-statutory factors such as volume of sales, price variations, channels of distribution, etc. Significantly, nowhere in the statute is there any language requiring the Department to alter its methodology depending on (i) the specific form of presentation of the product (*e.g.*, whether in bulk, in bags, in drums, in pails, on pallets, etc.), or on (ii) the pricing dissimilarities that CEMEX finds to be so convincing.

Consistent with the arguments made by Southern Tier and the Department, the introductory sentence to this statute is also important to an understanding of its scope. This sentence states that “[t]he term ‘foreign like product’ means merchandise...” which I read to, in effect, mean “[all] merchandise” (or the universe of merchandise) which meets the specific standards set out in the statute.<sup>68/</sup> Thus, the straight-forward, if not compelling, reading of the statute is that the Department must identify *all* merchandise which (if Part (B) is to be used) conforms to the cited

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<sup>68/</sup> As Southern Tier noted in its brief, there are no *implicit* exceptions to the universality of the “foreign like product,” only *explicit* exceptions derived by statute. See note 18 *supra* and accompanying text.



three elements. Considering the impact of the case law noted just above, the irreducible minimum is that the Department must identify *all* home market merchandise which is similar to the subject merchandise “in component material or materials.”

What has the Department done in this case? It has determined that all three elements of Part (B) of the statute have been met.<sup>69/</sup> With respect to the physical characteristics, it has expressly determined that Type I cement, whether in a bag or in bulk, is Type I cement. It has determined that the two different presentations of Type I cement are not just similar in “component materials” but are identical in “component materials.” It has determined that the only difference between the two is in the packaging and it has made an appropriate adjustment for the difference in cost arising out of that packaging.<sup>70/</sup> Where does the majority find error in this interpretation and application of the statute?

In my judgment, the Department was absolutely correct in identifying the full *universe* of products which are alike “in component materials,” which in this instance means *all* of Type I cement, irrespective of the form of presentation (*i.e.*, whether in bulk or bagged). Indeed, although

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<sup>69/</sup> In the Final Results, the Department did not make an express finding with regard to the first element of Part (B). Nevertheless it is plain from the record that all of Type I cement (bulk and bagged) were produced by CEMEX in Mexico, which would satisfy this first element. Similarly, the Department did not make an express finding with regard to the third element of Part (B) (commercial value) which, under Nihon Cement Co., Ltd. v. United States, 15 ITRD 1558, 1567 (Ct. Int’l Trade 1993) might be the subject of some criticism (remand directing the Department to articulate its reasoning with respect to every element of the statute). Nevertheless, particularly in the light of the applicable case law, which appears to minimize the importance of this element, I do not find the Department’s “analysis or reasoning” to be “inadequate” in this respect. See USX Corp. v. United States, 655 F. Supp. 487 (Ct. Int’l Trade 1987)

<sup>70/</sup> Additionally, the Department determined that there was only one level of trade and one channel of distribution within that level, although it duly considered CEMEX’s arguments that there were differences in price and end-use characteristics depending on the form of the presentation, handling and freight. See note 29 *supra* and accompanying text.

the courts have consistently upheld a broad discretion on the part of the Department to come up with suitable model-match or comparison methodologies, one could easily interpret the statute to find that it would have been legal error to have *excluded* Type I bagged cement from the home market comparator. In other words, it could well be the case that when Congress seized upon the phrase “[alike] in component materials,” it was specifically expressing its view that packaging should *not* be considered to be relevant to this portion of the inquiry.<sup>71/</sup>

Therefore, I find that not only does the statute not expressly *support* CEMEX’s argument, the most straight-forward reading of the statute runs directly *counter* to that argument and supports the position taken by the Department. As an aside, I would be concerned about the policy implications of the contrary (CEMEX’s) position, since its adoption would clearly allow a respondent to manipulate the final results. It may be more clear in industries other than cement but one can easily visualize a respondent manipulating its universe of “foreign like product” simply by changing its packaging from bulk, to plastic containers, to metal containers, to wooden containers, etc. I do not know how this could be tolerated and concerns of this type may well have been a motivation of the Congress in selecting the language that it did.

Thus, just as I found that the majority has no support for its view in the applicable case law, I find that it has no support for its view in the relevant statute. Of course, as has been pointed out, from CEMEX’s standpoint, it doesn’t even really attempt to argue that it has such support. Its approach is simply to *prefer* an alternative methodology which it hopes the Panel will require the Department to accept. However, I cannot in good conscious vote to require the Department to use

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<sup>71/</sup> Of course, it was appropriate for the Department, in calculating the margin, to adjust for any cost differences in packaging, but that is a separate issue.

a methodology which is not any more reasonable than that selected and employed by the Department and which is palpably inconsistent with the governing statute, a consistent line of CIT cases, a consistent line of Chapter 19 panel opinions, and the Federal Circuit decision in CEMEX. If we could actually set aside these minor inconveniences, as the Majority has effectively done, I could concede that there is nothing inherently unreasonable in CEMEX's proposed methodology (*i.e.*, comparing bulk to bulk); however, the courts have consistently reminded us that it is not the respondent which administers antidumping cases, it is the agency.<sup>72/</sup> And, under Timken and the applicable standard of review, the agency is entitled to great deference in its selection of methodologies generally and model-match or comparison methodologies particularly. As I read the majority opinion, it appears that the majority relies on the "fair comparison" language of the Uruguay Round Agreement on Antidumping (incorporated in 19 U.S.C. § 1677b) to implicitly alter this standard of review and the deference that the Federal Circuit says exists under the relevant statute.<sup>73/</sup> For my part, I regard the "fair comparison" language as important but most certainly as not having this effect.<sup>74/</sup>

It is also important to focus on the findings that the Department actually made in the Final Results, as opposed to those findings that CEMEX would have the Panel believe that the Department

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<sup>72/</sup> See N.A.R. v. United States, 741 F. Supp. 936, 941 (Ct. Int'l Trade 1990) ("It is for [the Department] to conduct its antidumping investigations the way it sees fit, not the way an interested party seeks to have it conducted.")

