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MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Susan Kuhbach
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Administrative Review of Gray Portland Cement and Clinker From Mexico – August 31, 2000, through July 31, 2001

Summary

We have analyzed the comments and rebuttals of interested parties in the 2000-01 administrative review of the antidumping duty order covering gray portland cement and clinker from Mexico. As a result of our analysis, we have made changes in the margin calculations. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttals by interested parties:

1. Revocation
2. Sales-Below-Cost Test
3. Arm's-Length Test
4. Regional Assessment
5. Bag vs. Bulk
6. Customer Misclassification
7. Ordinary Course of Trade
8. Interest Rate for Credit Expenses

9. Cash Deposits
10. Ministerial Errors

Background

On September 10, 2002, the Department of Commerce (the Department) published the preliminary results of administrative review of the antidumping duty order on gray portland cement and clinker from Mexico (Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review: Gray Portland Cement and Clinker From Mexico, 67 FR 57379 (September 10, 2002) (Preliminary Results)). The merchandise covered by this review is gray portland cement and clinker. The period of review is August 1, 2000, through July 31, 2001.

We invited parties to comment on our preliminary results of review.

Discussion of the Issues

1. Revocation

Comment 1: GCC Cemento, S.A. de C.V. (GCCC) argues that the Department should terminate this review and revoke the underlying antidumping duty order because the regional producers did not demonstrate support for the petition in this case. According to GCCC, the Department lacks the authority to impose antidumping duties on the basis of petitions that are not filed “on behalf of” the relevant industry. GCCC contends that, due to the statutory linkage of the statements “on behalf of” with “industry,” the Department recognizes that the definition of industry is integral to resolving issues of standing. GCCC argues that a petitioner’s standing to request antidumping relief and the Department’s authority to give the relief depend in large part on how “industry” is defined.

According to GCCC, the statute provides two distinct definitions of “industry” – one for normal or national investigations and the other for special or regional investigations, such as this case. GCCC asserts that for national investigations the statute defines "industry" as the domestic producers as a whole of a like product or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product. GCCC contends that those producers accounting for either all or a major proportion of domestic production may qualify as the "industry." GCCC argues that the use of the disjunctive "or" confirms that the statute intends that either group of producers can be considered the national industry. GCCC asserts that, in contrast, the statutory provision defining the "industry" in regional markets does not include alternative definitions. GCCC asserts that, unlike the definition of national industry, there is no word such as "or" introducing an alternative definition. GCCC asserts further that, when dealing with the extraordinary exception of a regional industry, the Department is authorized only to treat the producers within each market as if they are a separate industry. According to GCCC, the word "they" in the statute can only mean all of the producers within each market; it does not mean "some" or "part" or a "major" or "minor proportion."

GCCC argues that the language in the statute is consistent with the statutory provision setting out the requirements for finding material injury in a regional-industry case. According to GCCC, the plain language of section 771(4)(C) of the Act requires petitions in regional-industry cases to be filed on behalf of the producers that account for "all, or almost all, of the production in the region." Since the antidumping duty order covering cement from Mexico was based on a petition that was unsupported by producers accounting for all or almost all of the region's production, GCCC contends that the Department issued the order in violation of U.S. law. GCCC disputes the Department's assertion in the 1999-2000 review that it lacked authority to rescind the antidumping duty order on the basis that the petitioner's standing had not been challenged in connection with the original investigation such that the issue could not be reviewed in the context of an administrative review. GCCC asserts that this view conflicts with both case law and the Department's own precedent. GCCC argues that the lack of standing to file an antidumping duty petition is a "jurisdictional" defect which parties may raise at any time. GCCC contends that the Department has the authority to revoke an order that never had the requisite level of industry support, citing Zenith Electronics Corp. v. United States, 872 F. Supp. 992 (CIT 1994) (Zenith Electronics), Gilmore Steel Corp. v. United States, 585 F. Supp. 670 (CIT 1984) (Gilmore Steel), and Oregon Steel Mills, Inc. v. United States, 862 F.2d 1541 (CAFC 1988) (Oregon Steel Mills).

Citing Oil Country Tubular Goods From Argentina and Cold-Rolled Carbon Steel Flat Products from Argentina: Preliminary Results of Countervailing Duty Administrative Reviews/Intent to Terminate Administrative Reviews, 61 FR 68713 (December 30, 1996) (OCTG from Argentina), GCCC argues that the Department's position is also contradicted by its decisions in other administrative reviews where the Department found a fundamental defect in its authority to collect duties. According to GCCC, the Department acknowledged in such cases its lack of authority in the context of an administrative review, terminated the review, and ordered the liquidation of the merchandise subject to review without regard to the duties in question.

