

particular importer made during the POR. The Department will issue appraisal instructions directly to the U.S. Customs Service.

Further, the following deposit requirements will be effective for all shipments of extruded rubber thread from Malaysia entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided for by section 751(a)(1) of the Act: (1) The cash deposit rates for the reviewed companies will be the rates for those firms as stated above (except that for Heveafil the cash deposit rate will be reduced by 0.90 percent, the current cash deposit rate attributable to export subsidies); (2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, or the LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 15.16 percent, the all others rate established in the LTFV investigation.

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with section 353.34(d) of the Department's regulations. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)), section 777(i) of the Act (19 U.S.C. 1677f(i)), and 19 CFR 353.22.

Dated: March 9, 1998.

**Robert S. LaRussa,**

*Assistant Secretary for Import Administration.*

[FR Doc. 98-6715 Filed 3-13-98; 8:45 am]

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## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-201-802]

#### Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of final results of antidumping duty administrative review.

**SUMMARY:** On September 10, 1997, the Department of Commerce (the Department) published the preliminary results of its administrative review of the antidumping duty order on gray portland cement and clinker from Mexico. The review covers one manufacturer/exporter, CEMEX, S.A. de C.V. (CEMEX), and its affiliated party Cementos de Chihuahua, S.A. de C.V. (CDC), and the period August 1, 1995, through July 31, 1996. We gave interested parties an opportunity to comment on the preliminary results. We received comments from petitioner and respondent. We received rebuttal comments from the petitioner and respondent.

**EFFECTIVE DATE:** March 16, 1998.

**FOR FURTHER INFORMATION CONTACT:** Nithya Nagarajan, Kristen Stevens or John Totaro, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482-3793.

**SUPPLEMENTARY INFORMATION:**

#### Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations at 19 CFR Part 353 (April 1997).

## Background

On September 10, 1997, the Department published in the **Federal Register** (62 FR 47626) the preliminary results of its administrative review of the antidumping duty order on gray portland cement and clinker from Mexico covering the period August 1, 1995 through July 31, 1996. The Department has now completed this review in accordance with section 751(a) of the Act.

## Scope of the Review

The products covered by this review include gray portland cement and clinker. Gray portland cement is a hydraulic cement and the primary component of concrete. Clinker, an intermediate material product produced when manufacturing cement, has no use other than being ground into finished cement. Gray portland cement is currently classifiable under the Harmonized Tariff Schedule (HTS) item number 2523.29 and cement clinker is currently classifiable under HTS item number 2523.10. Gray portland cement has also been entered under HTS item number 2523.90 as "other hydraulic cements." The HTS subheadings are provided for convenience and U.S. Customs Service purposes only. The Department's written description remains dispositive as to the scope of the product coverage.

## Verification

As provided in section 782(i) of the Act, we verified information provided by the respondent using standard verification procedures, including on site inspection of the manufacturer's facilities and the examination of relevant sales and financial records. Our verification results are outlined in verification reports in the official file of this case (public versions of these reports are on file in room B-099 of the Department's main building).

## Analysis of Comments Received

The Southern Tier Cement Committee (petitioner), CEMEX, and CDC submitted case briefs on October 24, 1997. Petitioner and CEMEX submitted supplemental case briefs on December 5, 1997. All parties submitted rebuttal briefs on December 19, 1997. A public hearing was held on February 12, 1998.

## Revocation of the Underlying Order

### Comment 1

CEMEX contends that the Department lacks the authority to assess antidumping duties pursuant to the final results of this review because at the time the original less-than-fair-value

(LTFV) investigation was initiated (October 16, 1989), the Department assumed that the petition was filed "on behalf of" a regional industry without measuring whether a majority of the industry actually supported the request. The Department should have measured industry support, CEMEX argues, because a GATT panel recommended in July of 1992 that an antidumping petition filed "on behalf of" an industry must be supported by an appropriate majority of the industry, and such support must be ascertained prior to initiating an investigation. According to CEMEX, the panel's recommendation is applicable to the instant administrative review for two reasons.

First, CEMEX claims that the Antidumping Agreement which resulted from the Uruguay Round of global trade talks "adopted" the requirement of industry support articulated by the GATT panel. Moreover, CEMEX asserts, the new standard regarding industry support for a petition is contained in the URAA and since this review is governed by the amendments to the antidumping law occasioned by the URAA, "the new standard should be used in this case."

Second, even if the new requirement on standing does not apply retroactively to a determination the Department made over eight years ago, the antidumping statute that was in effect in 1989 did not define the term "on behalf of." Faced with this lacuna in the statute, CEMEX asserts, the Department is compelled by the decision in *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 2 Cranch 64 (1804) to reinterpret U.S. law in accordance with the international obligations of the United States. In the opinion of CEMEX, this means that the Department is required in the sixth review to revisit the issue of initiation in the original LTFV investigation and abide by the 1992 GATT panel ruling.

CDC also argues that the Department must terminate this review and revoke the underlying antidumping duty order. According to CDC, the plain language of the antidumping statute requires petitions in regional industry cases to be filed on behalf of the producers who account for "all or virtually all" of the production in the region. Since the antidumping order covering cement from Mexico was based, CDC asserts, on a petition that was not supported by producers accounting for all or almost all of the region's production, the order was issued in violation of U.S. law.

Finally, CDC argues that lack of standing to file an antidumping duty petition is a "jurisdictional" defect which parties may raise at any time. Citing *Zenith Electronics Corp. v. United States*, *Gilmore Steel Corp. v.*

*United States*, and *Oregon Steel Mills, Inc. v. United States*, CDC contends that the Department has the authority to revoke an order that never had the requisite level of industry support.

Petitioner argues that the Department properly initiated the original antidumping investigation and that respondent's claim that the Department should revoke the antidumping order is barred because it has been previously adjudicated adversely to CEMEX and CDC. In this regard, petitioner notes that both parties tried to challenge the initiation of the original LTFV investigation before a binational panel convened under the auspices of Chapter 19 of the North American Free Trade Agreement (NAFTA) to review the final results of the third administrative review. In a unanimous opinion issued on September 13, 1996, the panel rejected the very claims that CEMEX and CDC advance in the instant review. Thus, petitioner argues, the principle of "issue preclusion" (or "collateral estoppel") should prevent CEMEX and CDC from "relitigating" these claims before the Department in the sixth administrative review.

Petitioner also contends that the respondent's claim lacks any legal basis because it is barred by the statute of limitations which requires "any appeal of the decision to initiate the antidumping investigation to be filed within 30 days of the publication of the antidumping order." Additionally, petitioner asserts, CEMEX and CDC failed to "exhaust available administrative remedies" by not raising the issue before the Department in the original LTFV investigation. CEMEX and CDC also failed to raise this issue in the now-concluded litigation over the LTFV investigation and, therefore, the claim is barred by *res judicata*.

Petitioner also contends that much of the basis for CEMEX's and CDC's claim is an unadopted GATT panel report which is not binding international law. Furthermore, petitioner claims that the Department "lacks authority under the statute to rescind its initiation of the original investigation in the context of an administrative review." Finally, petitioner asserts, citing *Suramerica de Aleaciones Laminada, C.A. v. United States*, that the courts have upheld the Department's prior practice of presuming industry support for a petition in absence of "any showing to the contrary."

#### *Department's Position*

For the following reasons, respondent's arguments are without merit. First, like the GATT itself, panel reports under the 1947 GATT were not

self-executing and thus had no direct legal effect under U.S. law.

Second, neither the 1947 GATT nor the 1979 GATT Antidumping Code obligated the United States to affirmatively establish prior to the initiation of a regional-industry case that all or almost all of the producers in the region supported the petition. There certainly was no suggestion in either instrument that the standing requirements in regional-industry cases were any more rigorous than the standing requirements in national-industry cases.

Furthermore, GATT panel reports, such as the one issued in 1992, had no legal effect or formal status unless and until they were adopted by the GATT Council or, in the case of antidumping measures, the GATT Antidumping Code Committee. This followed from the fact that the 1947 GATT operated, throughout its history, on the basis of consensus for purposes of decision-making in general and the resolution of disputes in particular. In the present case, it is undisputed that the GATT panel report was never adopted by the Antidumping Code Committee. Thus, the recommendations contained in the report were never binding, did not impose any international obligations upon the United States, and did not trigger the rule of statutory construction set forth in the *Charming Betsy* case.

Third, the object of CEMEX's and CDC's comments is not the preliminary results of this review. Rather, they complain about the initiation of the original LTFV investigation—an event which occurred over eight years ago and over five years before the effective date of the URAA. The time to voice such objections before the Department was *during* the investigation. Instead, CEMEX and CDC, as well as the other Mexican cement producer that participated in the original investigation (Apasco, S.A. de C.V.), sat silent before the Department. See *Final Determination of Sales at Less Than Fair Value: Gray Portland Cement and Clinker From Mexico*, 55 FR 29244 (1990). Moreover, neither CEMEX nor any other party appealed the agency's final affirmative LTFV determination (including the decision to initiate) to the appropriate court, and the statute of limitations for doing so has long expired. See 19 U.S.C. 1516a(a)(2)(A).

The only one who appealed the Department's final LTFV determination was the petitioner. It challenged certain aspects of the Department's final determination before the U.S. Court of International Trade ("CIT") and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). See *Ad Hoc*

*Committee Of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, Slip Op. 94-152 (CIT), *aff'd*, 68 F.3d 487 (Fed. Cir. 1995). CEMEX participated in that litigation as an intervenor on the side of the Department. On October 10, 1995, the Federal Circuit issued an opinion which disposed of the last issue in that case.

Therefore, even if the Department, of its own volition, were to reinterpret U.S. law in light of the 1992 GATT panel report, it lacks the legal authority in this review to revoke the order or otherwise rescind the initiation of the underlying investigation. As we stated in the final results of the third administrative review and reaffirm here:

\* \* \* the Department has no authority to rescind its initiation of the LTFV investigation. Under sections 514(b) and 516A(c)(1) of the Act, a LTFV determination regarding initiation becomes final and binding unless a court challenge to that determination is timely initiated under 516A. Even if judicial review of a determination is timely sought, the Department's determination continues to control until there is a resulting court decision "not in harmony with that determination." See 19 U.S.C. § 1516a(c)(1). *In this case, no one challenged the Department's determination on standing before the CIT. Therefore, that determination is final and binding on all persons, including the Department.*

*Gray Portland Cement and Clinker from Mexico; Final Results Of Antidumping Duty Administrative Review*, 60 FR 26865 (1995) (emphasis added). See also *Gray Portland Cement and Clinker from Mexico; Final Results of Antidumping Duty Administrative Review*, 62 FR 17581 (1997) (final results of fourth administrative review); *Gray Portland Cement and Clinker from Mexico; Final Results of Antidumping Duty Administrative Review*, 62 FR 17148 (1997) (final results of five administrative review).

Fourth, no court, including the court in *Gilmore Steel*, has ever held that the Department has the authority, in an administrative review under section 751(a) of the Act, to reach back more than eight years and reexamine the issue of industry support for the original petition. *Gilmore Steel* involved a challenge to the termination of a *pending* investigation based upon information obtained in the course of that investigation. In particular, the petitioner contended that the Department lacked the authority to rescind the investigation based upon insufficient industry support for the petition after the 20-day period provided for in section 732(c) of the Act had elapsed. 585 F. Supp. at 673. In upholding the Department's determination, the court recognized that

administrative officers have the authority to correct errors, such as "jurisdictional defects," at anytime during the proceeding. *Id.* at 674-75. The court did not state or imply that a change in legal interpretation (in this case a non-binding one) authorizes administrative officers to reopen prior agency decisions which are otherwise final. The court simply held that the administering authority may, in the context of the original investigation, rescind an ongoing proceeding after expiration of the 20-day initiation period.

Although the *Zenith Electronics* case did involve an administrative review, it did *not* concern questions about industry support for a petition in the original investigation. Rather, the plaintiffs in *Zenith Electronics* alleged that the petitioner was no longer a domestic "interested party" with standing to request an administrative review. 872 F. Supp. at 994. As in *Gilmore Steel*, the court found that the Department had the authority to determine whether the proceeding from which the appeal was taken—the administrative review—was properly initiated. Nothing in *Zenith Electronics* or *Gilmore Steel* supports CDC's argument that a party may challenge industry support for a petition more than eight years after the fact in the context of an administrative review under section 751(a) of the Act.

Lastly, CDC completely misapprehends the holding in *Oregon Steel Mills*. First, the case involved a challenge to the Department's authority to revoke an antidumping duty order based upon new facts, not upon a reexamination of the facts as they existed during the original LTFV investigation. Secondly, the new fact was the industry's affirmative expression of no further support for the antidumping order. Under these circumstances, the Federal Circuit held that it was lawful for the investigating authority, in the context of a "changed circumstances" review pursuant to section 751(b) of the Act, to revoke an order over the objection of one member of the industry. 862 F.2d at 1544-46. The court did not state that industry support for an order must be affirmatively established throughout the life of an order. Indeed, the court went to lengths to explain that it was not ruling on the claim that "loss of industry support for an existing order creates a 'jurisdictional defect.'" *Id.* at 1545 n. 4. As subsequent courts have explained, the holding in *Oregon Steel Mills* is limited to the proposition that the Department may, but need not, revoke an order when presented with

record evidence which demonstrates a lack of industry support for the continuation of the order. See, e.g., *Suramerica De Aleaciones Laminadas v. United States*, 966 F.2d 660, 666 (Fed. Cir. 1992); *Citrosuco Paulista, S.A. v. United States*, 704 F. Supp. 1075, 1085 (CIT 1988).

In short, the cases cited by CEMEX and CDC are inapposite. None of them support the argument that the Department has the authority, in an administrative review under section 751(a) of the Act, to reach back more than eight years and reexamine the issue of industry support for the original petition.

