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Gray Portland Cement and Clinker from Mexico
Final Results of the Seventh Antidumping Administrative Review
Secretariat File No. USA-MEX-99-1904-03 (May 30, 2002)

FINAL RESULTS OF REDETERMINATION PURSUANT TO NAFTA PANEL

SUMMARY

The Department of Commerce has prepared these final results of redetermination pursuant to the remand order from the Article 1904 Binational Panel in Gray Portland Cement and Clinker from Mexico; Final Results of the Seventh Antidumping Administrative Review, Secretariat File No. USA-MEX-99-1904-03 (May 30, 2002). In accordance with the Article 1904 Binational Panel's instructions, we have 1) determined that CEMEX's sales of Type V cement sold as Type I cement were made in the ordinary course of trade, 2) explained the basis of our decision to assess duties on merchandise destined for consumption outside the region, with particular reference to the requirements of the U.S. Constitution, 3) found that bag and bulk cement are identical products and that they are sold at the same level of trade, 4) segregated U.S. terminal expenses from CDC's and CEMEX's reported indirect selling expenses and treated them as warehousing (*i.e.*, movement) expenses, 5) classified CEMEX's home-market warehousing expenses as movement expenses and deducted them from normal value, 6) treated CDC's reported export-price sales as constructed-export-price sales, 7) set the amount of the difference-in-merchandise adjustment for CEMEX's sales to zero, and 8) explained our decision to allow CEMEX an adjustment for home-market freight expenses. These changes resulted in a weighted-average margin of 48.05 percent for CEMEX, S.A. de C.V., and Cementos de Chihuahua, S.A. de C.V., for the period August 1, 1996, through July 31, 1997.

BACKGROUND

On May 30, 2002, the Article 1904 Binational Panel (the Panel) issued an order in Gray Portland Cement and Clinker from Mexico; Final Results of the Seventh Antidumping Administrative Review, Secretariat File No. USA-MEX-99-1904-03 (May 30, 2002) (Remand Order), remanding to the Department of Commerce (the Department) the final results in Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review, 64 FR 13148 (March 17, 1999) (Final Results). In the Remand Order, the Panel instructed the Department to do the following: 1) explain why its findings regarding the difference in freight costs, the relative profit levels, the number and type of customers, and the disparity in handling charges support the Department's determination that sales of Type V cement sold as Type I cement were outside the ordinary course of trade, 2) explain the basis of its decision to assess duties on merchandise destined for consumption outside the region, with particular reference to the requirements of the U.S. Constitution, 3) reconsider its decision that sales by CEMEX, S.A. de C.V. (CEMEX), of bag and bulk cement should be classified as the same like product and that sales of CEMEX's bag and bulk cement were made at the same level of trade, 4) reconsider its decision to treat U.S. warehousing expenses of CEMEX and Cementos de Chihuahua, S.A. de C.V. (CDC), as indirect selling expenses, 5) make the appropriate adjustment to normal value for CEMEX's home-market pre-sale warehousing expenses, 6) reconsider its decision to treat CDC's sales to unaffiliated U.S. customers as indirect export-price (EP) sales instead of constructed-export-price (CEP) sales in light of the decision of the Court of Appeals for the Federal Circuit (CAFC) in AK Steel Corp. v. United States, 226 F.3d 1361 (2000), 7) correct errors it made in its calculation of the difference-in-merchandise (DIFMER)

adjustment and explain its DIFMER decision further, and 8) explain further its decision to allow CEMEX an adjustment for home-market freight expenses. This remand affects CEMEX and CDC with respect to the administrative review of the antidumping duty order on gray portland cement and clinker from Mexico for the period August 1, 1996, through July 31, 1997.

On August 8, 2002, we issued our Draft Results of Redetermination Pursuant to NAFTA Panel for Gray Portland Cement and Clinker from Mexico; Final Results of the Seventh Antidumping Administrative Review, Secretariat File No. USA-MEX-99-1904-03 (May 30, 2002) (Draft Results), to interested parties for comment. On August 15, 2002, CEMEX, CDC, and the Southern Tier Cement Committee (STCC), the petitioner, submitted comments with regard to the Draft Results and all parties presented rebuttal briefs on September 3, 2002.

DISCUSSION

Treatment of Type V Cement

In the Final Results, we determined that CEMEX's sales of Type V cement sold as Type I cement were outside the ordinary course of trade. We made this determination on the basis of the following factors: 1) the sales volume of Type V cement sold as Type I cement was small in comparison to total sales of Type I cement; 2) the freight costs for Type V cement sold as Type I cement were different from the average freight costs of Type I cement; 3) there was a disparity in profitability between sales of Type I cement and sales of Type V cement sold as Type I cement; 4) the number and type of customers purchasing Type V cement sold as Type I cement were substantially different from customers purchasing Type I cement; 5) there were differences in handling charges between sales of Type I cement and sales of Type V cement sold as Type I cement.

The Panel found that the record supports the Department's finding with regard to the disparity in sales volume. The Panel found that the Department did not adequately explain its findings, however, with regard to the other four factors the Department cited in determining that sales of Type V cement sold as Type I cement were outside the ordinary course of trade. Moreover, the Panel found that the Department did not explain the relevance of the factors adequately in its ordinary-course-of-trade determination. The Panel remanded the review to the Department to explain why the findings it made regarding the difference in freight costs, the relative profit levels, the number and type of customers, and the disparity in handling charges support the agency's determination that sales of Type V cement sold as Type I cement were outside the ordinary course of trade.

We have reconsidered our decision with regard to CEMEX's sales of Type V cement sold as Type I cement and now determine that such sales were made in the ordinary course of trade. Upon reexamining the record, we find that the only factor we cited that would support our finding of sales outside the ordinary course of trade in this instance is the disparity in sales volume. We address our reconsideration of the other factors in turn.

First, with respect to the number and type of customers, although Type V cement sold as Type I cement was sold to significantly fewer customers than was Type I cement, an analysis of CEMEX's home-market sales database revealed that CEMEX sold both types of cement to the same types of customers. The fact that Type V cement sold as Type I cement is sold to fewer customers than is Type I is unremarkable given that CEMEX sold substantially less Type V as Type I than it did Type I. Furthermore, the types of customers to which CEMEX sold the two types of cement (i.e., end-users, distributors, and ready-mixers) are largely the same. In fact,

except for the fact that CEMEX sold Type I cement but did not sell Type V sold as Type I cement to [* * *], CEMEX sold Type V as Type I to the same types of customers as of sales of Type I. Notably, we did not use sales to [* * *] in our normal-value calculations. Because the types of customers are essentially the same, we find this factor does not indicate any meaningful departure from the usual conditions and practices of CEMEX's home-market sales of Type I cement. Therefore, this factor does not indicate that the sales in question are outside the ordinary course of trade.

Second, as the Panel noted, and as we stated in our Ordinary Course of Trade Memorandum dated August 31, 1998 (OCT Memorandum), at page 9, the levels of profitability between the two types of cement were comparable ([* * *] percent for Type V cement sold as Type I cement versus [* * *] percent for Type I cement). Thus, with regard to Type V cement sold as Type I cement, we find that the profitability of sales of Type V cement sold as Type I cement does not indicate any meaningful departure from the usual conditions and practices of CEMEX's home-market sales of Type I cement. Therefore, this factor does not indicate that the sales in question are outside the ordinary course of trade.

Finally, we have reconsidered the relevance of freight and handling charges in the context of this review. While these charges differed for the two types of cement, because profit is calculated by subtracting costs from revenue, the net effect of the difference is ultimately reflected in the profitability of the two types of cement. Because we have already analyzed the profit issue and, as explained above, found the profit levels to be comparable, we conclude that whatever differences exist in freight or handling charges do not indicate that the sales in question are outside the ordinary course of trade.

Thus, the only significant difference in the circumstances surrounding the sales of Type V cement sold as Type I cement and sales of Type I cement is that CEMEX sold substantially less Type V cement as Type I than it sold Type I as Type I. This difference in quantities sold is an insufficient basis, however, for us to conclude that Type V cement sold as Type I cement was sold outside the ordinary course of trade. Therefore, for these remand results, we have included CEMEX's reported sales of Type V cement sold as Type I cement in our normal-value calculations.

Comment 1: STCC argues that the Department should find that CEMEX's sales of Type V cement sold as Type I cement were outside the ordinary course of trade. STCC argues that, because CEMEX did not report usable data for cement produced at the Hidalgo plant, which produced Type V cement as well as Type I cement, the Department cannot analyze the impact of the missing Hidalgo sales on its ordinary-course-of-trade determination. Thus, STCC contends, for this reason alone, the Department cannot meaningfully determine that CEMEX's sales of Type V cement sold as Type I cement were made in the ordinary course of trade.

STCC also argues that, in its determination for the Draft Results, the Department improperly disregarded the key factor in its decision that these sales were made outside the ordinary course of trade for the Final Results. According to STCC, the key factor in the Department's decision for the Final Results was the fact that selling cement in Mexico meeting one ASTM standard as cement meeting a lower ASTM standard was not the ordinary practice in the industry. STCC contends that there is no home-market demand for cement sold as Type I but produced as Type V and that sales of such cement constituted overruns of cement produced for export. STCC asserts that the Department's omission of this finding in its discussion is

disturbing because it was the linchpin of its original determination in the Final Results.

According to STCC, the fact that only the Hermosillo plants followed the practice of selling cement produced as one type of cement as another type of cement is by itself conclusive evidence that these sales were not normal industry practice and thus not representative of CEMEX's home-market cement sales.

With regard to the number and type of customers, STCC argues that the Department's decision in the Draft Results is at odds with the Department's longstanding practice. Citing Circular Welded Non-Alloy Steel Pipe from the Republic of Korea, 62 FR 36761, 36762 (1997), Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 63 FR 18404, 18437 (1997), and Indian Pipes and Tubes, 56 FR at 64755, STCC asserts that the Department has repeatedly relied on the fact that there are only a limited number of customers for the sales at issue in determining that those sales are outside the ordinary course of trade. STCC contends that the Department's conclusion regarding the number and types of customers does not reflect the record evidence documenting the considerable differences in customers for the two products, including the facts that CEMEX sold a [* * *] percentage of Type V as Type I to affiliated customers than it did of Type I cement, it sold nearly [* * *], it sold such cement primarily to customers purchasing [* * *], CEMEX made no [* * *] sales of such cement, its customers for such cement were unusually concentrated in only a few locations, and purchasers of such cement bought [* * *] than purchasers of Type I cement.

