

Gray Portland Cement and Clinker from Mexico
Final Results of the Sixth Antidumping Administrative Review
Secretariat File No. USA-98-1904-02 (May 26, 2005)

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 Sixth Antidumping Administrative Review, Secretariat File No. USA-98-1904-02 (NAFTA May 26, 2005). In accordance with the Article 1904 Binational Panel's instructions, we have (1) reconsidered, in view of the remand determination in the seventh review, whether CEMEX's home-market sales of Type V cement sold as Types II and V cement produced at the Hermosillo plants were outside the ordinary course of trade and supported the conclusion that such sales are outside the ordinary course of trade with adequate reasoning based on substantial evidence in the record of this review, (2) further analyzed and explained the plant-efficiency issues in the calculation of the difference-in-merchandise adjustment in accordance with the Panel's opinion, and (3) treated CDC's reported export-price sales as constructed export-price sales.

BACKGROUND

On May 26, 2005, the Article 1904 Binational Panel (the Panel) issued an order in Gray Portland Cement and Clinker from Mexico; Final Results of the Sixth Antidumping Administrative Review, Secretariat File No. USA-98-1904-02 (NAFTA May 26, 2005) (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, 63 FR 12764 (March 16, 1998), as amended by Gray Portland Cement and Clinker from

Mexico; Amended Final Results of Antidumping Duty Administrative Review, 63 FR 24528 (May 4, 1998) (Sixth Review Final Results).

In the Remand Order, the Panel instructed the Department to do the following: (1) reconsider, in view of the changed methodology adopted in the remand determination in the Seventh Review,¹ whether CEMEX, S.A. de C.V.'s (CEMEX) home-market sales of Type V cement sold as Types II and V cement produced at the Hermosillo plant were outside the ordinary course of trade and support any conclusion reached with adequate reasoning based on substantial evidence on the record,² (2) further analyze and explain the plant-efficiency issues in the calculation of the difference-in-merchandise adjustment in accordance with the Panel's opinion, and (3) reclassify certain sales in accordance with the decision of the Court of Appeals for the Federal Circuit (CAFC) in AK Steel Corp. v. United States, 226 F.3d 1361 (2000).

On July 5, 2005, we issued our Draft Results of Redetermination Pursuant to NAFTA Panel for Gray Portland Cement and Clinker from Mexico; Final Results of the Sixth Antidumping Administrative Review, Secretariat File No. USA-98-1904-02 (NAFTA May 26, 2005) (Draft Results), to interested parties for comment. On July 11, 2005, CEMEX and CDC submitted comments with regard to the Draft Results and the Southern Tier Cement Committee (STCC), the petitioner, presented its rebuttal brief on July 15, 2005.

¹ Gray Portland Cement and Clinker from Mexico: Decision of the Panel concerning the Final Results of Redetermination of the Department of Commerce (Seventh Review Panel Decision and Remand), USA-MEX-99-1904-03 (NAFTA May 30, 2002), at 23-35; Gray Portland Cement and Clinker from Mexico: Decision of the Panel concerning the September 15, 2003 Final Results of Redetermination of the Department of Commerce (Seventh Review Remand Affirmed), USA-MEX-99-1904-03 (NAFTA Apr. 11, 2003), at 10-14 (citing the Final Results of Redetermination Pursuant to NAFTA Panel (Seventh Review Redetermination) (Sept. 27, 2002), at 3-21) (collectively, Seventh Review Remand).

² Remand Order, at 90 & 29.

DISCUSSION

1. Ordinary-Course-of-Trade Findings Regarding CEMEX's Home-Market Sales of Type V Cement Sold as Types V and II Cement in the Sixth Review

In the Sixth Review Final Results, the Department determined that CEMEX's sales of Type V cement sold as Types II and V cement were outside the ordinary course of trade, provided its findings in a memorandum, and summarized the findings in its *Federal Register* notice of the final results of the review.³ We made this determination on the basis of the following factors: (1) the sales volume of Type II and Type V cement was extremely small in comparison to CEMEX's sales of Type I cement in Mexico; (2) the number and type of customers purchasing Types II and V cement are substantially different from those purchasing Type I; (3) Types II and V cement are specialty products CEMEX sold to a "niche" market; (4) shipping distances and freight costs for Types II and V cement sales were significantly greater than for Type I sales; (5) CEMEX's profits for Type II were small in comparison to its profits on all other cement; (6) CEMEX did not sell Types II and V cement until it began production for export in the mid-1980s despite the existence of a small domestic demand for such cement; and (7) sales of Types II and V cement continued to exhibit a promotional quality that is not evidenced in CEMEX's ordinary sales of cement in the home market.

The Panel found that, during the course of the binational panel review of this case involving the ordinary-course-of-trade issue in the sixth review, the Department "reversed its position on this issue" and allegedly "changed its methodology, or at least its understanding of the interaction of factors involved, in making the ordinary course of trade determination" in the

³ See Sixth Review Ordinary Course of Trade Memorandum, dated March 9, 1998, at 4-9; Sixth Review Final Results, 63 FR at 12770-72.

Seventh Review Remand.⁴ The Panel found that it was “unable to determine from the Department’s decision in this case how it would consider . . . the methodological change (in understanding) made in the Seventh Review Remand Determination” and found that “it is not the role of the panel to speculate.”⁵ Accordingly, the Panel remanded the issue to the Department for reconsideration of whether Type V cement sold as Type V and Type II cement is outside the ordinary course of trade in view of the changed methodology the Department adopted in the Seventh Review Remand.

We have reconsidered our ordinary-course-of-trade decisions with regard to CEMEX’s sales of Type V cement sold as Types II and V cement produced at the Hermosillo plant in view of the Seventh Review Remand. We have redetermined that such sales were made outside the ordinary course of trade during the sixth review period.

First, the Panel’s remand of the Department’s ordinary-course-of-trade determinations concerning CEMEX’s home-market sales of Type V cement sold as Type II and Type V cement (V/II and V/V) is based on an incorrect characterization of the Department’s ordinary-course-of-trade determination in the Seventh Review Remand. The Department did not change its methodology or have a new understanding of the interaction of factors for its ordinary-course-of-trade determination. Rather, the Department reevaluated the facts on the record in the totality of circumstances of the seventh review period and applied the same methodology, indeed, many of the same factors it considered in the sixth review, and reached a different conclusion.

Originally, in the Seventh Review Final Results, the Department found five factors that

⁴ Remand Order, at 26-27, 29 (citing Seventh Review Remand Affirmed, at 11-12).

⁵ Remand Order, at 29.

indicated that sales of Type V sold as Type I (V/I) were sold outside the ordinary course of trade: (1) substantially lower sales volume, (2) different freight costs, (3) disparity in profits, (4) substantially different number and types of customers, and (5) different handling charges.⁶

Pursuant to the Panel's order in the seventh review, the Department reexamined the facts on the record for each factor and made the following findings: (1) CEMEX's home-market sales of Type I sold as I (I/I) and Type V sold as I (V/I) were made to "largely the same" types of customers (*e.g.*, end-users, distributors, and ready-mixers wanting Type I cement), (2) the level of profits were comparable and did not indicate a meaningful departure from the usual conditions and practices of CEMEX's home-market sales of Type I cement, and (3) the differences in freight and handling charges for the two types of cement (I/I vs. V/I) did not indicate that the sales in question were outside the ordinary course of trade because, in the context of the seventh review, the net effect of the different freight costs and handling charges were reflected in the comparable profit levels. The only factor supporting the original determination was sales volume, and the Department found the difference in quantities sold to be an insufficient basis alone to conclude that Type V cement sold as Type I was outside the ordinary course of trade.⁷ Although we found differences in circumstances surrounding these sales, these differences were insufficient, "based upon the totality of the facts of this case, for a finding that the sales were made outside the ordinary course of trade."⁸ Therefore, the Department reversed its original determination, finding

⁶ Seventh Review Remand Affirmed, at 10 (summarizing the Department's findings in the original final results of the seventh review); see also Gray Portland Cement and Clinker from Mexico; Final Results of Antidumping Duty Administrative Review, 64 FR 13148 (March 17, 1999) (Original Seventh Review Final Results).

⁷ Seventh Review Redetermination, at 4-6; Seventh Review Remand Affirmed, at 11-12.

⁸ Seventh Review Redetermination, at 11.

that Type V cement sold as Type I was sold within the ordinary course of trade during the seventh review period.