Finally, we note, as we did in the final results of the third, fourth, and fifth administrative reviews, that numerous courts upheld the Department's prior practice of assuming, in the absence of evidence to the contrary, that a petition filed on behalf of a regional or national industry is supported by that industry. See, e.g., *NTN Bearing Corp. v. United States*, 757 F. Supp. 1425, 1427-30 (CIT 1991); *Citrosuco*, 704 F. Supp. at 1085; *Comeau Seafoods v. United States*, 724 F. Supp. 1407, 1410-12 (CIT 1989).

Indeed, the very issue raised by CEMEX and CDC was before the Federal Circuit in the *Suramerica* case. 966 F.2d at 665 & 667. In *Suramerica* the appellees challenged the Department's interpretation of the phrase "on behalf of" which applied to both national and regional-industry cases. Specifically, the appellees argued that the Department's prior practice of presuming industry support for a petition was contrary to the statute *and* an unadopted GATT panel report involving the U.S. antidumping order on certain stainless steel hollow products from Sweden. In affirming the Department's practice, the Federal Circuit observed that the phrase "on behalf of" was not defined in the statute. *Id.* at 666-67. The statute was, in fact, open "to several possible interpretations." In the opinion of the court, the Department's practice with regard to standing and industry support for a petition reflected a reasonable "middle position." 966 F.2d at 667. While there was a gap in the statute, the court stated, "Congress did make [one thing] clear—Commerce has broad discretion in deciding when to pursue an investigation, and when to terminate one." *Id.*

The court then dismissed the argument that the gap in the statute must be interpreted in a manner that is consistent with the 1947 GATT or the GATT panel ruling:

Appellees next argue that the statutory provisions should be interpreted to be consistent with the obligations of the United States as a signatory country of the GATT. Appellees argue that the legislative history of the statute demonstrates Congress's intent to comply with the GATT in formulating these provisions. Appellees refer also to a GATT panel—a group of experts convened under the GATT to resolve disputes—which “recently rejected [Commerce’s] views on the meaning of ‘on behalf of.’”

*We reject this argument.* First, the GATT panel itself acknowledged and declared that its examination and decision were limited in scope to the case before it. The panel also acknowledged that it was not faced with the issue of whether, even in the case before it, Commerce had acted in conformity with U.S. domestic legislation.

Second, even if we were convinced that Commerce’s interpretation conflicts with the GATT, *which we are not*, the GATT is not controlling. *While we acknowledge Congress’s interest in complying with U.S. responsibilities under the GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did.* The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is matter for Congress and not this court to decide and remedy. See 19 U.S.C. 2504(a); *Algoma Steel Corp. v. United States*, 865 F.2d 240, 242 (Fed. Cir. 1989).

*Id.* at 667–68 (emphasis added).

### Produced As vs. Sold As

#### Comment 2

CEMEX argues that the Department’s methodology for calculating normal value (NV) has been fundamentally flawed since the original LTFV investigation. CEMEX claims that the Department has matched U.S. sales to home market sales using a “sold as” methodology which matches U.S. sales to home market sales on the basis of how the cement is sold (e.g., according to the cement type listed on the invoice.) CEMEX asserts that since the original investigation, it has argued that the Department should use a “produced as” methodology which matches U.S. sales to home market sales based on the physical characteristics of the cement being sold.

CEMEX asserts that in the original LTFV investigation, the Department learned that cement is differentiated according to standards established by the American Society for Testing and Materials (ASTM). According to these standards, the physical and performance specifications for a Type II cement are more exacting than the specifications for a Type I cement. Similarly, the specifications for Type V cement are more exacting than for Type II. A cement that meets the physical and performance specifications for a higher

grade cement also meets the specifications for a lower grade cement.

During the POR, CEMEX sold cement invoiced as Type I, Type II, and Type V in Mexico and cement invoiced as Type II in the United States. However, all cement invoiced as Type II or Type V (and a small amount invoiced as Type I) contains the physical and performance specifications of Type V cement. CEMEX states that customers requiring a lower grade of cement can use the higher grade cement for their applications. Thus, CEMEX asserts that cement producers will sell a higher grade cement to a customer needing only a lower level ASTM cement when it is commercially sensible to do so.

CEMEX argues that according to 19 U.S.C. 1677(b)(A)(1)(B)(i), the Department must base NV on the price at which the “foreign like product” is sold in the home market. CEMEX contends that the foreign like product can only be merchandise “identical in physical characteristics with” the cement sold in the United States. Furthermore, CEMEX argues that the dumping law requires the inclusion of all sales having identical physical characteristics, including those invoiced as another product. CEMEX argues that the “sold-as” methodology would not include all of the appropriate home market sales during the POR (i.e., “Type I and V” produced at the Hermosillo plants).

Petitioner argues that CEMEX waived its objection to the Department’s matching methodology by not appealing the Department’s final determination in the original LTFV investigation and not raising the issue in any of the previous reviews. Petitioner further argues that the Department’s questionnaire instructed CEMEX to “assign a control number to each unique product reported in the Section B sales data file” and to assign an identical control number to identical merchandise sold in the home market and in the United States. Petitioner asserts that CEMEX assigned unique control numbers to merchandise that was invoiced as Type I, Type II, and Type V cement, even though it may have been the same cement from the same plant. Thus, CEMEX reported its sales on an “as invoiced” basis, rather than on an “as produced” basis. Petitioner argues that CEMEX only raised this issue after the Department discovered that all cement produced at the Hermosillo plants and sold as Type I, Type II, or Type V cement was basically identical in physical characteristics.

Additionally, petitioner asserts that CEMEX altered its production and shipping arrangements for Type II

cement to artificially lower the dumping margin. Petitioner argues that the statute does not direct the Department to “blindly compare the merchandise exported to the United States with *all* identical merchandise sold in the home market.” Rather, the Department must recognize the commercial reality that prices can vary based on the specifications to which a product is sold, even though the products in question are physically identical. Furthermore, petitioner asserts that in this case it is impossible to match Type II cement exported by CEMEX to the United States with all home market sales of cement produced at the Hermosillo plants because CEMEX did not report a plant code to identify its home market sales with the producing plant.

### Department’s Position

We agree, in part, with CEMEX. Section 771(16)(A) of the Act expresses a clear preference for matching sales in the United States with sales in the home market of merchandise that is “identical in physical characteristics.” See *CEMEX, S.A. v. United States*, 1998 U.S. App. LEXIS 163 (Fed. Cir.). When circumstances require the Department to compare non-identical merchandise, the statute, at section 773(a)(6)(C)(ii) of the Act, provides for a “difference-in-merchandise” adjustment (DIFMER) which is normally equal to the difference in cost of production attributable to differences in physical characteristics. 19 CFR 353.57.

Since the inception of this proceeding, we have seen that all cement generally conforms to the standards established by the ASTM. These standards tend to classify cement according to its physical characteristics, dimensional characteristics, and/or performance properties. Also from the outset, interested parties and the Department have used ASTM standards to identify merchandise subject to this antidumping order *and* to inform how, and on what basis, we match sales of identical or similar merchandise. Specifically, the Department has sought, wherever possible, to match sales of ASTM standard Type II to Type II, ASTM standard Type V to Type V, and so forth.

During the period covered by the original investigation, the Department discovered one or more instances where Mexican producers sold cement meeting one ASTM standard on the basis of cement meeting a lower (included) ASTM standard. However, in the final determination, the Department described these sales as a mistake and not “the ordinary practice in the

industry." *Final Determination of Sales at Less Than Fair Value, Gray Portland Cement and Clinker from Mexico*, 55 FR 29244, 29248 (1990). Therefore, based on the fact that it was the normal industry practice to produce and sell on the same basis, the Department accepted that "matching by ASTM standard was the most reasonable basis for making equitable identical merchandise comparisons." *Id.* at 29248.

Devising a methodology for matching sales is often a difficult task and the courts have recognized that the Department has broad discretion "to choose the manner in which \* \* \* merchandise shall be selected." *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995). In the instant proceeding, we have sought, throughout each of the past six reviews, including the present one, to (i) match based on physical characteristics, (ii) rely on ASTM standards to distinguish one type of cement from another, and (iii) rely on sales documentation as a convenient surrogate for more direct evidence (e.g., mill test certificates) of cement type. In general, this methodology has not generated much controversy. Indeed, as petitioner notes in its comments on the preliminary results, this issue has not been in dispute since the original LTFV investigation.

In the instant review, the Department repeatedly requested CEMEX to provide information on whether home market sales of Type I, Type II, and Type V cement were produced to meet other specifications or whether merchandise is produced and sold on the same basis. CEMEX consistently reported that it sold cement in the home market as either Type I, Type II, or Type V although these products may meet other ASTM standards. Not until the conclusion of verification did the Department discover that the practice of producing one type of cement and selling it as another type was not an isolated incident or mistake. In fact, the record now demonstrates that all U.S. sales and all home market sales from the Hermosillo plants during the POR met the ASTM standard for Type V cement, but were sold as meeting the specifications for Type I, II, and/or V.

Under these circumstances, we believe it would be unreasonable to match merchandise on a "sold as" basis. For one thing, it would make any cost of production or DIFMER calculations more difficult, if not impossible. Secondly, such an approach would not address any sales that were merely labeled "gray portland cement" or "cement." Finally, a "sold as" approach would lend itself to the type of product manipulation about which petitioner

has so often expressed concern. Therefore, for purposes of the instant review, the Department will apply the matching methodology applied in the preliminary results of the instant review. Petitioner has expressed concerns that matching using physical characteristics will enable CEMEX to manipulate home market sales to conform to certain specifications, thereby limiting the Department's ability to properly review sales of merchandise in the comparison markets. In order to properly address these concerns, the Department will continue to closely review and monitor sales of both identical and similar merchandise in the home market to ensure that, in subsequent reviews, an accurate and reliable database of home market and U.S. sales are reported. For example, in the next administrative review, the Department has requested CEMEX to report its home market sales on both an "as sold" and "as produced" basis.

The Department disagrees with petitioner's comment that we cannot match sales on a "produced as" basis because CEMEX did not report plant codes. In the current review, the record demonstrates that CEMEX only produced cement meeting the ASTM specifications for Type V at its plants in Hermosillo. Additionally, CEMEX has stated that all cement invoiced as Type II or V was produced at the Hermosillo plants, and thus meets the ASTM specifications for Type V. Finally, the Department has isolated sales of cement produced at the Hermosillo plants and sold as Type I through Cementos del Yaqui at the Campana and Yaqui plants.

### Ordinary Course of Trade

#### Comment 3

CEMEX contends that the Department improperly concluded that its home market sales of Type II and Type V cement produced at the Hermosillo plants were outside the ordinary course of trade. CEMEX argues that the Department's analysis only relied on facts which indicate that sales were outside the ordinary course of trade. CEMEX asserts that the Department must evaluate all evidence on the record of the review, including any evidence that indicates that sales are made within the ordinary course of trade. CEMEX believes that the Department ignored legally relevant factors which indicate that these sales were made *within* the ordinary course of trade.

First, CEMEX asserts that the Department failed to recognize that a bona fide home market demand existed for Type II and Type V cement produced at the Hermosillo plants.

Second, CEMEX contends that the Department failed to recognize that these sales were of first-quality, non-defective merchandise. Finally, CEMEX argues that the Department failed to acknowledge that rebate, discount, and payment terms varied by customer, not by cement type.

CEMEX claims that additional aspects of the administrative record demonstrate that its home market sales of Type II and V cement were made within the ordinary course of trade during the sixth administrative review. To support this argument, CEMEX maintains that the Department should focus on the actual sale terms and practices surrounding the sales of Type II and Type V cement as compared to other cement types subject to the order (i.e., Type I cement). In this regard, CEMEX notes that shipping terms for all cement types were identical (C.I.F. or F.O.B.) which is "indicative" of sales in the ordinary course of trade. Moreover, CEMEX notes that all pre-sale freight expenses absorbed by CEMEX for Type II and V sales were incurred in precisely the same manner as pre-sale freight expenses for all other cement types, including Type I.

CEMEX further argues that the Department should not have focused on shipping distances to the customer. Shipping distances and freight costs, CEMEX asserts, are the result of geographic locality, rather than differences in sales practices, and thus should not affect the Department's ordinary-course-of-trade determination. Finally, CEMEX argues that shipping distances have never been a consideration in any other ordinary-course-of-trade determination.

Next, CEMEX contends that the difference in profitability between sales of Type II/V cement and Type I cement is not of sufficient magnitude to be indicative of sales outside the ordinary course of trade. CEMEX argues that the profitability of Type II sales is substantial in absolute terms and significantly higher than in prior reviews. According to CEMEX, the preamble to the Department's new regulations defines "abnormally low profits" indicative of sales outside the ordinary course of trade as "negative profitability." CEMEX argues that by regarding differences in magnitude of profitability as a factor indicative of sales outside the ordinary course of trade, the Department is requiring companies to earn virtually equal profits on all different products in order for sales to be considered within the ordinary course of trade.

CEMEX maintains that the profit differential is not caused by price

disparities, but rather by the higher average freight costs associated with sales of Type II cement. CEMEX asserts that it has maximized profits by supplying its home market Type II customers from Hermosillo; therefore, the profit differential is the result of a legitimate business decision, indicating that home market sales of Type II cement are within the ordinary course of trade.

CEMEX argues that sales of Type II and Type V cement are made in the same manner and for the same reasons as sales of Type I cement. Thus, CEMEX questions the Department's comments about the "promotional" nature of its Type II and V sales. According to CEMEX, if the Department's reasoning for this factor is taken literally, any attempt by a producer to diversify a product line outside of the mass market would be indicative of those sales being outside the ordinary course of trade. CEMEX claims that there has been no proceeding at the Department since the second review of this case which has relied on this factor in an ordinary-course-of-trade-determination.

CEMEX further asserts that in the first review the Department found CEMEX's consolidation of Type II cement production in northwestern Mexico to be based on legitimate business reasons (*i.e.*, maximization of company profitability). Therefore, if the Department finds a company's motivation to sell cement in a profitable manner irrelevant to the ordinary course of trade argument, then the company's possible motivation for selling specific cement types must also not be relevant.