With respect to profitability, STCC asserts that the Department's description of the profitability as "comparable" in the OCT Memorandum was obviously a typographical error. STCC also argues, in light of the fact that Type V cement sold as Type I cement was sold and

invoiced as the same merchandise as Type I cement, the existence of any difference in profitability is significant. STCC contends that the Department's decision in the Draft Results is at odds with its finding in the 1995-96 review, where the Department cited a smaller difference in profitability than in the current review as a reason for finding sales of Type II cement as outside the ordinary course of trade.

With regard to freight costs, STCC argues that the Department's finding improperly dismisses the relevance of any factor with respect to sales outside the ordinary course of trade if the factor reflects a cost that is taken into account in determining profit. STCC contends that a condition that results in a cost to a respondent unrepresentative of normal conditions or practices is indicative of sales outside the ordinary course of trade independent of its impact on profitability. STCC also asserts that the Department's reasoning is inconsistent with its prior decisions regarding sales outside the ordinary course of trade under the Mexican cement antidumping duty order and that the relevance of freight expenses was affirmed in CEMEX, S.A. v. United States, 133 F.3d 897, 901 (Federal Circuit 1998), and Gray Portland Cement and Clinker from Mexico, Secretariat No. 97-1904-01 (June 18, 1999) (fifth review panel decision), at 61.

STCC also argues that Type V cement sold as Type I has a [* * *] than Type V cement sold as Type V cement, that CEMEX's sales of Type V cement sold as Type I were small in comparison with its sales of Type I cement, that sales of Type V cement as Type I cement account for a small percentage of CEMEX's production of Type V cement, and that the handling charges and rebates for CEMEX's sales of Type V cement sold as Type I cement were unusual.

For all these reasons, STCC argues, the Department must find that CEMEX's sales of Type V cement as Type I cement were made outside the ordinary course of trade.

CEMEX and CDC argue that the Department's determination that sales of Type V sold as Type I cement were made in the ordinary course of trade is proper and supported by the record.

Citing Monsato Co. v. United States, 698 F. Supp. 275, 278 (CIT 1988), CEMEX contends that precedent makes clear that the term "ordinary course of trade" refers to "ordinary" in the commercial sense and that 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.

CEMEX contends that the Department correctly found that the CEMEX sold both Type I and Type V sold as Type I to the same type of customers and that the fact that there were fewer customers was not unusual. CEMEX also asserts that the number of customers was not the dispositive factor in finding sales outside the ordinary course of trade in the cases cited by STCC. Rather, according to CEMEX, it is one of several factors the Department examines. CEMEX also argues that STCC creates artificial customer types in order to find distinctions without explaining why such distinctions are relevant.

CEMEX contends that STCC gives no reason why it is not logical to conclude that the mention of profit is the error rather than the alleged dropping of the word "not." CEMEX asserts that a more detailed analysis than the one the Department performed reveals that the profits on sales of Type V sold as Type I are even more similar to profits on sales of Type I cement than the Department's analysis indicated.

CEMEX contends further that the Department correctly recognized that taking freight and handling charges into account as an independent factor would in fact be double-counting that factor, since the charges are already taken into account with regard to profitability. CEMEX also asserts the Department was correct in determining that a difference in total sales volumes was an insufficient basis upon which to find that the sales were outside the ordinary course of trade.

Department's Position: When reaching an ordinary-course-of-trade determination, our inquiry is far-reaching and fact-specific. We must evaluate not just “one factor taken in isolation but rather ... all the circumstances particular to the sales in question.” CEMEX v. United States, 133 F.3d at 900, quoting Murata Mfr. Co. v. United States, 820 F. Supp. 603, 607 (CIT 1993) (quoting Certain Welded Carbon Steel Standard Pipes and Tubes from India, 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 whether sales are being made for “unusual reasons” or under “unusual circumstances.” Electrolytic Manganese Dioxide from Japan, 58 FR 28551, 28552 (1993).

We understand that the purpose of the ordinary-course-of-trade provision is to prevent dumping margins from being calculated on the basis of sales which are not representative of the comparison market. Therefore, when we examine sales to ascertain whether they were made in the ordinary course of trade, we examine them with a view as to whether such sales would constitute appropriate sales on which to base normal value. Thus, the point of the exercise is not merely to catalog whatever differences may exist, but to determine whether the differences that

exist are substantial, such that the sales in question cannot be said to be representative of “normal” home-market sales. Pursuant to the Panel’s order, in this final redetermination, we have re-examined sales of Type V cement sold as Type I cement and have determined that, although there were differences in the circumstances surrounding these sales compared to sales of Type I cement, such differences were insufficient, based on the totality of the facts of this case, for a finding that the sales were made outside the ordinary course of trade.

We disagree with STCC that the fact that we had no usable data for cement produced at the Hidalgo plant prevents us from finding that the Hermosillo sales in question were in the ordinary course of trade. When we make a determination whether a set of sales are in the ordinary course of trade, we do not begin from a presumption that the sales are or are not in the ordinary course of trade. Thus, if we took STCC’s comment to heart, we could not decide one way or the other whether the Hermosillo sales were made in the ordinary course of trade. Therefore, in order to make a determination with regard to sales of Hermosillo plant, we conducted our analysis in the OCT Memorandum without regard to sales of Hidalgo plant cement. Indeed, the reason we mention the Hidalgo plant in the footnote on page 1 of the OCT Memorandum is to make clear that we were examining the Hermosillo plant sales in isolation from Hidalgo plant sales.

With regard to STCC’s contention that we ignored the “key factor” in our decision in the OCT Memorandum, we did not ignore it at all. The practice of producing one type of cement and selling it as another certainly appears to be an unusual circumstance and is definitely grounds for our examining such sales in closer detail in order to ascertain whether the sales were made in the ordinary course of trade. Thus, the mere fact we are examining these sales demonstrates that

we are not ignoring this fact. However, it is possible that some circumstances surrounding a set of sales can be unusual and yet the sales are made in the ordinary course of trade. For example, in a case where a respondent makes a number of sample sales, we could find that the sample sales are made in the ordinary course of trade because that circumstance does not in and of itself mean that the sales are necessarily not representative of the comparison market without additional evidence. It is unlikely that any single factor would lead to a finding that sales were outside the ordinary course of trade. In this case, we examined these apparently unusual sales and, as described above, other than the fact that such sales constitute a substantially smaller proportion of home-market sales, we found no significant differences between sales of Type V sold as Type I cement and sales of Type I cement. This is the basis for our finding that these sales were made in the ordinary course of trade.

It is important to recognize that the cement produced at the Hermosillo plants is produced at a location where the limestone and clay are such that the cement produced naturally meets the specifications for Type V cement using the same production process CEMEX used to produce Type I cement at other plants. See the affidavit of German Fraustro Velhagen in CEMEX's December 24, 1997, submission and CEMEX's May 8, 1998, submission at page 25. Because CEMEX was able to produce Type V cement at the Hermosillo plants without incurring additional expenses, it is not surprising that it would sell this cement as Type I. Furthermore, while the cement sold as Type II or Type V were sold to niche markets, cement sold as Type I was sold as the same type as the cement normally purchased by Mexican customers.

We also disagree with STCC's characterization of these sales as overruns. First, STCC cited no record evidence demonstrating that such cement constituted overruns. Rather, STCC

based its argument purely on speculation based on the quantities of cement sold. Second, although the sales of Type V sold as Type I cement were small in proportion to sales of Type I cement, CEMEX sold [* * *] metric tons of such cement, which, while small, is not an insignificant quantity such that the sales of the cement in question were necessarily overruns on production destined for a foreign market.

While it is true that the number and types of customers are important considerations when making an ordinary-course-of-trade determination, as we explained above, we found that the differences in the number and types of customers were not extraordinary. First, there are indeed fewer customers for Type V sold as Type I cement than for Type I cement. Because there are fewer sales of Type V sold as Type I cement than sales of Type I cement, however, we expect that there would be fewer customers. Furthermore, and importantly, we found that CEMEX largely sold both types of cement to the same types of customers (i.e., end-users, distributors, and ready-mixers). To counter our finding, STCC has enumerated a list of distinctions between the customers of the two types of cement. STCC has not explained, however, how or why these distinctions render the sales of Type V sold as Type I to be an inappropriate basis for normal value. For example, STCC asserts that CEMEX sold a [* * *] percentage of Type V as Type I cement to affiliates than it did of Type I cement. STCC does not explain, however, why this would warrant our finding that CEMEX sells the different types of cement to different customers given that CEMEX does, in fact, sell both types of cement to affiliated and unaffiliated customers. Because we test the arm's-length nature of affiliated-party sales, we do not see why the proportion of sales between affiliated and unaffiliated parties is important.

STCC asserts that, because there were [* * *] cement of Type V sold as Type I, the types of customers are different. This is contrary to our finding, however, that bagged and bulk cement are sold to the same types of customers. (See the “Bag and Bulk Cement” section, below.) In fact, STCC supported our finding that bagged and bulk cement are sold to the same types of customers in its comments with regard to the issue of whether bagged and bulk cement were the same foreign like product (see page 41 of its August 15, 2002, case brief).