In the Seventh Review Remand, we did not apply a different methodology or a different understanding of the interaction of the factors when we considered net profitability in terms of freight and handling charges. Rather, we acknowledged the basic economic principle that “profits and expenses are interrelated.”⁹ As in all cases when conducting an ordinary-course-of-trade inquiry, we examined the totality of facts in the seventh review regarding CEMEX’s home-market sales of Type V/I cement to determine whether the sales were being made for unusual reasons or under unusual circumstances.¹⁰ This broad approach is far-reaching, fact-specific, and does not evaluate just “one factor taken in isolation but rather. . . all the circumstances particular to the sales in question” to determine what sales are representative of the normal conditions and practices of sales in the home market.¹¹

When examining the totality of the circumstances, the Department must view each fact in the context of the other surrounding facts. Consequently, the Department must not apply the “comparable” profit-factor discussion of the Seventh Review Remand outside its proper factual

⁹ Seventh Review Redetermination, at 7, 15.

¹⁰ Seventh Review Redetermination, at 10; see also sections 773(a)(1) and 771(15) of the Tariff Act of 1930, as amended (the Act); 19 C.F.R. 353.46(b)(1994); Statement of Administrative Action accompanying the URAA, H.R. Doc. 103-316, at 834 (1994), reprinted in 1994 U.S.C.C.A.N. 4171.

¹¹ CEMEX, S.A. v. United States, 133 F.3d 897, 900 (Fed. Cir. 1998) (affirming the Department’s ordinary-course-of-trade-methodology and determinations that CEMEX’s home-market sales of Types II and V cement were outside the ordinary course of trade in the second review). See also Seventh Review Remand, at 9-22 (affirming the Department’s determinations that CEMEX’s home-market sales of Types II and V cement were outside the ordinary course of trade in the seventh review), and Gray Portland Cement and Clinker from Mexico Final Results of the Fifth Antidumping Administrative Review, USA-MEX-97-1904-01 (NAFTA June 18, 1999), at 64-100 (affirming the Department’s determination that CEMEX’s Type II cement sales in the home market were outside the ordinary course of trade in the fifth review).

context. For example, the Panel mentions that CEMEX argues that “shipping distances” were “discounted” or “contained in the determination of the net profitability”¹² in the Seventh Review Remand. In fact, however, “shipping distances” were not a factor upon which we relied as a basis for the original Seventh Review Final Results or the Seventh Review Remand for Type V/I cement sales; that is, we examined them but concluded there was not a significant difference that weighed in favor of finding sales outside the ordinary course of trade. In the Seventh Review Remand, the Department only considered how freight and handling charges affect profit, not shipping distances themselves.¹³

Unlike in the seventh review for Type V/I sales, the Department did consider shipping distances in determining whether CEMEX’s home-market sales of Types V/II and V/V cement in the sixth review were within the ordinary course of trade. Indeed, the Department found in the sixth review that CEMEX’s shipping distances for Type V/II and V/V were “unusually long distances,” e.g., “over 95 percent of all cement shipments in Mexico cover less than 150 miles,” but CEMEX shipped extremely small volumes of Types II and V sales over one thousand miles.¹⁴ Therefore, when viewed in its proper context, the Department’s analysis of profit in the Seventh

¹² CEMEX Supplemental Brief, May 4, 2004, at 4; see Remand Order, at 27.

¹³ In the seventh review, we did not rely upon *shipping* distance to support our original ordinary-course-of-trade decision that Type V/I cement sales were outside the ordinary course of trade. See Seventh Review Final Results, 64 FR at 13157-58. In the Seventh Review Remand, we only discussed the same five factors upon which we relied originally without any reference to the *shipping distances*. See Seventh Review Remand, at 4-6. CEMEX has confused the facts and asserted incorrectly that shipping distances were a factor in the Seventh Review Remand. Shipping distances were simply not a factor upon which the Department relied for its Type I cement ordinary-course-of-trade decision in the Seventh Review Remand. This is a big distinction between the ordinary-course-of-trade facts of the sixth and seventh reviews. In the sixth review the sales of Types II and V cement were shipped very long distances and resulted in very high costs; this was not the situation for Type I cement sales in the seventh review. See Seventh Review Remand, at 16.

¹⁴ Sixth Review Final Results, 63 FR at 12771; Sixth Review Ordinary Course of Trade Memorandum, at 4-5, 7-8.

Review Remand and the extraordinary shipping distances in the sixth review simply reflect the distinct record facts in each review.

There are other important factual differences and distinctions between these period-specific ordinary-course-of-trade determinations. First, in our ordinary-course-of-trade determination for the Seventh Review Remand we examined a different type of cement – Type V sold as Type I (V/I) cement, which naturally had more similarities to Type I (I/I) cement demanded and sold commonly in the home market. In contrast, the sixth review remand concerns Type V cement sold as Types II (V/II) and V (V/V) cement. CEMEX’s home-market sales of Types II and V cement have distinct characteristics, reflecting unique practices and conditions, that demonstrate the unusual circumstances of Type V/II and V/V sales in comparison to the normal sales of Type I cement in the home market.¹⁵ Indeed, the Seventh Review NAFTA Panel upheld the Department’s ordinary-course-of-trade findings with respect to these same kinds of Type V/II and Type V/V sales.¹⁶ Furthermore, the Seventh Review NAFTA Panel did not revisit the Department’s analysis of Type II/V and Type V/V sales following the remand regarding sales of Type V/I cement, indicating that the remand did not undermine the Department’s ordinary-course-of-trade findings for Types V/II and V/V cement.¹⁷

Second, in the sixth review, the Department considered and found evidence supporting four additional factors that it did not consider in the redetermination for the seventh review.

¹⁵ Sixth Review Final Results, 63 FR at 12770-72; Sixth Review Ordinary Course of Trade Memorandum, at 4-9.

¹⁶ Seventh Review Panel Decision and Remand, at 15-23.

¹⁷ Seventh Review Remand Affirmed.

Specifically, the Department considered and found evidence in the sixth review that CEMEX's home-market sales of Type V sold as Type II and V were (1) specialty products sold to a niche market, (2) transported significantly greater shipping distances, (3) not sold before implementation of the antidumping duty order, and (4) sold as promotional quality products.¹⁸ The Department did not consider any of these four factors in the Seventh Review Remand for its ordinary-course-of-trade decision concerning Type V/I cement sales.

Third, although the profit differences we cited in the sixth review may be within the range of what we considered to be "comparable" in the Seventh Review Remand, this fact alone does not lead us to conclude that we should change our ordinary-course-of-trade determination for the sixth review. When we considered the relative profits for Type II and Type V sales compared to profits for Type I sales in the home market for the sixth review, we only found that CEMEX's profits on Type II sales were "small in comparison to its profits on Type I cement" sold in Mexico.¹⁹ Regarding CEMEX's home-market sales of Type V/V, however, we found that the profit rate on Type V sales was "similar to its profit rate on Type I sales."²⁰ Notwithstanding the similar profits for Type V/V sales, the totality of facts indicated that Type V/V sales were outside the ordinary course of trade in the sixth review period and "for the most part sales of Type V [were] very similar to sales of Type II cement."²¹ Even if the Department were to conclude that

¹⁸ Sixth Review Final Results, 63 FR at 12770-72; Sixth Review Ordinary Course of Trade Memorandum, at 4-9.

¹⁹ Sixth Review Final Results, 63 FR at 12771; Sixth Review Ordinary Course of Trade Memorandum, at 5.

²⁰ Sixth Review Ordinary Course of Trade Memorandum, at 7.

²¹ Sixth Review Final Results, 63 FR at 12770-72; Sixth Review Ordinary Course of Trade Memorandum, at 7-9.

the profit differences of CEMEX's Type V and Type II cement sales when compared to Type I cement sales in the sixth review were not significant, the extraordinarily long shipping distances and high freight expenses remain relevant, as are the other factors which, taken together, indicate that CEMEX's Type V/II and V/V sales are outside the ordinary course of trade.²² These other factors ((1) sales volume, (2) number and types of customers, (3) specialty products sold to a niche market, (4) historical sales trends, and (5) promotional quality) continue to support the Department's original ordinary-course-of-trade determinations for Type V/II and V/V cement sales in the sixth review.

In addition to highlighting these distinctions between the Seventh Review Remand and the sixth review ordinary-course-of-trade determination, pursuant to the Panel's instructions, we have reconsidered the evidence and the ordinary-course-of-trade factors in light of the Seventh Review Remand. We continue to find that, based upon the totality of facts of this case, CEMEX's home-market sales of Types V/II and V/V cement were outside the ordinary course of trade. We summarize below the basis for our redetermination that CEMEX's home-market sales of Types V/II and V/V cement produced at the Hermosillo plant and sold during the sixth review period were outside the ordinary course of trade:

- (1) The volume of Type II and Type V sales was extremely small compared with sales of other cement types sold in Mexico. The Department based this finding on sales data submitted by CEMEX that showed that Type II and Type V sales were minuscule in volume in comparison to CEMEX's sales of Type I cement.²³
- (2) Shipping distances and freight costs for Type II and Type V sales were significantly greater than for Type I sales, with CEMEX absorbing the costs. The

²² Seventh Review Redetermination, at 15.