CEMEX also argues that the relative sales volume of Type II and Type V sales (as compared to other cement types) is not indicative of sales outside the ordinary course of trade. In particular, CEMEX argues, Department precedent establishes that low relative sales volume is a factor indicative of sales outside the ordinary course trade only in situations where there is no *bona fide* demand or ready market for the product. For example, in *Thai Pipe and Tube*, CEMEX asserts that the Department found certain sales to be within the ordinary course of trade notwithstanding low relative sales volume as there was a *bona fide* demand for the product in the home market. CEMEX maintains that the administrative record in this case establishes both a significant volume of home market sales for Type II and Type V cement, in absolute terms, and the existence of a *bona fide* home market demand for these products. In addition, CEMEX argues that information on the record of this review shows that sales

volumes for Type II and Type V cement have been increasing from review to review and that it now exceeds 5% of U.S. sales.

Likewise, CEMEX argues that historical sales trends support its view that home market sales of Type II and Type V cement have been made within the ordinary course of trade. According to CEMEX, home market customers have been purchasing Type II cement for ten years, including the five years that preceded the antidumping order. Additionally, CEMEX asserts that with regard to Type V cement, the Department's analysis of historical sales trends is factually incorrect because the Department ignores the fact that CEMEX's subsidiary, Tolteca, has made continuous sales of Type V cement since 1964. Finally, CEMEX asserts that the incorporation of the fictitious market verification report from the second review into the record of this review eliminates any need to rely on facts available regarding historical sales patterns.

Lastly, CEMEX contends that the number and type of Type II and Type V customers are not indicative of sales outside the ordinary course of trade. According to CEMEX, it is the existence of customers, not the number of customers, that is relevant to this issue. CEMEX asserts that the Department has found a small number of home market customers to be indicative of sales outside the ordinary course of trade only when the sales have been limited to home market sales of export overrun merchandise or non-specification merchandise. When the subject merchandise has been sold to satisfy a *bona fide* home market demand, sales to a small number of customers have been found inside the ordinary course of trade.

Petitioner contends that the Department correctly applied the statute by excluding all home market sales of Type II and Type V cement from the calculation of NV. Petitioner maintains that the Department properly considered the totality of the circumstances, including all factors expressly considered by the Department in prior reviews, and several of the "alleged" factors relied upon by CEMEX. In particular, petitioner asserts that in this review (similar to the second and fifth reviews) the Department has not found an absence of *bona fide* demand, but the existence of limited home market demand.

Petitioner also argues that the Department correctly found that CEMEX's home market shipping arrangements for Type II and Type V cement were unusual compared to its

arrangements for other types of cement. In particular, petitioner argues that during the POR, CEMEX shipped Type II and Type V cement greater distances and absorbed the freight expense. To support its claim, petitioner points out that prior to the antidumping order, CEMEX produced Type II cement at 11 plants throughout Mexico. In direct response to the antidumping order; however, petitioner claims that CEMEX radically altered its production and distribution arrangements for Type II cement by consolidating production at Hermosillo despite the fact that home market demand for this cement type is centered in the Mexico City area.

Petitioner asserts that CEMEX's claim that shipping terms were identical for all cement types is misleading, noting that Type I sales terms were "either FOB CEMEX plant or terminal or CIF at customer's delivery point" while Type II and Type V cement were never sold using the plant as point of shipment. Furthermore, Petitioner asserts that CEMEX's treatment of handling revenue and freight adjustment rebates differed between sales of Type I cement and sales of Types II and V. Additionally, petitioner argues that CEMEX's statement that shipping distances are not relevant to the ordinary course of trade determination is both factually and legally wrong.

Petitioner contends that the record demonstrates that CEMEX consolidated production of Type II and Type V at Hermosillo in direct response to the antidumping order with the intention of circumventing the order. Petitioner further claims that CEMEX sold cement meeting Type II specifications from plants closer to Mexico City than the Hermosillo plants using product designations such as "Type I," "Type I Modified," "Type I plus" and "Type I special cement." Petitioner supports this claim by referencing quality tests certificates submitted on the record of this review by petitioner and chemical analysis spreadsheets located in Exhibit 46 of the Department's July 21, 1997 home market sales verification report. Petitioner points out that CEMEX has made several contradictory statements regarding sales of cement under these alternative descriptions. Furthermore, petitioner asserts that CEMEX concedes it can produce Type II cement at its plants producing Type I cement, but that it would not be economically feasible to produce Type II *low alkali* cement at such plants.

As further evidence that sales of Type II and V are outside the ordinary course of trade, petitioner claims that CEMEX restricted its sales volume of Type II cement after the antidumping order by

ceasing to promote and offer Type II for sale as a general purpose cement, and selling it only as a specialty cement to those customers demonstrating a specific need for Type II in order to diminish the impact of absorbing the higher transportation costs. Petitioner asserts that Type II and Type V cement are now sold to a "niche" market. Prior to the order, CEMEX sold Type II as interchangeable with Type I and pozzolanic cement. In addition, petitioner asserts that CEMEX restricted its sales according to "customer need" by selling Type II cement only to customers demanding optional specifications of Type II low-alkali cement and actively discouraging Type II sales by reviewing with the customer whether there is a need for low-alkali cement.

Petitioner contends that the Department correctly considered relative sales volume as a factor in its ordinary-course-of-trade analysis. Petitioner argues that CEMEX does not explain the probative value of "absolute-term" analysis of sales volumes and, in fact, the statute requires the type of comparative analysis between cement types used by the Department. CEMEX's assertion that small sales volumes are only indicative of sales outside the ordinary course of trade when there is not a *bona fide* home market demand would not be consistent with the Department's principle of considering "each case on its own facts, not according to some set of preconceived factors." In addition, petitioner points out that only a small percentage of CEMEX's Type II and V cement production are sold in the home market; thus, petitioner likens these sales to "overrun" merchandise designed for export."

Petitioner further asserts that the number, type, and geographic location of customers for CEMEX's Type II and Type V sales are unusual relative to Type I. In contrast to the broad range of customers and uses for Type I cement, Type II and Type V cement was principally sold only to certain types of customers (usually large industrial contractors) for particular projects. Petitioner states that the courts have upheld the use of a limited number of customers as a factor in the ordinary course of trade analysis. See, e.g., *Mantex*, 841 F. Supp. At 1307; *Laclede Steel*, 18 CIT at 967. Petitioner cites differences in presentation types (bag or bulk) between the different cement types as additional evidence of different customer types. Moreover, CEMEX's customers for Type II and Type V cement are concentrated in the Mexico City area, while its customers for Type

I and pozzolanic cement are dispersed throughout Mexico. Furthermore, from the Hermosillo plants, CEMEX sells cement invoiced as Type II and Type V only to distant customers, while it artificially sells the identical cement to nearby customers as Type I.

Petitioner asserts that CEMEX's profit on Type II sales is unusually small in comparison to its profits on all cement types, with an even greater difference if there is an "apples to apples" comparison for sales from the Yaqui plant. Petitioner asserts that this difference is further magnified by a "before freight" and after freight" comparison of Yaqui sales. Petitioner asserts that CEMEX only began selling Type II and Type V cement in the home market when it began production for export in the mid-1980s. Then, after the antidumping order, CEMEX was able "to drastically change its production and distribution for those cement types without disturbing its profitability on sales of Type I and pozzolanic cement."

Petitioner agrees with the Department's determination that CEMEX sold Type II and Type V cement for reasons other than profit as CEMEX failed to address this factor in the sixth review. Petitioner points to CEMEX's admission in earlier reviews (which are now part of the record of the instant review) that CEMEX's sales of Type II cement exhibit a promotional quality not evidenced in ordinary sales of cement.

Petitioner argues that CEMEX's contention that consolidation of production at Hermosillo was a legitimate business decision is irrelevant to the ordinary course of trade determination. Moreover, petitioner claims that CEMEX has failed to preserve this issue for the final results by not including it in its case brief.

#### *Department's Position*

Consistent with our preliminary results, the Department has determined that CEMEX's home market sales of Type II and Type V cement produced at the Hermosillo plants were outside the ordinary course of trade during the sixth review. Section 773(a)(1)(B) of the Act states, in part, that NV is "the price at which the foreign like product is first sold (or, in absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade \* \* \*". The term "ordinary course of trade" is defined as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class

or kind." The Statement of Administrative Action (SAA) which accompanied the passage of the URAA further clarifies this portion of the statute, when it states: "Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market." SAA, at 164. Thus, the statute and the SAA are clear that a determination of whether sales (other than those specifically addressed in section 771(15)) are in the ordinary course of trade must be based on an analysis comparing the sales in question with sales of merchandise of the same class or kind generally made in the home market (*i.e.*, the Department must consider whether certain home market sales of cement are ordinary in comparison with other home market sales of cement).

The purpose of the ordinary course of trade provision "is to prevent dumping margins from being based on sales which are not representative" of the home market. *Monsanto Co. v. United States*, 698 F. Supp. 275, 278 (CIT 1988). By basing the determination of NV upon representative sales, the provision ensures that the comparison between NV and sales to the United States is done on an "apples-to-apples" basis. However, Congress has not specified any criteria that the agency should use in determining the appropriate "conditions and practices." Thus, the Department, "in its discretion, chooses how best to analyze the many factors involved in a determination of whether sales are made with in the ordinary course of trade." *Thai Pineapple Public Co. v. United States*, 946 F. Supp. 11, 14-17 (CIT 1996) (quoting *Laclede Steel Co. v. United States*, Slip Op. 95-144 at 6 (CIT Aug. 11, 1995)).

In the instant review, the Department's decision to exclude sales of Type II and Type V cement from the calculation of NV centered around the unusual nature and characteristics of these sales compared to the vast bulk of CEMEX's other home market sales. Based upon these differences, the Department concluded that they were not representative of CEMEX's home market sales. Stated differently, these sales were not within CEMEX's ordinary course of trade.

The Department's ordinary-course-of-trade inquiry is far-reaching. The agency must evaluate not just "one factor taken in isolation but rather \* \* \* all the circumstances particular to the sales in question." *Murata Mfg. Co. v. United*

*States*, 820 F. Supp. 603, 607 (CIT 1993) (quoting *Certain Welded Carbon Steel Standard Pipes and Tubes from India, Final Results of Antidumping Duty Administrative Review*, 56 FR 64753, 64755 (1991)). This broad approach recognizes that each company has its own conditions and practices particular to its trade. For example, it might be a normal practice for one company to sell samples in its line of business; for other companies, that might be an abnormal practice. In short, the Department examines the totality of the facts in each case to determine if sales are being made for "unusual reasons" or under "unusual circumstances." *Electrolytic Manganese Dioxide from Japan Final Results of Antidumping Duty Administrative Review*, 58 FR 28551, 28552 (1993).

A full discussion of our conclusions, requiring reference to proprietary information, is contained in several Department memoranda in the official file for this case (public versions of these memoranda are on file in room B-099 of the Department's main building). Generally, however, we have found, with respect to Type II cement: (1) the volume of Type II home market sales is extremely small compared to sales of other cement types; (2) the number and type of customers purchasing Type II cement is substantially different from other cement types; (3) Type II is a speciality cement sold to a niche market; (4) shipping distances and freight costs for Type II cement sold in the home market is significantly greater than for sales of other cement types; and (5) CEMEX's profit on Type II sales is small in comparison to its profits on all cement types.

In addition, there are two items, historical sales trends and the "promotional quality" of CEMEX's Type II cement sales, which were cited previously as factors in the second review ordinary-course analysis, but which are not discussed above. On March 10, 1997, the Department issued a questionnaire requesting CEMEX to support its position that home market sales of Type II cement were within the ordinary course of trade by addressing, among other things, "historical sales trends" and "marketing reasons for sales other than profit." CEMEX's response, (copies of its submission from the fifth administrative review), failed to address these two items. Thus, the Department assumes that the facts regarding these items have not changed since the second review and that: (i) CEMEX did not sell Type II cement until it began production for export in the mid-eighties, despite the fact that a small

domestic demand for such existed prior to that time; and (ii) sales of Type II cement continue to exhibit a promotional quality that is not evidenced in CEMEX's ordinary sales of cement.

With respect to CEMEX's home market sales of Type V cement produced at the Hermosillo plants, we note that these sales are less unusual than its home market sales of Type II cement. For example, CEMEX's profit rate on Type V sales is slightly closer to its profit rate on Type I sales than is true of its Type II sales. Notwithstanding this distinction, the Department has determined, after considering the totality of circumstances surrounding these sales, that CEMEX's home market sales of Type V cement are also outside the ordinary course of trade.

First, the volume of these sales, either individually or in combination with sales of Type II cement, is extremely small compared to sales of Type I cement. Secondly, the number and type of customers purchasing Type V cement is substantially different from those purchasing Type I. As is true of Type II, Type V is a speciality cement that CEMEX sells to a niche market. Finally, shipping distances and freight costs for sales of Type V cement are significantly greater than for sales of Type I. Like its sales of Type II cement, CEMEX's sales of Type V cement are shipped over unusually long distances.

Consistent with our preliminary results, we have also determined, based upon the facts otherwise available, that: (1) CEMEX did not sell Type V cement in Mexico until it began production for export in the mid-eighties, despite the fact that a small domestic demand for such existed prior to that time; and (2) sales of Type V cement continue to exhibit (as they did in the second review) a promotional quality that is not evidenced in CEMEX's ordinary sales of cement. We continue to believe, for reasons expressed in our preliminary results, that this use of facts available is warranted and appropriate.

In sum, the Department has determined that CEMEX's home market sales of Type II and Type V cement produced at the Hermosillo plants are not representative of its sales in Mexico of the class or kind of merchandise under investigation. We note that while our decision is based solely upon the facts established in the record of the sixth review, those facts are very similar to the facts which led the department to determine in the second review that home market sales of Type II cement were outside the ordinary course of trade. This determination was recently affirmed by the Federal Circuit in the

*CEMEX* case (1998 U.S. App. LEXIS 163) (" \* \* \* Commerce's decision that the sales of Types II and V cements were outside the ordinary course of trade was supported by substantial evidence.").