STCC also asserts that the fact that Type V sold as Type I is primarily sold in [* * *] than Type I cement suggests that the two types of cement are sold to different customers, but STCC does not explain how this makes the types of customers different. Given that [* * *] of the sales of Type V sold as Type I were sold in [* * *] form, we find it is not surprising that the average quantities for such cement are [* * *] than sales of [* * *] cement. Furthermore, STCC’s assertion that the customers of Type V sold as Type I primarily purchase [* * *] of cement than customers of Type I cement would appear to follow from the fact that Type V sold as Type I is primarily sold in [* * *] than Type I cement. Also, with regard to STCC’s contention that the customers for Type V cement were concentrated in a few locations, we find this to be unremarkable, given the fact that there are fewer customers and significantly fewer sales of Type V sold as Type I cement. Again, STCC does not explain how this makes the types of customers different. Therefore, we are unconvinced by STCC’s arguments that the types of customers for Type V sold as Type I cement vary significantly from the types of customers for Type I cement.

With regard to profitability, we examined the record and conclude that the profit for Type V sold as Type I is comparable to the profit for Type I cement. While it is true, as STCC

contends, that the absolute percentage difference in profit between the two types of cement is rather large, the profit realized on both types of cement is [* * *]. Also, while the absolute percentage difference in profit between the two types of cement is larger than the difference we cited as a reason for finding sales to be outside the ordinary course of trade in the 1995-96 administrative review, the profits realized on the two types of cement we compared in that review were [* * *] of the profits realized on the two types of cement at issue in this review. See Volume 3 of CEMEX's May 20, 1998, submission placing information from previous administrative reviews on the record at page 5 of exhibit C4. Thus, the relative difference in profit between the types of cement compared in the 1995-96 review is higher than the relative difference in profit between the types of cement at issue in this review.

Furthermore, profitability can vary due to a number of factors, such as whether the sale occurs early or late in the period of review. The important thing is whether the difference that does exist is substantial enough to render the sales in question unrepresentative of the home market and, therefore, an inappropriate basis for normal value. In this review, based on our examination of the totality of circumstances, we find this is not the case with regard to Type V sold as Type I cement. Furthermore, our examination of CEMEX's home-market sales suggests that some individual plants that produced Type I cement realized average profits lower than those realized by the Hermosillo plants. Thus, the profits realized on sales of cement produced at the Hermosillo plants do not appear unusual.

With regard to freight expenses, handling expenses, and rebates, we do not mean to imply that expenses can never be a consideration in an ordinary-course-of-trade determination. We recognize, however, that profits and expenses are interrelated. Because profit is calculated by

subtracting expenses from revenue, differences in profitability are dependent on differences in expenses and prices. Moreover, CEMEX's home-market sales database reveals that the prices of Type V sold as Type I cement and of Type I cement are also similar. The average price of Type V sold as Type I cement is approximately [* * *] than the average price of Type I cement. Thus, although the expenses for Type V sold as Type I are [* * *] than the expenses for Type I cement, the net effect of the differences in expenses is relatively small because the prices and profit for Type V sold as Type I are comparable to the prices and profit for Type I cement. Thus, we find that the differences that exist in the freight expenses, the handling charges, and rebates incurred on the two types of sales are not so great as to render the sales of Type V sold a Type I an inappropriate basis for comparison. Accordingly, we do not find these differences to be relevant to our ordinary-course-of-trade determination in this case.

Finally, STCC argues that Type V cement sold as Type I has a [* * *] commercial value than Type V cement sold as Type V cement. Given the fact that we determined that sales of Type V cement sold as Type V cement were made outside the ordinary course of trade, a decision upheld by the Panel, this argument does not appear to be particularly relevant. In any event, as we mentioned above, CEMEX does not incur additional costs to produce cement as Type V cement compared to its costs to produce Type I cement at other plants. Thus, notwithstanding the [* * *] difference in prices, we do not find it all that unusual that CEMEX would sell such cement as a product that generally has a [* * *] price, especially in light of the fact that CEMEX earned a [* * *].

As stated above, we found that the only factor we cited in the OCT Memorandum that would support a finding that the sales were outside the ordinary course of trade was the fact that

CEMEX sold substantially less Type V cement as Type I than it sold of Type I. We continue to find this an insufficient basis, in and of itself, to find that such sales were made outside the ordinary course of trade. Accordingly, we have used CEMEX's reported sales of Type V sold as Type I in our normal-value calculations.

Comment 2: STCC asserts that CEMEX did not cooperate with the Department's request for information regarding sales of cement produced at the Hidalgo plant and that the Department appropriately used adverse facts available with respect to such sales in its final margin calculation for CEMEX. STCC contends, however, that the Department should have used an adverse inference for Hidalgo plant sales when it found in the Draft Results that CEMEX's sales of Type V cement sold as Type I cement were made in the ordinary course of trade. STCC argues that, if the Department continues to find that CEMEX's sales of Type V cement sold as Type I cement were made in the ordinary course of trade, the Department needs to take into account CEMEX's sales of such cement from the Hidalgo plant.

STCC observes that the Department used partial facts available instead of total facts available in the Final Results because of "the small proportion of {home-market} sales affected by CEMEX's error." Final Results, 64 FR at 13153. STCC contends that, because the Department is using home-market sales of Type V cement sold as Type I cement as the basis of normal value instead of home-market sales of Type I cement, the Hidalgo plant sales are no longer a small proportion of the home-market sales the Department uses to calculate normal value. Accordingly, the petitioners conclude, the Department should calculate CEMEX's antidumping margin on the basis of total adverse facts available. The petitioners suggest using

the highest calculated margin under the Mexican cement antidumping duty order of 109.43 percent.

Alternatively, STCC argues that, if the Department finds that total facts available is not warranted, it should base normal value for the Hidalgo sales on partial adverse facts available. STCC suggests three methods for applying such a partial adverse facts available.

CEMEX argues that the Department's decision to treat the Hidalgo sales as sales of Type I cement was not appealed to the Panel and was not remanded to the Department by the Panel. Therefore, according to CEMEX, the Department's decision in the Final Results is final and binding. CEMEX also contends that the Department's decision to treat Hidalgo sales as Type I was consistent with the administrative record because the production of non-Type I cement was inconsistent. According to CEMEX, most of the other plants that produced only Type I cement occasionally produced cement that met a higher ASTM standard but that it is relatively rare. Thus, CEMEX argues, it is proper to treat all of its Hidalgo sales as Type I sales. Finally, CEMEX contends that the Hidalgo sales of non-type I cement were outside the ordinary course of trade.

Department's Position: We agree with STCC that we did not apply adverse facts available to CEMEX's Hidalgo plant sales properly in the Draft Results. As we stated in the Final Results, "{b}ecause CEMEX provided information regarding its Hidalgo sales in an untimely manner, we were unable to verify this information. Therefore, pursuant to section 776(a)(2)(D) of the Act, we have used facts available to establish the normal value (NV) of CEMEX's Hidalgo sales in the home market. In addition, we note that the nature and timing of CEMEX's cancellation of the home-market verification the last business day before it was

scheduled to begin was unprecedented. Given CEMEX's actions, we determine that CEMEX did not act to the best of its ability to provide accurate and timely information for use in our review and therefore our use of an adverse inference is appropriate under section 776(b) of the Act. Therefore, as facts available, we substituted the highest calculated NV in this review for all HM sales of cement produced at Hidalgo.” Final Results, 64 FR at 13152-53. Moreover, the Panel upheld our determination on this matter. See the Article 1904 Binational Panel Review Pursuant to North American Free Trade Agreement in the matter of Gray Portland Cement and Clinker from Mexico; Final Results of the Seventh Antidumping Administrative Review, Secretariat File No. USA-MEX-99-1904-03 (May 30, 2002), at 66.

When we treated all Hidalgo plant sales as Type I cement for the Final Results, we did not do so as a result of hypothesizing about the likely composition of the types of cement produced at the Hidalgo plant. Rather, we did so because we calculated the normal value for CEMEX on the basis of sales of Type I cement. Thus, in order to apply an adverse inference as we intended, we had to treat the Hidalgo plant sales as the same type of cement as the reported, verified sales which we used as the basis for normal value. Thus, on remand, when we changed the basis of normal value to sales of Type V sold as Type I cement but did not do the same for the Hidalgo plant sales in the Draft Results, we inadvertently neutralized the adverse facts available we had intended to apply. This was an error on our part and we have corrected it for these final results of redetermination.

Moreover, CEMEX’s assertions that the Type V cement sold from Hidalgo constituted a small proportion of sales and were outside the ordinary course of trade are irrelevant. As we stated above, we are applying an adverse inference with regard to the Hidalgo plant sales.

Therefore, for these final results of redetermination, we have treated the Hidalgo plant sales as Type V sold as Type I cement and have included them in our normal-value calculations. In addition, in keeping with our selection of adverse facts available in the Final Results, we have substituted the highest calculated normal value in this review for all home-market sales of cement produced at Hidalgo.

Comment 3: CDC argues that the Department should compare CDC's U.S. sales of Type II cement to CEMEX's home-market sales of Type V cement sold as Type I cement. CDC contends that comparing CDC's U.S. sales to CEMEX's home-market sales is consistent with Departmental practice and that Type V cement sold as Type I cement is the most similar product match for Type II cement.

STCC argues that CDC never challenged the Department's methodology for collapsing CEMEX and CDC either during the course of the review or in its appeal to the Panel. STCC contends that, as a result, CDC has not exhausted its administrative remedies and the Department should reject its argument.

Department's Position: We have not made the change CDC suggests. For both the preliminary and final results of review, we matched CEMEX's U.S. sales to CEMEX's home-market sales and CDC's U.S. sales to CDC's home-market sales. We did not match CDC's U.S. sales to CEMEX's home-market sales of Type I cement even though it was the same type as that of CDC's home-market sales. We did not change this practice for the Draft Results.

Accordingly, our change with respect to CEMEX's Type V cement did not affect our fair-value comparisons with respect to CDC. Thus, if CDC wanted us to match its U.S. sales to CEMEX's home-market sales, it would have been proper to raise the issue during the course of the review.

The fact that we are now using a different subset of CEMEX's home-market sales as the basis for normal value for CEMEX's U.S. sales does not change this fact. Therefore, we find that CDC exhausted its entitlement to legal remedy by not raising this issue previously.

