

ARTICLE 1904 BINATIONAL PANEL REVIEW  
pursuant to the  
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:	)	
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	)	
GRAY PORTLAND CEMENT AND	)	Secretariat File No.
CEMENT CLINKER FROM MEXICO	)	USA-MEX-2000-1904-10
(Five-Year Review)	)	
	)	

PANEL MEMBERS\*:

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\* The Panelists wish to express their appreciation for the support received from Panel Assistants Gisela Bolívar, Ligia González, Edgar Valdes Kinney, Idalia Mestey-Borges, and Jorge Ogarrio.

## DECISION OF THE PANEL

### I. INTRODUCTION

This Panel has been constituted pursuant to Article 1904.2 of the North American Free Trade Agreement and appointed to review the five-year “sunset” review of the U.S. International Trade Commission involving imports of gray portland cement and cement clinker from Mexico. See Gray Portland Cement and Clinker from Japan, Mexico, and Venezuela, Inv. Nos. 303-TA-21 (Review) and 731-TA-451, 461, and 519 (Review) (USITC Pub. 3361 Oct. 2000). The International Trade Commission determined that revocation of the antidumping duty order on gray portland cement and cement clinker from Mexico would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.<sup>1</sup> In addition to the Investigating Authority the U.S. International Trade Commission (“ITC,” “Commission,” or “Investigating Authority”), the parties to this proceeding are CEMEX, S.A. de C.V. (“CEMEX”), GCC Cemento, S.A. de C.V. (“GCCC”), and the Committee for Fairly Traded Mexican Cement (“the Committee”).

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

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<sup>1</sup> Notice of the Commission’s determination was published in the Federal Register at 65 Fed. Reg. 65,327 (Nov. 1, 2000). The Commission also determined that revocation of the antidumping duty order on gray portland cement and cement clinker from Japan would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. In a parallel determination, the Commission determined that termination of the suspension agreements on cement from Venezuela would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

## II. BACKGROUND

On August 23, 1990, the Commission determined that a regional industry in the United States was being materially injured by reason of imports of gray portland cement and cement clinker from Mexico that were being sold at less than fair value.<sup>2</sup> In making its determination the Commission concluded that appropriate circumstances existed for finding a regional industry, with the regional industry consisting of the U.S. producers in the “Southern-tier Region.”<sup>3</sup> Pursuant to section 751(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(c), on August 2, 1999, the Commission instituted its first sunset review of its original material injury determination to determine whether revocation of the antidumping duty order on cement from Mexico would likely lead to continuation or recurrence of material injury. Thereafter, on October 27, 2000, the Commission determined by a vote of 4-1 that revocation of the antidumping duty order on cement from Mexico would be likely to lead to a continuation or recurrence of material injury to a regional industry in the United States within a reasonably foreseeable time.

On November 21, 2000, CEMEX filed a request for NAFTA Chapter 19 binational panel review. GCCC followed suit with its own request on November 22, 2000. On December 21, 2000, CEMEX and GCCC both filed separate complaints generally alleging that the Commission’s sunset review determination is unsupported by

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<sup>2</sup> See Gray Portland Cement and Cement Clinker from Mexico, Inv. No. 731-TA-451 (Final) (USITC Pub. 2305 Aug. 1990)(“Mexico Cement Final Determination”). Throughout this decision, the term “gray portland cement and cement clinker” is referred to collectively as “cement.”

<sup>3</sup> The Southern-tier Region consists of the States of Florida, Alabama, Mississippi, Louisiana, Texas, New Mexico, Arizona, and California. See Mexico Cement Final Determination, at 14-17, 53.

substantial evidence or is otherwise contrary to law. Beyond that broad claim of error, the Complainants allege the following specific defects in the Commission's determination.

First, according to Complainant GCCC, the Commission's finding that regional injury was likely to recur is unsupported by substantial evidence. Second, GCCC contends that the Commission's finding that material injury was likely to recur within a reasonably foreseeable time is unsupported by substantial evidence or is otherwise contrary to law. Third, GCCC maintains that the Commission's regional industry finding is unsupported by substantial evidence or is otherwise contrary to law. Finally, GCCC alleges that the Commission's finding that producers of "all or almost all" of the production within the region would likely be materially injured by reason of dumped imports is unsupported by substantial evidence or is otherwise contrary to law.

While generally echoing the allegations of GCCC, Complainant CEMEX alleges defects in the Commission's determination from a slightly different perspective. First, CEMEX alleges that the Commission failed to adequately explain its reasoning that producers of "all or almost all" production within the region would likely be materially injured by reason of dumped imports. Moreover, CEMEX adds, the Commission's "all or almost all" finding is unsupported by substantial evidence or is otherwise contrary to law. Second, CEMEX alleges that the Commission incorrectly interpreted the statutory term "likely." Third, according to CEMEX, the Commission's finding that Mexican producers have significant excess capacity is unsupported by substantial evidence or is otherwise contrary to law. Fourth, CEMEX contends that the Commission's finding that Mexican cement exports to the United States would be priced aggressively if the antidumping duty order were revoked is unsupported by substantial evidence or is otherwise contrary to

law. Finally, CEMEX alleges that the Commission's finding that Mexican producers would subordinate the interests of their U.S. subsidiaries when exporting cement to the United States is unsupported by substantial evidence or is otherwise contrary to law.

Based on the parties' briefs<sup>4</sup> and the oral argument held on April 7, 2005, and as explained in greater detail below, the Panel affirms in part and remands the following six issues to the Commission for a determination not inconsistent with the Panel's decision and instructions:

- (1) Whether the Commission employed a "probable" or "more likely than not" standard, as announced in the CIT's Siderca decision, when evaluating the likely volume, likely price effects, and likely impact on the industry if the antidumping duty order is revoked.
- (2) Whether substantial evidence supports the Commission's finding on the likely volume of subject imports if the antidumping duty order is revoked.
- (3) Whether substantial evidence supports the Commission's finding on the likely price effects of subject imports if the antidumping duty order is revoked.
- (4) Whether substantial evidence supports the Commission's finding on the likely impact of subject imports on the domestic industry if the antidumping duty order is revoked.

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<sup>4</sup> Through no fault or delay on the part of the Panel, nearly four years passed since the completion of the original briefing schedule in this case in June 2001 and the April 7, 2005 hearing date. Pursuant to a consent motion granted by the Panel on March 3, 2005, the Panel granted the parties leave to file supplemental briefs in order to provide the Panel with both case law and administrative law developments since the filing of the initial and reply briefs in this matter.

(5) Whether substantial evidence supports the Commission’s finding that producers of all or almost all of the domestic production of cement would be materially injured by reason of the subject imports if the antidumping duty order is revoked.

(6) Whether the Commission properly evaluated the evidence concerning the proposed Southdown acquisition.

### **III. STANDARD OF REVIEW**

Pursuant to NAFTA Article 1904.3 and NAFTA Annex 1911, the Panel must apply the standard of review set forth in Section 516A(b)(1)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B), as well as the general legal principles that the Court of International Trade (“CIT”) would apply in reviewing a final determination by the Commission. Accordingly, the Panel will uphold any ITC determination, finding, or conclusion unless that determination, finding, or conclusion is either unsupported by substantial evidence on the record, or is otherwise not in accordance with law.

All parties to this review agree that the applicable standard of review is the one specified in NAFTA Articles 1904.2-.3 and Annex 1911 of the NAFTA. Chapter 19 review panels are directed by Article 1904.3 to apply the following standard of review:

the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

These provisions therefore require that a Chapter 19 panel apply the standard of review and “general legal principles” that a federal court in the United States would otherwise apply in reviewing an ITC injury determination.<sup>5</sup>

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<sup>5</sup> NAFTA Article 1911 provides a non-exhaustive list of such "general legal principles," including, for

Annex 1911 defines the standard of review to be applied in a panel review as “the standard set forth in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended.” Section 516A(b)(1)(B)(i), 19 U.S.C. § 1516a(b)(1)(B)(i), in turn, defines that standard of review as follows:

The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

Accordingly, the standard of review for the instant proceeding includes the “substantial evidence” standard as set out in section 516A(b)(1)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B)(i).

#### A. The Substantial Evidence Standard of Review

The Panel must affirm the ITC’s Final Determination “unless we conclude that the . . . determination is not supported by substantial evidence or is otherwise not in accordance with law.” PPG Industries, Inc. v. United States, 978 F.2d 1232, 1236 (Fed. Cir. 1992). The U.S. Supreme Court has explained what quantum of evidence constitutes “substantial evidence” in the following terms:

Substantial evidence is more than a mere scintilla, and must do more than create a suspicion of the existence of the fact to be established. “It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” . . . and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from is one of fact for the jury.

NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939)(quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). Accord Consolo v. Federal Maritime Comm’n, 383 U.S. 607, 619-20 (1966); Universal Camera Corp. v. NLRB, 340

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example, "standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies."

U.S. 474, 477 (1951). Substantial evidence thus constitutes “something less than the weight of the evidence.” Consolo v. Federal Maritime Comm’n, 383 U.S. at 619-20.

The Court of Appeals for the Federal Circuit has applied the same interpretation of “substantial evidence” in reviewing administrative agency determinations in international trade investigations. As noted by the Federal Circuit, “The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.”

Matsushita Electric Industrial Co. v. United States, 750 F.2d 927, 933 (1984)(quoting Consolo v. Federal Maritime Comm’n, 383 U.S. at 619-20). To this rule the Court of International Trade has added that 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.” Koyo Seiko Co., Ltd. v. United States, 810 F. Supp. 1287, 1289 (Ct. Int’l Trade 1993)(quoting Timken Co. v. United States, 699 F. Supp. 300, 306 (1988), aff’d, 894 F.2d 385 (Fed. Cir. 1990)). Neither a Chapter 19 panel nor a reviewing court “may . . . substitute its judgment for that of the [agency] when the choice is ‘between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.’” American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1276 (Ct. Int’l Trade 1984), aff’d sub nom. Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985)(quoting Universal Camera Corp. v. NLRB, 340 U.S. at 348).

Nevertheless, as the Federal Circuit stressed in Gerald Metals, Inc. v. United States, 132 F.3d 716, 720 (1977), the substantial evidence standard of review requires more than a mere assertion of evidence that justifies the Commission's determination.



Rather, the Commission must also take into account contradictory evidence or evidence from which conflicting inferences could be drawn. Taiwan Semiconductor Indus. Ass'n v. U.S. Int'l Trade Comm'n, 266 F.3d 1339, 1345 (Fed. Cir. 2001)(the Commission must examine contradictory evidence and alternative causes of injury “to ensure that the subject imports are causing the injury, not simply contributing to the injury in a tangential or minimal way.”).

From the foregoing discussion it is abundantly clear that under the substantial evidence standard of review a panel may not undertake a de novo review of the Investigating Authority's determination. See Cabot Corp. v. United States, 694 F. Supp. 949, 952-53 (Ct. Int'l Trade 1988); Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 966 (Ct. Int'l Trade 1986), aff'd, 810 F.2d 1137 (Fed. Cir. 1987); Luciano Pisoni Fabbrica Accessori v. United States, 640 F. Supp. 255, 256 (Ct. Int'l Trade 1986). On the contrary, panel review of a final injury determination is conducted “upon the administrative record.” NAFTA Article 1904.2. The requirement that panel review be “on the record” means that such a review must be limited to “information presented to or obtained by [the ITC] . . . during the course of an administrative proceeding . . . .” 19 U.S.C. § 1516a(b)(2)(A)(i). Consideration of information that was not presented to or obtained by the ITC during the course of its investigation would be well beyond the scope of panel review.

#### B. The “Otherwise Not in Accordance with Law” Standard of Review

Not only must the ITC's determination be supported by substantial evidence, but its determination must also be “in accordance with law.” Section 516A(b)(1)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B). In determining whether the

ITC's interpretation of the governing statute is “in accordance with law,” a panel is to accord deference to the Investigating Authority’s reasonable interpretation of the statute that it administers. As observed by the Federal Circuit, “The Supreme Court has instructed that the courts must defer to an agency's interpretation of the statute an agency has been charged with administering provided its interpretation is a reasonable one.” PPG Industries, Inc. v. United States, 928 F.2d 1568, 1571 (Fed. Cir. 1991)(citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984); Udall v. Tallman, 380 U.S. 1, 16 (1965); K Mart v. Cartier, Inc., 486 U.S. 281, 291 (1988); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985)).

In accordance with this fundamental principle of administrative law, the ITC is given wide latitude in administering and interpreting the antidumping and countervailing duty laws. As a consequence, “appellant's burden on appeal is a difficult one, for it must convince us that the interpretation . . . [of the Investigating Authority] is effectively precluded by the statute.” PPG Industries, Inc. v. United States, 928 F.2d at 1571. As noted by the CIT in the context of judicial review of a Commerce Department determination, “Since Commerce administers the trade laws and its implementing regulations, it is entitled to deference in its reasonable interpretations of those laws and regulations.” PPG Industries, Inc., 712 F. Supp. at 198.

Nevertheless, despite the substantial deference that reviewing courts accord administrative agencies’ statutory interpretations, that deference is not unfettered. In the words of the CIT, “The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.” Saudi Iron & Steel Co. v. United States, 675 F. Supp. 1362, 1365 (Ct. Int’l Trade 1987). As the CIT has further observed:

[T]he substantial evidence standard requires courts generally to defer to the methods and findings of an agency's investigation . . . . [T]he Court must not permit an agency in the exercise of that discretion to ignore or frustrate the intent of Congress as expressed in substantive legislation that the agency is charged with administering. . . . Were the scope of the discretion accorded to the agency unlimited, there would be no point in the (statutorily mandated) judicial review here undertaken.

Armco, Inc. v. United States, 733 F. Supp. 1514, 1519 (Ct. Int'l Trade 1990) (citations omitted). Accord Cabot Corp., 694 F. Supp. at 953 (and cases cited therein).