GCCC also contends that the Department dismissed the standing issue raised in the 1999-2000 review and supported its decision based on cases that pertained to national rather than regional-industry cases. GCCC points out that the definition of domestic industry in regional cases imposes a different standard for the support that is required when making the "on behalf of" determination.

The Southern Tier Cement Committee (the petitioner) comments that GCCC has raised this argument in prior reviews. The petitioner asserts that, considering the North America Free Trade Agreement (NAFTA) binational panel decisions pertaining to the 1992-93, 1994-95, and 1996-97 administrative reviews that rejected GCCC's claims for revocation, it is long past time for GCCC to drop this argument.

The petitioner also argues that GCCC's claim is barred by the statute of limitations, which, according to the petitioner, required any appeal of the decision to initiate the antidumping investigation to be filed within 30 days of the publication of the antidumping duty order. The petitioner argues further that GCCC's claim is barred by failure to exhaust available administrative remedies because the issue was not raised before the Department in the original investigation. The petitioner contends that GCCC's claim is barred by the doctrine of re judicata because it could have been raised, but was not raised, in an appeal to the Court of International Trade (CIT) from the Department's final determination in the original investigation. The petitioner argues that, to the extent that GCCC's claim is based on the unadopted recommendation of a General Agreement on Trade and Tariffs (GATT) panel, that recommendation does not constitute binding international law and there is no basis for applying the rule of statutory construction in Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (Charming Betsy). The petitioner cites Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 63 FR 12765 (March 16, 1998) (1995-96 Final Results), Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 64 FR 13149 (March 17, 1999) (1996-97 Final Results), and Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 66 FR 14889

(March 14, 2001), in which the Department commented that panel reports under the 1947 GATT were not self-executing and had no legal effect under U.S. law, and that neither the 1947 GATT nor the 1979 GATT antidumping code obligated the United States to establish industry support in regional-industry cases.

The petitioner concludes that the Department lacks authority under the statute to rescind its decision to initiate or to re-examine the issue of industry support in a review. Citing Suramerica de Aleaciones Laminda, C.A. v. United States, 966 F.2d 660 (CAFC 1992) (Suramerica), and the 1995-96 Final Results, the petitioner asserts that the court has affirmed the Department's presumption of industry support.

Department's Position: The issue of whether a petitioner has the necessary support to file a petition is an investigation issue. The statutory deadline for parties to challenge the industry support for the petition was 30 days after the antidumping duty order was issued in 1990 (see 19 U.S.C. 1516a). No party did so. As a result, the Department will not reconsider its industry-support determination. Further, the Uruguay Round Agreements Act (URAA) amended the statute to prohibit the Department from revisiting the issue of industry support once the Department has initiated a less-than-fair-value (LTFV) investigation. See section 732(c)(4)(E) of the Act. The bulk of GCCC's argument is a statutory argument that the Department applied the wrong standard for determining industry support in the investigation.[1] Because the statutory time limit to challenge this issue has passed and cannot be

[1]GCCC cites, in footnote 118 of its administrative case brief, a GATT Panel Report on Mexican Cement to support its argument pertaining to regional-industry provisions of the statute. That report was never adopted, however, by the GATT General Council.

properly raised in this review, we have not addressed that argument.

Of the cases cited by GCCC, none of them supports the argument that the Department has the authority, in an administrative review under section 751(a) of the Act, to reach back over ten years and reexamine the issue of industry support for the original petition. In Gilmore Steel, 585 F. Supp. at 673, the plaintiff contended that the Department lacked the authority to rescind the investigation based upon insufficient industry support for the petition after the 20-day period established in section 732(c) of the Act had elapsed. In Zenith Electronics, 872 F. Supp. at 994, the plaintiff alleged that the petitioner was no longer a domestic "interested party" with standing to request an administrative review. Nothing in Zenith Electronics or Gilmore Steel supports GCCC's argument that a party may challenge industry support for a petition over ten years after the fact and in the context of an administrative review under section 751(a) of the Act.