²³ See Sixth Review Ordinary Course of Trade Memorandum at 4, 7.

disparity in freight costs between Type I and Types II and V is demonstrated by data provided in CEMEX's questionnaire responses.²⁴ As in the second and fifth reviews, the Department found that the "normal practice in Mexico is to ship cement, a heavy material, over relatively short distances. Indeed, over 95 percent of all cement shipments in Mexico cover less than 150 miles."²⁵ CEMEX's shipments of Type II and Type V cement did not conform to this norm, being shipped from Hermosillo to customers located in central Mexico, a distance that CEMEX acknowledged was 1220 miles from Hermosillo.²⁶ This arrangement was contrary to CEMEX's normal practice of dispersing its plants geographically to minimize shipping costs.²⁷ In addition, CEMEX acknowledged that it absorbed the freight costs on these sales rather than passing them on to its customers.²⁸ The Department found in the second review that CEMEX's normal practice prior to the antidumping duty order was not to absorb freight costs on such sales.²⁹

- (3) CEMEX's profit on Type II sales was small in comparison with its profit on sales of all cement types. This finding was based upon the sales data submitted by CEMEX showing a significant disparity between profit on Type II sales and profit on Type I sales.³⁰
- (4) The number and type of customers that purchased Type II and Type V cement were substantially different from those purchasing other cement types in Mexico. This was demonstrated by CEMEX's own sales data showing the small number of customers and that such customers tended to be large industrial contractors working on a small number of projects for both Type II and Type V cement

²⁴ See Sixth Review Ordinary Course of Trade Memorandum at 4-5, 7.

²⁵ See Sixth Review Ordinary Course of Trade Memorandum at 4-5, 7.

²⁶ See Excerpts from CEMEX's July 18, 1996, submission in the fifth review (submitted in sixth review in Petitioner's March 17, 1997, ordinary-course-of-trade submission, Appendices 10 and 14).

²⁷ See Excerpts from CEMEX documents, concerning geographic diversification of plants and freight costs (submitted in sixth review in Petitioner's March 17, 1997, ordinary-course-of-trade submission, Appendix 3).

²⁸ See Excerpts from CEMEX's July 18, 1996, submission in the fifth review (submitted in sixth review in Petitioner's March 17, 1997, ordinary-course-of-trade submission, Appendices 10 and 14).

²⁹ See note in the Sixth Review Ordinary Course of Trade Memorandum, at n.2, "[f]or CEMEX to absorb freight costs after the issuance of the order is an 'unusual circumstance,' particularly given the high freight costs for Types II and V".

³⁰ See Sixth Review Ordinary Course of Trade Memorandum, at 5.

sales.³¹

- (5) There was a promotional quality to CEMEX's sales of Type II and Type V cement that indicates that these sales of higher-quality cement types were made for reasons other than profit. The Department made this finding in the second administrative review based on statements made by CEMEX officials during verification but, when it asked CEMEX to address this factor in the sixth review, CEMEX did not respond. Consequently, the Department concluded reasonably that such sales continued to exhibit a promotional quality that was not evident in CEMEX's ordinary sales of cement.³²
- (6) CEMEX did not sell Type II and Type V cement in the home market until it began production for export in the mid-1980s even though a small domestic demand for such cement existed prior to that time ("historical sales trends"). The Department made this finding in the second administrative review based on statements made by CEMEX officials during verification but, when it asked CEMEX to address this factor in the sixth review, CEMEX did not respond. Consequently, the Department concluded reasonably that the facts had not changed with respect to this factor since the second review.³³
- (7) Type II cement and Type V cement were specialty products sold to a "niche" market. The Department made this finding in the second review and CEMEX never contested it. As the Department indicated, CEMEX stated on the record of the sixth review that the demand for Type II was small and that the overall volume of such sales was "insignificant."³⁴ The Department also found that CEMEX's affiliate CDC did not produce Type V cement and did not sell Type II cement in Mexico.³⁵

In sum, these factors indicate "that CEMEX's Type V/II and V/V sales were not representative of

³¹ See Sixth Review Ordinary Course of Trade Memorandum, at 5, 8.

³² See Sixth Review Final Results, 63 FR at 12771; Sixth Review Ordinary Course of Trade Memorandum, at 5-6, 8.

³³ See Sixth Review Final Results, 63 FR at 12771; Sixth Review Ordinary Course of Trade Memorandum, at 5-6, 8.

³⁴ See Sixth Review Ordinary Course of Trade Memorandum, at 6 (quoting CEMEX's July 18, 1996, submission in the fifth review).

³⁵ See Sixth Review Ordinary Course of Trade Memorandum, at 6.

CEMEX's home market sales"³⁶ based upon the totality of facts of the sixth review record.

Comment 1: CEMEX and CDC argue that the Department should comply with the Panel's remand instructions and apply the seventh-review methodology to the facts of the sixth review. Based on that analysis, CEMEX and CDC contend, the Department should find that all of CEMEX's home-market sales of Type V LA³⁷ cement, sold as Type II and Type V LA, were made in the ordinary course of trade.³⁸

CEMEX and CDC assert that the Department's suggestion that the Seventh Review Remand results did not represent a change in methodology is disingenuous. According to CEMEX and CDC, the Department's ordinary-course-of-trade analysis in the Seventh Review Remand differed significantly from its original seventh-review ordinary-course-of-trade analysis with respect to the number and relevance of factors that it considered. Specifically, CEMEX and CDC argue that in the Seventh Review Remand, the Department disregarded the number of customers and size of transactions as unimportant factors, and determined that differences in freight and handling charges were not separate ordinary-course-of-trade factors but were reflected in profit. According to CEMEX and CDC, the Department considered the difference in five factors (volume, freight costs, profit, number and type of customers, and handling charges) in the original seventh review final results and considered only three (volume, profit, and number and

³⁶ Sixth Review Final Results, 63 FR at 12770.

³⁷ Although CEMEX asserts that the cement produced at Hermosillo is really Type V LA cement and that it is the same product as Type V cement, this assertion is not supported by the record evidence of the sixth review. Based on the record of the sixth review, CEMEX reported selling Type I, II, and V in the home market, but the Department discovered at verification that CEMEX produced only Type V cement at Hermosillo plant. See additional discussion of the issue, at page 25 of the remand.

³⁸ CEMEX Comments on Draft Results (July 11, 2005) ("CEMEX's Comments"), at 2-3.

type of customers) in the Seventh Review Remand. CEMEX and CDC argue that it was this shift in factors that the Panel considered to be significant.

CEMEX and CDC argue further that the Department is now changing its methodology to fit its conclusion, going from analyzing three factors to seven factors, including additional ordinary-course-of-trade factors that it did not consider in its Seventh Review Remand decision: (1) volume, (2) shipping distance and freight costs, (3) profit, (4) number and type of customers, (5) promotional quality, (6) historical sales trends, and (7) sold to a “niche” market.

CEMEX and CDC contend that the Department’s characterization of the seven listed factors in the Draft Results decision shows that the Department has repeated the conclusions contained in its original sixth review ordinary-course-of-trade determination and it has made no effort to examine its ordinary-course-of-trade determination in light of the Seventh Review Remand determination.

CEMEX and CDC argue that the Department’s suggestion in the Draft Results that the longer shipping distance and higher freight expenses support the Department’s determination that such sales are outside the ordinary course of trade directly contradicts its acknowledgment in the Draft Results of the basic economic principle that profits and expenses are interrelated. CEMEX and CDC argue further that, having concluded that profits are comparable, citation to the higher freight expenses as a factor supporting its decision in the Draft Results is another attempt to revive differences in freight cost improperly despite the Department’s recognition that taking freight expense into account as an independent factor would be double-counting the factor.³⁹

CEMEX and CDC assert that, pursuant to the sixth review Panel’s instructions, the

³⁹ CEMEX’s Comments, at 6-11.

Department should have reconsidered its ordinary-course-of-trade analysis with respect to CEMEX's Type V LA cement sales by applying the methodology it used in the Seventh Review Remand. CEMEX and CDC argue, that the Department should treat all home-market sales of Type V LA cement sold as Type II and Type V LA as a single product, in accordance with its "produced-as" matching methodology.

CEMEX and CDC argue that a comparison of the facts of the sixth review with the facts of the seventh review with regard to sales found to be within the ordinary course of trade shows that the record evidence in the sixth review is even more compelling in favor of finding such sales to be within the ordinary course of trade. CEMEX and CDC argue that, for example, in the Seventh Review Remand, the Department found that the fact that Type V LA cement sold as Type I cement was sold to fewer customers than was Type I is unremarkable given that CEMEX sold substantially less Type V LA than it did Type I and this fact does not indicate that the sales in question are outside the ordinary course of trade. CEMEX and CDC argue that these facts also exist in the sixth review.