The Department disagrees with CEMEX's contention that (i) low sales volume is only relevant to the ordinary-course-of-trade issue if there is no *bona fide* home market demand, and (ii) the presence of home market demand is indicative of sales inside the ordinary course of trade. First, the Department verified in the second review that there was a small, but apparently legitimate, home market demand for Type II and Type V cements. However, that finding did not lead to a determination that the subject sales were made within the ordinary course of trade. As we note above, the Federal Circuit, in the *CEMEX* case, affirmed the Department's determination that CEMEX's home market sales of Types II and V were outside the ordinary course of trade. Secondly, the Department has often found sales to be outside the ordinary course of trade where volume was considered with other, non-demand-related, factors. For example, in *Final Determination of Sales at Less Than Fair Value; Sulfur Dyes Including Sulfur Vat Dyes, from the United Kingdom*, 58 FR 3253, 3256 (1993), the Department concluded that sales were outside the ordinary course of trade based upon abnormally high volume, low price, and the existence of a "special agreement" to promote the product at issue. In *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan*, 52 FR 30700, 30704 (1987), the Department determined that sales were outside the ordinary course of trade because the sales in question were of small volume and high prices, most of the sales were canceled prior to invoice, and there were no comparable sales in the United States. We have also excluded transactions from the calculation of NV based upon sales made to employees and negligible volume. See, e.g., *New Minivans from Japan*, 57 FR 43, 46 (1992). In short, the Department's consistent and longstanding practice has been to consider sales volume along with numerous other factors, depending upon the specific product involved.

The Department also disagrees with CEMEX's claim that instead of considering shipping distances and freight costs, we should focus on shipping terms and practices. First, the normal practice in Mexico is to ship cement, a heavy material, over relatively short distances. Indeed, over 95% of all cement shipments in Mexico cover less than 150 miles. While CEMEX's home

market shipments of Type I cement conformed to this norm, its shipments of Type II and V occurred over substantially greater distances. CEMEX's claim that these "differences in shipping distances is simply a geographic fact" and the result of a "legitimate business decision" missed their mark. A company may have sound business reasons for changing its methods of operation; but, if sales resulting from this new business practice are not normal for the company (for a reasonable time prior to exportation), then they cannot be said to be within that company's ordinary course of trade. As the CIT succinctly stated in its examination of the second administrative review:

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

*CEMEX*, Slip Op. 95-72 at 11 (CIT 1995), *aff'd*, 1998 U.S. App. LEXIS 163.

Secondly, while it is true, as CEMEX points out, that shipping *terms* (e.g., CIF or FOB plant) for Types II and V are in some respects similar to Type I, we believe this contention proceeds from an incorrect premise. In an ordinary-course-of-trade inquiry, the pertinent issue is whether the conditions and practices are "normal" for the company in question. For the years preceding the antidumping order, it was CEMEX's *normal* business practice to pass along the cost of pre-sale freight to purchasers of its Type II and V cement. For CEMEX to absorb freight costs after the issuance of the order is an "unusual circumstance," particularly given the high freight costs for Type II and V cement.

Finally, we disagree with CEMEX's contention that our analysis of historical sales trends is factually incorrect. CEMEX's production of Type II and Type V cement is a relatively recent phenomenon for a company producing cement in Mexico for nearly nine decades. CEMEX did not produce Type V cement for the home market until March 1989, when it purchased Tolteca. Company officials conceded at verification in the second review that CEMEX did not produce Type II cement for the home market until the mid-1980s when it was required for export to other countries. CEMEX's argument that it should somehow receive credit for having acquired Tolteca fails to focus upon the pertinent ordinary course of trade issue "that is, whether the sale of Type II and V cement was a normal condition or practice for CEMEX, not

whether it was a normal condition or practice for another company in Mexico. Therefore, the fact that Tolteca (as an independent company) produced Type V cement is unpersuasive.

#### *Comment 4*

CEMEX asserts that home market sales of cement produced at Hermosillo to customers needing only Type I cement should be used in the calculation of NV. CEMEX claims that the Department should have been able to make an ordinary course of trade determination in connection with these sales because its January 29, 1997 submission informed the Department that these sales met the physical specifications for Type V cement. CEMEX further claims that the Department could have determined whether these sales were below cost because the Department could have used the submitted cost databases to perform this analysis.

According to CEMEX, sales of Type I cement produced at the Hermosillo plants were, in fact, not outside the ordinary course of trade since sales volumes were significant in absolute terms, sales were to the same types of customers as other Type I sales, and the shipping distances and freight costs for cement sold as Type I out of Hermosillo were not unlike all other sales of Type I. Additionally, the profitability for the Hermosillo-produced sales to Type I customers is not significantly different than the profitability for all other Type I sales. Finally, CEMEX argues that the "promotional quality" factor cannot apply since customers perceive this cement to be the same type of cement as all other Type I cement.

Petitioner argues that the Department properly relied upon facts available to exclude sales of Type I cement produced at Hermosillo from its dumping calculations. Petitioner argues that the Department was only prepared to verify whether sales of Type II cement were outside the ordinary course of trade. The Department did not learn until verification that cement produced at the Hermosillo plants and invoiced as Type I was, in fact, physically identical to the cement labeled as Type II and Type V. Because neither party raised the ordinary course of trade issue with respect to Type I sales, the Department was not prepared, nor able, to verify this issue. Petitioner asserts that if CEMEX had revealed the true nature of these sales prior to verification, the Department could have performed an ordinary course of trade analysis on these sales.

Petitioner asserts that it is not possible in this review to determine

exactly which sales of Type I cement in the home market were produced at the Hermosillo plants because CEMEX did not report a plant code for its sales. Additionally, the reported costs for cement produced at the Hermosillo plants were based on an allocation of costs for Type V cement according to how the cement was sold. Therefore, it is impossible to conduct a product-specific cost test. Petitioner asserts that the home market database is "extremely flawed" with regard to these sales. Petitioner states that the statute provides the Department with the authority to use facts available whenever (1) necessary information is not on the record, (2) an interested party withholds information that is requested, (3) an interested party significantly impedes a proceeding, or (4) the information submitted cannot be verified. 19 U.S.C. 1677e(a). According to petitioner, each one of these prerequisites to using facts available is satisfied in the instant review.

#### *Department's Position*

Pursuant to section 776(a) of the Act, we have continued to exclude, as facts available, sales of Type I cement produced at the Hermosillo plants from our calculation of NV. As stated in our preliminary results of review, home market sales of Type I, Type II, and Type V cement produced at Hermosillo actually satisfy the ASTM specifications for Type V cement. Because the Department only received this information at verification, the Department was unable to determine whether these sales provided an appropriate basis for calculating NV. In particular, the Department lacked information which would allow it to determine whether these sales were made above cost or within the ordinary course of trade. For example, the Department discovered at verification that the reported production costs for the different types of cement supposedly produced at Hermosillo were, in fact, based upon an allocation of costs for Type V that was tied to sales ratios.

The Department has not received any information between our preliminary results of review and these final results which would warrant the inclusion of these sales in our calculation of NV. Therefore, the Department is continuing to exclude home market sales of Type I cement produced at the Hermosillo plants from our dumping calculations in this review.

#### *Comment 5*

CEMEX contends that even if all of its home market sales of identical

merchandise were properly excluded from the calculation of NV, the statute requires the Department to base NV upon constructed value (CV), not home market sales of similar merchandise (i.e., Type I). In support of its position, CEMEX cites *DRAMs from the Republic of Korea* in which the Department resorted to CV when all sales of comparison merchandise were excluded from the calculation of NV because they failed the arm's length test. CEMEX argues that in the instant review, all sales to the United States were of Type II cement; therefore, if all home market sales of this type are excluded, Commerce must base NV on CV, not on home market sales of the next most similar merchandise, Type I.

Petitioner argues that, having excluded home market sales of Type II and Type V from the calculation of NV, the Department correctly based NV on sales of the next most similar merchandise, not CV. According to petitioner, the cases relied upon by CEMEX in its brief are those where the Department is required by the statute to exclude sales of the identical or most similar merchandise because they were below the cost of production. In any event, petitioner asserts that CEMEX's reported costs for the Hermosillo plants are extremely flawed and cannot be used to calculate CV.

#### *Department's Position*

Subsequent to the preparation of case and rebuttal briefs in this review, the Federal Circuit issued its opinion in the *CEMEX* case. In that case, the appellate court affirmed the Department's use of Type I cement (as opposed to CV) to calculate NV when CEMEX's home market sales of identical merchandise (Type II and V) were found to be outside the ordinary course of trade in the second administrative review of this order. 1998 U.S. App. LEXIS 163. Indeed, the Federal Circuit declared that this result was required by "the plain language of the statute \* \* \* when sales of identical merchandise have been found to be outside the ordinary course of trade."

Although the court did not have before it the statutory amendments occasioned by the URAA, the specific provision at issue (section 771(16) of the Act) was not changed in any meaningful sense. Accordingly, our determination on this issue has not changed from the preliminary results.

#### **Fictitious Market**

##### *Comment 6*

Petitioner claims that CEMEX established a fictitious niche market for

home market sales of Type II cement. In particular, petitioner argues that CEMEX, in reaction to the antidumping order, created an artificial and highly restricted market for Type II cement with the intention of manipulating the calculation of NV for identical merchandise "to mask the fact that the average home market price of the entire class of subject merchandise covered by the order (including Type I, Type V, and pozzolanic cement) continued to greatly exceed the U.S. price of the imported merchandise." As a result, petitioner believes a price comparison that is based on home market sales of Type II cement would disguise CEMEX's dumping. Petitioner states that the evidence on the record in this review continues to demonstrate, as it has in prior reviews, that CEMEX established a separate and artificially limited home market distribution channel for sales of Type II cement in order to circumvent the antidumping order and to lower its margin.

CEMEX counters that the Department has correctly rejected petitioner's fictitious market allegation in prior administrative reviews of this antidumping order, and should reject the same argument in this review. CEMEX states that in past reviews the Department accepted CEMEX's business reasons for consolidating production of Type II cement in northwest Mexico, and for not passing on freight costs for Type II cement to its customers. According to CEMEX, the Department also determined in prior reviews that CEMEX provided sufficient evidence of genuine demand for Type II cement in Mexico.

#### *Department's Position*

Since the sales in question have been found to be outside the ordinary course of trade and, accordingly, will not be used in the calculation of NV, it is not necessary for us to address this issue for these final results.

#### **Collapsing**

##### *Comment 7*

CDC argues that the Department's decision to "collapse" CDC with CEMEX is contrary to its established practice and is not justified by the facts on the record of this review. CDC cites the Department's determination in *Antifriction Bearings (Other Than Tapered Rolling Bearings) and Parts Thereof From the From the Federal Republic of Germany, Final Determination of Sales at Less Than Fair Value*, 54 FR 18992 (1989) in which the Department states the "it is the Department's general practice *not* to

collapse related parties except in relatively unusual situations, where the type and degree of relationship is so significant that we find that there is strong possibility of price manipulation. The Department has refused to collapse firms in situations where the facts suggest that such a possibility does not exist." CDC asserts that the new regulations support this interpretation by strongly rejecting a recommendation that the Department collapse upon finding "any potential for price manipulation." CDC asserts that the potential for price and product manipulation is the primary rationale for collapsing two related companies. CDC believes that the facts in this review are similar to those in the *Nihon* case where the court found that cross ownership and overlapping boards of directors were not sufficient grounds to warrant collapsing two entities. CDC asserts that a company's liability under the antidumping law should be based on that company's own pricing decisions, not those of an affiliated party.

CDC asserts that the Department's decision to collapse CDC and CEMEX is based on an insufficient legal analysis and ignores record evidence. According to CDC, the Department should apply a two-step test for collapsing, and show (1) that the two companies are affiliated parties with production facilities that would not require substantial retooling, and (2) that there exists between the two companies a significant potential for manipulation of price or production. CDC concedes that it is affiliated with CEMEX, but argues that the "significant potential" element of the test is not met. CDC argues that there are three elements to be considered in determining "significant potential": level of common ownership, overlapping boards of directors, and intertwined operations. CDC contends that the Department only addressed the first two factors, but does not provide any analysis as to whether operations are intertwined.

As to common ownership, CDC argues that CEMEX is only a minority shareholder in CAMSA (CDC's parent company) and the majority of shares are still retained by CDC. CDC asserts that its sale of stock to CEMEX was purely a business decision made for financial reasons and CEMEX's share does not constitute a controlling interest under Mexican law.

As far as management overlap, CDC acknowledges that members of CEMEX's management sit on the boards of directors of CDC and its affiliated companies. However, CDC asserts that (1) CEMEX's representatives are in the minority on all of these boards, (2) the

Terrazas/Marquez families are in the majority on all boards, (3) CDC's pricing and production are not discussed at the board meetings of CDC or any of the groups's companies, and (4) that CEMEX's interest in CDC is only that of a passive investor. Therefore, CDC contends that this management/director overlap does not, and will not, result in a significant potential for manipulation of price or production.

CDC argues that the third element of the significant potential test is not established by the facts on the record. CDC argues that the record shows that: (1) the daily operations of CDC are controlled strictly by management, which is appointed by the majority shareholder; (2) CDC and CEMEX do not coordinate pricing strategies in the U.S. market or the Mexican market; (3) the natural markets of CDC and CEMEX do not overlap; (4) CDC and CEMEX do not share sales, distribution, or marketing systems in either the U.S. or Mexico; and (5) there were no commercial transactions between CDC and CEMEX during the sixth review. In addition, CDC argues that CEMEX's role as an engineering consultant during the construction of the Samalayuca plant does not indicate "significant potential for affecting CDC's production and pricing decisions." CDC states that it has shown that this consulting advice was provided by CEMEX on an arm's length basis. Furthermore, CDC asserts that CEMEX's statement at verification that it provided these consulting services to CDC as a result of its ownership interest in CDC does not indicate that CEMEX can coerce CDC to choose it for consulting advice or affect CDC's decisions with respect to any pricing or production issue. Also, CDC does not dispute that CDC and CEMEX have similar production processes and equipment, but the record facts do not demonstrate significant potential for manipulation.