Finally, it is a vital and time-honored principle of U.S. administrative law that an agency's ruling in an adjudicative proceeding must be supported by reasoned decision making, with the various connections among the agency's fact findings, its reasoning process, and its conclusions being sufficiently clear. As the U.S. Supreme Court ruled in Securities & Exchange Comm'n v. Chenery Corp.:

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

332 U.S. 194, 196-97 (1947)(quoting United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499, 511 (1935)). The Supreme Court has underscored this point in its post-Chenery opinions. See, e.g., Burlington Truck Lines v. United States, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action; Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . . .") Accord SKF USA Inc. v. United States, 254 F.3d 1022, 1028 (Fed. Cir. 2001) ("we generally decline to consider the agency's new justification for the agency action"); Rhodia Inc. v. United

States, 185 F. Supp. 2d 1343 (Ct. Int'l Trade 2001)(“Although Commerce's brief addresses in greater detail the reasons that integrated producers have higher overhead costs, the ‘post hoc rationalizations’ of counsel [cannot] supplement or supplant the rationale or reasoning of the agency.”). In other words, the agency’s decisional path must be reasonably discernible from its determination, not from its counsel’s brief. Within the four corners of its determination the agency must articulate a rational connection between the facts found and the choice made. Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974); Wheatland Tube Co. v. United States, 161 F.3d 1365, 1369 (Fed. Cir. 1988); A. Hirsh, Inc. v. United States, 729 F. Supp. 1360, 1362 (Ct. Int'l Trade 1990) (“although ITC is allowed wide latitude in its decision-making in this area, it is not exempt from articulating its reasoning”).

The rationale for the courts’ insistence on reasoned agency decision making is simple but fundamental: If an agency fails to meet this standard of reasoned decision making, it deprives the parties of their opportunity for a fair and transparent proceeding and makes impossible the task of the reviewing authority. In short, an agency’s reasoning process must be transparent before a reviewing body can be asked to review an agency’s determination.

#### **IV. THE “LIKELY” STANDARD**

##### **A. Background**

The statutory provisions for five-year reviews are set forth in two sections of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act. First, Section 751(c)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(c)(1), provides in

relevant part that “the Commission shall conduct a review to determine . . . whether revocation of the . . . antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping . . . and of material injury.” Second, Section 752(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675a, entitled “Determination of Likelihood of Continuation or Recurrence of Material Injury,” sets forth a special rule for the conduct of ITC sunset reviews. Subsection 752(a)(1) provides in full as follows:

In a review conducted under section 1675(b) or (c) of this title [19 U.S.C. § 1675(b) or (c)], the Commission shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The Commission shall consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated. The Commission shall take into account—

- (A) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued or the suspension agreement was accepted,
- (B) whether any improvement in the state of the industry is related to the order or the suspension agreement,
- (C) whether the industry is vulnerable to material injury if the order is revoked or the suspension agreement is terminated, and
- (D) in an antidumping proceeding under section 1675(c) of this title, the findings of the administering authority regarding duty absorption under section 1675(a)(4) of this title.

19 U.S.C. § 1675a(1). Given the central importance of the term “likely” in the context of ITC sunset reviews – the meaning of which was unresolved until after the present sunset – the parties devoted considerable energy on this question in their initial briefs filed in 2001. The Panel will not recount in exhaustive detail the parties’ contentions. Suffice it say that, based on several decisions by the Court of International Trade that were announced after the instant sunset review, the term “likely” as used in the statute governing ITC sunset reviews has been interpreted by the CIT to mean “probable” or

“more likely than not.” See, e.g., Siderca, S.A.I.C. v. United States, 350 F. Supp. 2d 1223, 1226 (Ct. Int’l Trade 2004) (“The common meaning of ‘likely’ is ‘probable,’ or, to put it another way, ‘more likely than not.’”); NMB Singapore Ltd. v. United States, 288 F. Supp. 2d 1306, 1352 (Ct. Int’l Trade 2003) (“likely” means “probable” in the context of 19 U.S.C. §§ 1675(c) & 1675a); Usinor Industeel, S.A. v. United States, 2002 WL 31864771, 24 ITRD 2237 (Ct. Int’l Trade Dec. 20, 2002) (the common meaning of “likely” is “probable” in the context of an ITC sunset review) (“Usinor III”). For purposes of Chapter 19 binational panel review, the U.S. antidumping duty law includes these judicial precedents. See NAFTA Article 1902.1.

To quote counsel for the ITC, “the issue regarding the interpretation of likely has been resolved.”<sup>6</sup> Although this issue may be resolved, what remains unclear to the Panel is whether the Commission in the instant sunset review gave the term “likely” the meaning assigned to it in its recent line of CIT cases. Having parsed the Commission’s determination in this case, it is impossible to know exactly how the Commission interpreted the term “likely”. It would appear from other sunset review determinations that the Commission has not interpreted “likely” as meaning “probable” or “more likely than not.” For example, in a sunset review remand determination issued after the sunset review determination in the present case, Corrosion-Resistant Carbon Steel Flat Products from France and Germany, Inv. Nos. 701-TA-348-349 and 731-TA-615 (USITC Pub. 3539 Sept. 2002), the Commission expressed reservations about the CIT’s interpretation of the term “likely” as meaning “probable,” adding that “previously we have found such a standard to be inconsistent with the statutory scheme as a whole.” Id. at 2 n.3. The

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<sup>6</sup> ITC Supplemental Brief at 8.

Commission sought leave to file an interlocutory appeal in order to challenge the CIT's interpretation of "likely," a request that the CIT denied. See Usinor Industeel, S.A. v. United States, 215 F. Supp. 2d 1356 (Ct. Int'l Trade 2002).

In addition, as Vice Chairman Okun explained in the sunset review remand determination in the Siderca case, under the Commission's understanding of the term "likely," more than one likely outcome would be possible. She acknowledged, however, that under the CIT's interpretation of the "likely" standard, two opposite outcomes cannot both be likely in the same case. Consequently, applying the CIT's legal standard, Vice Chairman Okun changed her affirmative injury vote in the original sunset review determination to a negative injury vote on remand. See Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Argentina, Brazil, Germany, and Italy, Additional Views of Vice Chairman Deanna Tanner Okun Concerning the "Likely" Standard, Inv. Nos. 701-TA-362 and 731-TA-707-710, at 4-5 (Jan. 24, 2005). In short, the CIT's interpretation of the likely standard can make a difference in a given case.

Despite ITC counsel's assurances in its supplemental brief and at oral argument that the Commission has applied the correct legal standard in this case,<sup>7</sup> it is not possible to discern that the Commission has done so from its determination. Considering the thick legal fog that blanketed both the meaning and application of the likely standard at the time the Commission issue its determination in this sunset review, the Panel is unable to rest its decision on counsel's assurances. Moreover, ITC counsel's assurances are

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<sup>7</sup> See ITC Supplemental Brief at 12 ("whether the ITC actually applied the "likely" standard in the sunset review . . . is evident in the ITC's determination" (emphasis in original)); Hearing Transcript at 85 ("But I would tell you that the way that you can tell whether in fact the Commission properly applied it in this case is that you are to look at the facts, and that you are to look at whether there is – what you do is you evaluate where the Commission's determination of likely was supported by a sufficient factual basis.").

undermined by its own arguments in its initial brief to the Panel. First, ITC counsel characterized as “novel” CEMEX’s and GCCC’s interpretation of “likely” as meaning “probable.” Second, ITC counsel placed heavy reliance on the Statement of Administrative Action to the Uruguay Round Agreements Act (“SAA”) in its interpretation of the term “likely,” which the CIT rejected on the ground that the meaning of the statutory term “likely” is plain, making resort to legislative history inappropriate.<sup>8</sup> See Usinor III, 2002 WL 31864771, at 3 n.6 (“ambiguous provisions of the SAA should not be interpreted to conflict with clear statutory provisions”).

We thus find ourselves faced with the identical quandary that confronted Judge Pogue in the Siderca case. To quote from the CIT in that case:

Although the ITC . . . constantly references the statutory “likely” standards, nothing in its determination indicates whether it used “likely” to mean “more likely than not” or something less. The ITC does not discuss the meaning of “likely,” and the substance of the Commission’s Views does not reveal the use of a particular standard. The ITC’s use of an incorrect standard in contemporaneous reviews, the ITC’s confused arguments regarding the standard it used in this review, and the failure of the Commission’s Views to identify the standard used in this review all render the determination unclear on this issue. It therefore cannot be sustained as in accordance with law.

Siderca, 350 F. Supp. 2d at 1227. The foregoing views expressed in Siderca apply with equal force to the present case. Consistent with Siderca and in accordance with the views of the Panel that follow in Part IV.B below, the Panel remands and instructs the Commission to apply the “probable” or “more likely than not” standard announced in Siderca in its determinations regarding the likely volume, the likely price effects, and the likely impact on the industry if the antidumping duty order is revoked.

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<sup>8</sup> See ITC Brief at 46-49.



## B. Analysis

### 1. Likely Volume

#### *a. Statutory Background and the Commission's Determination*

Section 752(a)(2) of the Tariff Act of 1930, as amended, provides in pertinent as follows:

(2) Volume. In evaluating the likely volume of imports of the subject merchandise if the order is revoked . . . , the Commission shall consider whether the likely volume of imports of the subject merchandise would be significant if the order is revoked . . . , either in absolute terms or relative to production or consumption in the United States. In so doing, the Commission shall consider all relevant economic factors, including-

- (A) any likely increase in production capacity or existing unused production capacity in the exporting country,
- (B) existing inventories of the subject merchandise, or likely increases in inventories,
- (C) the existence of barriers to the importation of such merchandise into countries other than the United States, and
- (D) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.

19 U.S.C § 1675a(a)(2)(emphasis added). Accordingly, when evaluating the likely volume of imports the governing statute requires the Commission to consider all relevant economic factors, including the following four criteria: (1) any likely increase in production capacity or existing unused production capacity in the exporting country, (2) existing inventories of the subject merchandise, or likely increases in inventories, (3) the existence of barriers to the importation of such merchandise into countries other than the United States, and (4) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.

In assessing any likely increase in production or existing unused production

capacity in the exporting country, the ITC placed heavy reliance upon an interview reported in a trade publication, as well as statements by CEMEX explaining that that article stated “the outside limit of what would be theoretically possible.”<sup>9</sup> In the words of the Commission, “Mexican producer CEMEX has publicly indicated that if the antidumping duty order was revoked, imports of cement to the United States could reach four million tons per year. Thus, if the order is revoked, CEMEX believes it could triple the current level of subject imports from Mexico entering the U.S. market.”<sup>10</sup>

The ITC also found that existing inventories “generally are not a significant factor in the cement industry” and that the increase has been “relatively small.”<sup>11</sup> In connection with barriers to the importation of subject imports into countries other than the United States, the Commission found that “Mexican producers face tariff barriers to gray Portland cement and cement clinker importation into several third country markets.”<sup>12</sup>

*b. The Parties’ Contentions*

In their briefs both CEMEX and GCCC argue that the ITC’s determination of whether the likely volume of subject imports would be significant if the order is revoked is unsupported by substantial evidence and is otherwise contrary to law.<sup>13</sup> CEMEX

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<sup>9</sup> Commission Determination at 36 n.215. All references to the Commission’s determination are to the public version.

<sup>10</sup> *Id.* at 36.

<sup>11</sup> *Id.* at 38 n.227.

<sup>12</sup> *Id.* at 38.

<sup>13</sup> *See* CEMEX Initial Brief at 62-69; GCCC Initial Brief at 17-32.

argues that the domestic industry does not and will not have the capacity to respond to the increase in regional demand for cement. It notes further that Mexican imports accounted for only 2.8 percent of regional consumption in 1999. Moreover, CEMEX points out, Mexican producers have long-term supply relations with importers in other countries. Even if the order were to be revoked, CEMEX adds, Mexican imports would merely substitute for non-subject imports. CEMEX concludes that there is a lack of record evidence to support a finding that volume increases of subject imports would be substantial.<sup>14</sup>

GCCC contends that the Commission relied on excess production capacity to conclude that the volume of subject imports would increase following revocation of the antidumping duty order. However, GCCC points out, excess capacity per se does not indicate the volume of subject imports that would likely be exported to the United States in the event the order is revoked. On the contrary, GCCC contends, serious bottlenecks and other major constraints make such a scenario problematic.<sup>15</sup>

Not surprisingly, in their briefs both the ITC and the Committee state that the Commission's finding that the volume of subject imports from Mexico entering the Southern Tier region would likely be significant within a reasonably foreseeable time if the antidumping duty order was revoked is based on substantial evidence and is in accordance with law.<sup>16</sup> The ITC begins by noting that record evidence supports the Commission's finding that subject imports would increase if the order were revoked. The

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<sup>14</sup> CEMEX Initial Brief at 67-68.

<sup>15</sup> GCCC Initial Brief at 18-19.

<sup>16</sup> See ITC Brief at 54-87; Committee Brief at 127-60.

ITC continues that excess Mexican production capacity is substantial, giving Mexican producers the ability to significantly increase shipments of cement to the Southern Tier region.<sup>17</sup> As for alleged bottlenecks and terminal capacity constraints, the Commission contends that the record nevertheless supports the finding that a significant volume of Mexican cement could be exported to the United States if the order were revoked.<sup>18</sup>

For its part the Committee maintains that Mexican producers had much greater export capacity in 2000 than they did in 1989, thus supporting the Commission's finding that the volume of subject imports would likely increase if the order were revoked.<sup>19</sup> As for Complainants' argument that only a handful of Mexican cement plants can serve the U.S. market due to transportation constraints, the Committee responds that cement plants in central and southern Mexico are located sufficiently close to the Mexican markets served by the export-oriented plants to serve those markets, thus freeing up the latter plants for export-oriented activities in the United States.<sup>20</sup>

*c. The Panel's Analysis*

As noted in Part III above regarding the standard of review, the Panel must affirm the ITC's determination "unless we conclude that the determination is not supported by substantial evidence or is otherwise not in accordance with law." PPG Industries, Inc. v. United States, 978 F.2d 1232, 1236 (Fed. Cir. 1992). In order to do that, the Panel must assure itself that the Commission considered all relevant economic factors, including the

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<sup>17</sup> ITC Brief at 64.