With respect to profit, CEMEX and CDC assert that, in the Seventh Review Remand, the Department found the profit ratios to be "comparable" and not suggestive of any meaningful departure from the usual conditions and practices of CEMEX's home-market sales of Type I cement. CEMEX and CDC argue that profit margins between Type V LA cement and Type I cement sales in the sixth review are comparable as well. CEMEX and CDC contend that, given that profitability levels are comparable in the sixth review, the Department; should conclude, as it did in the Seventh Review Remand, that whatever differences exist in freight or handling charges

do not indicate that the sales in question are outside the ordinary course of trade.⁴⁰

CEMEX and CDC also argue that, as in the Seventh Review Remand, the only significant difference between the sales of Type V LA cement and Type I cement is the fact that the sales volume of Type V LA cement was smaller than that of Type I cement. CEMEX and CDC argue further that pursuant to the Department's reasoning in the Seventh Review Remand, whatever difference may exist in the relative sales volumes of Type V LA and Type I cement in the sixth review is an insufficient basis for finding the sales in question to be outside the ordinary course of trade.

With respect to the remaining factors such as promotional quality, historical sales trends, and sales to a "niche" market, CEMEX and CDC argue that the Department has not explained why these factors were relevant only in the context of the sixth review but not in the seventh review.⁴¹ CEMEX and CDC argue that, for example, the Department did consider historical sales trends and promotional quality in the original seventh review ordinary-course-of-trade analysis but did not do so in the Seventh Review Remand.

CEMEX and CDC also argue that the Department's conclusion regarding promotional quality is incorrect. According to CEMEX and CDC, the Panel specifically rejected the Department's determination that there was substantial evidence on the record supporting the Department's conclusion that there was a promotion quality to sales of Type V LA and Type II cement. CEMEX and CDC assert that evidence on the record contradicts this conclusion.

With regard to the niche-market factor, CEMEX and CDC argue that the Department's

⁴⁰ CEMEX's Comments, at 11.

⁴¹ CEMEX's Comments, at 12-13.

conclusion that Type V cement sold as Type II and V is sold to a niche market only reflects the fact that Type V cement is sold to a smaller number of customers which, according to CEMEX and CDC, the Department considered as a separate factor and found to be unremarkable given that CEMEX sold substantially less Type V as Type I than it did Type I cement.

CEMEX and CDC argue that, for these reasons, the Department should comply with the Panel's remand instructions and apply the Seventh Review Remand methodology to the facts of the sixth review.

The petitioner contends that in the Draft Results the Department re-affirmed its determination properly that CEMEX's sales of Type V cement invoiced as Type II and Type V cement were outside the ordinary course of trade. The petitioner argues that the Panel misunderstood the Department's remand determination in the seventh review, which, according to the petitioner, did not announce any new methodology or understanding with respect to determining whether sales are outside the ordinary course of trade. The petitioner asserts that, rather, the Department re-evaluated the evidence on the record of that case regarding sales of Type V cement invoiced as Type I in terms of the factors relevant to those sales. The petitioner argues that the Department found that such factors provided an insufficient basis to conclude that the sales were so unusual compared with other home-market sales as to be outside the ordinary course of trade. The petitioner argues further that the Seventh Review Remand results are not controlling with respect to the issues in the Draft Results because the Seventh Review Remand involved a different type of cement (Type V sold as Type I), a different evidentiary record, and a different, although overlapping, set of factors.

The petitioner asserts that, when considering the totality of the circumstances regarding

the sales at issue, the Department must view each fact not in isolation but in the context of the other surrounding facts. The petitioner argues that there is one factor that distinguishes the Draft Results from the Seventh Review Remand. Specifically, the petitioner contends that, in the seventh review, there was no evidence that CEMEX shipped Type V cement invoiced as Type I long distances from the plant as was the case with respect to sales of Type V cement invoiced as Type II and Type V cement, both in the sixth review and the seventh review. The petitioner contends that, in the absence of evidence of unusually long shipping distances in the seventh review, the Department found that the difference in freight expense between Type V cement invoiced as Type I and physical Type I cement was relatively small, given the comparable prices and profit for such sales. The petitioner argues that, contrary to CEMEX's argument regarding the Department's alleged double-counting of freight expenses in the Draft Results, the Department did not make a blanket conclusion in the seventh review that freight expenses are necessarily subsumed within profitability and never can be considered as an independent factor.⁴²

The petitioner argues that, in the Draft Results, the Department determined correctly that both shipping distances and freight costs were significantly greater for CEMEX's Type V cement sold as Type II and Type V cement than for other home-market sales and that CEMEX absorbed the freight costs contrary to its normal practice.

The petitioner argues further that as the Department discusses in the Draft Results, the Panel in the seventh review actually affirmed the Department's determination with respect to sales of Type V cement invoiced as Type II and Type V cement and did not revisit that ruling until after the Department changed its determination on remand with respect to sales of Type V

⁴² The petitioner's Comments on Draft Results (July 15, 2005) ("The petitioner's Comments") at 4-5

invoiced as Type I cement. The petitioner argues that there is no basis for CEMEX's and CDC's assertion that the timing of the Department's Seventh Review Remand somehow prevented the panel in that case from revisiting the ordinary-course-of-trade issue with respect to sales of Type V cement invoiced as Type II and Type V cement.

The petitioner argues that CEMEX's assertion that the Department should have reconsidered its analysis on ordinary course of trade with respect to CEMEX's Type V LA cement sales by applying the methodology used in the Seventh Review Remand is based on a false premise. According to the petitioner, the Panel did not order the Department to apply the same factors in the sixth review reflexively that it applied in the Seventh Review Remand regardless of the differences in products and evidentiary records. The petitioner points out that, in fact, the Panel actually disavowed speculation on how the Department should respond to its Remand Order and instead remanded the case to the Department to make its own determination. Thus, according to the petitioner, it would be an error to simply apply the same factors from one case to the next without considering the factual differences that distinguish them.

The petitioner argues that CEMEX and CDC not only ignore the significant factual differences in the situations presented in the Remand Order and the Seventh Review Remand but pretend that only three factors are relevant to either case (profit, sales volume, and the number and type of customers). According to the petitioner, this assertion mischaracterizes the Department's Seventh Review Remand results which, contrary to the respondent's contention, did not disregard as unimportant all the other factors in that case but considered those factors fully based on the evidence of that review and concluded that they were not sufficient to warrant a determination of sales outside the ordinary course of trade. The petitioner argues that, ignoring

most of the relevant factors and particularly the key factors of shipping distances and freight cost, CEMEX and CDC are unable to demonstrate any flaw in the Department's finding on ordinary course of trade.⁴³

The petitioner argues further that, even with respect to the three factors it does address, the respondent is unable to substantiate any problems with the Department's determination on ordinary course of trade. According to the petitioner, CEMEX and CDC have conceded that there is a significant difference in volumes between sales of Type V cement invoiced as Type II and Type V cement and sales of Type I cement. With regard to the number and type of customers, the petitioner argues that it is true that it is unremarkable that CEMEX made sales of specialty Type V and Type II cement to fewer customers than it did of Type I cement. The petitioner argues that those fewer customers were unquestionably very different in nature from the customers which purchased Type I cement. The petitioner asserts that those customers tended to be large industrial contractors which worked on a relatively small number of projects in contrast to the wide variety of types of customers which purchased Type I cement.

With respect to profit, the petitioner argues, the difference in profit margins should not be considered in the abstract but in the context of the other relevant factors in this review.

The petitioner contends that the record evidence supports the other factors upon which the Department relied, particularly the extraordinarily long shipping distances and high freight costs, and supports the determination that the sales at issue were outside the ordinary course of trade. The petitioner contends further that this is demonstrated by the fact that the Department found that sales of Type V cement invoiced as Type V cement were outside the ordinary course

⁴³ The petitioner's Comments at 8-9.

of trade even though the profit on such sales was similar to that of sales of Type I cement. The petitioner argues that, because the evidence regarding all other factors is very similar with respect to both Type V cement invoiced as Type II cement and Type V cement invoiced as Type V cement, both are outside the ordinary course of trade regardless of the Department's conclusions with respect to profit.⁴⁴

With respect to CEMEX's and CDC's argument that the Department should re-open the record to incorporate the proprietary versions of the Department's seventh review memorandum on ordinary course of trade and the Seventh Review Remand results, the petitioner argues that there is nothing in the Panel's Remand Order indicating that the Department expand the record to include any new information, much less information from the seventh review. For the reasons stated, the petitioner requests that the Department reject CEMEX's and CDC's objections and issue the final remand results confirming the Draft Results.