Finally, CDC asserts that there is no policy reason in this case to collapse CDC and CEMEX. CDC distinguishes the facts in this case from those in *Queen's Flowers de Colombia v. United States* (97-120 Slip. Op. at 9). Unlike the two collapsed entities in that case, CDC argues, CEMEX and CDC do not constitute a single producer of cement and are separate legal entities. Additionally, CDC asserts that collapsing is not needed to prevent circumvention because CDC submitted all of its own questionnaire responses and participated in verification. CDC asserts that collapsing does not satisfy the purpose of the statute which is to determine dumping margins as accurately as possible. CDC argues that

in the cement industry, high inland freight costs limit CDC's natural market; therefore, regardless of the antidumping margin, CDC cannot increase its market beyond these geographic constraints. CDC states that there is no incentive for the owners or management of CDC to agree to any plan that could give rise to an unpredictable monetary liability for CDC's imports. CDC sees no reason why CDC's liability for antidumping duties should be determined by cost, pricing, and sales decisions made by a minority shareholder.

Petitioner argues that, as in the original LTFV investigation and every administrative review conducted to date, the Department should collapse CDC and CEMEX, and that CDC has provided no justification for the Department to depart from this approach. Petitioner asserts that CDC's argument that collapsing CEMEX and CDC is contrary to the Department's established practice is refuted by the history of this proceeding. The Department has always collapsed in this proceeding and circumstances have not changed. The Department has the authority to collapse affiliated producers.

Petitioner argues that all of the factors normally considered by the Department support collapsing CEMEX and CDC. First, petitioner argues that the Department has collapsed in numerous cases where one party holds less than a majority interest in another party. In this review, petitioner contends, CEMEX is in a position to exercise restraint or direction over CDC, though not through majority voting rights. Petitioner claims that this degree of control is not even required for the Department to collapse affiliated parties—as long as similar production processes and significant potential for price or production manipulation are evidenced.

Second, petitioner argues that the existence of interlocking directors between CDC and CEMEX is evidence of significant potential for the manipulation of price and production if these companies are not collapsed.

Third, petitioner argues that the following facts demonstrate that CEMEX and CDC have intertwined business operations that demonstrate a "significant potential" for price and production manipulation: (1) CEMEX and CDC formerly shipped to the U.S. through the same channel of distribution—an affiliated importer; (2) CEMEX provides CDC with consulting services and assistance in marketing and exports; and (3) CEMEX provided engineering and technical assistance to CDC in building the Samalayuca plant,

services which CEMEX stated that it does not provide to non-affiliated parties.

Finally, petitioner states that there are no valid "policy" reasons not to collapse CEMEX and CDC in this review. Petitioner argues that despite CDC's assertion that the "type of manipulation the Department has cited in other cases simply cannot occur in the cement industry" because "each producer has a limited geographic market" and that the parties "cannot increase [their] market beyond these natural and geographic limitations," the Department must only consider the existence of a significant potential for manipulation. According to petitioner, the record evidence demonstrates that there is a natural overlap in the U.S. market for imports from CDC and CEMEX. Petitioner states that the two producers could also reallocate their geographic shares of the Mexican market in a manner that manipulates the dumping margin and circumvents the order.

#### *Department's Position*

The Department agrees with CDC that it must consider all relevant factors when collapsing two affiliated parties. Section 351.401(f) of the Department's new regulations (*Antidumping Duties; Final Rule*, 62 FR 27296, 27410 (May 19, 1997)), describes the Department's current policy regarding when it will treat two or more affiliated producers as a single entity (*i.e.*, "collapse") for purposes of calculating a dumping margin. In order for the Department to treat two or more producers as a single entity (1) the producers must be affiliated, (2) the producers must have production facilities that are sufficiently similar so that a shift in production would not require substantial retooling, and (3) there must be a significant potential for the manipulation of price or production.

First, because CEMEX indirectly owns more than five percent of the outstanding voting shares of CDC, the Department considers CEMEX and CDC to be affiliated within the meaning of section 771(33)(F) of the Act. In addition, both CEMEX and CDC manufactured Type I and Type II cement during the period of review. Second, as CDC and CEMEX have similar production processes and facilities, a shift in production would not require substantial retooling. Record evidence for the sixth administrative review also reveals intertwined business operations between CDC and CEMEX. (A complete analysis surrounding the Department's decision to collapse CDC and CEMEX, requiring reference to

proprietary information, is contained in the Department's Memorandum from Roland L. MacDonald to Joseph A. Spetrini, dated September 2, 1997, located in the official file for this case. A public version of this memorandum is on file in room B-099 of the Department's main building.)

Third, given the level of common ownership and cross board members, which provides a mechanism for the two parties to share pertinent pricing and production information, similar production facilities that would not require substantial retooling, as well as intertwined business operations, the Department finds that if CDC and CEMEX are not collapsed, there is a significant potential for price manipulation which could undermine the effectiveness of the order.

#### **Level of Trade (LOT)/ CEP Offset**

##### *Comment 8*

Petitioner argues that the Department erroneously determined that CEMEX's and CDC's home market sales were at a different level of trade than their sales to the United States, and on that basis granted CEMEX and CDC a constructed export price (CEP) offset adjustment to NV. According to petitioner, the Department found no differences in level of trade in the previous (fifth) review and the facts in this review are virtually identical to the facts in that review. Petitioner claims that the Department's methodology for analyzing the level of trade and CEP offset issues has not changed since the fifth review and, therefore, no basis exists for a different result with respect to the level of trade and CEP offset issues in this review.

Specifically, petitioner argues that, in the preliminary results of this review, the Department found that CEMEX and CDC perform more selling functions for sales to end-users and ready-mixers in the home market than for sales to affiliated importers in the United States. Petitioner argues that the Department must find more than the fact that selling functions in the home market and the United States differ in intensity to find a difference in level of trade.

Petitioner also argues that if the Department grants a CEP offset to CEMEX and CDC, it should modify the methodology employed in the preliminary results. Petitioner first argues that if the Department grants a CEP offset adjustment, the Department should classify CEMEX and CDC's U.S. terminal expenses as movement expenses, not indirect selling expenses. Second, petitioner argues that if the Department grants a CEP offset

adjustment, the Department should modify its treatment of U.S. indirect selling expenses incurred in Mexico. Petitioner states that by not deducting from CEP the indirect selling expenses incurred in Mexico that supported U.S. sales, the Department in the preliminary results in effect calculated an ex-U.S. border price, not an ex-factory price, while the deductions made for home market sales calculate an ex-factory price. According to petitioner, comparison of these two prices is unfair, and runs counter to the apples-to-apples price comparison required by the statute. Finally, petitioner argues that the Department should base its identification of levels of trade on the starting price for both EP and CEP sales, not the CEP price adjusted for selling expenses and profit. Petitioner claims that the CEP level of trade, as with the home market, should be based on the price paid by the first unaffiliated customer prior to deductions for expenses and profit. In addition, petitioner argues that if the Department grants a CEP offset adjustment, we should reclassify CEMEX and CDC's U.S. terminal expenses from U.S. indirect selling expenses to movement expenses.

CDC argues that the Department properly granted CDC a CEP offset. CDC argues that the Department's regulations direct the Department to determine NV at the level of trade of the CEP, which includes any CEP deductions under section 772(d) of the Act. In light of this interpretation of the statute, argues CDC, any comparison of selling functions for the purpose of determining CDC's eligibility for a CEP offset must focus on CDC's activities in selling to the two markets, not on the activities of its U.S. affiliate. CDC argues that the record demonstrates that its home market sales were made at a more advanced level of trade than its U.S. sales, thus satisfying the level of trade standard.

CEMEX agrees with the Department's preliminary results which granted CEMEX a CEP offset based on the law and on verified information. First, CEMEX concurs with the Department's determination that the sales to Sunbelt Cement, CEMEX's affiliated U.S. distributor, were at a less advanced level of trade than the level of trade of home market sales. CEMEX notes that the CEP adjustments made under section 772(d) of the Act remove all the marketing and distribution activities of Sunbelt Cement thereby altering the level of trade of the starting price to a less remote link in the chain of distribution. CEMEX contends that the appropriate comparison is based on the selling functions performed by CEMEX

with respect to its sales in Mexico and its sales to the U.S. ("[f]or both EP and CEP, the relevant transaction for the level of trade analysis is the sale (or constructed sale) from the exporter to the importer" 62 FR 47632).

Third, CEMEX argues that the Department appropriately determined that CEMEX performed significantly different selling functions for CEP and home market sales and the home market level of trade was more advanced. CEMEX rejects petitioner's implication that because the Department reached a different determination in from the fifth review, that the sixth review preliminary results must be wrong. CEMEX also rejects petitioner's hypothesis that because the U.S. market is important to CEMEX's business, CEMEX's centralized strategic planning in Mexico must support exports to the United States. CEMEX states that activities with respect to procuring/sourcing materials and other assets for U.S. operations are performed by CEMEX's U.S. affiliate. Finally, CEMEX disagrees with petitioner's argument that market research, advertising, after-sales service, and technical advice are all insignificant in selling cement. CEMEX notes that the list of selling activities that CEMEX included in the responses are representative of the activities that the Department has included in level of trade questionnaires issued to companies in other cases.

##### *Department's Position*

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade as the export price (EP) or CEP. The NV level of trade is that of the starting-price sales in the comparison market, or, when NV is based on constructed value (CV), that of sales from which we derive selling, general and administrative (SG&A) expenses and profit. For EP, the U.S. level of trade is also the level of the starting-price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sales from the exporter to the importer.

To determine whether NV sales are at a different level of trade than EP or CEP, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different level of trade, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the level of trade of the

export transaction, we make a level of trade adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP offset provision). See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 FR 61971 (November 19, 1997).

Although CEMEX and CDC are collapsed for purposes of determining the weighted-average dumping margin, the Department has determined that CEMEX and CDC's home market sales are at different levels of trade based upon a review of the selling functions performed by CEMEX and CDC to their respective customers. Therefore, for purposes of this administrative review, we are performing separate level of trade analyses for CEMEX's sales and CDC's sales in the home market.

CEMEX claimed that it has three levels of trade in the home market—sales to end-users concrete manufacturers, and distributors through two channels of distribution, bulk and bagged cement. It also reported two levels of trade in the U.S. market—sales of bulk cement to end-users and ready-mixers. We disagree with CEMEX that there are three levels of trade in the home market and two levels of trade in the U.S. market. We have determined that CEMEX sells to one level in the home market and one level of trade in the U.S. market.

Based on our analysis, we concluded the following: (1) there is one level of trade in the home market and one level of trade in the U.S.; (2) there is a quantitative and qualitative difference in the selling functions performed by CEMEX in the home market and the United States; (3) there are two distinct and separate levels of trade; (4) we do not have information which would allow us to examine pricing patterns based on respondent's sales of other products at the same level as the U.S. CEP; and (5) we have determined that NV is at a more advanced level of trade than the CEP. Therefore, we granted a CEP offset consistent with the aforementioned statutory provision. For a complete discussion of the Department's analysis, see the Level of Trade Memorandum, dated March 9, 1998.

CDC claimed that it has two levels of trade in the home market—sales to end-users and concrete manufacturers through two channels of distribution,

bulk and bagged cement. It also reported two CEP levels of trade in the U.S. market—sales of bulk cement to end-users and ready-mixers. We disagree with CDC that there are two levels of trade in the home market and two levels of trade in the U.S. market. We have determined that CDC sells to one level of trade in the home market and one level of trade in the U.S. market. Finally, we found no record evidence to suggest that EP and CEP sales by CDC are at the same level of trade, nor is there evidence to suggest that EP and home market sales are at different trades of trade. Therefore, based on the information on the record, we have determined that CDC's home market sales and EP sales are at the same level of trade and no LOT adjustment has been granted.

Based on our analysis of CDC's CEP sales, we concluded the following: (1) there is one level of trade in the home market and one level of trade in the U.S.; (2) there is a quantitative and qualitative difference in the selling functions performed by CDC in the home market and the United States; (3) these are two distinct and separate levels of trade; (4) we do not have information which would allow us to examine pricing patterns based on respondent's sales of other products at the same level as the U.S. CEP; and (5) we have determined that NV is at a more advanced level of trade than the CEP. Therefore, we granted a CEP offset consistent with the aforementioned statutory provision. For a complete discussion of the Department's analysis, see the Level of Trade Memorandum, dated March 9, 1998.

Finally, in response to petitioner's argument that CEMEX and CDC's U.S. terminal expenses should be considered movement expenses, we confirmed at verification (see U.S. Sales Verification Report dated July 21, 1997), that the reported terminal expenses are the expenses associated with making sales in the United States from the various sales offices/terminals. The evidence on the record does not indicate that these are expenses associated with the storage or movement of the subject merchandise prior to, or subsequent to the final sale. The Department reviewed the methodology employed by CEMEX and CDC to determine if the reported expenses were in accordance with Departmental practice. We found no discrepancies with respondent's reporting of U.S. indirect selling expenses and, consistent with our final determination in the fifth administrative review, we continue to treat the reported terminal expenses as U.S. indirect selling expenses.

#### *Comment 9*

CEMEX argues that Commerce included sales made by its affiliated reseller PROMEXMA, a retailer of cement and building materials. CEMEX argues that the sales functions provided by PROMEXMA differ substantially from those provided by the other CEMEX sales offices. CEMEX argues that sales made to retailers, such as PROMEXMA, are different than those made to distributors and end users. CEMEX asserts that the preliminary results of this review fail to analyze the role of PROMEXMA within "the seller's whole scheme of marking." CEMEX also argues that the Department did not conduct a complete comparison of PROMEXMA sale prices with all other sale prices. CEMEX argues that individual sale quantities and prices by PROMEXMA were significantly different than all other home market sales.

Petitioner asserts that CEMEX has failed to establish that home market sales made by its affiliated distributor, PROMEXMA, were at a different level of trade. Establishing that PROMEXMA is a different class of customer (a retailer) is not sufficient—CEMEX has failed to demonstrate that PROMEXMA performs selling functions that are qualitatively or quantitatively different than the functions CEMEX performs with respect to all other home market sales. Therefore, it would be contrary to the statute and the Department's practice to determine that sales by PROMEXMA were at a different level of trade. Petitioner maintains that the Department correctly determined in the preliminary result that all of CEMEX's home market sales, including sales by PROMEXMA, were made at the same level of trade. Therefore, these sales should be included in the calculation of NV.