Regional Assessment

In the Final Results, we determined that, under U.S. law, in cases where issuance of an antidumping duty order is based on a regional-injury determination, we must "assess duties on all subject merchandise exported into the United States by CEMEX and CDC . . ." Final Results, at 13165. CDC challenged this determination. In challenging this determination before a NAFTA dispute resolution panel, the appropriate standard of review is whether the Department's actions were supported by substantial evidence on the record and otherwise in accordance with U.S. law. NAFTA Article 1904(2). In its challenge, however, CDC did not make a single argument that the Department's actions were inconsistent with U.S. law. CDC's sole argument was based on an argument that the Department's determination was inconsistent with the WTO antidumping agreement provisions on regional assessment and, as part of that WTO argument, that the Department was not prevented by the U.S. Constitution from assessing on a regional basis. CEMEX's Admin. Case Brief at 61-62, Pub. Doc. 220, CDC's Admin. Case Brief at 30-53, Pub. Doc. 244, and CDC's November 3rd Administrative Rebuttal Brief at 32-36, Pub. Doc. 223 (CDC's Admin. Rebuttal Brief). Having made no arguments that could be appropriately reviewed by the Panel, CDC's challenge should have been rejected and the Department's decision affirmed.

The Panel found that, while it had no authority "to decide whether the United States is in default of the nation's obligations under any of the WTO agreements" . . . in construing the

statute, the Panel was “bound to look at those international agreements which, like the WTO Antidumping agreement, may shed some light on Congressional intent.” Panel Decision at 46. This statement would only be accurate, however, if the U.S. statute was ambiguous and needed to be construed or interpreted. All of the cases cited by the Panel stand for the proposition that, if the statute is ambiguous or there is an absence of express Congressional intent, U.S. laws should be interpreted so as not to conflict with the international obligations of the United States. In this instance, however, the statute is clear and unambiguous.¹ Congress has spoken directly to the issue concerning the entries on which antidumping duties will be assessed in a regional antidumping duty order.

The U.S. antidumping duty statute provides that the results of an administrative review “shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties.” Section 751(a)(2)(C) of the Tariff Act of 1930, as amended (the Act) (emphasis added). Moreover, in enacting the Uruguay Round Agreements Act, Congress added some specific provisions with regard to assessment of duties for regional antidumping duty orders which direct the Department to assess duties on the entries of certain exporters or producers and do not allow for a distinction to be made based on location of imports. The statute provides that the Department shall assess duties only on the subject merchandise of the specific exporters or producers who exported to the region during the period of investigation:

(d) Special Rule for Regional Industries

¹ The fact that the Department must now explain this to the Panel for the first time highlights the fatal flaw in CDC’s challenge and why the Panel should have rejected the challenge and affirmed the Department’s original decision.

(1) In an investigation in which the Commission makes a regional industry determination under section 771(4)(C), the administering authority, shall to the maximum extent possible, direct that duties be assessed only on the subject merchandise of the specific exporters or producers that exported the subject merchandise for sale in the region concerned during the period of investigation.

Section 736(d)(1) of the Act.² The statute goes on to provide an exception for “New Exporters and Producers,” stating that the Department shall direct that duties be assessed on the subject merchandise of a new exporter or producer exporting to the region (section 736(d)(2) of the Act). Because Congress has addressed the issue of the entries on which duties must be assessed under a regional order directly, *i.e.*, the entries of the exporters who exported to the region during the period of investigation and new exporters and producers to the region, there is no silence or ambiguity in the statute to be interpreted by the Department, the courts, or the Panel.³

CDC exported subject merchandise into the region during the period of investigation. As a result, the Department’s determination to assess antidumping duties on all entries of CDC merchandise is supported by substantial evidence and otherwise in accordance with U.S. law. Therefore, the Department’s decision should be sustained.

² In the Final Results, the Department stated incorrectly that section 736 of the Act did not apply to this case because the investigation concerning Mexican cement took place before the effective date of the URAA. Final Results at 13165. The proceeding at issue here is not an investigation but an administrative review. The URAA applies to all administrative reviews initiated after January 1, 1995. The determination at issue, the seventh administrative review, was initiated on September 25, 1997 (Notice of Initiation of Antidumping Review, 62 FR 50292).

³ See Sutherland Statutory Construction, 6th Ed. 2000, Norman J. Singer, § 47.23 “Expressio unius est exclusio alterius” (“As the maxim is applied to statutory interpretation, where a form of conduct, the manner of its performance or operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.”).

Comment: CDC and CEMEX contend that the Department did not follow the Panel's instructions regarding this issue. The respondents assert that the Panel remanded the Final Results to the Department with the specific instruction that it more adequately explicate the basis of its decision, with particular reference to the requirements of the U.S. Constitution. According to the respondents the Department did not refer to the requirements of the U.S. Constitution in the Draft Results. The respondents argue that the Department must address the Constitutional issue in the final remand redetermination.

Department's Position: The standard of review for a NAFTA Chapter 19 binational dispute settlement panel is "whether such determination was in accordance with the antidumping . . . duty law of the importing Party. For this purpose, the antidumping . . . duty law consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigation authority." NAFTA Article 1904(2).

Furthermore, NAFTA Chapter 19, Annex 1911, defines the relevant standard of review, with respect to the United States, to mean "(i) the standard set out in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended, with the exception of a determination referred to in (ii), and (ii) the standard set out in 516A(b)(1)(A) of the Tariff Act of 1930, as amended, with respect to a determination by the U.S. International Trade Commission not to initiate a review pursuant to section 751(b) of the Tariff Act of 1930, as amended;" These provisions provide the Panel with the authority to rule only on the consistency of the Department's determination with U.S. law and the relevant provisions of Title VII in particular, which CDC has not challenged. In

addition, under U.S. law (19 U.S.C. §1516a(g)(4)), Constitutional issues are excepted from NAFTA panel review. In relevant part, the statute provides that constitutional issues arising under the application of a U.S. law “shall be assigned to a 3-judge panel of the United States Court of International Trade.” 19 U.S.C. §1516a(g)(4)(B). Under U.S. law, therefore, the Panel does not have the authority to rule on the consistency of U.S. law with the WTO agreements or on Constitutional issues. Therefore, it would be inappropriate to address these issues in the remand and we respectfully decline to do so.

Bag and Bulk Cement

In the Final Results, we found that Type I cement, whether sold in bags or packed in bulk, was physically identical merchandise. On the basis of this determination, we calculated normal value using all sales of Type I cement regardless of packaging form.

We requested that this issue be remanded so that we could consider it further. The Panel granted this request and also asked us to explain our decision that CEMEX’s and CDC’s home-market sales of bagged and bulk cement were made at one level of trade.

As we explained in the Treatment of Type V Cement section of this notice, above, we are now using Type V cement that CEMEX sold as Type I cement as the basis of normal value for CEMEX’s U.S. sales. Because the home-market sales we are using as the basis for normal value are all bulk sales, there is no longer an issue with respect to home-market sales by CEMEX. Accordingly, this issue only affects home-market sales by CDC in this review.

With regard to product matching, we find that matching the U.S. merchandise which is sold only in bulk to the foreign like product sold both in bulk and in bags is appropriate. Section 771(16) of the Act instructs that “[t]he term ‘foreign like product’ means merchandise in the first

of the following categories in respect of which a determination for the purposes of subtitle B of this title can be satisfactorily made:

- (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
- (B) Merchandise
 - (i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
 - (ii) like that merchandise in component material or materials and in the purposes for which used, and
 - (iii) approximately equal in commercial value to that merchandise.
- (C) Merchandise
 - (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
 - (ii) like that merchandise in the purposes for which used, and
 - (iii) which the administering authority determines may reasonably be compared with that merchandise.”

The cement type which CDC sold in the United States during the instant review period was Type II. CDC sold Type I in Mexico. Thus, we did not have a basis on which to compare the subject merchandise with identical sales of the foreign like product. In accordance with section 771(16)(B) of the Act, we matched the sales of subject merchandise to Type I sales.

We find that the selection of all Type I cement, whether bagged or sold in bulk, as similar merchandise is consistent with section 771(16)(B) of the Act for the following reasons. First, Type I cement sold both in bulk and in bags is produced in the same country, Mexico, and by the same person, CDC, as is the subject merchandise, thus satisfying section 771(16)(B)(i) of the Act.

Second, Type I cement, whether sold in bulk or in bags, is “like” the subject merchandise in “component materials” and in the purposes for which it is used. Whether sold in bags or in bulk, cement is used to make concrete. Although CDC claimed that bag cement typically is used

for less-technical applications than bulk cement, CDC did not explain how – or if – the use for bagged cement differs in any significant way from that of bulk cement. Indeed, our analysis of CDC’s home-market sales indicates that CDC sold bagged cement and bulk cement to the same types of customers. Specifically, CDC sold both bagged cement and bulk cement to each of resellers, ready-mixers, industrial end-users, government agency end-users, private contractor end-users, and employee end-users. The fact that every type of customer to which CDC sold cement in the home market bought both bagged and bulk cement indicates that Type I cement, whether sold in bulk or in bags, is like the subject merchandise in the purposes for which it is used.

We do not normally consider packaging as part of the component material of either the subject merchandise or foreign like product. In those rare instances where we have treated packaging as part of the subject merchandise, it was due to the fact that the packaging substantially altered the characteristics of the product. For example, in Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon From Chile, 63 FR 31411 (June 9, 1998), we determined that vacuum-packed fillets and regular fillets were different products because the vacuum-packing was “an extra processing step that doubles the shelf life of fresh Atlantic salmon” and, therefore, “an integral part of the product.”

In this case, the only difference between bagged cement and bulk cement is the bag. Furthermore, the bag itself is not used in the making of concrete, the purposes for which cement is used. Thus, we find that bags are not “an integral part of the product” but, rather, incidental to shipment. Therefore, it would be improper to consider the bag to be a “component material” of

cement. Accordingly, we find that bag and bulk cement satisfy section 771(16)(B)(ii) of the Act equally as potential comparable merchandise.