<sup>73/</sup> See Koyo Seiko *supra*.

<sup>74/</sup> Manifestly, if Congress had intended that the "fair comparison" language be read to dramatically alter the long-standing case law on deference to the administrative agency, this would have been extensively discussed in the legislative history to the URAA—obviously, it was not. Moreover, the fairness principle has always been part of U.S. antidumping law. See Federal Mogul Corp. v. United States, 63 F.3d 1572, 1580 (Fed. Cir. 1995) ("Antidumping jurisprudence seeks to be fair, rather than to build bias into the calculation of dumping margins.")

made. The Department's actual finding that Type I cement is "identical," whether in bulk or bagged form, is incontestably true and supported by substantial evidence on the record. In the vernacular of the Department's past administrative cases, a rose is a rose, a raspberry is a raspberry, and (as the Federal Circuit found in CEMEX) Type I cement is Type I cement. In addition, the Department's separate finding that there is "only one level of trade and one channel of distribution in that level" is also supported by substantial evidence on the record. The Department's April 2, 1997 calculation memorandum<sup>75/</sup> quite adequately establishes that it *considered* CEMEX's contrary assertions, *rejected* them, and *supported* its own findings.

At the end of the day, the one thing that may explain the majority's position on this issue is its express willingness to allow CEMEX's Exhibit 4 to enter the record through the back door and to give that document an importance that the standard of review, the case law and the statute do not allow. First, as to admissibility of Exhibit 4, Article 1904(3) of the NAFTA requires that this Panel "apply the standard of review" set forth in 19 U.S.C. § 1516A(b)(1)(B). This statute requires the Panel to "hold unlawful any determination, finding, or conclusion found...to be unsupported by substantial evidence on the record or otherwise not in accordance with law." (Emphasis added). The requirement that a review by "on the record" means that a Panel's review must be limited to only that "information presented to or obtained by [the Department] ... during the course of the administrative proceeding...." 19 U.S.C. § 1516A(b)(2)(A)(i). The Department's own regulations further define the scope of the record.<sup>76/</sup> From the Panel's perspective, an inquiry beyond the record would

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<sup>75/</sup> See note 30 *supra*.

<sup>76/</sup> Current Reg. § 351.302(b) states, in part, that "the Secretary will not consider or retain in the official record of the proceeding... untimely filed factual information, written argument, or other (continued...)"

constitute an impermissible substitution of the Panel's judgment for that of the agency.<sup>77/</sup>

Manifestly, there is a time under the antidumping regulations and procedures for the introduction of evidence, for the verification of that evidence, and for the drawing of conclusions by the agency with respect to such evidence. CEMEX has ignored these regulations and procedures by waiting to introduce a significant document after the administrative record has been formally closed, indeed, by waiting until the matter is on appeal. This, of course, has made it impossible for the Department (the administering authority) to check and verify the "evidence" and has made it impossible for Southern Tier to argue against the relevance, interpretation or weight of such "evidence." Conveniently so, from CEMEX's standpoint. For my part, I would return Exhibit 4 to the Secretariat accompanied by a determination that it is an inappropriate document for either the Panel or the Department to consider.

Although I have not, for the above reasons, considered Exhibit 4 for purposes of this opinion, if CEMEX correctly describes that document as containing price comparisons of bulk and bagged cement, I would also observe the document is of little moment. Nowhere in the statute is the Department required to seize upon *price differences* as a basis for its comparison or model-match methodologies, and the case law, discussed above, have made it plain that it is the *physical characteristics* of the comparison products which are largely determinative, non-statutory factors such as price differentials having little or no significance as to this issue.

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<sup>76/</sup> (...continued)  
material...."

<sup>77/</sup> Material that is extraneous to the record should not be considered by the Panel, and any inquiry beyond the record is an impermissible substitution of the Panel's judgment for that of the agency. See, e.g., Beker Industries Corp. v. United States, 7 CIT 313, 316-17 (Ct. Int'l Trade 1984).

In conclusion, it is my view that the majority has improperly relied upon a document that is not in the administrative record and used that document to come to a conclusion that is completely unsupported by the statute and applicable case law (both the general case law and the specific decisional law of CEMEX). It is also my view that under the applicable standard of review—notwithstanding the majority's views as to how that standard has been altered by the “fair comparison” language—the Department has been granted and continues to enjoy substantial discretion in this area, it has reasonably exercised that discretion, and it has otherwise committed no error in its interpretation or application of the statute.

I have no trouble standing in dissent from the majority on this issue.<sup>78/</sup>

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<sup>78/</sup> The majority's determination on this issue impacts several other related issues presented to the Panel for decision. With respect to those related issues which the majority does not reach at all by virtue of its opinion, I dissent from the majority in its entirety, but write no separate opinion on those issues. With respect to those related issues which the majority is still compelled to decide, I join in the Panel's overall decisions on those issues but preserve my view that the Panel substantially errs in requiring the Department to not use bagged sales of Type I cement in its “foreign like product” and related calculations.