#### *Department's Position*

We agree with petitioner. As we stated in the preliminary results of this review "[c]ustomer categories such as distributor, original equipment manufacturer (OEM) or wholesaler are commonly used by respondents to describe levels of trade, but, without substantiation, they are insufficient to establish that a claimed level of trade is valid." As stated above in our discussion of level of trade, the Department has determined that based on the facts placed on the record of this review, that all of CEMEX's home market sales of Type I cement were made at the same level of trade. Therefore, consistent with our decision in the preliminary results of review, the

Department has continued to weight-average all home market sales on a monthly basis and has compared these sales to CEP sales in the U.S. market.

#### Comment 10

CEMEX asserts that the Department failed to limit price comparisons to sales at the same level of trade. Specifically, CEMEX argues that sales of bagged cement are made at a different level of trade than sales of cement in bulk. CEMEX asserts that there is a consistent pattern of differences in the price of cement sold in bulk and in bags. CEMEX argues that consumers are willing to pay a premium for the convenience of buying a bag of cement. Additionally, CEMEX argues that sales of cement in bags involve far more selling functions than sales in bulk.

Petitioner maintains that CEMEX has failed to establish that its home market sales of bagged cement were at a different level of trade than its home market sales of bulk cement.

Petitioner asserts that the preliminary results correctly included both in the calculation of NV because the merchandise is identical, the only difference being packaging. Petitioner argues that consistent with the statute the net prices for identical merchandise need not be equivalent (*i.e.*, taking into account an adjustment for packaging) to be averaged together in the calculation of NV.

#### Department's Position

We agree with petitioner. The Department has included the entire universe of Type I sales in its calculation of NV because bulk and bagged sales constitute identical merchandise. The only difference between these products is the packaging; therefore, the Department has made an adjustment for packaging differences. In addition, as stated in the level of trade section of this notice (*see* Comment 8, above), the Department has determined that CEMEX sold at one level of trade in the home market; therefore, comparing by discreet channels of distribution is not warranted as there is only one level of trade. Therefore, we have not calculated NV for each channel of distribution as requested by CEMEX and have used our standard methodology for comparing NV to U.S. sales for purposes of these final results of review.

#### Comment 11

CEMEX argues that Commerce failed to limit sales comparisons to the same customer category. CEMEX asserts that although all customers negotiate sales prices starting at the same base price,

the discount offered in each market differs according to customer category (*i.e.*, distributors, end-users, and ready mixers.) CEMEX argues that it has established distinct customer classifications in both markets and thus Commerce should compare prices by customer category.

Petitioner argues that all cases by CEMEX in support of price comparisons by customer category are original investigations. In addition, petitioner asserts that there is no basis in the statute for averaging prices by customer category in administrative reviews. Petitioner maintains that the statute says nothing about averaging prices based on customer category, only that the Department "shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale." 19 U.S.C. 1677f-1(d)(2).

In addition, petitioner asserts the CEMEX has not demonstrated that it is necessary to compare prices by customer category. CEMEX claims that its prices/discounts vary by customer class, but provides no evidence to support this claim. Petitioner argues that the evidence on the record of this review does not support the claim that there is a pattern of price differences between customer categories.

#### Department's Position

We agree with petitioner. Section 773(a)(1)(B) of the Act does not direct the Department to make comparisons on the basis of customer categories. It merely directs us to compare U.S. sales to the price at which the foreign like product is first sold for consumption in the exporting country, in the usual commercial quantities, and in the ordinary course of trade. Moreover, section 777A(d)(2) states a preference for "average-to-individual" price comparisons in administrative reviews under section 751(a) of the Act. "With the exception of the contemporaneity rule in section 777A(d)(2), neither the statute nor the SAA provides any guidance of what, if any, factors should be considered when averaging in reviews." *Certain Stainless Wire Rods From France*, 61 FR 47874, 47879 (1996).

As stated in the level of trade section of this notice (*see* Comment 8, above), the Department has determined that CEMEX sold at one level of trade in the home market. Therefore, we have not calculated NV for each customer category as requested by CEMEX and have used our standard methodology for comparing NV to U.S. sales for purposes of these final results of review.

## Differences in Merchandise (DIFMER)

### Comment 12

CEMEX claims that the Department improperly made a DIFMER adjustment based on facts available equal to 20 percent of total cost of manufacturing. CEMEX claims that it has established that there were physical differences between Type I and Type II by providing all supporting documentation for the reported weight-averaged VCOM for Type I and Type II for each plant, which the Department then verified. CEMEX also claims that the Department's own reporting requirements for COP and CV require the weight-averaged costs incurred at all facilities to be reported, and that the Department has granted claimed DIFMER adjustments in other cases when such adjustments were based on weighted-average costs at several facilities. Therefore, CEMEX should not be penalized for not being able to exclude from its DIFMER data costs associated with differences in production efficiencies at the different plants. CEMEX cites *Gray Portland Cement and Clinker from Japan*, 60 FR 43761, 762-763 (1995), in which the Department granted the respondent a DIFMER adjustment, as the Department was satisfied that the respondent reasonably tied cost differences to physical differences in merchandise, not withstanding reported differences in plant efficiencies.

Furthermore, CEMEX claims that government verifiers should have known prior to verification that all of CEMEX's cement produced at Hermosillo met the Type V specifications. CEMEX asserts that Commerce should have known that it could not strip out, for DIFMER purposes, the effects of "plant efficiencies." CEMEX asserts that even if the Department were justified in foregoing the use of CEMEX's plant cost of production data, it was not legally justified in immediately leaping to "facts available because there is cost of production data on the record of the sixth review for two plants of CEMEX's affiliated party CDC." CEMEX argues that if the Department collapses the two entities, it must do so for all purposes, not just for purposes which "artificially serve to increase antidumping duty liability."

CEMEX argues that the Department does not have *carte blanche* in arriving at a "facts available" number. CEMEX argues that the 20% adverse DIFMER chosen by the Department constitutes "secondary information" within the meaning of 19 U.S.C. 1677(C) which can only be used as facts available if it can

be corroborated with outside information or can otherwise be supported by substantial evidence in the administrative record. CEMEX claims that the 20% DIFMER adjustment cannot be corroborated because it vastly overstates any possible DIFMER adjustment needed to account for actual physical differences in the cost of producing Type I and Type II cement. CEMEX points to CDC's DIFMER adjustment which is substantially less than 20% and to an affidavit submitted by petitioner in its submission of July 12, 1995 which concludes that the cost-of-production differential between Type I and Type II cement is "negligible." CEMEX cites *Rhone Poulenc, Inc v. United States*, in which the Court of Appeals for the Federal Circuit determined that it would be improper for the DOC to reject low margin information in favor of high margin information that was clearly less probative of current conditions. CEMEX also cites *Saha Thai Steel Pipe Co. Ltd. v. United States*, in which the CIT determined that the Department must "seek to avoid the use of unrepresentative or extraordinary high surrogate data as BIA." CEMEX argues that the application of a 20% DIFMER adjustment would be punitive and has no basis in the administrative record or commercial reality.

CEMEX maintains that reliance on a 20% DIFMER adjustment simply because it was upheld by the CIT in the second review is unjustified. CEMEX argues that each administrative review is different and, furthermore, the 20% BIA rate used in the second review was based on the fact that CEMEX had refused to respond to specific requests for information from the Department. In this case, CEMEX argues that it has fully responded to the Department's requests and the agency has verified the accuracy of CEMEX's reported cost information.

Petitioner argues that the Department correctly applied a 20 percent DIFMER adjustment adverse to CEMEX as facts available. Petitioner asserts that as a result of its belated disclosure regarding the types of cement produced at the Yaqui and Campana plants, CEMEX impeded the review, failed verification, and prevented the Department from obtaining and evaluating other information that could have been used to calculate a DIFMER adjustment for CEMEX. Additionally, petitioner claims that CEMEX failed to report information tying the differences in variable costs of production of Type I and Type II cement to the physical differences in the merchandise.

Petitioner argues that the Department did not learn until verification that

CEMEX's claimed DIFMER adjustment was not based on differences in the physical characteristics between Type I and Type II cement, but rather on an allocation of costs between Type I and Type II sales for the same physical product—Type V cement. Furthermore, at verification, CEMEX admitted that the reported difference in variable cost for Type I cement produced at Yaqui and Type I produced at its other plants related to plant efficiency. CEMEX should have provided this information earlier. The Department was similarly misled in the fifth review, petitioner asserts, but these revelations were not made in that review. CEMEX repeatedly asserted in questionnaire responses that it was entitled to a DIFMER adjustment simply because there were differences in the variable production costs for Type I and Type II cement, and argued in its case brief that is variable production costs were usable for determining DIFMER. At verification, however, CEMEX stated that it was not entitled to a DIFMER adjustment. CEMEX's disclosure at verification that there were in fact no differences in physical characteristics between the cement types produced at Yaqui prevented the Department from collecting and analyzing other information that could have been used to calculate the DIFMER adjustment.

Petitioner disagrees with CEMEX's suggestion that the Department should have applied CDC's DIFMER rather than using facts available as this would allow CEMEX to avoid responsibility for misleading the Department and would reward CEMEX for its non-compliance with the Department's requests for information and impending of the review. Petitioner argues that CEMEX repeatedly failed to provide requested information tying the differences in variable production costs to differences in physical characteristics. In this review, the facts show that there are physical differences between Type I and Type II cement, and that these differences result in different variable costs of production. CEMEX, however, despite the Department's explicit and repeated requests, provided no information to isolate and quantify the cost differences that are specifically attributable to the physical differences. Petitioner states that this is CEMEX's burden under the regulations and the Department's practice. Thus, CEMEX is not entitled to its claimed DIFMER adjustment.

Petitioner also argues that CEMEX's own information contradicts its claim for a DIFMER adjustment. This data shows that Type II has tighter specifications than Type I which result

in it being more expensive to produce. It requires additional raw materials and additional grinding time. Data submitted by CDC corroborates this information.

Petitioner rebuts CEMEX's assertion that the Department should instead use data that is subject to corroboration for facts available. Petitioner argues that in this case the 20 percent adjustment is appropriate but corroboration of that percentage is impracticable. CEMEX's argument that the DIFMER should be lower is based on information that the Department was unable to verify. In this review, facts available DIFMER from the second review is the appropriate model for the Department's treatment of CEMEX's claimed DIFMER adjustment in this review.

Petitioner argues that there is no basis in the record or the Department's practices for calculating CEMEX's DIFMER adjustment from costs incurred at a single plant. In the fifth review, the Department departed from its longstanding practice and granted CEMEX a favorable DIFMER adjustment based solely on CEMEX's reported costs of producing Type I and Type II cement at a single facility, the Yaqui plant. Petitioner asserts that in this review, the Department should use weighted-average costs for all of CEMEX's plants. However, this will be impossible because CEMEX impeded the review by not providing information requested by the Department and failed verification. Furthermore, the adjustment will necessarily be distorted if the Department uses costs for the identical merchandise sold as different products.

#### *Department's Position*

Pursuant to section 773(a)(6)(C)(ii) of the Act, the Department will make adjustments to NV for physical differences in merchandise sold in the foreign market as compared to sales in the U.S. market. Pursuant to Section 353.57 of the Department's regulations, we will only adjust for differences in variable costs which correspond to physical differences in producing the merchandise, not due to differences in plant efficiencies. However, CEMEX has failed to report DIFMER information based solely on physical differences in merchandise.

In the preliminary determination, the Department determined that it was appropriate to use adverse facts available. The Department reached this conclusion because CEMEX did not make clear until verification that it only produced Type V cement at its Yaqui and Campana facilities. Therefore, the DIFMER reported for cement sold as Types I and II at these facilities did not

reflect differences in merchandise and was not a proper basis for a DIFMER adjustment. Given the late stage of the proceeding at which these facts came to light, the Department was not able to collect and analyze other DIFMER data and made a twenty percent upward adjustment to CEMEX's home market prices.

The Department continues to believe that CEMEX could and should have made clear the circumstances surrounding its reported DIFMER. In light of the comments received, the Department has evaluated possible alternatives to the twenty percent upward adjustment using the limited information on the record. Because of different plant efficiencies, the Department could not compare the variable costs at the Yaqui and Campana facilities with the variable costs at CEMEX's numerous facilities producing Type I cement. Therefore, as facts available and in order to minimize the effect of varying plant efficiencies, the Department has compared CEMEX's variable costs to produce cement at the Hermosillo plants (sold as Types I, II, and V) with the lowest variable costs reported by a CEMEX Type I facility. This calculation results in an upward adjustment to home market prices that in this case is sufficiently adverse, but is based on CEMEX's actual cost information.

We disagree with the assertion that CEMEX's adjustment should be based upon CDC's data. As stated in our preliminary determination, CDC's DIFMER is based on the differences in physical characteristics between Type I and Type II cement, whereas CEMEX's DIFMER adjustment would have to be based on differences in physical characteristics between Type I and Type V cement. The record evidence indicates that there are significant differences between the various types of cement produced at the various facilities. These are primarily due to different grinding and heating treatments and other factors. Therefore, we have determined that it would not be appropriate to apply CDC's Type I—Type II DIFMER adjustment to CEMEX's sales of Type I—V cement. Consistent with our findings in the preliminary results of review, we have applied a calculated DIFMER to CDC's home market sales based upon plant-specific reported data.

#### Normal Value

##### *Comment 13*

Petitioner argues that the Department should deny CEMEX a freight deduction for home market sales of Type I cement

because, contrary to the Department's practice and regulations, CEMEX has not demonstrated that (i) it is not feasible to provide freight expense data on home market sales on a transaction-specific basis, and (ii) company-specific reporting of average freight expenses does not create inaccuracies.