Department's Position: Our examination of the factors relevant to an ordinary-course-of-trade determination is far-reaching and fact-specific. In examining whether sales were made in the ordinary course of trade, we carefully review the conditions and practices surrounding the relevant home-market sales. We must evaluate not just "one factor taken in isolation but rather. . . all the circumstances particular to the sales in question."⁴⁵ In short, we examine the totality of the facts on each record to determine whether sales are being made for "unusual reasons" or

⁴⁴ The petitioner's Comments at 10.

⁴⁵ 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)).

under “unusual circumstances.”⁴⁶

The purpose of the statutory provision on ordinary course of trade is to “prevent dumping margins from being calculated on the basis of sales that are not representative” of the home market.⁴⁷ Therefore, when we examine sales to ascertain whether they were made within the ordinary course of trade, we examine them to determine whether such sales would constitute appropriate sales on which to base normal value. Thus, the reason for the exercise is not merely to catalog any differences that 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, we have reconsidered, in view of the “changed methodology” in the Seventh Review Remand, whether CEMEX’s home market sales of Type V cement sold as Type II and Type V cement produced at the Hermosillo plant were outside the ordinary course of trade, and we have determined that these sales are outside the ordinary course of trade based upon the totality of the facts of this case.

The Department agrees with the Panel, as well as CEMEX and CDC, that the Seventh Review Remand “reflects a further development” in the Department’s consideration of the ordinary-course-of-trade issues in the cement and clinker proceedings.⁴⁸ The Seventh Review Remand represents the first administrative review in which we examined CEMEX’s home-market sales of Type V sold as Type I cement. We also acknowledge that we reached a different

⁴⁶ Electrolytic Manganese Dioxide from Japan, 58 FR 28551, 28552 (1993).

⁴⁷ Monsanto Co. v. United States, 698 F. Supp. 275, 278 (CIT 1988).

⁴⁸ Remand Order, at 27; CEMEX Comments at 5.

conclusion after re-evaluating the facts on the record in the totality of circumstances for CEMEX's home-market sales of Type V sold as Type I cement during the seventh review period.

These changes do not equate, however, to a change in methodology. The Department clarifies above that in both the seventh and sixth review remands it employed the exact same ordinary-course-of-trade methodology – an examination of the totality of facts on each record. The analysis is the same but the facts differed. The different facts on each review record indicate that the sales of different types of cement in the home market have different characteristics and conditions. The difference in the number of factors upon which we relied to support a conclusion does not, in and of itself, indicate a different methodology or understanding of factors. Also contrary to CEMEX's and CDC's allegation, we did not disregard factors as unimportant or combine factors in the Seventh Review Remand but, instead, examined or "considered" the same five factors that we considered in the original seventh review decision⁴⁹ and nearly the same factors we have considered in this remand redetermination.

We disagree with the contention of CEMEX and CDC that we did not comply with the Panel's Remand Order to reconsider the findings on ordinary course of trade in view of the Seventh Review Remand. For this remand, the Department has reconsidered its findings on ordinary course of trade for Type II and Type V cement home-market sales, in the Seventh Review Remand in view of the revised ordinary-course-of-trade determination for Type I cement. In fact, we re-examined each factor, and the evidence surrounding each factor, in view of the

⁴⁹ In the original seventh review determination, the Department considered five factors: (1) volume, (2) freight costs, (3) profit, (4) number and type of customers, and (5) handling charges. In the Seventh Review Remand, the Department considered the same five factors: (1) sales volume "disparity," (2) number and type of customer "not extraordinary," (3) profits "comparable," and (4 & 5) freight and handling charges were "not so great" and "relatively small." Seventh Review Remand, at 4-5, 13, 15-16.

revised conclusion in the Seventh Review Remand and within the proper context of the totality of the circumstances of this review. We have explained the distinctions between the revised decision on ordinary course of trade with respect to Type I in the Seventh Review Remand and the re-confirmed findings on ordinary course of trade with respect to Type II and V in the Remand Order.

CEMEX and CDC assert several substantive challenges to the Department's ordinary-course-of-trade redetermination that are riddled with fundamental factual inaccuracies which make their assertions erroneous. First, CEMEX provides a side-by-side comparison chart⁵⁰ that does not reveal any comparable facts from the seventh review.⁵¹ Instead, the chart is missing CEMEX's business-proprietary information from the seventh review record that was neither on the record of the sixth review at the time of the original determination nor now.⁵² Well-settled case law refutes CEMEX's contentions that the information is necessary for this remand and indicates that "the scope of the record for purposes of judicial review is based upon information

⁵⁰ The only helpful information revealed by this side-by-side comparison is the distinctions between the home-market sales of Type II and Type V and the Type I sales. At the very least, this chart highlights some of the unique characteristics and conditions of the Type II and V sales in the sixth review simply based upon the substantially different number of customers, relatively small sales volume, and the lower profit (for Type II only). CEMEX's Comments, at 9-10.

⁵¹ The only factual comparison available between the sixth and seventh review is the type of customers; otherwise, CEMEX's summary of the sixth-review facts is incorrect. The record evidence indicates that the types of customers for Type II and V cement "tended to be large industrial contractors working on a small number of projects" whereas the customers for Type I "ranged in size" from individuals buying one bag of cement to large contractors buying several metric tons. Sixth Review Ordinary Course of Trade Memorandum, at 5 & 8. Instead, CEMEX merely cites its response to a question regarding the distribution process that is off-point and discusses distribution of cement generally to four customer categories without reference to the types of cement. CEMEX's Comments, at 9 n.18.

⁵² After unsuccessful motions before the Panel, CEMEX submitted unsolicited comments to the Department about how its compliance with the Panel's remand requires the Department to open the record to include the limited ordinary-course-of-trade information from the seventh review. CEMEX's June 28, 2005, letter to Commerce, at 1-2. See also CEMEX Comments, at 9 n.15.

which was ‘before the relevant decision-maker’ and was presented and considered ‘at the time the decision was rendered.’”⁵³ Thus, consistent with the statute and case law, it is not appropriate under these circumstances to re-open and supplement the administrative record in this case.

Second, although the Panel upheld the Department’s decision to exclude CEMEX’s home-market sales of Type V sold as Type I cement from the determination of normal value, CEMEX’s comments include Type I cement sales inappropriately to support its arguments on ordinary course of trade.⁵⁴ Consistent with the Panel’s findings, we do not revisit this decision or include these sales in the determination on ordinary course of trade subject to this remand concerning CEMEX’s home-market sales of Type II and Type V cement.

Third, CEMEX asserts the false factual pretext that CEMEX’s Type V cement is really Type V LA.⁵⁵ CEMEX’s presentation of the facts is wrong because the record information in the sixth review does not support this assertion. The record evidence CEMEX submitted and the Department verified for the sixth review demonstrated that CEMEX sold only Type I, Type II,

⁵³ See Kerr-McGee Chem. Corp. v. United States, 955 F. Supp. 1466, 1472 (CIT 1997) (citing Baker Indus. Corp. v. United States, 7 CIT 313, 315 (1984) (quoting S. Rep. No. 96-249, at 247-48 (1979) reprinted in 1979 U.S.C.C.A.N. 381, 633)); See also Neuweg Fertigung GmbH v. United States, 797 F. Supp. 1020, 1022 (1992) (“The case law of this court is very clear that the administrative record ‘is limited to the information that was presented to or obtained by the agency making the determination during the particular review proceeding for which section 1516 authorizes judicial review.’ ‘Any information received by [the Department] after the particular determination at issue is not part of the reviewable administrative record.’” See Rhone Poulenc, Inc. v. United States, 710 F. Supp. 341, 345 (1989) (CIT rejected plaintiffs’ attempt to supplement record with materials from record of separate administrative review arising from the same antidumping duty order because “judicial review of an administrative review of an antidumping duty order is confined to information contained in administrative record”); PPG Industries, Inc. v. United States, 708 F. Supp. 1327 (1989) (judicial review is limited to evidence contained in the administrative record).

⁵⁴ Remand Order, at 6 & 32 (upheld because CEMEX did not provide complete information in its responses, forcing the Department to apply partial adverse facts available); CEMEX’s Comments, at 10 n.26.

⁵⁵ CEMEX Comments on Draft Results (July 11, 2005), at 2 n.1.

Type V, and pozzolanic cement in the home market, not Type V LA.⁵⁶ Although CEMEX reported producing Type I, Type II, and Type V cement, we discovered at verification that the cement CEMEX produced at the Hermosillo plants and sold as Type I, Type II, and Type V in Mexico and as Type II and Type V in the United States contained the physical and performance specifications of Type V cement.⁵⁷ The record does not indicate that CEMEX made home-market sales of Type V LA during the sixth review period.