Finally, whether sold in bulk or in bags, we find that Type I cement is approximately equal in commercial value to Type II cement sold in the United States. We normally determine whether a product is “approximately equal in commercial value to that merchandise” based on the differences in the variable cost of manufacturing the products to be compared. We normally do not use observable price differences to make this determination because, in addition to the physical characteristics of the merchandise, there are a number of factors, such as the quantity sold, the timing of sales, and level of trade, that can affect price. In this case, the variable cost of manufacturing bagged and bulk Type I cement is identical. Thus, under our normal methodology, bagged and bulk Type I cement both satisfy section 771(16)(B)(iii) of the Act.

In addition, we examined CDC’s prices of bagged and bulk cement after adjusting for movement and direct selling expenses and found that the weighted-average price of bagged cement sold by CDC was [* * *] percent higher than the weighted-average price of bulk cement sold by CDC. Moreover, there was significant overlap between prices of CDC’s bagged and bulk cement. We found that, by quantity, [* * *] percent of CDC’s sales of bagged cement were sold for more than the weighted-average price of all bulk cement sold by CDC. [* * *] percent of CDC’s sales of bagged cement were sold for less than the weighted-average price of bulk cement sold by CDC. We also found that, by quantity, [* * *] percent of CDC’s sales of bulk cement were sold for more than the weighted-average price of bagged cement sold by CDC and [* * *] percent of CDC’s sales of bulk cement were sold for less than the weighted-average price of bagged cement sold by CDC. Furthermore, we found that there are relatively small

differences in the weighted-average prices for bagged and bulk cement, that a significant range in prices exists for both bagged and bulk sales, and that these prices overlap substantially. CDC's prices for bagged cement ranged from [* * *] pesos per metric ton⁴ to [* * *] pesos per metric ton, while its prices for bulk ranged from [* * *] pesos per metric ton to [* * *] pesos per metric ton. Thus, while bagged cement can be sold at substantially higher prices than bulk cement, it can also be sold at substantially lower prices than bulk cement. Moreover, the ranges of prices for both bagged and bulk cement were substantial during the period of review (POR). Therefore, it is impossible to ascertain that the price differences that may exist are the result of whether the cement is sold in bags or in bulk or the result of other factors, such as those described above⁵. Indeed, these facts suggest that bagged and bulk Type I cement are, on the basis of observable prices, approximately equal in commercial value. Therefore, we find that bagged and bulk Type I cement both satisfy section 771(16)(B)(iii) of the Act equally.

Section 771(16) of the Act is silent with regard to the methodology we should develop for purposes of matching the subject merchandise to the foreign like product. Moreover, as

⁴ This figure excludes [* * *] transactions which had negative prices after adjusting for movement and direct selling expenses. All [* * *] of these transactions were sales of bagged cement. If we include these transactions in our analysis, the range of prices for bagged cement is even greater, with the lowest figure in the range being a price of [* * *] pesos per metric ton.

⁵ One possible, but not necessarily the only, factor is the fact CDC sold a larger proportion of its bulk cement early in the POR and a larger proportion of its bagged cement later in the POR. CDC sold approximately [* * *] percent of its sales of bulk cement during the first half of the POR while it sold approximately [* * *] percent of its sales of bagged cement during the second half of the POR. Because the prices of both bagged and bulk cement rose during the POR, this fact would tend to cause the weighted-average price of bagged cement to be higher than the weighted-average price of bulk cement.

recognized by the courts⁶, Congress has granted us broad discretion in developing our model-match methodology. See Kerr-McGee Chemical Corp. v. United States, 741 F. Supp. 947, 951-52 (CIT 1990). In Koyo Seiko Co., Ltd. v. United States, 66 F.3d 1204, 1209 (CAFC 1994), the Federal Circuit acknowledged that “Congress has implicitly delegated authority to Commerce to determine and apply a model-match methodology necessary to yield ‘such or similar’ merchandise under the statute.” For the reasons discussed below, we believe that comparing sales of bulk cement with sales of bagged and bulk cement is reasonable, consistent with the statute, and supported by administrative practice.

The Department has a longstanding practice of developing a model-match methodology in the early stages of each proceeding. In this respect, in consultation with the parties, the Department selects commercially relevant product characteristics that dictate the selection of a foreign like product based on physical characteristics, purposes for which used, and commercial value. Since the less-than-fair-value (LTFV) investigation in this case, the Department has selected the foreign like product based upon ASTM specifications because all parties have acknowledged the commercial significance of these specifications. In the LTFV investigation, the Department indicated that “both petitioner and CEMEX have noted that customers and producers in both markets rely on ASTM standards to differentiate between products.” See Gray Portland Cement and Clinker from Mexico, 55 FR 29244, 29247 (July 18, 1990). No interested party has challenged the use of ASTM specifications as a matching criterion in this review.

⁶ As well as Chapter 19 panels. See Certain Cut-to-Length Carbon Steel Plate from Canada, USA-93-1904-04, Opinion at 12 et seq. (October 31, 1994) (“Commerce has discretion in the establishment of a product characteristic hierarchy as an aid in its selection of product matches”).

Although CDC is correct in asserting that there have been instances in which the Department compared bag-to-bag and bulk-to-bulk cement, there is also case precedent which supports our methodology to consider both bulk and bagged cement as the foreign like product. See Gray Portland Cement and Clinker from Japan, 60 FR 43761, 43763 (August 23, 1995), Calcium Aluminate Cement Clinker and Flux from France, 59 FR 14136, 14143-44 (March 25, 1994), Gray Portland Cement and Clinker from Venezuela, 56 FR 56390, 56391 (November 21, 1991), and Frozen Concentrated Orange Juice from Brazil, 57 FR 3995 (February 3, 1992) (“we deducted foreign packing expenses and added U.S. packing expenses to home market price (packing costs were not incurred on bulk sales)”).

Further, the cases which CDC cited in its December 2, 1998, case brief (Final Determination of Sales at Less Than Fair Value, Gray Portland Cement and Clinker from Mexico, 55 FR 29244, 29245 (July 18, 1990) (Mexico Cement Investigation), the Concurrence Memorandum dated October 28, 1991, for Preliminary Determination: Gray Portland Cement and Clinker from Venezuela (Venezuela Cement), and Gray Portland Cement and Clinker from Japan; Final Results of Antidumping Duty Administrative Review, 60 FR 43761, 43763 (August 23, 1995) (Japan Cement)) in support of its contention are inapposite. In the Mexico Cement Investigation, we compared U.S. sales with home-market sales of identical merchandise pursuant to section 771(16)(A) of the Act. This statutory provision contains criteria for the selection of comparison merchandise that are distinct from those criteria contained in section 771(16)(B) of the Act.

CDC cited Venezuela Cement to argue that the Department “implicitly recognizes the two rules the Department has followed when comparing sales of differently packaged cement.

These rules are ... {w}here a respondent makes both bag and bulk sales in both the U.S. market and the home market, the Department will compare bag sales in the U.S. market with bag sales in the home market, and bulk sales in the U.S. market with bulk sales in the home market; and ... {w}here a respondent makes sales of only bag or bulk cement in one market (Market A) and sales of both bag and bulk cement in the other market (Market B), the Department will compare the sales of either bag or bulk in Market A to the sales of both bag and bulk in Market B.” See CDC’s December 2, 1998, case brief at 27 (emphasis in original). Citing Japan Cement, CDC contends that the Department applied these rules in other cement decisions.

We do not recognize these “implicit rules” which CDC claims exist. With regard to Venezuela Cement, for one respondent, where we compared bagged cement to bagged cement and bulk cement to bulk cement, we compared U.S. sales with home-market sales of identical merchandise pursuant to section 771(16)(A) of the Act. As described above, this statutory provision contains criteria for the selection of comparison merchandise that are distinct from those criteria contained in section 771(16)(B) of the Act. The other respondent in Venezuela Cement sold only bagged cement in the home market. We compared bagged and bulk cement sold in the United States to the bagged cement sold in the home market because the bagged cement sold in the home market was the only form of cement to which we could compare U.S. sales. We did not invent some new implicit rule in that case.

Furthermore, CDC’s claim that we applied these rules in Japan Cement is incorrect. While it is true that we matched U.S. sales, which were all of bulk cement, to home-market sales of bagged and bulk cement, we did so because we determined that “{t}here is no physical difference between the bagged and bulk cement sold in Japan.” Japan Cement, 60 FR at 43763.

In fact, our determination in Japan Cement is identical to our decision in this review. Moreover, CDC's situation is precisely the same as that of the Japanese respondent. Thus, none of the cases which CDC cites supports its position.

Finally, the NAFTA panel's decision regarding the 94/95 administrative review which reversed our decision on the bulk/bag issue is not binding. As the NAFTA makes clear, panel decisions do not have precedential effect since each decision is "limited to the particular matter between the particular parties before the Panel." See NAFTA Article 1904(9).⁷

CDC also argued that, "[* * *]n a case in which sales in the U.S. market occur in both bulk and bag form, the Department is faced with the issue of the packing that, according to the statute, must be added to the home market price for the comparison. If the Department ignores the distinction between bag and bulk cement, it would have to develop a second-best approach (possibly an average of the packing costs for the bulk and bagged sales in the U.S.) in order to comply with the statute's requirement for an ex-factory, packed-for-U.S. price." See CDC's December 2, 1998, case brief at page 28. This argument is without merit. Pursuant to section 773(6)(B)(i) of the Act, we subtract "the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the foreign like product in condition packed ready for shipment to the place of delivery to the purchaser" from the home-market price. Pursuant to section 773(6)(A) of the Act, we then increase the home-market price by "the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States." We do this by adding

⁷ In addition, we have requested an Extraordinary Challenge Committee review of the Panel's decision, although the formation of the Committee is still pending. See Gray Portland Cement and Clinker from Mexico, Secretariat File No. ECC-2000-1904-01-USA.

the packing expense incurred on the U.S. sale. Thus, regardless of whether the cement sold in the home market is sold in bags or in bulk, no expense associated with packing that cement for shipment in the home market is included in normal value. Furthermore, regardless of whether the cement sold in the United States is sold in bags or in bulk, the packing expenses included in normal value is identical to the packing expense included in the U.S. price. Therefore, there is no distortion.