CEMEX argues that the Department's preliminary results correctly adjusted NV for CEMEX's verified freight expenses. CEMEX contends that it reported pre-sale and post-sale freight expenses broken down on a monthly basis based on (i) the selling company, (ii) the type of cement shown on the invoice, and (iii) the method of presentation (bulk or bagged). CEMEX first notes that the Department verified the accuracy of these factors for five separate cement plants and found no discrepancies. CEMEX also notes that the methodology employed in the instant review is identical to the methodology CEMEX used in the fifth review, which was accepted by the Department. CEMEX states that the Department's regulations authorize the use of a reasonable allocation methodology when transaction specific reporting is not feasible, provided that the methodology used is not distortive. CEMEX notes that transaction-specific reporting was not feasible due to the extremely large number of sales. CEMEX also notes that in its ordinary course of business, CEMEX cumulates transaction-specific freight expenses on a company basis; thus reallocation of freight expenses on a point-of sale, plant, or customer basis would not be feasible.

Finally, CEMEX rejects petitioner's argument that CEMEX's allocation is distortive. First, CEMEX states that it used a weight-based allocation methodology, matching the manner in which CEMEX's freight expenses were incurred. Second, CEMEX calculated its freight expenses on a cement-type and presentation-specific basis, without reference to out-of-scope merchandise, further reducing the possibility for distortion. Third, CEMEX calculated monthly, rather than annual (or period-wide) factors. Fourth, CEMEX's allocation used the most specific methodology permitted by company records. Finally, CEMEX rejects petitioner's argument that freight expenses were distortive because CEMEX did not take into account differing delivery distances between the point of sale and the customer. CEMEX counters that in cases where the company records cumulate freight charges and it is not possible to tie the destination of each shipment to cumulated expenses, the use of an

overall, weight-based factor has been found by the Department to be reasonable (*Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 61 FR 1328, 1333 (1996)).

##### *Department's Position*

We agree with CEMEX. The Department has allowed a deduction for freight expenses for Type I sales because the reported expenses provided are in accordance with Departmental methodology, consistent with the company's accounting practices, and were substantiated at verification. (see July 21, 1997 Verification Report at 9.) CEMEX has reported home market Type I freight in accordance with its accounting system and provided the data on a company, cement-type, and presentation-specific basis. Based on our findings at verification, the Department determined that respondent's reported freight costs for sales of Type I cement are not distortive and provide a reasonable estimate of actual transaction-specific freight expenses. Therefore, we are granting CEMEX a home market freight adjustment for sales of Type I cement.

##### *Comment 14*

Petitioner argues that CDC's reported freight expenses between two of its plants, Samalayuca and Chihuahua, are distortive because: (1) the expenses are not calculated on a transaction-specific basis, (2) the reported freight expenses for Type I cement may include freight expenses for clinker, and (3) freight expenses charged to CDC by affiliated parties may not be at arm's length. Petitioner argues, therefore, that these expenses should not be allowed.

CDC asserts that the Department properly deducted from NV its home market inland freight expenses from plant to distribution warehouse. CDC asserts that although the Department prefers transaction-specific reporting, it does permit the use of allocations where transaction-specific reporting is impossible. In this case, CDC argues that transaction-specific reporting is impossible because bagged cement produced at the Samalayuca plant was shipped to the Chihuahua plant warehouse where it was commingled with cement produced at Chihuahua. CDC asserts that it provided two allocation methodologies to the Department, and the Department did not request further information on this issue. CDC further argues that it provided evidence on the record that the reported freight expenses (INLFTWH) include freight for cement only and that affiliated party freight expenses were at arm's length. This

evidence included freight invoices from affiliated and unaffiliated parties.

#### *Department's Position*

We agree with CDC. The Department has allowed a deduction for home market freight expenses due to the fact that CDC reported its freight expenses in accordance with Departmental methodology. CDC provided invoices from affiliated and unaffiliated transportation companies demonstrating that the reported freight costs were at arm's length. Based on this information, the Department determined that the reported freight was accurate and non-distortive. Therefore, for the instant review, we have utilized all reported home market freight expenses in our final results of review.

#### *Comment 15*

Petitioner argues that the methodology for calculating freight expenses incurred by a CDC affiliate, Construentro commingles costs related to cement with various other hardware items. Petitioner argues that this commingling distorts the reported freight costs for cement only, and that the Department should disallow CDC a freight adjustment for sales through Construentro.

CDC argues that because other lighter products are commingled with cement, it is not possible to calculate a product-specific, sale-specific, per-unit freight cost for sales by Construentro to its customers. CDC argues that its methodology of calculating the total cost of freight by the total sales value is non-distortive, and is the identical methodology accepted by the Department in the fifth review.

#### *Department's Position*

We agree with CDC. The Department has allowed a deduction for home market freight expenses incurred by CDC's downstream affiliate, Construentro, due to the fact that CDC reported its freight expenses in accordance with Departmental methodology. After reviewing CDC's methodology for allocating freight costs, the Department has determined that the reported freight costs were accurate and non-distortive. Although in certain instances, non-subject merchandise accompanies shipments of subject merchandise, CDC's allocation methodology is a conservative means of calculating freight costs. Allocating based on sales value results in a total freight deduction that is less than if freight costs were calculated based on weight. In addition, record evidence indicates the CDC would be unable, in the normal course of business, to isolate

the freight costs associated with subject and non-subject merchandise in these particular cases. Therefore, for the instant review, we have utilized all reported home market freight expenses in our final results of review.

#### *Comment 16*

According to petitioner, CEMEX is not entitled to a deduction for either allocated or transaction-specific price rebates. Petitioner argues that the allocation methodology used by CEMEX for reporting certain rebates is distortive, because the allocated rebates may include rebates on sales of non-subject merchandise. For transaction-specific rebates, petitioner argues that CEMEX failed to establish that (1) its customers were aware, prior to the sale, of the conditions of the rebate and the amount of the rebate, and (2) the rebates was granted pursuant to a standard business practice or established program.

CEMEX argues that the Department's preliminary results correctly adjusted NV for CEMEX's verified rebates. CEMEX notes that it provided adequate sample documentation for its rebate programs, and that the Department verified this information. CEMEX rejects petitioner's claim that CEMEX's customers were not aware of its rebate policies at the time they were purchasing cement from CEMEX. According to CEMEX, as all rebates were negotiated on a customer-specific basis and customers were aware of the discounts for which they were eligible. CEMEX also notes that petitioner made the same argument in the fifth administrative review, which the Department rejected.

Next, CEMEX rebuts petitioner's argument that it was wrong for the Department to adjust NV because CEMEX failed to establish that it was not feasible for CEMEX to report all rebates on a transaction specific basis. Next, CEMEX argues that in fact the majority of rebates reported were transaction-specific. CEMEX also notes that the use of an allocation methodology for one specific rebate program is required, as this post-sale quantity discount is tied to total customer purchases over a stated period of time and is applied to the customer's outstanding accounts receivable, not to an individual transaction or invoice. CEMEX notes that the Department has long recognized that rebates which are not granted on a transaction-specific basis cannot be reported on a transaction-specific basis (*Corrosion Resistant Carbon Steel Flat Products from Canada*, 61 FR 13815, 13821 (1996)).

Finally, CEMEX rejects petitioner's allegation that CEMEX's rebate calculations included rebates paid on sales of out-of-scope merchandise. CEMEX contends that the Department verified that only rebates and sales of the subject merchandise during the appropriate time period were included in the rebate allocations.

#### *Department's Position*

We agree with CEMEX. The Department has allowed CEMEX's claimed rebate adjustments because the data was submitted in accordance with the Department's methodology and was substantiated at verification. While the Department prefers that discounts, rebates, and other price adjustments be reported on a transaction-specific basis, the Department has long recognized that some price adjustments are not granted to customers on that basis, and thus cannot be reported on that basis. Generally, "we have accepted claims for discounts, rebates, and other billing adjustments as direct adjustments to price if we determined that the respondent, in reporting these adjustments, acted to the best of its ability and that its reporting methodology was not unreasonably distortive." See *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al., Final Results of Antidumping Duty Administrative Reviews*, 62 FR 2081 (1997).

Furthermore, the Department disagrees with petitioner's argument that the rebates at issue were not granted on a transaction-specific basis. These rebates were reported on a customer-specific basis for cement sold in a specific form, bag or bulk, and applied equally (as a fixed percentage of price) to all invoices for a given month. The Department does not agree with petitioner that respondent's methodology is sufficient to warrant treatment of the adjustments as indirect expenses in the home market. In this case, the amount of the "allocation" is limited to a few specific transactions, all to the same customer, and typically within a very limited period of time. Thus, the danger of unreasonable distortions, which is the averaging effect on prices, is extremely limited in this case. This case is similar to situations, permitted by the Department as direct adjustments, in which a rebate is granted on a limited number of purchases by a single customer. Because CEMEX's method of reporting its rebate is reasonable, the Department has allowed it as a direct adjustment.

*Comment 17*

Petitioner argues that CDC is not entitled to a deduction for certain other price adjustments combined in the OTHADJH and OTHDISH fields in its home market sales database. Petitioner argues that (1) the adjustments are distortive because they result in a negative net price for certain sales, (2) CDC did not establish that the adjustments were granted pursuant to a standard business practice or under a pre-established program, (3) CDC did not establish that the adjustments were made in proportionate amounts with respect to sales of out-of-scope merchandise, and (4) CDC has commingled price adjustments benefitting sales of products other than cement. For these reasons, the other price adjustments should be denied.

CDC rebuts petitioner's argument that the Department should deny its other adjustments. CDC acknowledges that for a very few sales this deduction results in a negative price, but CDC states that it made the Department aware of this in the first supplemental response. CDC provides language for the computer program to delete these negative sales. CDC also argues that it provided evidence to the Department in its April 7, 1997 submission demonstrating that customers are aware of the terms of the other adjustments and that CDC maintains records of these terms. CDC also argues that these discounts are restricted to the subject merchandise because they are recorded on a product-specific basis, by product code, and by presentation (bag or bulk). Finally, CDC argues that the petitioner misinterpreted the "concrete pavement discount." CDC asserts that this is a discount on the cement used for concrete paving projects, not for sales of concrete. CDC states that the methodology used in the sixth review for this discount is identical to the methodology accepted by the Department in the fifth review.

*Department's Position*

We agree with CDC. The Department has allowed CDC's claimed adjustments because these adjustments were reported in accordance with Departmental methodology. Based on the information placed on the record of this review, the Department has determined that CDC was able to allocate these adjustments on a product-specific, customer-specific basis for the month in which the sale occurred, thereby not creating a distortive effect on NV. Therefore, we are granting CDC these adjustments. However, we have disregarded those sales which result in negative prices due to these adjustments

and have not included these in the calculation of NV.

*Comment 18*

Petitioner argues in its case brief that the Department erred in basing CEMEX's short-term interest rate on CDC's short-term interest rate. In the preliminary results, the Department found that CEMEX improperly used its interest rate for long-term loans in calculating imputed expenses, and substituted CDC's short-term interest rate. Petitioner argues that because CEMEX affirmatively misrepresented the fact that it had short-term, peso-denominated debt during the sixth review period, the Department should apply adverse facts available. The effect of the adverse facts available, according to petitioner, should be to (1) completely deny CEMEX's claimed imputed credit expenses and inventory carrying costs, (2) revise the calculation of these expenses using IMF rates instead of CDC's rates, or (3) substitute an interest rate for borrowing by CEMEX based on the shortest period available.

CEMEX argues that it accurately reported its interest rate experience. CEMEX claims that the factual record shows that it fully and accurately described its debt position, providing the interest rates applicable to the current portion of its long-term loans as a benchmark for short-term, peso-loan interest rates, and that this description was verified and accepted by the Department. CEMEX also rejects petitioner's argument that the Department should not have used the verified short-term interest rate from CDC. CEMEX argues that the Department was correct to use this data since it has determined that CDC and CEMEX constitute a "single entity."

*Department's Position*

We agree with CEMEX. CEMEX incorrectly included the long-term interest rate in its reported calculation. However, consistent with our decision in the final results of review in the fifth administrative review and in the preliminary results of the instant review, the Department has continued to use the interest rate reported by CDC as a surrogate value for CEMEX's interest rate as facts available because it is the short-term market interest rate of CEMEX's collapsed affiliate.

*Comment 19*

CDC argues that the expenses reported in the field ADVERTH should be considered direct expenses because they reflect advertising directed at the customer's customer. Furthermore, CDC cites the verification report which notes

that "Company officials indicated that in Mexico, CDC performs significant direct advertising."

*Department's Position*

We disagree with CDC. The Department normally considers direct expenses as expenses that result from, and bear a direct relationship to, the particular sale in question. In the instant review, the advertising at issue is associated with sales of subject and non-subject cement and promotes the overall corporate image of CDC. Therefore, consistent with prior Departmental practice, we have treated these expenses as indirect selling expenses in the home market and have not adjusted NV for these expenses except to the extent that these expenses are included in the CEP offset.

**Calculation of Export Price and Constructed Export Price****CEP Profit Calculation***Comment 20*

Petitioner argues that the Department failed to include home market indirect selling expenses and inventory carrying costs that were incurred on sales to the United States in "total United States expenses" for purposes of calculating CEP profit. Petitioner argues that these expenses (DINDIRSU and DINVCARU) should be deducted from the CEP. (See Comment 8). Therefore, any expense properly deducted from CEP should also be included in "total United States expenses" for the calculation of CEP profit.

CEMEX and CDC rebut petitioner's argument that DINDIRSU and DINVCARU should be included in total U.S. expenses to calculate CEP profit. They argue that because these expenses are not deducted from CEP, they should not be included in the total U.S. expenses when calculating CEP profit. Furthermore, CDC and CEMEX argue that the Department made an error in creating a formula for calculating the CEP ratio. Specifically, they argue that the Department should not have subtracted Foreign Inventory Carrying Costs (DINVCARU) from U.S. direct selling expenses (DIREXPU) for the CEP ratio calculation because the direct selling expenses did not originally include these expenses.