Fourth, CEMEX further evades the factual reality of the sixth-review determination on ordinary course of trade by re-asserting its “as-produced” theory.⁵⁸ Once again, this argument is irrelevant to the finding on ordinary course of trade. As explained throughout this entire proceeding, the Department examines the normal business conditions and practices of CEMEX’s cement sales in Mexico to determine whether certain sales were unusual and, thus, outside the ordinary course of trade. We based our findings on ordinary course of trade for CEMEX’s home-market sales of Type II and Type V cement produced at its Hermosillo plants in this review upon the facts which CEMEX submitted.

Specifically for this remand, the Department re-examined each and every factor it considered in the original Type II and Type V ordinary-course-of-trade determinations with an astute consideration of the Seventh Review Remand’s revised conclusion concerning profit and freight expenses. With respect to the profit factor, as discussed before, profit was only a factor

⁵⁶ Sixth Review Final Results, 63 FR at 12767.

⁵⁷ Sixth Review Preliminary Results, 62 FR at 47628; Sixth Review Final Results, 63 FR at 12770-72; see also Verification of Costs of Production and Sales Report (July 21, 1997), at 14-15; Verification of Home Market Sales and Ordinary-Course-of-Trade Memorandum (July 21, 1997), at 16-17.

⁵⁸ CEMEX’s Comments on the Draft Results, at 10 n.27.

which we relied upon for the determination on ordinary course of trade for Type II cement and we found it to be “small in comparison to its profits on Type I cement” sold in the home market.⁵⁹ Furthermore, in the Seventh Review Remand, the Department even recognized that “the relative difference in profit between the types of cement compared in the {sixth} review is higher than the relative difference in profit between the types of cement at issue in this review.”⁶⁰ Profitability can vary due to several factors, including a variety of expenses, prices, and the timing of the sales. Accordingly, whether supported by record evidence or presumed, comparable profits do not equate automatically to comparable freight expenses.⁶¹

Also contrary to CEMEX’s assertion, volume is not “the only significant difference” between the sales of Type II and V cement and CEMEX’s normal home-market sales.⁶² Most notably, CEMEX’s comments do not acknowledge that the facts on the record indicate the existence of significantly greater shipping distances and freight costs for Type II and Type V cement in the home market during the sixth review.⁶³ CEMEX’s shipments of Type II and Type V cement produced at Hermosillo were shipped significantly greater distances, which was a very unusual practice when compared to CEMEX’s other sales of cement sold in the home market. Contrary to normal practices of shipping cement short distances, CEMEX only shipped Types II and V cement “significantly greater” distances. Even more unusual, these vast shipping distances

⁵⁹ Sixth Review Final Results, 63 FR at 12771; Sixth Review Ordinary Course of Trade Memorandum, at 5.

⁶⁰ Seventh Review Remand, at 15.

⁶¹ Sixth Review Ordinary Course of Trade Memorandum at 4-5, n.2 & 7 (finding significantly greater freight costs for Type II and V cement sales).

⁶² CEMEX’s Comments, at 11.

⁶³ CEMEX’s Comment, at 8

resulted in exorbitant freight costs that CEMEX absorbed for these two types of cement. CEMEX's shipping arrangements for Type II and V cement in the sixth review departed significantly from the standard industry practice in Mexico. Indeed, alone, "this departure from the norm could well give rise to Commerce's determination that the sales of Type II and V cements were outside the ordinary course of trade."⁶⁴

Regarding the promotional quality, historical sales trends, and "niche" market factors, we re-examined all the factors and the totality of the facts on the record to reconsider whether CEMEX's home-market sales of Type V sold as Types II and V cement were outside the ordinary course of trade in view of the Seventh Review Remand. Our analysis and conclusions for this remand follow the Panel's instructions. The Panel for the Seventh Review Remand instructed the Department to explain why four factors upon which the agency relied in making its ordinary-course-of-trade determination – differences in freight costs, relative profit levels, the number and type of customers, and disparity of handling charges – supported the conclusion that CEMEX's sales of Type V cement sold as Type I cement were made outside the ordinary course of trade.⁶⁵ The three additional factors (promotional quality, historical sales trends, and "niche" market factors) were not at issue in the seventh review. Thus, in accordance with the Panel's instructions for the Seventh Review Remand, the Department did not examine such factors or explain why they were relevant or not to its revised analysis.

Nevertheless, these three factors are relevant and supported by substantial evidence on the record of the sixth review, as discussed above. Regarding promotional quality, we recognize that

⁶⁴ CEMEX v. United States, 133 F. 3d at 901.

⁶⁵ Seventh Review Panel Decision and Remand at 34; Final Results of Review Remand Affirmed, at 6.

the Panel has not issued a finding regarding our decision to rely upon this factor in our determinations but merely restated CEMEX's arguments concerning the application of facts available for the promotional quality of the sales.⁶⁶ Instead, the fact still remains that, although the Department requested information from CEMEX regarding, among other things, the "historical trends" and "promotional quality" of its home-market sales, CEMEX did not address these issues on the record of this review and, thus, we reasonably resorted to facts available.⁶⁷ Finally, the factor of the "niche" market for the specialty products reflects that the *demand* for the product in the home market was less than for the other cement products normally sold in Mexico, which we considered originally in the context of the sales-volume factor, not the number of customers as CEMEX contends.⁶⁸

As stated above, we continue to find that, based upon the totality of facts of the sixth review, which were demonstrated by several factors – extremely small sales volume, significantly greater shipping distances and freight costs, small profit, substantially different number and type of customers, promotional quality, historical sales trends, and specialty products sold to a "niche" market – CEMEX's sales of Type V/II and V/V cement in the home market were outside the ordinary course of trade. Accordingly, we continue to exclude CEMEX's reported sales of Type V sold as Type II and V cement in our determination of normal value.

2. Selection of Adverse Facts-Available Difference-In-Merchandise (DIFMER) Data

The Panel remanded the Department's selection of adverse facts-available, DIFMER data

⁶⁶ Remand Order, at 28.

⁶⁷ Sixth Review Ordinary Course of Trade Memorandum, at 5-8.

⁶⁸ Sixth Review Ordinary Course of Trade Memorandum, at 4, n.1.

for further analysis and explanation. See Opinion and Order of the Panel, USA-98-1904-02 (May 26, 2005), at 86-88. In the original review results, for the DIFMER adjustment, the Department used the difference between cost data from the CEMEX plant producing Type I cement with the lowest variable cost and CEMEX's Type V variable cost data at the Hermosillo plant which did not pass verification. The Panel's primary concern seems to be the inconsistency in the Department's explanation for not using the weighted-average costs of all of CEMEX's plants producing Type I cement in light of the Department's discussion of plant efficiencies.⁶⁹ *Id.*

Specifically, the Panel has requested that the Department explain how the Department's stated goal of minimizing the effects of plant efficiencies on the DIFMER calculations can be consistent with the use of the data from a single plant with the lowest variable costs instead of the weighted-average data from all plants producing Type I. *Id.*

In response to the Panel's request, we conclude that the decision we articulated in the final review results confuses two separate concepts, the plant-efficiency concept with the adverse facts-available concept. With regard to the plant-efficiency concern, when the Department has accurate, verified variable-cost data upon which to base a DIFMER adjustment, it tries to determine as accurately as possible the actual cost differences associated with producing the different physical characteristics between the products being compared. The purpose of a

⁶⁹ We point out that, on page 85 of the Remand Order, this Panel states that, in the Seventh Review, after remand, the Department determined "there was no physical difference between the products, and therefore no DIFMER allowance was appropriate." This is a misstatement of the Seventh Review Remand findings. After the Seventh Review Remand, the Department did not have to make a DIFMER adjustment because on remand the Department did not use Type I home-market sales for the comparison sales. In the Seventh Review Remand, the Department determined that certain Type V cement sales that it had found previously to be outside the ordinary course of trade were now within the ordinary course of trade. Therefore, on remand, the Department compared sales of identical merchandise and did not have to make a DIFMER adjustment. The Department did not find that there are no physical differences between Types I, II, and V cement as this statement from the Panel implies.

DIFMER adjustment is to adjust the home-market price of the non-identical like product to reflect what the price would be if there were home-market sales of the like product which is physically identical to the product sold in the United States. If the production and cost data being compared come from two separate plants, the Department is concerned that, in addition to cost differences attributable to physical differences in products, some of the cost difference might be attributable to the different production efficiencies between the plants. As a result, the Department prefers data from the same plant to eliminate any difference in costs due to different plant efficiencies. If such single-plant data is not available through no fault of the interested parties, the Department may weight-average the variable cost-of-manufacture data across all plants in order to minimize the effect of plant or production-line efficiencies, a weight-averaging effect which this Panel has acknowledged. Remand Order, at 87.