For these reasons, we find there is no justification for treating foreign like product sold in both bulk and bags as separate like products based on physical characteristics.

With regard to level of trade, to the extent practicable, we determine normal value based on sales in the comparison market at the same level of trade as the EP or CEP transaction in accordance with section 773(a)(1)(B) of the Act. The normal-value level of trade is that of the starting-price sales in the comparison market or, when normal value is based on constructed value (CV), that of the 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 sale from the exporter to the importer.

To determine whether normal-value 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 normal value 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 normal-value 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 normal value and CEP affects price comparability, we adjust normal value under section 773(a)(7)(B) of the Act (the CEP-offset provision).

See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 63 FR 33320, 33329-30 (June 18, 1998).

We have reviewed CDC's responses and found that sales of bagged cement and sales of bulk cement are all made at a single level of trade in the United States. Although CDC reported EP sales, we have treated all of CDC's U.S. sales as CEP sales. See the "CDC's Sales to Unaffiliated U.S. Customers" section of this determination, below. After excluding the selling functions associated with expenses we deduct pursuant to section 772(d) of the Act, we find that CDC performs minimal selling functions on behalf of its U.S. sales. Furthermore, the only difference in selling functions that CDC performs for sales of bagged cement and bulk cement appears to be inventory maintenance. Because there is only one significant difference in the selling functions performed for sales of bagged cement to resellers and sales of bulk cement, we find that all of CDC's U.S. sales constitute one level of trade.

We have also found that CDC's sales of bagged cement and sales of bulk cement are all made at a single level of trade in the home market. According to CDC's representations, sales of bagged cement to ready-mixers and end-users involve the same selling functions as sales of bulk cement to these types of customers. See CDC's November 20, 1997, section A response at page A-20. With regard to sales of bagged cement to resellers, CDC only reports minor differences in

selling functions it performs between such sales and sales of bulk cement except for the fact that CDC undertakes inventory maintenance services in warehouses in addition to the general inventory of cement in silos for sales of bagged cement.⁸ See CDC's November 20, 1997, section A response at pages A-17 through A-20. Because there is only one significant difference in the selling functions performed for sales of bagged cement to resellers and sales of cement (including bagged cement) to ready-mixers and end-users, we find that all of CDC's home-market sales constitute one level of trade. Moreover, we find that CDC's home-market sales were made at a different level of trade than its U.S. sales. Because we find that all of CDC's home-market sales constituted one level of trade, however, we have no data available that would allow us to make a level-of-trade adjustment. Because we find that CDC's U.S. sales were CEP sales made at a less-advanced level of trade than that of its home-market sales, we made a CEP-offset adjustment to all of CDC's U.S. sales. In addition, because there is only one level of trade in each of the U.S. and home markets, there is no level-of-trade-related reason to attempt to match bagged cement to bagged cement and bulk cement to bulk cement because there is no difference in the level of trade of sales of bagged and bulk cement.

Comment: CDC contends that the Department's analysis is wrong in its conclusion that bag and bulk sales meet the statutory requirements set out in sections 771(B)(ii) and (iii) of the Act for similar merchandise because they allegedly are sold to the same customers and at similar

⁸ CDC also reports a significant difference between "freight and delivery arrangements," but we do not include an analysis of transportation in our level-of-trade analysis. See NTN Bearing Corporation, et al. v. United States, Consol. Court No. 97-10-01801, Slip Op. 00-64 (June 5, 2000).

prices. CDC asserts that, contrary to the Department's contention, there is almost no overlap of customers buying both bag and bulk cement.

CDC also contends that the Department's analysis of net prices is incomplete and incorrect. CDC argues that the analysis is incomplete because the statute calls for an analysis of "commercial value," which is not synonymous with the net price. Instead, CDC argues, the relative "commercial value" must be measured by the price observed by the consumers in the marketplace. CDC also contends that it was unable to duplicate the price difference the Department claimed existed, finding instead that bagged cement was sold at prices considerably higher than the prices for bulk cement.

Finally, CDC contends that, even though the Department did not rely on section 771(16)(B) of the Act in making comparisons in the original investigation of this case, the Department compared sales within type categories on a bag-to-bag and bulk-to-bulk basis, as it did in Venezuela Cement. CDC argues that, for these reasons, the Department should compare U.S. sales of bagged cement to home-market sales of bagged cement and U.S. sales of bulk cement to home-market sales of bulk cement.

CEMEX states that it continues to believe that the Department should not compare bagged cement to bulk cement on the grounds that the two are neither identical nor similar merchandise as defined in section 771(16)(B) of the Act. CEMEX comments, however, that the issue is now moot for CEMEX in the context of this review because the home-market sales now being used as the basis for normal value are all bulk sales.

STCC argues that a comparison of home-market prices for bagged and bulk cement is irrelevant to the determination of the foreign like product. STCC contends that the Department

found correctly that cement sold in Mexico is approximately equal in commercial value to the cement sold in the United States based on the differences in variable cost of production of bagged and bulk cement. STCC also agrees with the Department's statement in the Final Results of Redetermination Pursuant to Panel Remand (November 15, 1999) at 26 (Fifth Review Panel Remand), that "Congress cannot have intended that commercial value and price are synonymous for the simple reason that significant differences in prices may reflect dumping rather than any actual difference in the commercial value of the comparison product" (emphasis in original).

STCC contends that the analysis proposed by CEMEX and CDC is flawed in that it compares prices of bulk and bagged cement sold only in the home market. According to STCC, this is inappropriate because the criteria in section 771(16) address whether home-market and export products are appropriate matches, not whether two home-market products are appropriate matches. STCC also argues that, even if such a comparison were appropriate, the analyses suggested by CEMEX and CDC are flawed and misleading. According to STCC, cement prices vary by region, over time, and by buyer. Therefore, STCC argues, it is necessary to control for these factors in comparing prices of bagged cement and bulk cement. STCC claims that, when one controls for specific destinations and months, the price of bagged cement is [* * *] than the price of bulk cement.

STCC argues further that CDC does not address the Department's finding that bulk and bagged cement are "like" in "component materials" and that it ignores the Department's finding that "{w}hether sold in bags or in bulk, cement is used to make concrete." STCC observes that CDC takes issue with the Department's statement that CDC sold both bagged and bulk cement to the same types of customers. STCC argues that CDC's argument is flawed because it is

immaterial for purposes of the Department's foreign-like-product analysis whether CEMEX and CDC sold bulk and bagged cement to the same types of customers because there is no reference to customer type or category as a foreign-like-product criterion in section 771(16) of the Act. STCC contends that CDC's reliance on customer type is improperly based on alleged differences in uses for concrete – the downstream product – rather than cement.

STCC also argues that, even if it were relevant, the Department's finding that CDC sold bulk and bagged cement to customers in exactly the same categories is accurate. Observing that CDC focuses on the fact that there is only a small overlap in types of customers, STCC contends that it would only be significant if no overlap in customer types existed. STCC argues that, where there is an overlap in customer types, it is impossible to argue that bulk and bagged cement are used exclusively for different purposes.

Department's Position: We have continued to treat bulk and bagged cement as the same foreign like product meeting the definition under section 771(16)(B) of the Act.

Section 771(16)(B)(ii) of the Act directs us to compare merchandise that is like the subject merchandise in component material or materials and in the purposes for which used. As STCC observes, the respondents did not take issue with our finding that both bagged and bulk cement are like in component material or materials, nor did they take issue with our finding that cement is used to make concrete. Rather, CDC argued that, because there was little overlap between the types of customers to which CDC sold bulk and bagged cement, bulk and bagged cement are not alike in the purposes for which they are used. We agree with STCC that customer type is not a criterion for determining the foreign like product. To the extent that cement sold to different customer types indicates different uses, such a factor could be significant if there were

no overlap in the types of customers to which CDC sold bagged and bulk cement. In this case, however, there is overlap between all types of customers to which CDC sold cement, even if not large. The fact that large industrial users do buy bagged cement, even if less frequently than do resellers, and the fact that resellers buy bulk cement, even if less frequently than do large industrial users, suggest that cement in bags and in bulk is used for the same purpose, namely, to make concrete.

We also agree with STCC that the respondents focus improperly on the downstream uses of concrete in their arguments rather than on the use of cement itself. Ultimately, whether a customer uses the cement for private residential use or for a large construction project, the cement is used to make concrete, a fact which respondents nowhere dispute. In fact, the difference in uses that the respondents claim exist is actually merely a difference in scale, not a genuine difference in use. What the respondents are proposing would be analogous to our finding two otherwise identical bearings to be different products because one is used in manufacturing an automobile while the other is used in manufacturing a skateboard. Therefore, because bagged and bulk cement are like each other in their component materials and are identical in the purpose for which they are used, we find that bagged and bulk cement both meet the requirements of section 771(16)(B)(ii) of the Act.

Section 771(16)(B)(iii) of the Act directs us to compare merchandise approximately equal in commercial value to the subject merchandise. We agree with STCC that differences in home-market prices of Type I cement are not an appropriate measure for determining whether this product sold in the home market is an appropriate comparison to a different product sold in the United States. Indeed, as we explained, we normally rely on the differences in the variable cost

of manufacturing between the subject merchandise and a prospective foreign like product in determining whether the two products are approximately equal in commercial value. CDC did not address this point in its comments. Instead, CDC took issue with the fact that we performed a price analysis using net prices and argued we should be examining gross prices (“the price observed by consumers in the marketplace”).

First, we should clarify that we only performed that price analysis to test CEMEX’s claim that there is a [* * *]-percent markup for bagged cement as compared to bulk cement. See CEMEX’s July 16, 2002, submission at page 8. This analysis was only performed to ascertain whether the claim that there is a significant markup is accurate, not to suggest that this was the basis of our determination that bagged and bulk cement are approximately equal in commercial value. Rather, in keeping with our normal practice, we determined that bagged and bulk cement have the same commercial value because they have the same variable cost of manufacturing. However, as our above analysis demonstrates, bagged and bulk cement are approximately equal in commercial value even if we measure it by means of the observed prices in the home market. Second, CDC’s proposal that we should look at prices observed by consumers in the marketplace instead of net prices would cause improper results. This is because the prices observed by consumers in the marketplace, in addition to reflecting a theoretical markup for bagged cement, reflect a number of factors for which we normally adjust, such as differences in the circumstance in sale and movement expenses.