<sup>18</sup> Id. at 80.

<sup>19</sup> Committee Brief at 138, 146-51.

<sup>20</sup> Id. at 139.

four factors of 19 U.S.C § 1675a(a)(2), and that substantial record evidence supports the Commission's views. The Panel's review must be limited to "information presented to or obtained by [the ITC] . . . during the course of the administrative proceeding . . ." 19 U.S.C. § 1516a(b)(2)(A).

Turning to the Commission's evaluation of the likely volume of subject imports if the order is revoked, the Commission must consider all relevant economic factors, including "any likely increase in production capacity or existing unused production capacity in the exporting country." 19 U.S.C. § 1675a(a)(2)(A)(emphasis added). For the reasons stated above in Part IV.A of this decision, in the Panel's view the Commission did not give the term "likely" the meaning established in the recent CIT cases addressing this issue. See, e.g., Siderca, S.A.I.C. v. United States, 350 F. Supp. 2d 1223, 1226 (Ct. Int'l Trade 2004) ("The common meaning of 'likely' is 'probable,' or, to put it another way, 'more likely than not.'"); NMB Singapore Ltd. v. United States, 288 F. Supp. 2d 1306, 1352 (Ct. Int'l Trade 2003) ("likely" means "probable" in the context of 19 U.S.C. §§ 1675(c) & 1675a); Usinor Industeel, S.A. v. United States, 2002 WL 31864771, 24 ITRD 2237 (Ct. Int'l Trade Dec. 20, 2002) (the common meaning of "likely" is "probable" in the context of an ITC sunset review) ("Usinor III"). Because this sunset review predates these CIT decisions, the failure of the Commission to identify the standard used in this review renders its determination unclear on this issue. It is thus impossible for the Panel to know how the Commission interpreted the term "likely."

Notwithstanding this body of CIT case law, the Commission's own determination appears to have given the term "likely" a meaning significantly different from that given that term by the CIT. For example, in its likely volume finding the ITC placed heavy

reliance upon an interview reported in a trade publication, as well as statements by CEMEX explaining that the news article stated “the outside limit of what would be theoretically possible.”<sup>21</sup> In the words of the Commission:

Mexican producer CEMEX has publicly indicated that if the antidumping duty order was revoked, imports of cement to the United States could reach four million tons per year. Thus, if the order is revoked, CEMEX believes it could triple the current level of subject imports from Mexico entering the U.S. market.

Mexican producers have significant excess production capacity and thus have the ability to significantly increase shipments of cement to the Southern Tier region.<sup>22</sup>

The Panel is unable to see how, based on this quote from the Commission’s determination, the Commission could conclude that it is probable that subject imports would increase if the antidumping duty order were revoked. The Commission places reliance on newspaper articles that (1) do not expressly state what CEMEX’s specific export plans were if the antidumping duty order were revoked and (2) do not state that the interviewee was speaking on behalf of CEMEX rather than in his capacity as director of the Mexican Cement Chamber. The Commission has drawn inferences from these articles that a rational fact finder could not make. While administrative agencies may consider hearsay evidence, in order to qualify as “substantial evidence” such evidence must be the kind that “a reasonable mind might accept as adequate to support a conclusion.” Consolo v. Fed. Maritime Comm’n, 383 U.S. at 619. The inferences drawn by the Commission from these newspaper articles do not meet the substantial evidence test.

In regard to the second of the four factors listed in 19 U.S.C § 1675a(a)(2)(B) – existing inventories of the subject merchandise, or likely increases in inventories – the

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<sup>21</sup> Commission Determination at 36 n.215.

<sup>22</sup> Id. at 36 (emphasis added, footnotes omitted).

Commission took into consideration only existing inventories of the subject merchandise and not “likely increases” as well. The Panel notes, however, that ITC found that existing inventories “generally are not a significant factor in the cement industry” and that the increase has been “relatively small.”<sup>23</sup>

Regarding the third of the four factors of 19 U.S.C § 1675a(a)(2)(C) – the existence of barriers to the importation of such merchandise into countries other than the United States – the Commission found that “Mexican producers face tariff barriers to gray Portland cement and cement clinker importation into several third country markets.”<sup>24</sup> The Commission added the following explanation:

On July 12, 2000, the Government of Brazil imposed antidumping duties of 22.5 percent on exports of Mexican cement to certain Brazil states. On January 17, 2000, the Government of Guatemala imposed antidumping duties of 89.54 percent on exports of cement by Mexican producer Cruz Azul. On January 14, 2000, the Government of Ecuador imposed antidumping duties of 20 percent for a period of six months on imports of cement from Mexico; this order should have expired on July 14, 2000.<sup>25</sup>

However, the Commission failed to render a complete analysis of how these various third-country antidumping duty orders would affect the likely volume of subject imports to the United States “within a reasonable foreseeable time.” Without a further explanation, the Panel is unable to discern the relevance of this finding to the Commission’s determination.

In regard to the fourth factor found in 19 U.S.C § 1675a(a)(2)(D) – the potential for product-shifting if production facilities in the foreign country, which can be used to

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<sup>23</sup> Id. at 38 n.227.

<sup>24</sup> Id. at 38.

<sup>25</sup> Id. at 38 n.228.

produce the subject merchandise, are currently being used to produce other products – the Panel notes that this factor was not analyzed in the Commission’s determination.

Finally, in relation to other relevant economic factors that the Commission must consider when determining whether the likely volume of subject imports would be significant if the order is revoked, the ITC’s determination contains the following conclusions:

Mexican producers have acquired Southern Tier production facilities since the original investigation. We do not believe, however, that Mexican producers’ ownership of these facilities would impede the increase of subject imports to a significant level if the discipline of the antidumping duty order is removed. These facilities are operating at \*\*\* and there are no plans to expand their capacity in the reasonably foreseeable future. In fact, free of the restraining effects of the order, firms with a global presence would have more flexibility to supply the Southern Tier market through a combination of production and importation. Moreover, the established customer base and distribution system of their subsidiaries in the Southern Tier region would facilitate the Mexican producers’ ability to increase sales of imported subject merchandise if the order was revoked.<sup>26</sup>

To this the Commission adds the following observation in a footnote:

While we have given it limited consideration in our analysis as discussed above, we note that if CEMEX’ announced plans to acquire U.S. producer Southdown are realized, CEMEX would increase its Southern Tier distribution network. In 2000, Southdown has more than 10 inland and import distribution terminals in the Southern Tier region.<sup>27</sup>

The Commission then summarizes its findings with the following conclusion:

The evidence shows that Mexican producers have the ability and incentive to increase exports to the Southern Tier region, notwithstanding their regional operations. Consequently, based on the record in this review, we conclude that the volume of subject imports entering the Southern Tier

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<sup>26</sup> Id. at 37-38 (emphasis added). The Panel refers the parties to page 58 of the confidential version of the Commission’s determination for the deleted business proprietary information.

<sup>27</sup> Id. at 38 n.226 (emphasis added).



region likely would be significant in the reasonable foreseeable future if the antidumping duty order is revoked.<sup>28</sup>

When the Commission makes statements such as the ones that are highlighted in the three immediately preceding quotes, it leaves the Panel with no clear idea of the meaning given by the Commission to the term “likely.” The Panel is unable to conclude that it has the same meaning as that announced in recent CIT cases.

For all the foregoing reasons, in respect to the Commission’s finding on the “likely volume” of the subject imports, the Panel is forced to the conclusion that it is unclear whether the Commission gave the term “likely” the meaning specified in the recent line of CIT cases discussed above in Part IV.A. Accordingly, the Panel remands to the Commission for further review not inconsistent with this decision.

## 2. Likely Price Effects

### *a. Statutory Background and the Commission’s Determination*

Section 752(a)(3) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675a(a)(3), provides as follows:

In evaluating the likely price effects of imports of the subject merchandise if the order is revoked or the suspended investigation is terminated, the Commission shall consider whether—

- (A) there is likely to be significant price underselling by imports of the subject merchandise as compared to domestic like products, and
- (B) imports of the subject merchandise are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like products.

In its original investigation, the Commission found that dumped cement imports depressed prices for the domestic product.<sup>29</sup> In its sunset review determination, the

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<sup>28</sup> Id. at 38 (emphasis added).

Commission found that the significantly increased volumes of subject imports of cement from Mexico that would be likely to enter the Southern Tier region if the antidumping duty order was revoked would likely have significant price effects for the U.S. like product. The Commission took into account the importance of pricing as a purchasing factor and the relatively high degree of substitutability between subject imports and the domestic product.

The ITC determined that even though the pricing data did not give clear evidence of patterns of underselling or overselling, the data indicated that some underselling occurred even with the antidumping duty order in place and the substantial increases in demand during the period of review. It also concluded that even though prices generally increased slightly during the period of review, a possibly substantial further increase in prices would have been likely due to the substantial increases in demand from 1997-1999. Thus, it found that without the discipline of the antidumping duty order, there is a substantial likelihood that Mexican cement would be priced aggressively in the Southern Tier market in order to gain market share.<sup>30</sup>

The Commission further supported its finding by stating that the likelihood of price depression or suppression in the cement market is “accentuated” by the substantial excess capacity in Mexico. When focusing on costs, it concluded that the high fixed costs faced by cement producers provide significant incentive to the Mexican producers to sell their additional excess product even at low costs in order to meet their fixed costs. It observed that increasingly Mexican imports have been subject to high cash deposit

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<sup>29</sup> Mexico Cement Final Determination, *supra* note 2, at 46, 64.

<sup>30</sup> Commission Determination at 38.

rates under the order. Consequently, in the absence of such duty deposits, Mexican imports could be priced significantly lower in the United States, including the Southern Tier region.<sup>31</sup>

The Commission further remarked that Mexican producer CEMEX has stated in the past that it would likely substitute Mexican imports for the large volumes of non-subject imports that it has imported into the Southern Tier region because of the order. The Investigating Authority concluded that such a substitution would allow CEMEX to lower its prices in the Southern Tier region to reflect decreases in transportation costs for Mexican imports while the regional domestic industry's capacity expansion projects are underway, with the resultant increase in supply having the likely effect of increasing price sensitivity in the market. It concluded that it was “not convinced that the Mexican producers would refrain from using their excess capacity to ship cement to the Southern tier region at volumes or price levels that would injure regional producers including their regional subsidiaries.”<sup>32</sup>

Thus, the ITC found that revocation of the antidumping duty order would be likely to lead to significant underselling by the subject imports of the domestic like product in the Southern Tier region, as well as significant price depression and suppression, within a reasonably foreseeable time.

In contrast, the dissenting commissioner, Commissioner Askey, determined that there is nothing in the record suggesting that the Mexican producers would change their pricing practices in a way that would have a significant negative impact on the regional

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<sup>31</sup> Id. at 39.

<sup>32</sup> Id. at 41.

industry's prices. She indicated that domestic prices have been strong in the last three years of the sunset review period due to substantial increases in sustainable demand. In addition, domestic producers had been able to maintain high prices even with high domestic capacity utilization rates and increased subject imports flowing in through affiliated domestic producers of non-subject cement. She concluded by asserting that current market conditions make it likely that prices will continue to be strong in the region.

*b. The Parties' Contentions*

CEMEX contends that the Commission's finding that Mexican cement exports to the United States would be priced aggressively if the antidumping duty order were revoked is unsupported by substantial evidence or is otherwise contrary to law. It argues that the Commission's conclusions are instead based on unfounded speculation. GCCC adds that the evidence in the administrative record before the ITC contains evidence that undermines its conclusions and that the Commission failed to make a determination based on the whole record.

CEMEX notes that the pricing data collected during the sunset review does not provide clear evidence of patterns of overselling or underselling. It points that subject imports from Mexico oversold the domestic product 55 percent of the time (85 out of 156 months) and just undersold the domestic product 45 percent of the time (71 out of 156 months). Thus, it argues, substantial evidence on the record does not support the Commission's conclusions about the priorities of the Mexican producers that could justify a determination that a material price effect does or will likely exist. GCCC adds that the

ITC itself found that the conditions of competition have changed radically since the original investigation, noting that prices charged by Southern Tier producers have been increasing at a 5-percent rate per year.<sup>33</sup>

CEMEX next argues that even though the Commission's determination reports some Mexican respondents' testimony asserting that the Mexicans would refrain from exporting cement to the Southern Tier at price levels that would injure regional producers, including their own subsidiaries, the Commission provided no citation or substantiation as to why that sworn testimony should not be believed. It further maintains that had CEMEX, a global company with significant non-subject import sources, had the motivation to flood the Southern Tier market with low-priced imports, it could have done so already with cement from non-subject countries. CEMEX concludes by asserting that the Commission's supposition that an opportunity that has existed for years will only be taken advantage of using imports from Mexico if the order is revoked is not supported by substantial evidence.

The only support the Commission provides for its conclusion, according to CEMEX, is that CEMEX has in the past indicated that it will likely substitute Mexican imports for non-subject cement that it has been importing into the Southern Tier region with the order in place. CEMEX refutes the supportive value of this statement by saying that product substitution does not lead to a reduction in prices. CEMEX claims that it is a profit-driven company and that sound economic principles dictate that it not lower its prices when offering a higher quality product in a competitive market, where companies are price-takers forced to sell at market price to remain competitive. CEMEX refers to

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<sup>33</sup> See GCCC Initial Brief at 31 (citing Commission Determination at 32-36).

the ITC Staff's own COMPAS model showing that revocation of the antidumping duty order would only have very limited price effects on the Southern Tier.<sup>34</sup> It stresses that the Commission has accepted the same business and economic incentives in other sunset reviews to support its conclusion that no significant price effect would result upon revocation of an order.<sup>35</sup>

GCCC supports this argument by pointing to the ITC's prior findings of price effects attenuation.<sup>36</sup> It argues that its subject imports are geographically isolated in Albuquerque, New Mexico, and only compete with its own U.S. affiliate's cement. As a consequence, this isolation will prevent any competition with other domestic producers' cement. It further argues that record evidence shows that GCCC's imports have, in the majority of comparisons, oversold its U.S. affiliate's domestically-produced cement.<sup>37</sup> Thus, according to GCCC, when considering the statutory factors examined by the ITC, GCCC's imports will not have significant price effects on the domestic like product.