In cases such as this, however, where CEMEX could not support its DIFMER data at verification because it misreported its production and cost data, the Department has no way of knowing what the real data might have been. Therefore, we used facts available and applied an adverse inference for this element of our calculations. At this point, the issue of plant efficiency is no longer a relevant issue because, due to CEMEX's misreporting, the Department and the other parties to the proceeding were deprived of the opportunity to develop, comment on, and submit data on the issue. Nevertheless, given the incomplete record, the Department had to make a DIFMER adjustment because it was comparing the prices of two non-identical products.

As possible "adverse" facts-available data, the record contains essentially four options for calculating a DIFMER adjustment. The Department could use DIFMER data of CEMEX's affiliate CDC for Type I and Type II cement. With respect to the next two options, the record

contains CEMEX's variable cost-of-manufacturing data for its Type I plants and for the Type V cement which did not pass the verification; the Department could either compare the weighted-average variable costs of all of CEMEX's Type I plants with CEMEX's Type V data which did not pass verification or the Department could compare, as it did for the final results, the data from CEMEX's Type I cement plant with the lowest variable costs of manufacturing to the variable costs of manufacturing for Type V cement which did not pass the verification. Finally, the Department could use what it used in the preliminary results, the maximum DIFMER permitted, which is 20 percent of the variable cost of manufacture of the U.S. product.⁷⁰ The U.S. Courts and Federal Circuit have upheld the use of the maximum 20-percent DIFMER adjustment as adverse facts available.⁷¹

The Department continues to select as adverse facts available the data from CEMEX's plant with the lowest Type I cement variable costs of manufacturing. The Department made its selection based on the following corrected analysis. The Department did not use CDC's Type I and Type II cost data because the data is for different cement, Type II instead of Type V, and its use would not be adverse to CEMEX. The DIFMER adjustment needs to reflect the differences between CEMEX's sales of Type V and Type I cement. CDC's data concerned Type II and Type I cement. It is undisputed that Type II cement is closer in physical characteristics to Type I cement than Type V cement. Therefore, any difference between Type I and Type II cement would be less than the difference between Type I and Type V cement. Under the circumstances,

⁷⁰ The Department considers that any product with a DIFMER greater than 20 percent to be too different for comparison purposes. Therefore, 20 percent is the maximum DIFMER for which the Department will make an adjustment.

⁷¹ CEMEX, S.A. v United States, 133 F.3d 897, 904 (Fed. Cir., January 8, 1998).

to use the Type II and Type I DIFMER data would actually be a benefit to CEMEX and thus not be adverse. Therefore, the differences in the products exported to the United States and the lack of adversity make this option unusable.

The Department did not use the weighted-average of the variable cost-of-manufacturing data for all plants producing Type I cement not because of concerns over plant efficiencies as it stated in the final results. As explained above, plant efficiencies are no longer a concern when the respondent has not provided accurate data. Rather, use of the weighted-average cost data from all plants is not adverse to CEMEX. The weighted-average data would be the same non-adverse data the Department might have used had CEMEX cooperated and reported accurately that it did not have the different cost data at one plant.

This Panel has already upheld the Department's determination to resort to "adverse" facts available. The remaining choices of adverse data were the difference between CEMEX's Type I cement plant with the lowest variable costs of manufacturing and the Type V cost data which CEMEX could not support at verification or the maximum 20-percent court-sanctioned, adverse facts-available DIFMER adjustment. In selecting among inferences adverse to CEMEX, the Department used the less adverse data, the data based on CEMEX's plant with the lowest variable costs of manufacturing, rather than the alternative, more adverse inference (the maximum 20-percent DIFMER adjustment) that has been sanctioned by the courts.⁷²

Although the use of the Type I plant data with the lowest variable costs is adverse, it is not punitive because it is based on CEMEX's own reported variable cost-of-manufacturing data and the adjustment remains significantly less than the 20-percent maximum DIFMER adjustment

⁷² CEMEX, S.A. v United States, 133 F.3d 897, 904 (Fed. Cir., January 8, 1998).

permitted by law (and sanctioned as usable adverse facts available). As a result, this Panel should uphold the Department's use of the difference between CEMEX's cost data from its Type I cement plant with the lowest variable costs of manufacturing and the Type V cost data which failed verification as a reasonable exercise of discretion in selecting adverse facts available.

Comment 2: CEMEX and CDC argue that the Department should calculate CEMEX's dumping margin based on a comparison of the sales of Type V LA cement exported to the United States with Type V LA cement sold in the home market as Type II and Type V LA. CEMEX and CDC assert that, under these circumstances, the issue concerning the calculation of the DIFMER adjustment becomes moot because the Department will be comparing identical merchandise.

CEMEX and CDC argue further that, if the Department continues to compare CEMEX's U.S. sales of Type V LA cement with its home-market sales of Type I cement instead of home-market sales of identical merchandise (Type V LA cement), it should not make a DIFMER adjustment because there is no cost difference attributable to differences in physical characteristics. CEMEX and CDC assert that the only difference between Type I and Type V LA cement is the chemical composition of each, which, according to CEMEX and CDC, results from the chemical composition of clay and limestone that are naturally present at the quarries near the respective plants. CEMEX and CDC argue that any difference in processing cost is due solely to differences in plant efficiencies. CEMEX and CDC argue further that, because there is no difference in raw materials or the production process, a DIFMER adjustment is not warranted.⁷³

CEMEX and CDC argue that, in the event the Department continues to calculate a

⁷³ CEMEX's Comments at 16-17.

DIFMER adjustment, it must do so strictly in accordance with the Panel's instructions. CEMEX and CDC contend that, while the Panel upheld the use of partial facts available, it rejected the Department's particular choice of facts-available-methodology as being overly punitive and unreasonable. Specifically, according to CEMEX and CDC, the Panel reviewed and rejected the Department's rationale for selecting the overly punitive DIFMER calculation methodology. CEMEX and CDC argue that the Panel found that the Department's rejection of using the weighted-average variable-cost data (and instead of using the data from a single plant) was unjustified. According to CEMEX and CDC, the Panel held that the selection of a single facility with the lowest variable cost as the comparison plant, as a strategy to minimize plant-efficiency effects, was unreasonable because the selection of a single plant may yield a larger bias in the impact that comes from plant efficiencies and this bias could go in either direction. CEMEX and CDC contend that the Panel also asserted that, given that the DIFMER is obtained from the comparison between plants, and considering that plant efficiencies affect the measurement of variable costs, it seems more appropriate to use the information that comes from several cement plants to control for the impact of plant efficiencies. Thus, according to CEMEX and CDC, the Panel makes clear that a DIFMER adjustment based on the weighted-average variable cost of all CEMEX's production facilities is supported by the facts and, at the same time, would have served as sufficiently adverse facts available.⁷⁴

CEMEX and CDC argue that the Department's DIFMER methodology and its new rationale thereof ignores the Panel's opinion and its remand instructions. According to CEMEX and CDC, with respect to the DIFMER issue, the Panel looked specifically at two distinct

⁷⁴ CEMEX's Comments at 17.

questions, which appear as headings within the Panel’s opinion: (1) “Was the Department’s DIFMER adjustment based upon Partial Adverse Facts Available supported by substantial evidence in the record and in accordance with the law?” and (2) “Was the Department’s DIFMER calculation accurately based on the information available in the record?” CEMEX and CDC assert that the Panel affirmed the first question, upholding the use of partial facts available. With regard to the next question, according to CEMEX and CDC, the Panel found that the Department’s rationale for relying on the lowest variable-cost data based on plant-efficiency issues to be unreasonable and remanded only this issue to the Department.⁷⁵

CEMEX and CDC argue that the Panel specifically ordered the Department to “{f}urther analyze and explain the plant efficiency issues in the calculation of the DIFMER adjustment in accordance with this opinion.” CEMEX and CDC argue further that the scope of the Panel’s remand was limited to the sole issue of plant efficiency and, therefore, the Department’s remand analysis must be limited to that issue as well.

Citing Oy v. United States, 23 CIT 257, Slip Op. 99-39 (CIT1999), CEMEX and CDC argue that the CIT rejected the Department’s attempt upon remand to present a brand new theory for selecting identical products based on differences in product specifications. CEMEX and CDC assert that, in that case, the CIT held that, “{b}ecause the court relied on Commerce’s pre-remand position in ordering remand, the court cannot accept this new explanation for purposes of this review” and ordered the Department to treat all merchandise as identical. CEMEX and CDC argue that in this case the Department does not have the authority to re-examine the DIFMER issue except to analyze and explain the plant-efficiency issue in the calculation of the DIFMER

⁷⁵ CEMEX’s Comments at 18.

adjustment further in accordance with the Panel's instructions. According to CEMEX and CDC, the Panel's explicit instructions do not authorize the Department to discard the original issue altogether and advance an entirely new justification for its incorrect methodology. CEMEX and CDC contend that the introduction of a new explanation for the DIFMER calculation is not permissible when it comes after the Panel has ordered a remand. CEMEX and CDC contend further that, given that the Panel's decision was based on the Department's pre-remand justification, the Department was limited to clarifying its position with respect to the plant-efficiency issue as instructed by the Panel. CEMEX and CDC argue that, in accordance with the Panel's instruction and to the extent that the Department calculates a DIFMER adjustment, it must base the calculation on the weighted-average variable cost of producing Type I cement at all CEMEX production facilities.⁷⁶

CEMEX and CDC argue that, if the Department continues to find that CEMEX should be punished to a certain degree, the other two options available to the Department for calculating the DIFMER (*i.e.*, using CDC's Type I and Type II cement cost data or using the weighted-average variable cost of all CEMEX's plants) result in an upward adjustment that is adverse to CEMEX without being overly punitive.