*Department's Position*

The Department agrees in part with petitioner. As these expenses are not associated with economic activities in the United States, they have not been deducted from CEP and they should not be included in "total United States expenses" for purposes of calculating

CEP profit. CEP profit is calculated based on the total revenue and total actual expenses incurred in making the sale to the unaffiliated purchaser in the U.S. market. Therefore, consistent with recent developments in the Department's methodology, we have included the variable DINDIRSU in the calculation of CEP profit. However, neither inventory carrying costs (DINVCARU), nor U.S. imputed credit (CREDITU) are included in the calculation, as these are imputed expenses and by definition not actual expense. We additionally agree that DINVCARU should not be subtracted from DIREXPU in the CEP ratio calculation and have corrected this in the final results.

#### Comment 21

CEMEX and CDC further argue that the Department should include the costs associated with further manufactured sales in the CEP ratio calculation. They argue that the Department calculated total U.S. revenue using all U.S. sales, including further manufactured sales. However, in calculating total U.S. expenses, the Department did not include the costs associated with further manufacturing (FURMANU, INDIRS2U and USOTREU). CEMEX additionally argues that the Department should have included sales to affiliated parties that failed the arm's length test in the calculation of CEP profit. CEMEX argues that the SAA directs the Department to include all production and selling expenses incurred for sales of subject merchandise in the U.S. and sales of the foreign like product in the exporting country.

Petitioner counters that the Department's treatment of further manufacturing expenses for purposes of calculating CEP profit was correct. Despite CEMEX's and CDC's argument that the Department should have included transportation expenses and indirect selling expenses related to further manufactured sales in calculating CEP profit, petitioner argues that the Department made a reasonable choice in this matter. Petitioner also argues that the Department need not consider respondent's argument that the Department should have included further manufacturing costs in the CEP ratio calculation. In response to CEMEX's argument that sales failing the arm's length test should be included in the calculation of CEP profit, petitioner notes that the Department rejected CEMEX's argument in the final results of the prior administrative review. *Gray Portland Cement and Clinker From Mexico*, 62 FR 24414, 24414-15 (1997).

#### Department's Position

We agree with CEMEX and CDC. Consistent with the Department's discussion of CEP profit above, we have included those CEP expenses associated with further manufactured sales in our calculation of CEP profit. The variable FURMANU has been included in the calculation of CEP profit in the variable SELLEXP. However, we disagree that sales failing the arm's length test should be included in the calculation of CEP profit. See *Gray Portland Cement and Clinker from Mexico*, 62 FR 244414, 244415 (1997).

#### Financing Cash Deposits

##### Comment 22

Petitioner argues that the Department erroneously allowed CDC an offset to U.S. indirect selling expenses for the cost of financing antidumping cash deposits. CDC's claimed offset should be denied because (1) while the Department has allowed limited exemptions for cash deposits themselves, "[f]inancing expenses allegedly associated with cash deposits are not a direct, inevitable consequence of an antidumping order," and (2) CDC's claim is based on imputed, not actual, financing expenses.

CDC counters that the Department's allowance of an offset for the cost of financing antidumping cash deposits is in accordance with past practice and judicial precedence. CDC cites *AFBs from Japan*, and the December 3, 1997 CIT decision in which the court remanded to the Department a decision to deny the offset (*Timken Co. v. United States*). CDC further argues that the Department has in the past allowed the adjustment regardless of how it is financed.

#### Department's Position

We agree with petitioner that we should deny an adjustment to CDC's U.S. indirect selling expenses for imputed expenses which CDC claims are related to financing of cash deposits. The statute does not contain a precise definition of what constitutes a selling expense. Instead, Congress has given the Department discretion in this area. It is a matter of policy whether we consider there to be any financing expenses associated with cash deposits.

The Department has long maintained, and continues to maintain, that antidumping duties, and cash deposits of antidumping duties, are not expenses that should be deducted from U.S. price. To do so would involve a circular logic that could result in an unending spiral of deductions for an amount that is intended to represent the actual offset

for the dumping. See, e.g., *Antifriction Bearings (Other than Tapered Roller Bearings) & Parts from France*, et al., 62 FR 54043 (1997). We have also declined to deduct legal fees associated with participation in an antidumping case, reasoning that such expenses are incurred solely as a result of the existence of the antidumping duty order. *Id.* Underlying the logic in both these instances is an attempt to distinguish between business expenses that arise from economic activities in the United States and business expenses that are direct, inevitable consequences of the dumping order. Financial expenses allegedly associated with cash deposits are not a direct, inevitable consequence of an antidumping order.

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

In a different context, we have made similar observations. For example, we stated that "debt is fungible and corporations can shift debt and its related expenses toward or away from subsidiaries in order to manage profit" (see *Ferrosilicon from Brazil*, 61 FR 59407, 59412 (1996) (regarding whether the Department should allocate debt to specific divisions of a corporation)).

So, while under the statute we may allow a limited exemption from deductions from U.S. price for cash deposits themselves and legal fees associated with participation in dumping cases, we do not see a sound basis for extending this exemption to financing expenses allegedly associated with financing cash deposits. By the same token, for the reasons stated above, we would not allow an offset for financing the payment of legal fees associated with participation in a dumping case.

We see no merit to the argument that, since we do not deduct cash deposits from U.S. price, we should also not deduct financing expenses that are

arbitrarily associated with cash deposits. To draw an analogy as to why this logic is flawed, we also do not deduct corporate taxes from U.S. price; however, we would not consider a reduction in selling expenses to reflect financing alleged to be associated with payment of such taxes.

Finally, we also determine that we should not use an imputed amount that would theoretically be associated with financing of cash deposits. There is no real opportunity cost associated with cash deposits when the paying of such deposits is a precondition for doing business in the United States. Like taxes, rent, and salaries, cash deposits are simply a financial obligation of doing business. Companies cannot choose not to pay cash deposits if they want to import nor can they dictate the terms, conditions, or timing of such payments. By contrast, we impute credit and inventory carrying costs when companies do not show an actual expense in their records because companies have it within their discretion to provide different payment terms to different customers and to hold different inventory balances for different markets. We impute costs in these circumstances as a means of comparing different conditions of sale in different markets. Thus, our policy on imputed expenses is consistent; under this policy, the imputation of financing costs to actual expenses is inappropriate.

#### Other Issues

##### Comment 23

CEMEX argues that the Department failed to use the actual daily exchange rates as published by the Federal Reserve Board in New York, but rather used the rates from the Department's exchange rate model. CEMEX argues that this is inconsistent with the determination in the final results of the fifth review which stated that the exchange rate model is not suitable for use with hyper inflationary economies, and the daily rate should be used unless there is compelling evidence that a fluctuation or sustained movement in the currencies value has occurred.

Petitioner maintains that the Department did not err in its choice of exchange rates. Use of the exchange rate model was correct since the Mexican economy was not hyper-inflationary during the sixth review POR.

##### Department's Position

We agree with CEMEX that the Department should use actual daily exchange rates. For the final results of review, we have used the daily exchange rates as provided by Dow

Jones Business Information Services. The Department's new regulations at section 351.415 state: "this exchange rate model is not suitable for use with hyper-inflationary currencies. In these cases, we intend to use the daily rate absent compelling evidence that a fluctuation or sustained movement in the currency's value has occurred." As stated in our preliminary results of review, the Department found that based on the information on the record of this review, the annual inflation rate in Mexico during the POR exceeded 40 percent. Therefore, consistent with our prior practice, we limited our comparisons to sales in the same month, to avoid any distortions caused by the effects of inflation in the reported prices. However, in our preliminary results of review, the Department inadvertently failed to use the actual daily exchange rates as directed by the Department's exchange rate methodology (see *Change in Policy Regarding Currency Conversions* (61 FR 9434, March 8, 1996)). Thus, the actual daily exchange rate has been used in the final results for all currency conversion during the POR.

##### Comment 24

Petitioner claims that the Department made a programming error which granted a CEP offset to NV on EP sales.

CDC rebuts this argument by pointing out that although the margin calculation program appears to deduct OFFSETH from EP sale, the program has defined this value as zero for EP sales.

##### Department's Position

We agree with CDC that the variable OFFSETH was set to zero for EP sales in the preliminary results. Therefore, no CEP offset was granted on EP sales. However, in order to ensure that the final programming is more transparent, the Department has removed this language from the final results of review.

##### Comment 25

Petitioner claims that the Department made the following errors in the computer program: (1) the Department failed to exclude sales of Type I cement produced by the CEMEX plant at Campana from the calculation of NV by referencing an incorrect plant code in the arm's length test and the margin calculation program; (2) the Department failed to exclude non-arm's length sales to affiliated parties in the margin calculation program due to a programming error; and (3) the Department incorrectly calculated CEMEX's U.S. credit expense by

misplacing a decimal point in the calculation.

##### Department's Position

The Department agrees with these contentions and has included the appropriate corrections in the final results. See Final Analysis Memorandum dated March 9, 1998 located in room B099 of the Department's main building. In addition, the **Federal Register** notice for the preliminary results of this review (62 FR 47626) stated that indirect selling expenses incurred in the home market were deducted from gross unit price to determine net prices in the arm's length test. In fact, these were not deducted from the calculation.

##### Final Results of Review

As a result of this review, we have determined that the following margins exist for the period August 1, 1995, through July 31, 1996:

Company	Margin percentage
CEMEX, S.A. ....	36.30

The Department shall determine, and the U.S. Customs Service shall assess, antidumping duties on all appropriate entries. The Department shall issue appraisal instructions directly to the Customs Service. For assessment purposes, we have calculated importer-specific duty assessment rates for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales during the POR to the total entered value of sales examined during the POR. Individual differences between U.S. price and normal value may vary from the percentages stated above. As a result of this review, we have determined that the importer-specific duty assessments rates are necessary.

Furthermore, the following deposit requirements shall be effective upon publication of this notice of final results of review for all shipments of gray portland cement and clinker from Mexico, entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Tariff Act: (1) the cash deposit rate for the reviewed company will be the rate stated above; (2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in these reviews, or the original LTFV investigations, but the manufacturer is, the cash deposit rate

will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in these reviews, the cash deposit rate for this case will continue to be 61.85 percent, which was the "all others" rates in the LTFV investigations. See *Final Determination of Sales at Less Than Fair Value: Gray Portland Cement and Clinker from Mexico*, 55 FR 29244, (1990).

The deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative reviews.

This notice serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with section 353.34(d) of the Department's regulations. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and section 353.22 of the Department's regulations.

Dated: March 9, 1998.

**Robert S. LaRussa,**

*Assistant Secretary for Import Administration.*

[FR Doc. 98-6714 Filed 3-13-98; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

#### Export Trade Certificate of Review

**ACTION:** Notice of application to amend certificate.

**SUMMARY:** The Office of Export Trading Company Affairs ("OETCA"), International Trade Administration, Department of Commerce, has received an application to amend an Export

Trade Certificate of Review. This notice summarizes the proposed amendment and requests comments relevant to whether the amended Certificate should be issued.

#### FOR FURTHER INFORMATION CONTACT:

Morton Schnabel, Acting Director, Office of Export Trading Company Affairs, International Trade Administration, (202) 482-5131. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:** Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001-21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. A Certificate of Review protects the holder and the members identified in the Certificate from state and federal government antitrust actions and from private, treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Act and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

#### Request for Public Comments

Interested parties may submit written comments relevant to the determination whether an amended Certificate should be issued. If the comments include any privileged or confidential business information, it must be clearly marked and a nonconfidential version of the comments (identified as such) should be included. Any comments not marked privileged or confidential business information will be deemed to be nonconfidential. An original and five copies, plus two copies of the nonconfidential version, should be submitted no later than 20 days after the date of this notice to: Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, Room 1800H, Washington, D.C. 20230. Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). However, nonconfidential versions of the comments will be made available to the applicant if necessary for determining whether or not to issue the Certificate. Comments should refer to this application as "Export Trade Certificate of Review, application number 88-8A016."

Wood Machinery Manufacturers of America's ("WMMA") original Certificate was issued on February 3, 1989 (54 FR 6312, February 9, 1989) and previously amended on June 22, 1990

(55 FR 27292, July 2, 1990); August 20, 1991 (56 FR 42596, August 28, 1991); and December 13, 1993 (58 FR 66344, December 20, 1993); August 23, 1994 (59 FR 44408, August 29, 1994); September 20, 1996 (61 FR 50471); and June 20, 1997 (62 FR 34440, June 26, 1997). A summary of the application for an amendment follows.

#### *Summary of the Application:*

*Applicant:* Wood Machinery Manufacturers of America, 1900 Arch Street, Philadelphia, Pennsylvania 19103-1498.

*Contact:* Harold R. Zassenhaus, Export Director, Telephone: (301) 652-0693.

*Application No.:* 88-8A016.

*Date Deemed Submitted:* March 10, 1998.

*Proposed Amendment:* WMMA seeks to amend its Certificate to:

1. Add the following company as a new "Member" of the Certificate within the meaning of section 325.2(1) of the Regulations (15 CFR 325.2(1)): Terrco Inc., Waterloo, South Dakota; and
2. Delete L.R.H. Enterprises, Inc., Van Nuys, California; and Wood-Mizer Products, Indianapolis, Indiana as "Members" of the Certificate.

Dated: March 11, 1998.

**Morton Schnabel,**

*Acting Director, Office of Export Trading Company Affairs.*

[FR Doc. 98-6657 Filed 3-13-98; 8:45 am]

BILLING CODE 3510-DR-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[I.D. 031098B]

#### Gulf of Mexico Fishery Management Council; Public Meetings

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of public meetings.

**SUMMARY:** The Gulf of Mexico Fishery Management Council (Council) will convene public meetings of its Special Crustacean and Finfish Stock Assessment Panels (SAP).

**DATES:** A meeting of the Crustacean SAP will be held beginning at 8:00 a.m. on Monday, March 30, and will conclude by 11:00 a.m. on Wednesday, April 1, 1998. A meeting of the Finfish SAP will be held beginning at 1:00 p.m. on Monday, April 6, 1998, and will conclude by 5:00 p.m. on Thursday, April 9, 1998.