The case GCCC cites, Oregon Steel Mills, involved a challenge to the Department's authority to revoke an antidumping duty order based upon new facts, i.e., the industry's affirmative expression of no further support for the antidumping duty order. It was not based upon reexamination of the facts as they existed during the original LTFV investigation. The Court of Appeals for the Federal Circuit (CAFC) held that it was lawful for the Department to revoke an order, in the context of a "changed circumstances" review pursuant to section 751(b) of the Act, over the objection of one member of the industry. See Oregon Steel Mills, 862 F.2d at 1544-46. The CAFC did not state that industry support for an order must be established affirmatively throughout the life of an order. Indeed, the CAFC went to lengths to explain that it was not ruling on the claim that “loss of industry support for an existing order creates a 'jurisdictional defect.'” Id. at 1545 n. 4. As courts explained subsequently, the holding in Oregon Steel Mills is limited to the proposition that the Department may, but need not, revoke an order when presented with record evidence which demonstrates a lack of industry support for the continuation of the order. See, e.g., Suramerica 966 F.2d at 666 and Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1085 (CIT 1988) (Citrosuco).

We also find GCCC's reliance on the administrative decision in OCTG from Argentina to be misplaced. Although GCCC states correctly that the Department terminated these administrative reviews based on the Department's lack of authority to assess countervailing duties on subject merchandise entered after a certain date, this decision was necessitated by a decision by the CAFC which held that, once a country becomes entitled to an injury determination by virtue of its status as a "country under the Agreement" pursuant to the countervailing duty statute, the Department could not assess countervailing duties in the absence of an injury test. See Ceramica Regiomontana v. United States, 64 F.3d 1579, 1583 (CAFC 1995). The Department stated in OCTG from Argentina that, "at the time . . . Argentina qualified as {a country} under the Agreement, the assessment of countervailing duties on subsequent entries of dutiable merchandise became dependent upon a finding of subsidization and injury in accordance with section 701 of the Act." OCTG from Argentina, 61 FR at 68715. Thus, the Department concluded that it could not assess duties on entries after the date that Argentina qualified for an injury determination. The issue of Argentina's entitlement to an injury determination after the issuance of the original order is in no way relevant or related to the petitioner's standing to file a petition.

In short, the cases GCCC cites are inapposite. None of them supports GCCC's argument that the Department has the authority, in an administrative review under section 751 of the Act, to reach back ten years and reexamine the issue of industry support for the original petition.

Therefore, we reject GCCC's arguments that we lack the authority to assess antidumping duties pursuant to these final results of review and that we must revoke the underlying antidumping duty order.

2. Sales-Below-Cost Test

Comment 2: CEMEX, S.A. de C.V. (CEMEX) argues that, while it agrees with the Department's preliminary finding that it had no sales below cost, it was improper for the Department to require that the respondent bear the expense, both monetary and administrative, of complying with the Department's cost questionnaire.

According to CEMEX, the statute requires the Department to have "reasonable grounds to believe or suspect" that below-cost sales have occurred before initiating a "sales below cost" investigation and provides two bases for finding "reasonable grounds:" (1) the Department has excluded below-cost sales of the exporter or producer from the determination of normal value in the most recently completed segment of the proceeding; or (2) an interested party provides specific information indicating that sales in the foreign market are at below-cost prices. CEMEX argues that neither decisions in prior administrative reviews of this case nor the petitioner's sales-below-cost allegation in the current administrative review provided grounds for the Department to determine that the statutory requirements for initiating a sales-below-cost investigation were met.

CEMEX argues further that, in light of the Department's findings in the six previous reviews not to disregard any below-cost sales, the Department should have been skeptical of the petitioner's allegation in this review. Furthermore, according to CEMEX, the petitioner's past behavior suggests that it will continue to make allegations of sales below cost in future reviews. In conclusion, CEMEX asserts that the Department should determine that its initiation of a below-cost investigation in this review was improper.

GCCC argues that the petitioner did not provide a sufficient basis for requesting that the Department initiate a cost investigation and, that, as a result of the Department's initiation, as in the past six administrative reviews, the respondents and the Department have expended resources needlessly on an unwarranted investigation of sales below cost. GCCC contends that the petitioner made similar sales-below-cost allegations in the past six reviews of this case and, in each of those reviews, after the respondents were required to submit cost and supplemental cost responses and submit to verification of those responses, the Department did not disregard any sales. Furthermore, GCCC argues that, as the petitioner did not make a specific allegation regarding sales by GCCC, the sales-below-cost investigation of GCCC should not have been initiated. According to GCCC, given the consistent pattern in the past six reviews and this review of an allegation of de minimis below-cost sales, multiple submissions of cost data by respondents, and a decision by the Department not to disregard any sales below cost, the grounds for the Department to decline to initiate a sales-below-cost investigation have grown more compelling.