GCCC continues that its U.S. affiliate is the only supplier in the Albuquerque and El Paso markets, serving them with a combination of GCCC imports and its own cement. As the only supplier, GCCC's U.S. affiliate sets the prices and faces no competition from GCCC. GCCC alleges that the Commission's misinterpretation of the record evidence calls for remand and reconsideration to the extent that the Commission relied upon this material error of fact. It further stresses that given the typical 200-mile range for cement

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<sup>34</sup> See CEMEX Initial Brief at 74. The COMPAS price effects of revocation were only 0.6 to 1.9 percent.

<sup>35</sup> See *id.*, citing Electrolytic Manganese Dioxide from Greece and Japan, at 17 (USITC Pub. 3296 May 2000)(when demand outpaces supply, [there is] no incentive to sell at less than market prices.).

<sup>36</sup> See GCCC Initial Brief at 33 n. 65, citing Industrial Phosphoric Acid from Israel and Belgium, Inv. Nos. 701-TA-286 (Review) and 731-TA-365 (Review), USITC Pub. 3302 at 10 (May 2000).

<sup>37</sup> See *id.* at 34.

shipments recognized in the final staff report, it is highly speculative that California Portland's Rillito, Arizona plant, a new producer with facilities not yet operational and more than 300 miles away from El Paso, would attempt to enter that market.

Turning to the issue of significant price depressing or price suppressing effects, CEMEX contends that the Commission must affirmatively determine that substantial evidence has been presented that a price effect will exist, not that it is not convinced that a theory extraneous to the record could be constructed in which a price effect could theoretically be imagined. In support of its argument, CEMEX first alleges that in finding a price effect, the Commission only noted the fungibility of cement as a product, the weight given to pricing by purchasers, the high degree of substitutability between the subject imports and non-subject imports, and the Mexican excess capacity's heightening effect. The ITC then leapt to the conclusory statement that it is “not convinced that the Mexican producers would refrain from using their excess capacity to ship cement to the Southern tier region at volumes or price levels that would injure regional producers including their regional subsidiaries.”<sup>38</sup> CEMEX adds that the ITC continued by concluding – without a single citation – that without the discipline of the order, the interests of the Complainants’ Mexican operations likely would not be secondary to those of their smaller Southern Tier subsidiaries.

GCCC concludes by arguing that the Commission's determination is a result of speculation, rather than the legally-mandated application of the "likely" standard. In

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<sup>38</sup> CEMEX Initial Brief at 70.

support, it cites sections of the ITC's determination using speculative words such as "provide significant incentive," "could be priced," and "would allow."<sup>39</sup>

The Investigating Authority responds by stating that the Mexican Complainants refuse to recognize the predictive nature of five-year reviews and seek to have the Panel reweigh the evidence. The Commission asserts that Complainants are asking the Panel to find anything that does not support their position to be considered speculative, even when there is substantial evidence to support the Commission's finding. It asserts that it reasonably relied on record evidence such as the price sensitivity of cement, some underselling even with the order in place, the substantial increases in demand, statements by CEMEX officials that subject imports from Mexico that are substituted for non-subject imports would realize lower transportation costs, and the incentive to increase exports attributable to Mexican excess capacity in this highly-capital intensive industry. In sum, the Commission reasonably made its finding of likely significant negative price effects on logical assumptions and extrapolations flowing from the record evidence.

Regarding price underselling, the Investigating Authority supports its finding on the likelihood of underselling by stating that in four markets for which price comparisons of Mexican and domestic product were possible, the evidence showed that subject imports from Mexico predominantly undersold the domestic product in one market (Phoenix, Arizona; 36 out of 39 months), with consistent underselling for a one and a half year period (August 1998 to March 2000), and had mixed underselling in another market

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<sup>39</sup> See Commission Determination at 38 ("The high fixed costs faced by cement producers provide significant incentive to the Mexican producers to sell their additional excess product even at low costs in order to meet their fixed costs. Moreover, increasing Mexican imports have been subject to high cash deposit rates under the order; in their absence Mexican imports could be priced significantly lower in the United States . . . . Such a substitution would allow CEMEX to lower its prices in the Southern Tier region to reflect decreases in transportation costs for Mexican imports compared to those for more distant non-subject sources." [Emphases added])



(Tucson, Arizona; 20 out of 39 months). It adds that in the original investigation, underselling also predominated in one of these two markets (Phoenix, Arizona; 41 out of 48 months). It concludes that this evidence showing underselling when the order was in place in a market where the Mexican producer supplied imports from a plant with excess capacity and competed with two domestic producers reasonably lead the Commission to make a logical assumption that there likely would be significant price underselling, particularly in light of the present substantial Mexican excess capacity.

The Investigating Authority responds to GCCC's claims by asserting that record evidence shows that contrary to GCCC's contentions, GCCC is likely to undersell its regional subsidiary if the order were revoked. It points to record evidence showing that even though the Albuquerque, New Mexico market was the one market where overselling predominated during the original investigation's review period (37 out of 40 months), once GCCC bought its U.S. affiliate, it undersold its affiliate in 15 of 39 months (40 percent of the time) during the sunset review period (for three and a quarter years). Thus, the Investigating Authority claims it made logical assumptions regarding the likelihood of underselling on GCCC's part, based on the record of pricing patterns of Mexican imports and the supply available from California Portland's expanded Rillito, Arizona facility.

In sum, according to the ITC, the combination of price underselling, the elimination of the high cash duty deposit rates that the Mexican producers are currently paying (45.98 percent for CEMEX and GCCC), and current Mexican imports that are already priced to undersell the domestic product 40 percent of the time even with the high

deposit rates in place all lead to a reasonable conclusion that the Mexican industry would be likely to engage in aggressive pricing if the order were revoked.

Regarding significant price depressing or price suppressing effects, the Investigating Authority argues that its reliance on the price sensitivity of cement is supported by record evidence. It points to more than half of purchasers' responses to the Commission's questionnaires ranking price as the most important factor in purchasing decisions. It continues by stating that prices fall within a small range that are set by the competition and that domestically-produced and imported cement are readily interchangeable. The Commission adds that the regional industry's capacity expansion projects and its resultant increase in supply are likely to increase price sensitivity in the market. The ITC also points out that the high fixed costs faced by cement producers, coupled with excess capacity, provide an incentive for Mexican importers to sell their additional excess product at low costs in an effort to meet their fixed costs. The Commission contends that this is a logical assumption based on the cement industry's practice of operating at high capacity utilization rates to recover their high costs prior to realizing any return on investment.

The Investigating Authority concludes by stating that CEMEX acknowledges that it would save \$3 per ton if it were to replace non-subject imports with subject imports. The ITC finds this \$3 difference to be substantial, given the substitutability and price-sensitivity of cement. In sum, the Commission asserts that this evidence led to its findings regarding the likelihood of significant price underselling, price suppression, and price depression.

*c. The Panel's Analysis*

The Federal Circuit has held that predictive determinations by the Commission are by nature not “verifiable,” but are rather “based on currently available evidence and on logical assumptions and extrapolations flowing from that evidence.” Matsushita Electrical Industrial Co. v. United States, 750 F.2d at 933. In no case will the Commission ever be able to rely on concrete evidence establishing that, in the future, certain events will occur upon revocation of an antidumping order. Id. The Commission's reviewing courts have recognized that “[a]s it deals with the projection of future events . . . [the Commission's] analysis is inherently less amenable to quantification . . . .” NEC Corp. v. U.S. Int’l Trade Comm’n, 36 F. Supp. 2d 380, 391 (Ct. Int’l Trade 1998). See also Hannibal Indus., Inc. v. United States, 710 F. Supp. 332, 338 (Ct. Int’l Trade 1989); Rhone Poulenc S.A. v. United States, 592 F. Supp. 1318, 1329 (Ct. Int’l Trade 1984).

Nevertheless, the Court of International Trade has also stated that the Commission has an obligation to examine the relevant data and articulate a satisfactory explanation for its action. Taiwan Semiconductor Indus. Ass'n v. United States, 93 F. Supp. 2d 1283, 1299 (Ct. Int’l Trade 2000). Furthermore, the Commission's conclusion, as reflected in its determination, cannot be reinterpreted by counsel on appeal. See SEC v. Chenery Corp., 318 U.S. at 95. The Panel cannot permit post hoc rationalizations of counsel to supplement or supplant the rationale or reasoning of the agency. American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 1003 (Ct. Int'l Trade 2000); Bethlehem Steel Corp. v. United States, 140 F. Supp. 2d 1354, 1360 (Ct. Int'l Trade

2001) (“post hoc justification cannot salvage the methodological deficiencies present in [the Commission's] determination.”).

The Panel is aware of the predictive nature of five-year reviews and of the likelihood of a negative price effects determinations in particular, but it finds no rational connection between the facts in the record and the Commission's determination. While the Commission can weigh the evidence as it deems appropriate, it cannot draw conclusions that are not supported by the record evidence. It must link sufficient record evidence to its conclusions to adequately support its determination.

During the period of review, the ITC found no clear evidence regarding patterns of underselling or overselling. It also found the cement market to be a competitive market enjoying a healthy and consistent price level increase. Its staff's COMPAS model further showed that revocation of the order would only have very limited price effects (0.6 to 1.9 percent) on the Southern Tier region. The record also shows that 200 miles is the typical range for cement shipments due to the high transportation costs involved. There is additional record evidence showing the cement market to be a buyers' market with a narrow range for price negotiations. Moreover, there is evidence showing that CEMEX, a global company, has not flooded the Southern Tier market with low-priced, non-subject imports from other countries. The record also contains sworn testimony, not cited by the Commission in its determination, where the Complainants attest that they would refrain from exporting cement to the Southern Tier at price levels that would injure their U.S. affiliates.

Despite this record evidence, the Commission nevertheless determined that revocation of the order would likely lead to significant price underselling by subject

imports as compared to the domestic product. It supported its determination by pointing to its own inconclusive evidence on underselling patterns and to a Mexican plant's excess capacity. It then focused on the competition engaged in by GCCC and its New Mexico affiliate. It concluded that GCCC has at times in the past and will upon revocation of the order likely continue to undersell its own affiliate in an effort to capture the market, disregarding the fact that if GCCC does compete in the New Mexico market,<sup>40</sup> it only does so with its own affiliate because there are no other domestic producers supplying that market. Moreover, the Commission determined that a prospective California producer with a new location in Arizona, which will be located 100 miles beyond the typical range for cement shipments, will likely face underselling by GCCC.

Given the Commission's failure to explain how extensive record evidence conflicting with its determination on the likelihood of underselling, coupled with the lack of citations to record evidence logically supporting its conclusions, the Panel cannot affirm the Commission's findings on the substantial likelihood of underselling. As the Federal Circuit stressed in Gerald Metals, Inc. v. United States, 132 F.3d 716, 720 (1977), the substantial evidence standard of review requires more than a mere assertion of evidence that justifies the Commission's determination. Rather, the Commission must also take into account contradictory evidence or evidence from which conflicting inferences could be drawn. The Commission is therefore directed to consider all record

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<sup>40</sup> The veracity of these findings is contested by GCCC. GCCC claims that it does not compete with its affiliate in the El Paso and Albuquerque markets, even though it had previously claimed in its Initial Brief that imports from GCCC oversold its affiliate's domestically-produced cement. See GCCC Reply Brief at 45 n.92; GCCC Initial Brief at 34.

evidence, including all sworn testimony,<sup>41</sup> to make a reasonable determination that is adequately supported by the record evidence.

Regarding significant price depressing or price suppressing effects, the Commission supported its determination that imports of subject cement are likely to enter the United States at prices that would have a significant depressing or suppressing effect on the price of the domestic product with the following record evidence: (1) imported and domestic cement are interchangeable, (2) price is a very important purchasing factor, (3) the cement market is a competitive market with prices set by the competition, (4) there is excess Mexican capacity, (5) imports have been subject to high cash duty deposit rates, (6) the cement industry faces high fixed costs, and (7) there will be a future increase in domestic capacity.

However, the Commission did not explain how record evidence showing actual industry practice (such as closed bidding and profit maximizing behavior), actual market conditions (such as continued healthy and sustainable increases in demand and prices), and high transportation costs factored into its determination. Furthermore, when supporting its likelihood determination, the ITC used speculative statements such as “provide a significant incentive . . . to sell . . . excess product . . . at low costs,” “could be priced significantly lower in the United States,” and “would allow CEMEX to lower prices.”<sup>42</sup>

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<sup>41</sup> While the CIT has ruled that it is reasonable for the Commission not to credit a complainant's declarations that revocation of the order would have no effect on its pricing decisions, it has only done so when the record has presented substantial evidence to the contrary. See American Permac, Inc. v. United States, 656 F. Supp. 1228, 1235 (Ct. Int'l Trade 1986). The American Permac decision is thus distinguishable from the instant case.

<sup>42</sup> See supra note 29.

The likelihood standard is not intended to predict whether a producer has an incentive to do something, but whether it will probably do it. Speculative and conclusory statements do not support the Commission's finding that Mexican imports would probably flood the market and have a significant depressing or suppressing effect on the price of the domestic product. Accordingly, the Panel remands this matter to the Commission with instructions to consider all record evidence and to reach a reasonable determination that is adequately supported by record evidence.

### 3. Likely Impact on the Regional Industry

#### *a. Statutory Background and the Commission's Determination*

As previously noted, in conducting a five-year review the Commission is to consider the likely volume, price effects, and impact of imports of the subject merchandise on the industry if the order is revoked. Section 752(a)(4) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675a(a)(4), directs the Commission to consider the following factors when making its likely impact determination:

(4) Impact on the industry. In evaluating the likely impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated, the Commission shall consider all relevant economic factors which are likely to have a bearing on the state of the industry in the United States, including, but not limited to—

(A) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(B) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and

(C) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.

The Commission shall evaluate all relevant economic factors described in this paragraph within the context of the business cycle and the conditions of competition that are distinctive to the affected industry.