CDC also contends that it is unable to reproduce the figures we provided as the result of our price analysis and provides its own analysis. We have examined CDC’s analysis and find it flawed because it does not take into account the numerous changes we made to CDC’s data for

the purpose of the margin calculation. In fact, our analysis was based on the same sales and net prices that we used to calculate normal value. To demonstrate this, we have attached the program and output we used to derive the figures we cited above to the CEMEX final remand results memorandum dated September 27, 2002.

Because, as we stated above, we find that bagged and bulk cement have the same commercial value, we find that bagged and bulk cement both meet the requirements of section 771(16)(B)(iii) of the Act.

Finally, CDC takes issue with our characterization of the Mexico Cement Investigation. While it is true that the Department compared bagged to bagged cement and bulk to bulk cement in that investigation, it was not an issue that was developed or briefed by the parties in that investigation and, therefore, was not developed fully by the Department. We have since considered the issue in greater detail and have concluded that it is more appropriate to compare cement without regard to packaging type based on the evidence and argument developed in subsequent reviews of the order, Gray Portland Cement and Clinker from Japan, 60 FR 43761, 43763 (August 23, 1995), Calcium Aluminate Cement Clinker and Flux from France, 59 FR 14136, 14143-44 (March 25, 1994), and Gray Portland Cement and Clinker from Venezuela, 56 FR 56390, 56391 (November 21, 1991), as mentioned above.

Accordingly, we find that bagged and bulk cement are one foreign like product and have continued to treat them as such for these final results of redetermination.

U.S. Warehousing Expenses

In the Final Results, we treated CEMEX's and CDC's U.S. warehousing expenses as indirect selling expenses. Although CEMEX and CDC contested this treatment, we did not

address this issue in the Final Results. We requested that this issue be remanded so that we could address it.

STCC had argued that the Department treated CEMEX's and CDC's U.S. warehousing expenses improperly as indirect selling expenses. According to STCC, the statute, the SAA, the Department's regulations, and its practice all require the Department to treat CEMEX's and CDC's U.S. warehousing expenses as movement expenses.

CEMEX argued that the Department treated its U.S. warehousing expenses properly as indirect selling expenses because the expenses were incurred at CEMEX's plant rather than at a remote warehousing facility.

CDC argued that the Department should continue to treat its U.S. warehousing expenses as indirect selling expenses because these expenses included a significant selling expense component which the Department had verified. CDC also contended that STCC's argument was rejected by the Department in the 95/96 administrative review.

We have reviewed the record and agree with STCC that the terminal expenses reported by CEMEX and CDC are appropriately classified as warehousing expenses and, therefore, movement expenses.

When we asked CEMEX to describe the types of expenses it included in its reported U.S. indirect selling expenses, CEMEX described its terminal expenses as "loading and unloading and warehousing costs, labor and related taxes, benefits and employment costs of cement terminal personnel; costs of cement terminal/distribution facilities, including rent, depreciation, office equipment rentals, property taxes, utilities, property and liability insurance on such facilities; maintenance of distribution equipment and facilities." See CEMEX's March 20, 1998,

supplemental response at page 62. From this description, it is evident that CEMEX's terminals are involved entirely in "loading and unloading and warehousing" functions and that all other expenses cited by CEMEX relate to supporting those functions. There is no mention of even one selling activity performed by the terminals. Accordingly, we find that CEMEX's terminal expense is appropriately classified as warehousing expense.

When we asked CDC to explain why it reported such expenses as indirect selling expenses (as opposed to movement expenses), CDC merely claimed that the Department had found terminal expenses to be indirect selling expenses rather than movement expenses in prior reviews. CDC also claimed that its terminal "expenses include a significant selling expense component." CDC did not identify, however, even one selling function performed by the terminal. Thus, CDC's answer is essentially nonresponsive. It is incumbent on a respondent to justify a claim and we determine that CDC did not justify its claim that these expenses should be classified as indirect selling expenses. Because CDC did not justify its claim we have denied it and, accordingly, have treated CDC's terminal expense as warehousing expense.

The Department's regulations provide that it "will consider warehousing expenses that are incurred after the subject merchandise or foreign like product leaves the original place of shipment as movement expenses." See 19 CFR 351.401(e)(2). Because these terminal expenses are warehousing expenses incurred after importation and, therefore, after the subject merchandise or foreign like product left the original place of shipment, we treated the terminal expenses CEMEX and CDC reported as movement expenses. See the CEMEX/CDC calculation memorandum dated August 1, 2002, for a description of our calculation of CEMEX's and CDC's

U.S. warehousing expense and U.S. indirect selling expense. We have implemented these changes and recalculated the margin accordingly.

Comment: CDC argues that the Department should only treat the portion of terminal expenses that are warehousing expenses as movement expenses. CDC contends that it provided information on the record that would allow the Department to segregate terminal expenses between warehousing and selling expenses.

STCC did not comment on this issue.

Department's Position: We agree with CDC that, where possible, we should segregate terminal expenses between warehousing and selling expenses. Moreover, we agree with CDC's suggestion on how to segregate the expenses because we find its approach segregates the expenses between warehousing and selling expenses properly in accordance with the classification of the various expenses reported by CDC in Exhibit C-33 of its May 8, 1998, submission. Therefore, we have implemented the programming language suggested by CDC on page 19 of its August 15, 2002, case brief.

Home-Market Pre-Sale Warehousing Expenses

In the Final Results, we did not deduct home-market pre-sale warehousing expenses reported by CEMEX from normal value. Before the Panel, however, we requested a remand on this issue so that we could make an appropriate adjustment for this expense on the grounds that, when we reviewed the record, we determined that CEMEX had indeed submitted the data in the required manner and that CEMEX is entitled to the claimed adjustment. The Panel granted this remand.

We had denied the adjustment originally on the grounds that CEMEX did not submit its data in accordance with our instructions, we were not able to verify the expense in prior reviews, and there has been no change in the methodology CEMEX used to calculate this methodology in prior reviews. See Final Results, 64 FR at 13168-9, and the Calculation Memorandum dated August 31, 1998, at page 8.

Upon review of the record, we find that CEMEX did submit its data in accordance with our instructions. CEMEX responded to all of our questions in our original questionnaire, our supplemental questionnaire, and our second supplemental questionnaire. See CEMEX's December 8, 1997, section B response at page B-32 and B-33, its March 20, 1998, supplemental response at pages 45-46, and its May 8, 1998, second supplemental response at page 21. Moreover, an inability to verify an expense in a prior review is insufficient grounds for rejecting that methodology in the current review. If we found that the methodology was distortive or did not represent CEMEX's experience as accurately as possible, then we would have reason to deny the expense. This is not the case here. Importantly, we never asked CEMEX to revise its methodology. We find it is improper to make an adverse inference by denying CEMEX's reported warehousing costs because it used a methodology for reporting the expense when we did not advise CEMEX of any problems we may have had with its methodology.

Thus, the only remaining reason to deny this expense is the fact that we could not verify the expense in prior reviews. We have long held that each review stands alone. See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 62 FR 54043, 54064 (October 17, 1997). The fact

that we were unable to verify an expense in a prior review does not mean that we could not have verified it in this review, nor does it indicate that the methodology is distortive.

In conclusion, there is nothing on the record suggesting that CEMEX's reporting methodology was distortive or that the amounts it reported for this review were inaccurate. Accordingly, we have made an adjustment to normal value for these expenses. CEMEX "reported only the costs associated with remote terminals." See CEMEX's May 8, 1998, second supplemental response at page 21. Because the reported expenses were incurred for warehousing away from the plant, we deducted these expenses as movement expenses in accordance with our normal practice.

Comment: STCC argues that, because the Department was unable to verify CEMEX's home-market warehousing expense in prior reviews and there was no change in the reporting methodology from those reviews, the Department should deny CEMEX's claimed adjustment for home-market pre-sale warehousing expenses. STCC argues that it is incumbent on a respondent to justify a claim and that CEMEX did not provide any evidence to demonstrate that it was entitled to the adjustment. STCC contends that the Department's decision in the Draft Results effectively absolves CEMEX of the responsibility to correct reporting deficiencies.

CEMEX argues that the Department's conclusion that CEMEX submitted its data in accordance with instructions received from the Department is fully supported by the administrative record and that the Department deducted these expenses from normal value properly. CEMEX contends that STCC's proposed approach is contrary to the Act. Citing section 782(d) of the Act, CEMEX argues that the Act provides that if the Department "determines that a response to a request for information ... does not comply with the request, {it}

shall promptly inform the person submitting the response of the nature of the deficiency and shall ... provide the person with an opportunity to remedy or explain the deficiency.” CEMEX asserts that the Department recognized that CEMEX had not been provided with such an opportunity during the review and, thus, the use of facts available would be unwarranted.

Department’s Position: Although we agree with STCC that it is incumbent on CEMEX to justify its claim, it is our view that CEMEX did justify its claim. CEMEX responded to all of our questions in our original and supplemental questionnaires. We never identified any potential deficiencies to CEMEX for correction in any of our requests for information to which CEMEX did not respond adequately. Furthermore, the fact that we were unable to verify an expense in a prior review does not indicate that the methodology used to report the expense is distortive. Therefore, we find there is nothing inherently wrong with CEMEX’s reporting methodology.

Thus, the only reason for denying the adjustment would be if we found the data reported to be simply incorrect. As we stated above, the fact that we were unable to verify an expense in a prior review does not mean that we could not have verified it in this review. Although we did not verify this expense specifically in this review, it was because we chose not to review it at verification, not because the data was incorrect. It would be inappropriate to make adverse inferences with regard to the data CEMEX submitted when we chose not to verify an expense solely on the grounds that we were not able to verify it in a prior review because, as we stated above, each review stands alone. Therefore, we have deducted CEMEX’s reported home-market pre-sale warehousing from normal value for these final results of remand.