The petitioner contends that the Department should reject the respondents' arguments on the ground that they do not relate to any issue relevant to the final results of this review. The petitioner argues that, as it is too late for the Department to reverse its decision to initiate a cost investigation in this review, this issue is no longer relevant to these final results and, thus, the

Department should reject respondents' arguments on that ground alone. The petitioner argues further that, as long as there is sufficient information that home-market sales were made below cost in this current review, it is irrelevant whether the Department excluded below-cost sales in prior reviews. According to the petitioner, the antidumping law indicates explicitly that, in deciding whether to initiate a cost investigation, the Department may not disregard below-cost sales on the ground that they are purportedly de minimis and the statute does not establish any minimum quantity of sales that must be demonstrated to be below cost. Citing Huffy Corp. v. United States, 632 F. Supp. 50, 57-58 (CIT 1986), the petitioner argues that the statute requires only a showing that sales have been made at below-cost prices, but there is no requirement to show such sales were in substantial quantities. Rather, the petitioner asserts, the Department is to investigate and determine whether substantial below-cost sales were made.

Department's Position: Section 773(b)(1) of the Act requires that the Department have "reasonable grounds" to believe or suspect that below-cost sales occurred before initiating a below-cost investigation. See Statement of Administrative Action of the Uruguay Round Agreements Act, H.R. Doc.103-316, vol I, at 807 (1994) (SAA). Reasonable grounds exist when an interested party provides information indicating that sales have been made in the foreign market in question at below-cost prices. See section 773(b)(2)(A) of the Act. Based on our analysis of the information the petitioner provided to support its allegation of sales below cost, we found reasonable grounds to believe or suspect that below-cost sales occurred. The petitioner made use of the respondent's data on the record, employed a reasonable methodology, and provided evidence of below-cost sales. We also found that the petitioner's analysis was consistent with our practice of examining sales below cost and that the sales it used in the analysis were representative of a broader range of sales and products that were submitted as a basis for normal value. See Memorandum from Case Analyst to Laurie Parkhill, Gray Portland Cement and Clinker from Mexico: Request to Initiate Cost Investigation in the 2000/2001 Review (April 24, 2002).

In Connors Steel Company v. United States, 527 F. Supp. 350 (CIT 1981) (Connors Steel), the CIT determined that, when a petitioner provides reasonable evidence that home-market sales are being made below cost, the Department has a statutory duty to inquire further to determine the validity of such an allegation. Further, in that decision, the CIT stated that the statutory "duty could not be avoided except for the most compelling reasons." See Connors Steel, 527 F. Supp. at 356. In this case, based on the petitioner's submissions, we found reasonable grounds to believe or suspect that below-cost sales occurred. We reject CEMEX's and GCCC's assertions that the petitioner's allegation is insufficient based on the number of below-cost sales identified. Section 773(b)(2) of the Act does not establish a threshold quantity of sales below cost in order for the Department to initiate a cost investigation. There is no threshold quantity of below-cost sales in order to initiate a sales-below-cost investigation because petitioners, as a general matter, do not have access to a respondent's cost data in order to be able to demonstrate minimum percentages. If, based on available data, the petitioner can provide the Department with a reasonable basis to believe or suspect that any sales are being made below cost, the only way to determine whether the sales are being made at below-cost prices is to collect the data from the respondents and perform the calculations.

We also disagree with GCCC's contention that the initiation of a sales-below-cost investigation was improper, as it was not specifically named in the petitioner's allegation. We have determined repeatedly that the two respondents in this proceeding are affiliated according to section 771(33) of the Act and have treated both CEMEX and GCCC as a single entity for purposes of conducting our dumping analyses. See Memorandum from Case Analyst to Laurie Parkhill, <u>Collapsing CEMEX, S.A. de C.V. and GCC Cemento, S.A. de C.V. for the Current Administrative Review</u> (July 31, 2002). Thus, in order to conduct a proper sales-below-cost analysis in this review, it was necessary to request information from both CEMEX and GCCC.

For the above reasons, we find that we initiated a below-cost investigation on the respondents' home-market sales properly.