In the instant sunset review, the Commission concluded that if the antidumping duty order were revoked, cement imports from Mexico would be likely to have a significant adverse impact on the regional industry within a reasonably foreseeable time.<sup>43</sup> The

Commission based its determination on the following findings:<sup>44</sup>

- The antidumping duty order appears to have had a beneficial effect on the regional industry's performance.
- The condition of the regional industry has improved since imposition of the order. While production capacity increased by less than 5 percent from 1989 to 1999, regional production increased by almost 30 percent for the same period. Thus, the regional producers' capacity utilization increased from 75.1 percent in 1999 to 92.6 percent in 1999. Therefore, the regional industry's share of apparent consumption declined from 75.6 percent in 1997 to 65.1 percent in 1999. The regional industry's market share in 1999 was lower than its market share of 69.7 percent in 1989.
- Strong demand for cement has contributed to the regional industry's positive financial performance. The regional industry is not in a vulnerable state.
- Revocation of the antidumping duty order would likely lead to a significant increase in the volume of Mexican cement imports into the Southern Tier region, and these shipments would likely undersell the domestic product and significantly depress or suppress the regional industry's prices.
- Demand in the Southern Tier region was found to increase at slower rates or remain flat. Therefore, the increase in Mexican cement imports is likely to cause decreases in both the prices and volume of regional producers' shipments, which would cause a further loss of market share.
- Additional loss of market share and subsequent decrease in capacity utilization would be particularly harmful in this capital intensive industry, where producers require high capacity utilization levels and operating margins to meet fixed costs and to justify capital expenditures.

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<sup>43</sup> Commission Determination at 42.

<sup>44</sup> *Id.* at 40-41.



- Regional producers have undertaken, or have announced plans, to begin a number of production capacity expansion projects in order to meet increased demand, a process that takes three to five years. The demand cycle appears to have reached a peak with slower growth or constant demand expected in the Southern Tier region in the reasonably foreseeable future. Thus, the regional producers' investment in additional capacity will be particularly susceptible to the likely significant increases in Mexican cement imports if the order is revoked, and the result likely would be an adverse impact on the regional industry's capacity utilization levels and profitability due to high fixed costs.
- The regional industry's high level of operating income does not indicate that it likely would not be materially injured upon the revocation of the order, because high profits at the peak of the cycle are typical and do not indicate that the industry is immune from material injury. Moreover, due to the high fixed costs in this industry, relatively high levels of profitability are needed to justify investments and capital expenditures.

In a dissenting opinion Commissioner Askey determined that the improvement in the financial indicators of the industry cannot simply be attributed to the existence of the order. She mentioned that there has been a dramatic increase in demand in the region, which has outstripped domestic capacity and led to supply shortages. As a result, total import volumes, both absolutely and as a percentage of domestic consumption, have increased substantially since the time of the original investigation period. She noted that the domestic industry has benefited greatly from this demand increase, despite the presence of substantial volumes of non-Mexican cement imports. Non-Mexican cement imports have increased dramatically, to levels above those of Mexican cement imports during the original period, as domestic producers have operated at high capacity utilization levels and reported supply shortages. Thus, despite the presence of substantial levels of non-Mexican cement imports, the domestic regional industry has been operating at virtually peak capacity, which is likely to continue given projections of continued strong demand. Commissioner Askey also noted that domestic producers are in the process of adding new capacity, and such increases will contribute to their ability to

respond to high demand. Such increased capacity should also create an incentive to decrease the amount of non-Mexican cement imports that they have brought into the market to supplement their own production.<sup>45</sup>

In her dissent Commissioner Askey further found that Mexican cement imports would not be likely to have a significant impact on the regional industry's cash flow, inventories, employment, wages, growth, ability to raise capital, investment or development efforts within a reasonably foreseeable time if the order were revoked. She found that the revocation of the order would not be likely to lead to a significant reduction in regional producers' output, sales, market share, profits, productivity, ability to raise capital, or returns on investment. Accordingly, she concluded that revocation of the order on Mexican cement would be unlikely to have a significant impact on the regional industry within a reasonably foreseeable time.

*b. The Parties' Contentions*

For its part, GCCC contends that the Commission's findings that the volume and price effects of the subject imports would likely have a significant adverse impact on the production, shipments, sales, market share, and revenues of the regional industry, which would in turn have a direct adverse impact on the industry's profitability as well as its ability to raise capital and make and maintain necessary capital investment, does not follow from the evidence in the administrative record considered as a whole, and under the applicable standard of review is contrary to law. GCCC maintains that the imposition of the antidumping duty order is not primarily responsible for the industry's improved condition, but rather it is the extraordinary economic growth and expansion in the

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<sup>45</sup> *Id.* at 68-70 (Commissioner Askey, dissenting).

demand for cement during the 1990's which caused such strong performance. GCCC adds that continued projected growth in demand should not be treated as evidence of future injury to the domestic producers only because the growth appears to be slowing from historically unprecedented levels.

GCCC also argues that the position taken by the Commission in which it accepts the absence of vulnerability, but concludes that this situation does not foreclose future vulnerability, and defends the industry's high profitability on the theory that it is necessary in high fixed costs industries to justify future investment, begs the question of whether the evidence supports the conclusion of vulnerability in the foreseeable future. It contends that the record as a whole shows that the conditions that sustain the extraordinary performance levels of the industry, in particular strong demand, are not expected to change significantly in the foreseeable future. GCCC adds that evidence of possible substitution of subject imports for non-subject imports also fails to support the ITC's conclusion of likely negative impact on domestic production.

CEMEX argues that there is no evidence to support the ITC's conclusion that revocation of the antidumping order would be likely to lead to recurrence of material injury, given the Commission's acknowledgement that the domestic industry is not in a vulnerable state, but is in fact enjoying unsurpassed health. It cites an ITC determination where, in similar circumstances of non-vulnerability, the ITC revoked the order.<sup>46</sup> CEMEX contends that the ITC made no effort to reconcile the findings of non-vulnerability of the industry with the likely recurrence of material injury. It also points out that the ITC never attempted to explain why the health of the industry did not

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<sup>46</sup> CEMEX Brief at 74 (citing Electrolytic Manganese Dioxide from Greece and Japan, Inv. Nos. 731-TA-406 and 408 (Review) (USITC Pub. 3296 May 2000)).

improve in the first five years of the antidumping duty order (1990-1995), but only improved after U.S. demand for cement increased dramatically. CEMEX concludes by arguing that due to expected strong demand, coupled with the absence of domestic industry vulnerability, the domestic industry is likely to continue to experience record profitability. Moreover, CEMEX adds, because the domestic industry is presently unable and will not be able in the foreseeable future to satisfy local demand, the Commission's conclusion that this extraordinary healthy and non-vulnerable industry nevertheless is likely to be materially injured by revocation of the antidumping duty order is unsupported by substantial evidence.

In its brief the Investigating Authority states that the condition of the regional industry has improved since imposition of the order, and that record evidence demonstrates that strong demand for cement during the period of review had contributed to the regional industry's positive financial performance. However, the demand cycle appears to have reached its peak with slower growth or constant demand in the foreseeable future. Thus, the ITC argues, the Commission appropriately recognized that with demand projected to increase at a slower rate or to remain flat, the industry's performance might be more likely to deteriorate if the order is revoked. The Commission stresses the fact that despite overall improvements in performance since the imposition of the order, regional producers still have lost market share.

In connection with vulnerability, the Investigating Authority maintains that even though the Commission found that the regional industry was not in a vulnerable state at the present, this finding does not preclude the Commission from finding, as it did, that upon revocation of the order the regional industry would be vulnerable and would be

likely to be adversely impacted in a reasonably foreseeable time. It states that the issue in a five-year review is whether the industry would be vulnerable or susceptible to injury if the order were revoked, not whether it is vulnerable while the order remains in place. It adds that the Commission considered current trends and competitive conditions in the market, including whether the industry was facing difficulties from a variety of sources, to determine the likely future impact of subject imports and whether the industry was vulnerable to future harm. It supports its finding of future harm by pointing to its finding that revocation of the order would likely lead to a significant increase in the volume of subject imports and that such imports would likely undersell the domestic product and significantly depress or suppress the regional industry's prices. In addition, such volume and price effects on cement imports would likely cause the regional industry to lose additional market share. The Commission concludes that in a capital-intensive industry, where producers require high capacity utilization levels and operating margins to meet fixed costs and to justify capital expenditures, the loss in market share and subsequent decrease in capacity utilization would be particularly injurious.

More specifically, the Investigating Authority states that the regional producers' investment in additional capacity would be particularly susceptible or vulnerable to the likely significant increases in subject imports if the order were revoked, and this would result in an adverse impact on the regional industry's capacity utilization levels and profitability due to high fixed costs. After referring to the details of the capacity expansion by domestic producers, the Investigating Authority states that the evidence demonstrates that the process of expanding production capacity is extremely expensive

and that it takes three to five years for planning, permitting, and construction. It notes that the Complainants have not been challenged these findings.

The ITC concludes that if the announced production capacity expansion for 2002 were completed, the regional production capacity would be vulnerable to the likely significant increase in subject imports. The Commission asserts that due to high fixed costs in this industry, relatively high levels of profitability are needed to justify investments and capital expenditures. Thus, even though the Commission recognized the regional industry's high level of operating income, it found that this fact did not indicate that the industry likely would not be materially injured upon revocation of the order because high profits at the peak of the cycle did not indicate that the industry was immune from material injury.

Finally, the ITC states that the likely increase in the volume of subject imports that would undersell the domestic like product and significantly suppress or depress U.S. prices would make the regional producers' large capital expenditures particularly susceptible or vulnerable to the significant increases of Mexican cement if the order were revoked. The result would be an adverse impact on the regional industry's capacity utilization levels and profitability. The ITC concludes that the Commission's determination that revocation of the antidumping duty order would be likely to have a significant adverse impact on the regional industry is based on sufficient record evidence.<sup>47</sup>

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<sup>47</sup> The Committee contends that CEMEX and GCCC have waived argument on the vulnerability issue either because they failed to raise it in their complaints and/or otherwise failed to exhaust administrative remedies. See Committee Brief at 60-62. The Panel rejects this contention. Both Complainants have alleged in their complaints that the Commission's impact and material injury determinations are not based on substantial evidence. The Panel also does believe that the exhaustion doctrine applies here. See *infra* Part VII.A for the Panel's discussion of the exhaustion doctrine. The issue before the Commission is whether revocation of the

*c. The Panel's Analysis*

During the period of review the ITC found that the order had a beneficial effect on the regional industry's performance. As a consequence, the condition of the regional industry has improved. However, the ITC does not explain why improvement in the industry's current financial indicators can be attributed mainly to the existence of the order. For example, the ITC does not explain the improvement in the industry's performance in connection with other economic factors, such as the dramatic increase in demand in the region that has outstripped domestic capacity and that has led to supply shortages. Nor does the Commission explain that the domestic industry has benefited greatly from such an increase in demand, despite the presence in the market of substantial volumes of non-subject imports, both absolutely and as a percentage of domestic consumption.

The ITC found that the growth in demand will slow, not disappear, from the accelerated rates and historical highs observed during the period of review. Yet its conclusion about the industry's likely future performance does not hold up, in light of extensive evidence of the demand-driven causes of the positive performance that is likely or probably due to significant federal government expenditures for concrete/cement-intensive projects. The Investigating Authority acknowledges that record evidence suggests that demand will increase at a slower rate or remain flat but at high levels.<sup>48</sup> It therefore suggests that the Commission made a link between a slowing in demand and the

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order would likely have a negative impact on the domestic industry by reason of the subject imports. This is an issue that both Complainants vigorously pressed below.

<sup>48</sup> ITC Brief at 103.

condition of the industry. In the Panel's view, however, the Commission must explain why it reached the conclusion that the order should remain in place in order to protect the highly profitable regional cement industry against the possibility that the demand for cement may slacken.

In addition, based on the strong performance of the domestic industry, the ITC found that the regional industry is not in a vulnerable state. Nevertheless, the ITC concluded that in this non-vulnerable industry the producers of all or almost all of the Southern Tier production would be materially injured in a reasonably foreseeable time were the order to be revoked. The reason given by the ITC for this conclusion is that high profits at the peak of the cycle are typical and do not indicate that the industry is immune from material injury. Moreover, due to high fixed costs in this industry, relatively high levels of profitability are needed to justify investment and capital expenditures.<sup>49</sup> The ITC appears to be adding a different standard for sunset reviews than those articulated in the statute. The governing statute does not require that the regional industry be "immune from injury" before the Commission can revoke an antidumping duty order. Accordingly, the ITC must provide an explanation of how its finding that the regional industry is enjoying high profits at the peak of the cycle leads to the conclusion that it would likely be materially injured upon revocation of the order.

The Investigating Authority further contends that the Commission's finding that the industry is not in a vulnerable state does not preclude the Commission from finding, as it did, that upon revocation of the order the regional industry would be vulnerable and would be likely to be adversely impacted in a reasonably foreseeable time. However,

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<sup>49</sup> See ITC Brief at 112.



vulnerability is only a single aspect of the overall analysis the Commission must make in a sunset review – the Commission must also consider volume, price effects, and impact in its analysis. The Commission's finding of a non-vulnerable regional industry, coupled with a finding of a likelihood of future injury, requires that the Commission fully articulate its reasons why, despite the non-vulnerability of the industry, the volume of imports and price effects of revocation would be so significant as to lead to a likelihood of recurrence of injury.<sup>50</sup> Thus, on remand the Commission must give sufficient reasons to sustain its determination.