CEMEX and CDC assert that the Department's reasoning for not using CDC's Type I and Type II data because the data is for a different type of cement and would not be adverse to CEMEX is flawed. CEMEX and CDC argue that the Department's reasoning is incorrect because a DIFMER calculation is intended to capture the cost differential between the subject merchandise and the next most similar merchandise. CEMEX and CDC contend that, by the

⁷⁶ CEMEX's Comments at 19-21.

Department's own admission, in the absence of Type V data, Type II data represents information relating to the most similar merchandise.

CEMEX and CDC argue that, given that the Department had collapsed CDC with CEMEX for purposes of calculating a single margin, the CDC cement plant represents just one of CEMEX's production plants. Thus, according to CEMEX and CDC, if any DIFMER adjustment were to be made, the use of CDC's data would have represented the most neutral approach and one based on CEMEX's own cost data.

CEMEX and CDC argue further that, because the Department rejected CDC's cost data as the basis for a DIFMER adjustment, the next option available to the Department was the weighted-average variable cost data. CEMEX and CDC argue that, because the Department had cost data from CDC, the weighted-average data is not non-adverse when compared to the more neutral CDC cost data. Thus, according to CEMEX and CDC, using the weighted-average variable cost as the basis for a DIFMER adjustment would result in an upward adjustment to CEMEX's margin that is sufficiently adverse. CEMEX and CDC argue that, compared to these two options, the DIFMER calculation that is based on the lowest variable cost is overly punitive, unreasonable, and inconsistent with the Panel's remand instructions.⁷⁷

The petitioner contends that the Panel declined to limit the Department's discretion in complying with its Remand Order. The petitioner argues that the Panel made clear that its concern was the apparent inconsistency in the Department's explanation, not the Department's selection of facts available. The petitioner asserts that the Panel contended that, if the purpose was to reach a DIFMER measurement that used information from the record and that did not

⁷⁷ CEMEX's Comments at 22-23.

allow for the impact of plant efficiencies, the Department's methodology may not be appropriate for achieving that goal. The petitioner asserts further that the Panel stated that it was uncertain that the Department's facts-available methodology achieved its goal of controlling for plant efficiencies and that it did not understand how the use of information from a single plant would be superior to weighted-average information from several plants for this purpose. The petitioner argues that at no point in its instruction, did the Panel prohibit the Department from reaching the same result on remand as long as it provided a sufficient explanation to meet the Panel's concerns.

The petitioner argues that the Department followed the Panel's instruction that it analyze and explain the plant-efficiency issues in the calculation of the DIFMER adjustment further. Specifically, according to the petitioner, the Department clarified that, where a respondent has cooperated in providing cost data for the DIFMER adjustment, it prefers to use data for both comparison products from the same plant to eliminate any difference in costs due to different plant efficiencies. The petitioner asserts that the Department clarified also that, if such information is not available, the Department may instead weight-average the costs of all plants to minimize the effect of plant efficiency in the calculation of the DIFMER adjustment.⁷⁸

The petitioner contends that CEMEX and CDC argue unconvincingly that the Department went beyond the scope of the Panel's Remand Order by relying on the same choice of facts available as in the sixth review final results. The petitioner argues, that although the Panel expressed uncertainty about the Department's stated rationale for using the variable cost from the lowest-cost Type I cement plant, according to the petitioner, the Panel never instructed the

⁷⁸ The petitioner's Comments at 11-13.

Department not to make the same selection of adverse facts available again on remand. The petitioner argues further that the Panel also did not limit the scope of the remand to the issue of plant efficiency, as argued by CEMEX and CDC.⁷⁹

The petitioner argues that CEMEX and CDC provide no reason why the Department's selection of adverse facts available was not a proper exercise of its discretion or unsupported by the evidence of record. In addition, the petitioner argues that the Department has explained why its use of the variable costs of the lowest-cost Type I cement plant was justified as opposed to the two options favored by CEMEX and CDC.

The petitioner asserts that CEMEX's and CDC's argument that the DIFMER calculation is intended to capture the cost differential between the subject merchandise and the next most similar merchandise and that the use of CDC's data would have represented the most neutral approach is erroneous. The petitioner contends that the respondent's reasoning disregards the fact that, due to CEMEX's uncooperative position in the sixth review, the Department was required to determine the most appropriate choice for adverse facts available for CEMEX's DIFMER adjustment, not a neutral choice.

The petitioner asserts also that the Department explained that it did not use the weighted-average cost of all plants producing Type I because that would not be adverse to CEMEX. According to the petitioner, this is the same data the Department might have used for the DIFMER adjustment if CEMEX had cooperated in providing the necessary data.

Department's Position: We disagree with CEMEX and CDC that we have exceeded the scope of the Panel's directions in this redetermination. The Panel found that the our selection of

⁷⁹ The petitioner's Comments at 16.

what to use as adverse facts available was inconsistent with our explanation in the final results. Remand Order at 88. The Panel remanded the issue concerning the explanation of the selection of adverse facts available to the Department for “further analysis and explanation.” These remand results with regard to this issue are limited to further analysis and explanation of our selection of adverse facts available for the DIFMER adjustment.

In fact, in their comments, CEMEX and CDC ask the Department to exceed the remand instructions of the Panel. Once again, CEMEX has argued that the Department should not make a DIFMER adjustment. See CEMEX’s Comments at 14-16. The Panel has already held specifically that the Department’s determination to resort to adverse facts available for the DIFMER adjustment is supported by substantial evidence on the record and is otherwise in accordance with law. Remand Order at 81. To revisit this issue would indeed exceed the scope of the Panel’s remand order.

Finally, CEMEX’s argument that the weighted-average data from CEMEX’s Type I plants is adverse because it results in a larger DIFMER than the CDC data is based on a false assumption. The false assumption is that CDC’s data on DIFMER is an appropriate benchmark against which to measure the Department’s choice of adverse data.

As we explained in our remand results above, the use of CDC’s data would understate the DIFMER adjustment. It is undisputed that Type II cement is closer in physical characteristics to Type I cement than Type V cement is to Type I cement. Therefore, any DIFMER adjustment between Type I and Type II cement would be smaller than between Type I and Type V cement. Because, in this case, CEMEX’s U.S. sales are of Type V cement and the home-market comparison sales are of Type I cement, the Department needs DIFMER data between Type I and

Type V cement in order to accurately adjust normal value based on sales of Type I cement. Using CDC's DIFMER data based on Type I and Type II cement would understate the DIFMER adjustment making it not adverse but artificially beneficial to CEMEX. Therefore, CDC's DIFMER data is an inappropriate benchmark against which to test the adversity of CEMEX's DIFMER data. CEMEX's comments on this subject demonstrate a complete lack of understanding of the data needed and the comparisons being made. See CEMEX's Comments at 22-23. Therefore, we have not altered our selection of CEMEX's plant with the lowest Type I cement variable costs of manufacturing as the DIFMER adjustment for comparisons between U.S. sales of Type V cement and home-market sales of Type I cement.

3. CDC's Sales to Unaffiliated U.S. Customers

In the Sixth Review Final Results, we classified certain sales to unaffiliated U.S. customers made by CDC's U.S. affiliate as export price (EP) sales rather than as constructed export price (CEP) sales. The methodology we used to determine whether a sale is an EP sale or a constructed export price CEP sale has been superseded by a methodology arising from the decision of the CAFC in AK Steel Corp. v. United States, 226 F.3d 1361 (2000) (AK Steel). Because of this, we requested that the Panel remand this issue so that we could reclassify CDC's EP sales as CEP sales consistent with the CAFC's holdings in AK Steel. The Panel granted this request for remand. Therefore, pursuant to the Panel's instructions, we reclassified CDC's EP sales made by its US affiliate to unaffiliated US customers as CEP sales. The Department received no comments regarding this issue.

FINAL RESULTS OF REDETERMINATION

As a result of this final results redetermination, the weighted-average margin for CEMEX/CDC for the period August 1, 1995, through July 31, 1996, changed from 37.39 to 40.55 percent.

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

(Date)