3. Arm's-Length Test

<u>Comment 3</u>: CEMEX argues that the Department's exclusion of affiliated-party sales that failed the Department's arm's-length test from the calculation of normal value in the preliminary results was contrary to law. According to CEMEX, the Department's regulations specify that the Secretary may rely upon an affiliated party's sales to calculate normal value "only if satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller." CEMEX asserts that the statute and the regulations are silent, however, with respect to how the Department is to determine whether the sales price to an affiliated party is "comparable" to the sales price to an unaffiliated party. CEMEX explains that it is the Department's established practice to use the 99.5 percent arm's-length test to determine whether affiliated-party sales are to be used in the normal value calculation, as was demonstrated in the preliminary results.

CEMEX states that, on February 28, 2001, a World Trade Organization (WTO) dispute settlement panel determined that the Department's use of the 99.5 percent arm's-length test in the Department's determination in the Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan, 64 FR 24329 (May 6, 1999) (Hot-Rolled Steel Products from Japan), was contrary to Article 2.1 of the GATT Antidumping Code in that the Department's test was an impermissible interpretation of the term "sales in the ordinary course of trade." Thus, CEMEX argues, the Department's continued use of the arm's-length test can no longer be considered a permissible interpretation of the U.S. antidumping duty law and cannot be used in the Department's determinations. Moreover, citing Charming Betsy, CEMEX contends that if the statute is silent or ambiguous with respect to a specific issue, as it is in this case, the statute must be interpreted, if at all possible, in a manner that is consistent with international law.

Furthermore, citing Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 FR 53339 (August 15, 2002) (Proposed Revision), CEMEX asserts that, in response to adverse WTO decisions, the Department has announced its intention to change its affiliated-party-arm's-length test. CEMEX contends that, according to the Department's Proposed Revision, if the overall ratio of the price calculated for an affiliate is between 98 percent and 102 percent of the weighted average of non-affiliated prices, the affiliated sales will be deemed to satisfy the arm's-length test and be considered within the ordinary course of trade. Thus, CEMEX concludes, for the final results the Department should recalculate its margins using the proposed price band reflected in this notice of change in practice.

The petitioner refutes CEMEX's argument that the Department's established arm's-length test is now contrary to law because of findings made in WTO dispute settlement proceedings regarding a different United States antidumping duty order, asserting instead that failure to apply the Department's established test for affiliated-party sales would be contrary to law because the Department is required by United States law to apply it in this review.

The petitioner contends that CEMEX overreaches by claiming that the Appellate Body's decision in Hot-Rolled Steel Products from Japan "prohibit{s} the 99.5 percent arm's-length test." The petitioner argues instead that the Appellate Body upheld the WTO panel's finding "that the application of the 99.5 percent test" was not based upon a permissible interpretation of the term "sales in the ordinary course of trade" in Article 2.1. The petitioner states that the Appellate Body recommended only that the United States be requested to bring the measures that were found to be inconsistent with WTO requirements into conformity with U.S. obligations. In fact, the petitioner argues, not only was the Department's use of the arm's-length test not found to be inconsistent with WTO obligations, but the decision as to how to implement the decision was left up to the United States.

The petitioner maintains that, according to U.S. statute, the Department's authority to implement a new decision is limited to the particular proceeding that was at issue before the panel and Appellate Body, not other antidumping proceedings. Additionally, the petitioner comments, no implementation of the WTO report can affect any prior entries or any entries of merchandise other than the subject merchandise that was at issue in the WTO proceeding. Thus, according to the petitioner, any obligation imposed on the United States by a WTO decision goes no further than the specific measures at issue and does not apply to the Department's established practice regarding arm's-length sales with respect to proceedings under this particular antidumping order.

Nevertheless, the petitioner acknowledges the Department's proposal to change its arm's-length methodology in response to the Appellate Body's decision but emphasizes that the application of the proposed test will only have prospective effect. According to the petitioner, the Department's Proposed Revision was only released for comment and has not been implemented. Further, the petitioner argues, the application of the new test, once it is finalized, will only be prospective and, thus, will have no application to this review. Therefore, the petitioner contends, the Department's established test remains effective with respect to reviews that were initiated prior to promulgation of the revised test.

Furthermore, as the Department's antidumping proceedings are governed by U.S. law, as determined by Congress and not by international law, the petitioner claims that it is clear that WTO reports have no direct legal effect in the United States. The petitioner argues further that the CIT has affirmed the Department's use of the arm's-length test repeatedly in the absence of evidence that its application results in distorted price comparability.