Finally, the Investigating Authority contends that despite overall improvements in performance since the imposition of the order, regional producers still have lost market share. What the Commission does not explain is the regional producers' loss of relative market share against the backdrop of high demand that has substantially increased the size of the overall market and required significant volume of imports, both of Mexican and non-Mexican cement. The Commission must explain why the regional producers would likely suffer material injury because of the loss of market share, when it has acknowledged that such regional producers have not been able to meet demand even though they have been operating at near full capacity. The Commission must also explain why an obvious decline in market share derived from a substantial increase in demand – an increase in demand that has been met by imports of non-subject merchandise and that has led to record capacity utilization, operating margins, and profits – can be considered a cause of material injury to the regional producers. See Taiwan Semiconductors, 266 F.3d

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<sup>50</sup> The findings of significant volume and price effects if the order were revoked have been remanded for further analysis by the Commission. See supra Part IV.B.1 and Part IV.B.2.

at 1345 (“the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports,” quoting SAA at 852).

In sum, as mentioned above, the Panel is aware of the predictive nature of five-year reviews and of the likelihood of impact of subject imports on the domestic industry if the order is revoked. Nevertheless, the Panel is unable to see a rational connection between the facts in the record and the Commission’s determination. On remand, the Commission must link sufficient record evidence that adequately supports its determination; it cannot draw conclusions that are not supported by record evidence.

## **V. THE “ALL OR ALMOST ALL” STANDARD**

### **A. Statutory Background and the Commission’s Determination**

In the course of a sunset review the Commission may base its determination on a finding of the existence of a regional industry, if any, as defined in the original investigation. See 19 U.S.C. § 1675a(a)(8). That statutory provision cross-references 19 U.S.C. § 1677(4)(C), which in turn establishes the criteria for making a regional industry finding. The Commission must also consider whether the criteria set forth in 19 U.S.C. § 1677(4)(C) “are likely to be satisfied if the order is revoked.” 19 U.S.C. § 1675a(a)(8).

There are three criteria that must be met in making a regional industry finding: (1) a regional market, (2) a concentration of dumped imports into that regional market, and (3) material injury to producers of all or almost all of the regional production by reason of the dumped imports. Texas Crushed Stone Co. v. United States, 822 F. Supp. 773, 777 (Ct. Int’l Trade 1993), aff’d, 35 F.3d 1535 (Fed. Cir. 1994). Only the third criteria is of relevance in this review proceeding. Thus, in making its sunset review determination

under a regional industry analysis, the ITC must have considered whether revocation of the order would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time to producers of all or almost all of the regional production by reason of the dumped imports.

In its determination the Commission noted the lack of legislative guidance on how the “all or almost all” standard should be applied in a five-year review.<sup>51</sup> It also noted the disagreement among the parties over the proper methodology to employ, i.e., whether the use of aggregate regional data was adequate or instead whether a plant-by-plant inquiry should have been made.<sup>52</sup> In concluding that producers of all or almost all of the regional production would likely experience a recurrence of material injury if the order were revoked, the Commission used aggregate data for the regional industry, but states that it also “examined the performance of individual regional producers to look for anomalies as a safeguard ‘to assure that the “all or almost all” standard [was] met.’”<sup>53</sup> It rejected the Complainants’ contention that they would refrain from using their excess capacity to ship cement to the Southern Tier region at volumes or price levels that would injure regional producers, including their regional subsidiaries. The Commission found that the interests of the Complainants’ subsidiaries would be secondary to those of their Mexican parent.<sup>54</sup>

The Commission also rejected the Complainants’ contention that certain regional producers were insulated from competition by Mexican imports because of geography, i.e., that transportation costs tend to limit the distances that cement is shipped. It noted

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<sup>51</sup> Commission Determination at 31.

<sup>52</sup> *Id.* at 32 & n.177.

<sup>53</sup> *Id.* at 41 (quoting *Cemex, S.A. v. United States*, 790 F. Supp. 290, 296 (Ct. Int’l Trade 1992)).

<sup>54</sup> *Id.* at 41.

that “20 percent of regionally-produced cement in the Southern Tier region is shipped more than 200 miles . . . . However, the distance cement can be economically shipped is expanded if rail transport rather than truck transport is used.”<sup>55</sup> The ITC added that there are only limited areas in the Southern Tier region “that may be somewhat insulated from direct competition with subject imports.”<sup>56</sup> The Commission concluded, therefore, that the “all or almost” standard had been met.

#### B. The Parties’ Contentions

CEMEX launches several attacks against the Commission’s “all or almost all” finding. First, it contends that the ITC’s finding on this issue lacks the requisite clarity to enable a reviewing body to discern the path of the agency’s reasoning. The Commission never discusses the aggregate data that it relied upon or how that data met the legal standard.<sup>57</sup> The Commission never identifies which individual producers it examined to check for anomalies in the aggregate data. Moreover, CEMEX argues, the Commission erred as a matter of law by using an aggregate data analysis rather than a plant-by-plant analysis. CEMEX supports its argument by reference to the Final Staff Report that confirms that the region consists of many independent local economic markets where prices in one market are not transmitted to prices in another market.<sup>58</sup>

GCCC essentially echoes the arguments made by CEMEX. It adds that record evidence shows that a significant number of regional producers are beyond the reach of

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<sup>55</sup> *Id.* at 41-42 (footnotes omitted).

<sup>56</sup> *Id.* at 42 (footnote omitted).

<sup>57</sup> CEMEX Initial Brief at 33.

<sup>58</sup> *Id.* at 35.

competition from Mexican imports, thus making a plant-by-plant analysis particularly appropriate under the circumstances.<sup>59</sup>

For its part the ITC notes that neither the statute nor case law define what percentage of production constitutes “all or almost all” in the context of a regional industry analysis.<sup>60</sup> Regarding the methodology employed by the Commission in this review, the ITC observes that it has broad discretion in the choice of methodology, and that a pure producer-by-producer analysis is not required.<sup>61</sup> The balance of the ITC’s argument is taken up with a refutation of record evidence that the Complainants rely upon in support of their position, arguing that ample evidence supports the Commission’s “all or almost all” finding.<sup>62</sup>

Joining in the ITC’s arguments, the Committee adds that the portion of the Staff Report relied upon by the Complainants regarding the isolated nature of certain markets within the region is overly selective. The Committee points out that the ITC Staff itself noted the flaws in this study due to insufficient data analysis.<sup>63</sup>

### C. The Panel’s Analysis

In a five-year review, it is the intent of Congress that antidumping and countervailing duty orders be revoked unless the ITC finds all the elements of such a review are supported by substantial evidence. The inquiry is plain: if the order were

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<sup>59</sup> GCCC Initial Brief at 66.

<sup>60</sup> ITC Brief at 115.

<sup>61</sup> Id. at 118-19.

<sup>62</sup> Id. at 121-27.

<sup>63</sup> Committee Brief at 191-93.

revoked, would it likely lead to a continuation or recurrence of material injury to producers of all or almost all of the production by reason of the subject imports within a reasonably foreseeable time. In undertaking its review, the Commission must support its findings and conclusions in a reasoned and transparent manner, taking into account the entire record. See Taiwan Semiconductor, 266 F.3d at 1345 (the Commission must examine contradictory evidence and alternative causes of injury “to ensure that the subject imports are causing the injury, not simply contributing to the injury in a tangential or minimal way.”). Thus, in assessing whether the “all or almost all” standard has been met, the ITC must adequately explain not only the likelihood of continuation or recurrence of material injury to producers of all or almost all of the production within a reasonably foreseeable time, but also the causal link between material injury and dumped subject imports.

The disagreement between the parties centers around the Commission's asserted failure to incorporate in its determination a reasoned explanation of the following issues: (1) how the aggregate data shows likelihood of recurrence of material injury by reason of subject imports if the order is revoked; (2) the manner in which the ITC treated information regarding certain insulated markets and how that information influenced its “all or almost all” analysis; (3) how the performance of individual regional producers influenced the Commission’s determination of likelihood of recurrence of material injury; (4) which individual regional producer data was taken into account and the evaluation of that information; and (5) what anomalies, if any, were found after examining individual regional producer data and the evaluation of that information.

The ITC states both in its determination and in its brief to the Panel that “[t]here is

no specification in the statute or prior Commission determinations as to what percentage of domestic production constitutes ‘all or almost all’ in the context of a regional injury analysis.”<sup>64</sup> Although there is no such specification, any determination by the Commission must contain a reasoned basis for its conclusions, showing that substantial evidence on the administrative record supports its conclusion that producers of “all or almost all” of the regional production would likely suffer material injury by reason of the dumped imports if the order is revoked. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Suramerica, 44 F.3d at 985 (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 227 (1938)). However, the substantial evidence standard requires more than mere assertion of “evidence which in and of itself justified [the Commission's determination], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.” Id. (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951)). Rather “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” Id. (quoting Universal Camera, 340 U.S. at 488). In sum, the question before the Panel on review is whether “the administrative record contain[s] substantial evidence to support [the determination] and was it a rational decision?” Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984).

In the context of the “all or almost all” standard, the Court of International Trade has held that “all or almost all” determinations are to be made on a case-by-case basis. Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 616-17 (1993). See also Cemex, S.A. v. United States, 790 F. Supp. 251, 294 (Ct. Int’l Trade 1992)(not error for

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<sup>64</sup> See Commission Determination at 31; ITC Brief at 115.

the Commission to have failed to apply a fixed percentage of eighty to eighty-five percent), aff'd, 989 F.2d 1202 (Fed. Cir. 1993). Nevertheless, although “there is nothing in the statute, case law, or administrative practice to indicate Congressional intent to bind [the Commission] to a precise numerical percentage,” Cemex, 790 F. Supp. at 294, neither do they absolve the Commission of the duty to articulate with reasonable clarity the reasons for its determination that the “all or almost all” standard has been met in a particular case.

A review of the administrative record in this case, as well as the Commission’s determination, leads the Panel to conclude that the ITC has failed to provide a reasoned explanation for why producers of all or almost all of the production in the Southern Tier region would likely be materially injured if the order were revoked. The Panel recognizes that the “all or almost all” standard cannot be reduced to a fixed percentage that is generally applicable in every case. Nevertheless, a legal threshold must exist that the Commission may not cross without violating the governing statute. Thus, on remand the ITC must explain what percentage of regional production would likely be materially injured by reason of dumped imports if the order were revoked, in order for the Panel to determine that the Commission’s determination is not contrary to law.

Moreover, the CIT has provided that “although a pure producer-by-producer analysis is not required by statute, examination of individual plant information can highlight anomalies that an aggregate analysis would disguise.” Cemex, 790 F. Supp. at 295. Although the Commission asserts that it used an aggregate production methodology, supplemented by an individual plant analysis, it never explains what the aggregate methodology or individual plant analysis consisted of or what they revealed.



The Commission states that it examined individual producer data to look for anomalies, and cites generally but without any particularity to a series of tables in the Staff Report that contain the trade, employment, and financial data for the entire region.<sup>65</sup> However, if the numbers in those tables were totaled, the sum would be the aggregate data. In this connection the Panel finds especially salient the CIT's decision in Mitsubishi Materials Corp. v. United States, where the court stated the following in the context of the "all or almost all" standard:

Although it is apparent that the Commission majority did examine plant-by-plant information, the court cannot review whether the Commission majority's conclusion that the data itself substantiated the aggregate methodology's indications of injury because the Commission revealed so little of its reasoning.

820 F. Supp. at 618. If the CIT found itself in the dark in the Mitsubishi Materials Corp. case, the same applies with even greater force in the present case.

In short, the Panel remands to the Commission to explain its conclusion that producers of "all or almost all" of the regional production would likely be materially injured by reason of the subject imports within a reasonably foreseeable time if the order is revoked.

## **VI. INFORMATION CONCERNING THE SOUTHDOWN ACQUISITION**

Both GCCC and CEMEX contend that the Commission erred in its treatment of information submitted by CEMEX concerning a planned acquisition by CEMEX of a U.S. cement producer, Southdown.<sup>66</sup> The background is that the record in this case

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<sup>65</sup> See Commission Determination at 41 & n.251.

<sup>66</sup> See CEMEX Initial Brief at 38; GCCC Initial Brief at 78. The Committee contends that CEMEX and GCCC have waived argument on the Commission's treatment of the Southdown acquisition information either because they failed to raise it in their complaints and/or otherwise failed to exhaust administrative

closed on September 22, 2000. Pursuant to 19 U.S.C. § 1677m(g), the Commission could not consider any new information submitted after that date. Final comments were due from the parties on September 26, 2000. On September 29, 2000, counsel for CEMEX notified the Commission of CEMEX's pending acquisition of Southdown. In the exercise of its discretion the Commission reopened the administrative record to allow CEMEX the opportunity to place this information on the record, and then closed the record on October 2, 2000, so that the parties could comment on this new information before the Commission's October 5, 2000 vote day.<sup>67</sup> The information submitted by CEMEX indicates that although the Southdown acquisition had received necessary board approvals, it was still subject to shareholder and regulatory approval. In other words, the acquisition was not yet final.

In its final determination, the Commission considered this new information, but noted that “[t]his acquisition, which is conditional on two-thirds of Southdown’s shares being tendered and is subject to regulatory approval, is not final. Thus, we have given it limited consideration in our analysis.”<sup>68</sup> In the context of facilitating the Mexican producers’ ability to increase sales of Mexican cement in the United States, the

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remedies. See Committee Brief at 60-62. The Panel rejects this contention. Both Complainants have alleged in their complaints that the Commission’s determination is not based on substantial evidence. The Southdown acquisition is one piece of evidence upon which that determination rests and, thus, its substantiality has properly been placed in issue. The Panel also fails to see how the exhaustion doctrine applies here. The rationale for the exhaustion requirement is to ensure that an agency and the interested parties fully develop the facts in order to aid judicial review. See *McKart v. United States*, 395 U.S. 185, 194 (1969) (“Judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise.”). See *infra* Part VII.A for the Panel’s discussion of the exhaustion doctrine. Consistently with the exhaustion doctrine, CEMEX’s submission on the Southdown acquisition was to make a factual record. It would have required prescience on CEMEX’s part to know how the Commission would treat the information on the proposed Southdown acquisition in its final determination. The exhaustion doctrine does require such foresight.

<sup>67</sup> See CEMEX Reply Brief at 23-29.

<sup>68</sup> Commission Determination at 22 n.108.