CDC's Sales to Unaffiliated U.S. Customers

In the Final Results, we classified certain sales to unaffiliated U.S. customers made by CDC's U.S. affiliate as indirect EP sales rather than as CEP sales. The methodology we used to determine whether a sale is an EP sale or a CEP sale has been superseded by a methodology arising from the decision of the Federal Circuit in AK Steel Corp. v. United States, 226 F.3d 1361 (CAFC 2000) (AK Steel). Because of this, we requested that the Panel remand this issue so that we could determine whether CDC's U.S. sales should be classified as EP sales or CEP sales consistent with the Federal Circuit's holdings in AK Steel. The Panel granted this request for remand.

When we found in the Final Results that CDC's "indirect" EP sales were appropriately classified as EP sales, we had done so using a three-part test that we had developed in PQ Corp. v. United States, 11 CIT 52, 652 F. Supp. 724, 733-35 (CIT 1987). As STCC pointed out, however, this test has been rejected by the Federal Circuit in AK Steel, where it ruled that "the critical differences between EP and CEP sales are whether the sale or transaction takes place inside or outside the United States and whether it is made by an affiliate" and that "a transaction ... in which both parties are located in the United States and the contract is executed in the United States cannot be said to be 'outside the United States.' Thus, such a transaction cannot be classified as an EP transaction."

In this administrative review, the record indicates that CDC's reported EP sales were made in the United States. The customers placed an order with CDC's U.S. affiliate, which arranged for CDC to ship the merchandise to the customer. The U.S. affiliate also had its customs broker facilitate U.S. Customs clearance, it forwarded the railcars (or trucks) carrying

the cement to the designated destination, and it invoiced the customer. See CDC's November 10, 1997, section A response at page A-25. In addition, the customer made its payment to CDC. See CDC's December 9, 1997, section C response at page C-5. Thus, we find that these transactions are made between the U.S. affiliate and the unaffiliated U.S. customer. Therefore, we have reclassified CDC's reported EP sales as CEP sales and recalculated the margin accordingly.

Comment: STCC comments that the Department found correctly that all of CDC's U.S. sales were CEP sales.

Neither CDC nor CEMEX commented on this issue.

Department's Position: No party took issue with our treatment of CDC's U.S. sales and we have not changed our analysis from the Draft Results. Therefore, we have continued to treat CDC's reported EP sales as CEP sales.

Difference-in-Merchandise Adjustment

As we explained in the Treatment of Type V Cement section of this notice, above, we are now using Type V cement that CEMEX sold as Type I cement as the basis of normal value for CEMEX's U.S. sales. Because the home-market sales we are using as the basis for normal value are of merchandise identical to the merchandise CEMEX sold in the United States, no difference-in-merchandise adjustment is necessary.

Comment 1: STCC argues that the Department should reverse its finding that sales of Type V cement sold as Type I cement were made the ordinary course of trade and, having done so, should also make an adjustment for differences in merchandise between the cement sold in the United States and cement sold in the home market.

Department's Position: As explained above, we continue to find that CEMEX's sales of Type V sold as Type I cement were made in the ordinary course of trade. Therefore, we have matched CEMEX's U.S. sales to sales of identical merchandise in the home market.

Accordingly, it would be inappropriate to make a difference-in-merchandise adjustment.

CEMEX's Freight Expenses

In the review we deducted CEMEX's reported adjustment for home-market freight expenses from normal value. STCC argued in that we should not deduct this expense. We disagreed with STCC and continued to deduct this expense from normal value in the Final Results. We have since realized, however, that we had not addressed STCC's argument that an unresolved discrepancy in some of the volume data for Type II cement may have resulted in an inaccurate or distorted freight allocation. Therefore, we requested that the Panel remand this issue so that we could consider this matter and explain our decision further. The Panel granted this request for remand.

While it does appear that there is a discrepancy between the quantity of Type II cement reported in CEMEX's freight-calculation worksheets in Exhibit B-8 of its December 8, 1997, section B response and the quantity actually sold of Type II cement, any such discrepancy is irrelevant. It is irrelevant because we did not use sales of Type II cement in our margin calculation and because CEMEX reported its home-market inland-freight expense on a type- and presentation-specific basis (see CEMEX's December 8, 1997, section B response at page B-34). Furthermore, we verified that CEMEX tracks freight expenses on a type- and presentation-specific basis. See CEMEX cost and sales verification report dated August 21, 1998, at page 12. Because CEMEX tracked this expense on a type-specific basis, the freight expense incurred on

Type II cement has no relevance to the freight expense incurred on Type I cement. Because we only use sales of Type V cement in our margin calculations, any distortion with regard to the freight expenses for Type II cement would have no impact on our margin calculation. Therefore, we have not made any adjustment to CEMEX's reported freight expenses.

Comment: STCC argues that, if the Department continues to define the foreign like product as Type V cement sold as Type I, it must find that CEMEX's claimed home-market freight expense on those sales are not reported properly. According to STCC, although CEMEX purported to show freight expenses for Type I bulk cement sold out of Yaqui, it did not show freight expenses incurred on Type V cement sold as Type I cement from either Yaqui or Campana. STCC also argues that CEMEX's methodology ignored freight expenses from the Hermosillo plants to the points of sales for cement sold by Cementos Guadalajara (Ensenada). Accordingly, STCC contends, the Department must deny CEMEX any home-market freight adjustment if the foreign like product is defined as Type V cement sold as Type I cement.

CEMEX argues that it reported freight expense for all home-market transactions including Type V sold as Type I cement. CEMEX also contends that its freight expenses are based on averages because its accounting system does not maintain transaction-specific information. CEMEX asserts that it reported average home-market freight expenses by selling company, point of sale, packaging type, and month, and that the freight expenses incurred on sales of Type V sold as Type I cement were included in the broader category of freight expenses for Type I cement. CEMEX contends that this was the greatest level of detail available to it given its accounting and logistics system.

CEMEX also argues that STCC's claim that CEMEX's methodology ignored freight expenses from the Hermosillo plants to the points of sales for cement sold by Cementos Guadalajara (Ensenada) is unfounded. CEMEX asserts that it reported freight expenses, if applicable, in one of two variables depending on the terms of sale of the transaction. CEMEX contends that the Department verified and approved its methodology for reporting inland-freight expenses.

Department's Position: We have compared CEMEX's reported inland freight in its home-market sales database to the worksheets CEMEX provided in Exhibit B-8 of its December 8, 1997, section B questionnaire response and found that the freight expenses reported for Type V sold as Type I are the same as those reported for Type I expenses. Thus, these are the same expenses we accepted in the Final Results. See Final Results, 64 FR at 13168. We asked for a remand on this issue in order to explain why the potential distortion with regard to the freight expenses for Type II cement would have no impact on our margin calculation, which we have done above. Since the freight for Type V sold as Type I cement was calculated on a different set of sales than the freight for Type II cement, the potential distortion with regard to the freight expenses for Type II cement still has no impact on our margin calculation.

STCC argues that we should deny CEMEX's claimed home-market freight expenses on the grounds that they were not reported on a product-specific basis. As we explained in the Final Results, however, we found, "{b}ased on our findings at verification, ... that CEMEX's reported freight costs for Type I cement are reported on as specific a basis as is feasible given CEMEX's accounting system, and that they provide a reasonable estimate of actual transaction-specific freight expenses." See Final Results, 64 FR at 13168. Because we found that CEMEX acted to the best of its ability, it would be inappropriate to use adverse facts available by denying the

reported freight expense. Accordingly, we have not made any adjustment to CEMEX's reported freight expenses.

Ministerial-Error Allegations

STCC contends that the Department made the following ministerial errors in its draft remand margin calculation: 1) it incorrectly used the reported U.S. indirect selling expenses instead of the revised expenses in its CEP-profit calculation, 2) it neglected to account for the type of cement as produced in its arm's-length test, 3) it did not account for the manufacturer code in its implementation of the arm's-length test, and 4) it included data records pertaining to foreign manufacturing sales by CDC and CEMEX in its calculation of CEP profit.

CEMEX agrees that the Department should have used the revised U.S. indirect selling expenses in its CEP-profit calculation. With regard to the other allegations made by STCC, CEMEX argues that the alleged errors did not arise from the changes the Department made in the Draft Results. Rather, CEMEX contends, the methodologies cited by STCC were in the margin calculation for the Final Results and STCC did not exhaust its administrative remedies because it had not raising these issues previously. CEMEX argues that the Department should reject STCC's argument.

Department's Position: We agree that we should have used the revised U.S. indirect selling expenses in our CEP-profit calculation and have corrected our calculations accordingly.

We also agree with STCC that we did not account for the type of cement as produced correctly in the arm's-length test. Although CEMEX is correct that STCC did not raise this issue previously, in the Final Results there was only one type of cement retained in the home-market sales which we used in the arm's-length test. Thus, our arm's-length test in the Final Results was effectively type-specific and, as a result, there was no reason for STCC to make this comment previously. Accordingly, STCC could not fail to exhaust its administrative remedy. Moreover,

we agree with STCC that we should compare affiliated prices with unaffiliated prices on a model-specific basis. Therefore, we have implemented the change suggested by STCC.

With respect to STCC's other two ministerial-error allegations, we agree with CEMEX that our methodology for the Draft Results was identical to that used in the Final Results. STCC had at least two opportunities to raise these allegations prior to this point: 1) after we issued the Final Results, and 2) in its brief before the Panel. Because it did not do so, we have not made the changes suggested by STCC.

FINAL RESULTS OF REDETERMINATION

In accordance with the remand order, we have recalculated the antidumping duty margin for CEMEX/CDC as directed by the Panel. The recalculated weighted-average percentage dumping margin for the period August 1, 1996, through July 31, 1997, for gray portland cement and clinker from Mexico is as follows:

<u>Company</u>	<u>Margin (percent)</u>
CEMEX/CDC	
Final Results	49.58
Final Remand Results	48.05

Faryar Shirzad
Assistant Secretary
for Import Administration

Date