Commission added that if the Southdown acquisition were realized, “CEMEX would increase its Southern Tier distribution network.”<sup>69</sup> Counsel for the ITC concedes that the Commission “noted one possible implication based on evidence in the record.”<sup>70</sup> CEMEX complains of the one-sided treatment the Commission gave this information by failing to fully discuss how CEMEX might integrate this U.S. producer into its global operations.<sup>71</sup>

Under the circumstances it was clearly within the Commission’s discretion not to have accepted the Southdown acquisition information in the first place. Having reopened the record to admit the Southdown information, the Commission undoubtedly was correct in giving it “limited consideration,” if by “limited consideration” the Commission meant that it could not treat the Southdown acquisition as final. However, once the Commission reopened the record to receive this new information, it had a legal obligation to fully evaluate it. While the conclusions to be drawn from and the weight to be given to the evidence are for the Commission, the Commission is required at a minimum to fully evaluate all the evidence. See U.S. Steel Group v. United States, 96 F.3d 1352, 1357 (Fed. Cir. 1996) (“It is the Commission’s task to evaluate the evidence it collects during its investigation.”); Gerald Metals, Inc. v. United States, 132 F.3d at 720 (the Commission must “tak[e] into account contradictory evidence or evidence from which conflicting inferences could be drawn.”). If the Commission felt at liberty to evaluate how the Southdown acquisition might relieve import bottlenecks, it should have likewise

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<sup>69</sup> Id. at 38 n.226.

<sup>70</sup> ITC Brief at 146.

<sup>71</sup> CEMEX Initial Brief at 39-40.

evaluated, for example, the effect that the Southdown acquisition would have on the need to import Mexican cement at all and whether the Commission's "all or almost all" finding would be affected.

In short, the Panel remands to the Commission for further consideration the information concerning the proposed Southdown acquisition.

## **VII. OTHER ISSUES**

In their respective complaints and briefs CEMEX and GCCC raise the following five purported errors and improprieties:

- That the Commission erred as a matter of law in finding that revocation of the order would likely lead to a recurrence of injury within a "reasonably foreseeable time."
- That the Commission's regional industry finding was contrary to law.
- That the Commission's decision to take duty absorption into consideration was contrary to law.
- That the Commission's erred as a matter of law in considering cumulation.
- That the domestic industry's allegations that CEMEX made false statements to the Commission and to the Panel should be stricken from the record.

For the reasons that follow, the Panel concludes that the foregoing alleged errors and improprieties are neither erroneous nor improper as a matter of law or, if they are, that they constitute at most harmless error.<sup>72</sup>

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<sup>72</sup> The Panel also notes the Commission's objection to GCCC's filing of substituted pages to its initial brief. The Commission claims that it was deprived of five days of briefing time as a consequence of GCCC's post-brief filing. See ITC Brief at 35-36. Given the large number of replacement pages that GCCC filed – 27 pages of an 83-page brief – the Panel believes that it would have been better practice if GCCC had sought leave of the Panel to file its 27 substitute pages. Nevertheless, most of the content of the substituted pages qualifies as technical and clerical corrections that change numbering errors. To the extent that any substantive changes

A. The “Reasonably Foreseeable Time” Standard

As noted, the governing statute requires the Commission to determine whether injury would be likely to continue or recur “within a reasonably foreseeable time.” 19 U.S.C. § 1675a(a)(1). Section 752(a)(5) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675a(a)(5), further provides:

Basis for determination

The presence or absence of any factor which the Commission is required to consider under this subsection shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur within a reasonably foreseeable time if the order is revoked or the suspended investigation is terminated. In making that determination, the Commission shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time. [Emphasis added.]

The legislative history of this subsection adds that a “reasonably foreseeable time” “normally will exceed the ‘imminent’ time frame applicable on a threat of injury analysis. . . . [The Commission is to consider] other factors that may only manifest themselves in the longer term, such as planned investment and the shifting of production facilities.” Uruguay Round Trade Agreements, Statement of Administrative Action, H.R. Doc. No. 316, vol. 1, 103d Cong., 2d Sess. 887 (1994).

As stated by the Commission in its final determination, “[T]he process of expanding production capacity takes three to five years for planning, permitting, and

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were made, such changes were to remove text, not to add it. Moreover, the Commission has not drawn to the Panel’s attention any actual prejudice it has suffered. Although the Commission requested that it be afforded an additional 10 days to make any corrections to its brief that it might deem necessary, the Commission never filed any substitute pages to its brief, nor did it seek leave to file any substitute pages. Accordingly, the Panel deems this issue to be moot.

construction.”<sup>73</sup> GCCC complains that the Commission exceeded the permissible time frame by considering time periods up to four years in the future that involved planned investment activities by the regional industry.<sup>74</sup> The Commission responds in three ways. First, the Commission submits that GCCC has waived this argument because it failed to raise it below.<sup>75</sup> Second, the Commission adds, there can be no hard-and-fast rule as to what constitutes a “reasonably foreseeable time” because that necessarily will turn on a variety of factors, including the nature of the industry under review. Third, the Commission points out, in the demand portion of its final determination the Commission focused on the three-year period of 2000-2002. In addition, in considering projected expanded capacity, the Commission in fact focused its analysis on the two-year period of 2000-2001.<sup>76</sup>

In its reply brief GCCC virtually concedes that it failed to raise this issue in the course of the administrative proceedings.<sup>77</sup> Nowhere in its briefs to the Panel does GCCC show where in the record it raised this issue before the Commission. Undaunted, GCCC asks the Panel to invoke an exception to the doctrine of exhaustion of administrative remedies.

Exhaustion of administrative remedies is generally required before a litigant will be allowed to raise a claim or an issue in proceedings to review agency action. It is one of

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<sup>73</sup> Commission Determination at 27.

<sup>74</sup> GCCC Initial Brief at 67-68, 69 n.155.

<sup>75</sup> ITC Brief at 28, 51-52.

<sup>76</sup> ITC Brief at 53-54. See Commission Determination 41 & n.248.

<sup>77</sup> See GCCC Reply Brief at 62 (“The Panel has discretion not to apply the doctrine of administrative remedies.”).

the general legal principles binding upon the Panel. See NAFTA Article 1911 (“general legal principles includes . . . exhaustion of administrative remedies”). The rationale for the exhaustion requirement is to that an agency and the interested parties fully develop the facts in order to aid judicial review. See McKart v. United States, 395 U.S. 185, 194 (1969) (“Judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise.”). Other justifications for requiring exhaustion have to do with practical notions of judicial efficiency and notions of administrative autonomy. See Thomson Consumer Electronics, Inc. v. United States, 247 F.3d 1210, 1214 (Fed. Cir. 2001). The courts may never have to intervene if the complaining party is successful in vindicating its rights in the pursuit of its administrative remedies. In addition, the agency must be given a chance to discover and correct its own errors. Finally, it is possible that by allowing frequent and deliberate evasion of administrative processes the effectiveness of an agency could be weakened by encouraging parties to ignore its procedures. See McKart, 395 U.S. at 195.

Nevertheless, in cases other than those relating to import classification, Congress has left the matter of exhaustion to judicial discretion. The governing statute provides that “[t]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.” 28 U.S.C. § 2637(d)(emphasis added). Thus, unless it considers exhaustion “appropriate,” the CIT will allow a party to raise an issue not previously raised with the Investigating Authority. In determining whether to require exhaustion of administrative remedies, the CIT and, by analogy the Panel, analyzes the applicability of the doctrine of exhaustion on a case-by-case basis.

Exceptions to the exhaustion doctrine include (1) lack of opportunity to raise the issue below, (2) futility, and (3) review of legal issues that do not involve further agency involvement. See, e.g., Rhone Poulenc, S.A. v. United States, 583 F. Supp. 607 (Ct. Int'l Trade 1984); Gray Portland Cement and Cement Clinker from Mexico, Decision of the Chapter 19 Panel, Secretariat File No. USA-MEX-97-1904-02 (4th Admin. Review) (Dec. 4, 1998). As the court in Al Tech Special Steel Corp. v. United States, 661 F. Supp. 1206 (Ct. Int'l Trade 1987), explained:

[I]nherent in the application of the exhaustion doctrine . . . lies a responsibility for the agency, necessarily vested with control over the administrative proceedings, to allow a sufficient opportunity to raise issues. Thus in determining whether questions are precluded from consideration on appeal, the [c]ourt will assess the practical ability of a party to have its arguments considered by the administrative body.

Al Tech Specialty Steel, 661 F. Supp. at 1210. Following this reasoning, the CIT has held that the doctrine of exhaustion should not apply where a party did not have an opportunity to raise the issue before the administrative agency. See, e.g., American Permac, Inc. v. United States, 642 F. Supp. 1187, 1188 (Ct. Int'l Trade 1986) (plaintiff did not have an opportunity to raise issue during the comment period; exhaustion doctrine not applicable). In addition to the lack of opportunity to raise a particular issue before an administrative agency, courts have held that the exhaustion doctrine should not apply if raising the issue before the agency would be futile. See, e.g., Rhone Poulenc, 583 F. Supp. at 610. Arguments not raised below may also be raised on appeal when they involve questions of the legality or constitutionality of the governing statute. In such cases, the administrative agency has no choice but to obey the congressional directive. In other words, the agency is powerless to rule on a question of the constitutionality of its governing statute. The Federal Circuit has thus declined to apply the exhaustion doctrine



where the plaintiff raised a pure issue of law that did not require further agency involvement. See Thomson Consumer Electronics, 247 F.3d at 1215 (exhaustion not required when making a constitutional challenge).

The Panel is mindful to “resist inflexible applications of the doctrine . . . which frustrate the ability to apply exceptions developed to cover ‘exceptional cases or particular circumstances . . . where injustice might otherwise result’ if it were strictly applied.” Al Tech Specialty Steel Corp., 661 F. Supp. at 1210 (quoting Rhone Poulenc, 583 F. Supp. at 609). Nevertheless, the Panel is constrained to find that none of the exceptions to the exhaustion doctrine apply in this case. First, GCCC fails to make any showing of why it would have been futile to have argued during the course of the administrative proceeding that the Commission set some outside time limit on its foreseeability inquiry, nor does GCCC claim that it lacked an opportunity to do so. Second, GCCC’s challenge goes to the Commission’s exercise of statutory discretion, not to the validity or constitutionality of the governing statute itself.<sup>78</sup> In short, none of the exceptions to the exhaustion doctrine apply in this case.

More importantly, the Panel is unable to conclude that in the present case the Commission exceeded the bounds of the broad discretion accorded to it by Congress. First of all, GCCC takes out of context the Commission’s statement regarding the three to five years it takes to bring a new cement facility into operation. That was merely a statement of fact regarding the cement industry and the length of time it takes to bring a

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<sup>78</sup> GCCC further alleges that the Commission’s interpretation of “reasonably foreseeable” is inconsistent with the WTO Antidumping Agreement. To the extent that GCCC does challenge the Commission’s interpretation and application of the governing statute as being in violation of the WTO Antidumping Agreement, see GCCC Initial Brief at 69 n.155, such challenges are foreclosed by the Uruguay Round Agreements Act. See 19 U.S.C. § 3512(c)(1)(B) (“No person . . . may challenge . . . any action or inaction by any . . . agency . . . of the United States . . . on the ground that such action or inaction is inconsistent with such agreement [i.e., one of the Uruguay Round Agreements].”).

planned investment into operation. The Commission at other points in its determination limited its likelihood prognosis from two to three years. Secondly, what constitutes a “reasonably foreseeable time” is necessarily a fact-intensive inquiry that will vary from case to case. It is well settled that the silence of the statute in this regard reflects the considerable discretion enjoyed by the ITC to determine what constitutes a “reasonably foreseeable time.” As noted by reviewing courts in the context of the Commission’s discretion to set the period of investigation in an original material injury investigation, neither the statute nor the legislative history mandate any particular period of time. See, e.g., America Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1279 (Ct. Int’l Trade 1984) (“But the ITC is not required by statute to use any particular time frame for its analysis, although it generally focuses on annual time periods. . . . This is hardly a mandate for quarterly analysis on demand of petitioners”), aff’d sub nom. Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985).

Clearly, the Commission’s discretion is not unbounded in this regard. At some point it could abuse that discretion by engaging in unwarranted speculation about events in the far distant future. However, whatever the threshold of unwarranted speculation might be, it has not been crossed here. In sum, for all the foregoing reasons, that portion of the Commission’s determination regarding a “reasonably foreseeable time” is affirmed.

## B. The Regional Industry Finding

As noted above, the Commission's likelihood of injury determination was based on a regional industry analysis.<sup>79</sup> The Commission used the same regional industry that it found to exist in its original material injury investigation. GCCC contends that the Commission not only used the wrong legal standard in making its regional industry finding, but that it also ignored record evidence of present and future sales of Mexican-produced cement outside the Southern Tier region.<sup>80</sup> The Commission responds that not only has GCCC waived this argument by failing to raise it during the course of the administrative proceeding, but that in any event the Commission's regional industry finding is fully supported by the record and not contrary to law.<sup>81</sup>

Section 752(a)(8) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675a(a)(8), provides:

### Special rule for regional industries

In a review under section 1675(b) or (c) of this title [19 U.S.C.] involving a regional industry, the Commission may base its determination on the regional industry defined in the original investigation under this subtitle, another region that satisfies the criteria established in section 1677(4)(C) of this title [19 U.S.C.], or the United States as a whole. In determining if a regional industry analysis is appropriate for the determination in the review, the Commission shall consider whether the criteria established in section 1677(4)(C) of this title [19 U.S.C.] are likely to be satisfied if the order is revoked or the suspended investigation is terminated.

The statute thus requires the Commission to take the following three cumulative steps in a regional industry analysis: (1) determine whether a regional market exists under 19

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<sup>79</sup> Commission Determination at 8-20.

<sup>80</sup> GCCC Initial Brief at 70-71. GCCC also raises an argument that the Commission's regional industry finding violates the WTO Antidumping Agreement. See id. at 72. For the reasons stated in footnote 15 of this decision, that argument must be summarily rejected.

<sup>81</sup> ITC Brief at 135-141.

U.S.C. § 1677(4)(C),<sup>82</sup> (2) determine whether dumped imports are concentrated in that regional market, and (3) determine whether material injury would be likely to recur to all or almost all of the production within the regional market if the antidumping duty order is revoked. The SAA adds that the Commission’s original regional industry determination will be used in a subsequent sunset review, unless “there is sufficient evidence to warrant revisiting” that original determination.<sup>83</sup>

It appears from the record that GCCC has either conceded the existence of a Southern Tier regional industry in its submissions to the Commission or, at the very least, has failed to press the issue beyond its first response to the Commission’s notice of institution of this sunset review.<sup>84</sup> Under these circumstances, and for the reasons stated in Part VII.A of this decision, principles of waiver and failure to exhaust bar GCCC’s arguments on appeal.

Moreover, on the merits GCCC’s argument fails. First, GCCC provided no evidence warranting revisiting the Commission’s original regional industry determination. Second, contrary to GCCC’s contention, it is irrelevant to the first step of the regional industry analysis – namely, defining the regional industry – whether or not dumped imports are entering the region. Rather, whether dumped imports are entering the region is only relevant in connection with the second step of the analysis. Third, with regard to the issue of whether dumped imports would be concentrated in the Southern Tier region, the Commission did consider GCCC’s and CEMEX’s evidence in support of

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<sup>82</sup> In order to find the existence of a regional market under that section, two elements must be satisfied: (1) the producers within the region sell all or almost all of their production in that regional market, and (2) the demand in that market is not supplied to any substantial degree by producers located elsewhere in the United States.

<sup>83</sup> SAA at 887.

<sup>84</sup> See GCCC’s Pre-hearing Brief at 1-2 & n.1; GCCC’s Reply Brief at 63 n.136.

their argument that dumped imports would not be concentrated in the region, but the Commission chose not to rely on that evidence.<sup>85</sup> It is the Commission's responsibility to weigh the evidence, not the Panel's. See Koyo Seiko Co., Ltd. v. United States, 810 F. Supp. 1287, 1289 (Ct. Int'l Trade 1993) (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").

Finally, GCCC criticizes the Commission's statement that 100 percent of Mexican cement imports entered the Southern Tier region as being factually incorrect.<sup>86</sup> However, the Commission's statement was drawn from official import statistics contained in the Final Staff Report that categorized a virtually de minimis amount of Mexican imports to states outside the Southern Tier as being imports to the Southern Tier. GCCC never challenged the accuracy of this data during the course of the sunset review below. In any event, absent some showing by GCCC that the outcome would have been different had the record reflected the correct percentage of Mexican imports destined for the Southern Tier region, the alleged error on the part of the Commission, if any, is at most harmless. See Intercargo Ins. Co. v. United States, 83 F.3d 391, 394 (Fed.Cir.1996)("It is well settled that principles of harmless error apply to the review of agency proceedings."). Thus, under the harmless error rule – otherwise known as the rule of prejudicial error – a court will not demand perfection of an administrative agency and will only overturn an agency's action if the error complained of was prejudicial. See Barnhart v. United States, 588 F. Supp. 1432, 1437 (Ct. Int'l Trade 1984) ("The burden

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<sup>85</sup> See Commission Determination at 9 & n.38.

<sup>86</sup> See id. at 24.

to demonstrate prejudicial error is on the party claiming the error was prejudicial.”). Considering the extremely small percentage of non-Southern Tier imports in question, the Commission’s statement that 100 percent of Mexican cement imports entered the Southern Tier region does not detract from its conclusion that dumped imports would be concentrated in the Southern Tier region.

In sum, the Panel affirms the Commission’s regional industry determination.

### C. Duty Absorption

Section 751(a)(4) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a)(4), provides that when conducting certain administrative reviews the Department of Commerce is to determine whether antidumping duties have been absorbed by a foreign producer or exporter when the subject merchandise is sold in the United States through an affiliated importer. The statute directs the Commerce Department to notify the Commission regarding such duty absorption so that the Commission may consider it when conducting a sunset review.<sup>87</sup>

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<sup>87</sup> As explained in the SAA:

When an importer is affiliated with the exporter, dumping is measured by reference to the affiliated importer's resale price. However, it is the affiliated importer, not the unaffiliated U.S. purchaser of the dumped goods, who must pay the antidumping duty. Under certain circumstances, the affiliated importer may choose to pay the antidumping duty rather than eliminate the dumping, either through lowering prices in the foreign market, raising prices in the United States, or a combination of both.

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Commerce will inform the Commission of its findings regarding duty absorption, and the Commission will take such findings into account in determining whether injury is likely to continue or recur if an order were revoked. Duty absorption may indicate that the producer or exporter would be able to market more aggressively should the order be revoked as a result of a sunset review.

SAA at 885.

In SKF USA, Inc. v. United States, 94 F. Supp. 2d 1351 (Ct. Int'l Trade 2000), the CIT held that the Commerce Department lacks statutory authority to conduct a duty absorption inquiry in administrative reviews of pre-Uruguay Round antidumping duty orders, which includes the antidumping duty order on Mexican cement. A necessary corollary of the SKF USA decision is that it would be improper for the Commission to rely on such a duty absorption finding when conducting a sunset review.

In its determination the Commission made the following statement regarding duty absorption:

In reaching our conclusion on likely price effects, we have weighed all the pertinent evidence on price and taken into account Commerce's duty absorption finding on Mexico, although we note respondents' argument that a recent CIT decision calls into question the validity of Commerce's duty absorption findings with respect to transition orders. . . . SKF USA, Inc. v. United States, 94 F. Supp. 2d 1351 (CIT 2000), remand aff'd, Slip Op. 00-101 (CIT, Aug. 18, 2000). However, we do not rely on the duty absorption findings in making our determination that significant price effects are likely upon revocation of the order.<sup>88</sup>

Although GCCC did not allege in its complaint that the Commission erred in connection with this duty absorption issue, GCCC argues in its brief to the Panel that the Commission should have disregarded Commerce's duty absorption finding because the latter was contrary to law.<sup>89</sup> GCCC further contends that the Commission erred as a matter of law by taking such findings into consideration in reaching its conclusion on the likely price effects of revocation.<sup>90</sup>

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<sup>88</sup> Commission Determination at 39 n.236.

<sup>89</sup> See GCCC Initial Brief at 74.

<sup>90</sup> See id. at 75.

It is clear from the above-quoted footnote in the Commission's determination that the Commission took into account the CIT's decision in SKF USA. It is equally beyond doubt that the Commission placed no reliance on the Commerce Department's duty absorption finding in making the determination that significant price effects are likely upon revocation of the order. Accordingly, GCCC's contention must fail.

In addition, GCCC omitted this alleged error from the allegations of its complaint. In contrast to Rule 8(a)(1) of the Federal Rules of Civil Procedure that calls for a "short and plain statement of the claim," NAFTA Rule of Procedure 39(2)(b) requires that every complaint contain "the precise nature of the Complaint, including . . . the allegations of errors of fact or law . . . ." GCCC's complaint makes absolutely no mention of the duty absorption issue. Therefore, for this reason as well, its duty absorption claim must fail.

In sum, for all the foregoing reasons, the Panel affirms the Commission's determination with respect to duty absorption.

#### D. Cumulation

Although it did not allege so in its complaint, GCCC nevertheless argues in its briefs filed with the Panel that the Commission erred as a matter of law in considering cumulation in this sunset review. GCCC states categorically that there is no statutory authorization for cumulation in regional industry sunset reviews.<sup>91</sup> Although the Commission did not in fact cumulate in the present sunset review, it nevertheless took

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<sup>91</sup> See id. at 75-77.



issue with GCCC on this question by stating in dictum that the Commission may cumulate in regional industry sunset reviews.<sup>92</sup>

As the Panel understands it, GCCC is asking the Panel to instruct the Commission not to cumulate in the event the Panel remands this sunset review to the Commission for further determination. GCCC is making this request even though in its final determination the Commission did exactly what GCCC requested it to do, i.e., not cumulate imports. In other words, GCCC prevailed on the issue of cumulation. Under the circumstances, the Panel fails to see how GCCC is an aggrieved party with standing to complain when the outcome below was favorable to it.

Whether GCCC's claim should be rejected on the ground that GCCC seeks an advisory opinion (as counsel for the ITC argues), or on the ground that GCCC lacks standing to complain because it is not an aggrieved party, or on the ground that GCCC failed to allege cumulation in its complaint, the ultimate disposition of GCCC's request is the same. In sum, for the foregoing reasons, the Panel affirms the Commission's determination regarding its decision not to cumulate imports.

#### E. Alleged False Statements

CEMEX submits that the Committee for Fairly Traded Mexican Cement "throughout the sunset review process repeatedly accused CEMEX of intentionally providing false and misleading information to the Commission" and to the Panel.<sup>93</sup>

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<sup>92</sup> See Commission Determination at 26 n.140.

<sup>93</sup> CEMEX Initial Brief at 66. See Committee Brief at 39-40.

CEMEX requests that the Panel order stricken from the record all such allegations as inflammatory and untrue.

CEMEX cites no express legal authority to support what is implicit in its request to the Panel: That Chapter 19 panels possess the power to order that allegedly inflammatory or untrue statements be stricken from the record. The Panel notes that, pursuant to USCIT Rule 12(f), a motion to strike may be granted by the CIT when a party's pleading contains an insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter. In addition, pursuant to USCIT Rule 81(m), the CIT may disregard briefs that are not “free from burdensome, irrelevant, immaterial and scandalous matter.” However, no parallel rules exist in the Rules of Procedure for Article 1904 Binational Panel Reviews.

Thus, even if the Panel was inclined to accede to CEMEX’s request, it is clear that a Chapter 19 panel has no express power to grant the relief requested by CEMEX. Similarly, the Panel is not aware of any inherent power to do so. On the other hand, what is abundantly clear is that Chapter 19 panels are denied many of the most formidable powers that both the CIT and the Federal Circuit are granted, including the power to hold parties in contempt, the power to issue injunctions, and the power to impose sanctions for the filing of frivolous pleadings and briefs. See, e.g., 28 U.S.C. § 1927 (sanctions for unreasonably and vexatiously multiplying the proceedings); 19 U.S.C. § 1516a(c)(2)(CIT preliminary injunction to enjoin liquidation of entries until all appeals have been exhausted); USCIT Rule 11(b)(sanctions for filing any paper with the court that is “presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation”).

Even assuming arguendo that the Panel possesses the power to grant the relief CEMEX seeks, requests to strike portions of a brief are only sparingly granted by a court. See, e.g., Edge Import Corp. v. United States, 82 Cust. Ct. 343 (1979). This is especially true in an appellate-level proceeding, such as the present one, that is not tried to a jury. Compare Novo Nordick A/S v. Becton Dickinson & Co., 304 F.3d 1216, 1220 (Fed. Cir. 2002) (“Inflammatory insinuations and incorrect statements are improper, and their presentation to prejudice the jury is not condoned.”).

In sum, the Panel concludes that it lacks the power to grant CEMEX’s request. Nevertheless, the Panel assures all parties to this proceeding that no party has been prejudiced in the eyes of the Panel because of any alleged inflammatory or untrue statements made in the briefs or at oral argument, nor has the Panel been influenced by any such alleged statements.

## **VII. ORDER AND INSTRUCTIONS ON REMAND**

For all the reasons stated in Part VII.E, the Panel denies CEMEX’s request to strike portions of the Committee’s brief.

For all the reasons stated in Part VII.A-.D, the Panel affirms the Commission with respect to the following determinations:

1. The Panel affirms the Commission’s determination regarding a “reasonably foreseeable time.”
2. The Panel affirms the Commission’s determination with respect to the existence of a regional industry.

3. The Panel affirms the Commission's determination with respect to duty absorption.

4. The Panel affirms the Commission's determination regarding its decision not to cumulate imports.

For the reasons stated in Parts IV, V, and VI, the Panel remands the following matters to the Commission for resolution within 60 days of the date of this decision and instructs the Commission as follows:

1. On remand the Commission is to apply the "probable" or "more likely than not" standard announced by the CIT in Siderca when making its determination regarding likely volume, likely price effects, and likely impact on the industry.

2. With regard to the likely volume of subject imports if the antidumping duty order is revoked, the Commission is to (a) explain how it is probable that subject imports would increase if the antidumping duty order is revoked, and (b) render a complete analysis of how the various third-country antidumping duty orders would affect the likely volume of subject imports to the United States.

3. With regard to the likely price effects of subject imports on the industry if the order is revoked, the Commission is to (a) explain the price implications of revocation of the antidumping duty order with sufficient clarity to show how the record supports the Commission findings that revocation of the order would be likely to lead to significant negative price effects on the domestic industry, (b) explain how revocation of the antidumping duty order would be likely to lead to significant price underselling by subject imports of the domestic product, and (c) explain how subject imports are likely to

enter the United States at prices that otherwise would have a significant price depressing or suppressing effect on the domestic product.

4. With regard to the likely impact on the domestic industry if the antidumping duty order is revoked, the Commission is to (a) explain how it reached the conclusion that the order should remain in place in order to protect the highly-profitable, regional industry, given the continuing solid demand in the region and a substantial increase in non-Mexican cement imports; (b) explain how it reached the conclusion that the regional industry would be likely to suffer material injury, having found that the regional industry is not in a vulnerable state; and (c) explain how the decreasing market share of the regional industry, due to a substantial increase in demand, was not attributed to imports of non-Mexican cement.

5. With regard to the Commission's conclusion that producers of all or almost all of the production in the Southern Tier region would likely suffer material injury by reason of the dumped imports if the order is revoked, the Commission is to (a) explain why producers of all or almost all of the production in the Southern Tier region would likely be materially injured if the order is revoked, (b) explain what percentage of regional production would likely suffer material injury, and (c) explain what its aggregate and individual plant analyses consisted of and what anomalies, if any, the individual plant analysis revealed.

6. The Commission is to fully evaluate the information concerning the proposed Southdown acquisition.

Date of Issuance: June 24, 2005

Signed in the original by

Francisco Jose Contreras Vaca  
Francisco José Contreras Vaca, Chairperson

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