Moreover, the petitioner holds that, contrary to CEMEX's theory based on Charming Betsy, U.S. courts have consistently upheld a permissible agency construction of a silent or ambiguous statute notwithstanding an actual or potential conflict with an international trade agreement. Thus, according to the petitioner, there is no legal basis for the Department to alter its established arm's-length practice in this review.

Department's Position: We disagree with CEMEX's assertion that the exclusion of affiliated sales that failed the arm's-length test from the calculation of normal value is contrary to law. The regulations at 19 CFR 351.403(c) state that, "{i}f an exporter or producer sold the foreign like product to an affiliated party, the Secretary may calculate normal value based on that sale only if satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller." The preamble to the regulations states that "{t}he Department's current policy is to treat prices to an affiliated purchaser as 'arm's-length' prices if the prices to affiliated purchasers are on average at least 99.5 percent of the prices charged to unaffiliated purchasers." See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27355 (May 10, 1997). Thus, pursuant to our regulations and our practice as explained in the regulations, in this administrative review we interpret the term "comparable" to mean that the prices to affiliated purchasers are on average at least 99.5 percent of the prices charged to unaffiliated purchasers. The Department's "99.5 percent" arm's-length test methodology has been sustained by the CIT. See, e.g., Usinor Sacilor v. United States, 872 F. Supp. 1000, 1004 (CIT 1994).

With regard to CEMEX's reliance on the WTO dispute settlement panel's determination, as a general matter, under U.S. law, any application of the Uruguay Round Agreements that is inconsistent with any law of the United States shall have no effect. See 19 U.S.C. §3512(a)(1). This includes panel decisions, except to the extent that U.S. law provides for the implementation of such decisions. Under U.S. law, a particular methodology, such as the 99.5 percent test, which is found by a dispute settlement panel to be inconsistent with the Uruguay Round Agreements, "may not be amended, rescinded, or otherwise modified in implementation of" the decision until certain statutory criteria are met. See 19 U.S.C. §3533(g). In this instance, those criteria have not been met. Although the Department has published a modification to its arm's-length methodology, the new methodology will be only applicable in investigations and reviews initiated on or after November 23, 2002. See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 FR 69186, 69197 (November 15, 2002). This administrative review was initiated prior to November 23, 2002.

4. Regional Assessment

Comment 4: GCCC argues that the Department should terminate this review and revoke the underlying antidumping duty order. GCCC contends that, during the instant review, it sold cement both inside and outside the Southern Tier region, as defined by the U.S. International Trade Commission (ITC) in the original antidumping investigation. GCCC asserts that, in the preliminary results, the Department calculated duties on sales both inside and outside the Southern Tier region. According to the GCCC, the Department has no authority to assess duties on imports that do not affect the Southern Tier region and the Department has an international obligation to limit its assessment of antidumping duties in regional cases only to the imports consigned for final consumption in that region.

Citing the WTO Antidumping Code, the respondent argues that the Department must distinguish between sales inside and outside the relevant region. GCCC asserts that, because the Antidumping Code did not impose on the regional industry the burden of showing injury or causation with respect to a producer outside the region, it followed that merchandise destined for consumption outside the region could not be affected by the antidumping measure. According to the respondent, the exception to the general rule in Article 4.2 of the 1979 Tokyo Round Antidumping Code (Article 4.2) allowed the importing country to collect duties on all subject imports entering the country only if three conditions were met: 1) "the constitutional law of the importing country does not permit the levying of antidumping duties on such a basis . . . ." (i.e., on the basis of their consumption within the defined area); 2) "the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 7 of this Code, and adequate assurances in this regard have not been promptly given;" and 3) "such duties cannot be levied on specific producers which supply the area in question." The respondent contends that, if these three conditions are satisfied, then the Antidumping Code permits the member country to impose antidumping duties on all subject imports regardless of whether they affect the relevant region.

According to the respondent, Article 4.2 compels the Department to refrain from assessing duties on its subject merchandise destined for consumption outside the Southern Tier region. GCCC contends that the exception to Article 4.2 (when the constitutional law of the importing country does not permit levying of antidumping duties on a regional basis) does not apply because none of the conditions necessary to justify an exception to Article 4.2 are satisfied in this case. First, GCCC contends that deciding to assess duties on its imports consigned for consumption outside the Southern Tier region would not violate any provision of the U.S. Constitution. GCCC contends further that the lack of any Constitutional prohibition creates an obligation for the Department to adhere to the general assessment rule in Article 4.2. The respondent asserts that neither the port-preference clause of the Constitution, which prohibits Congress from regulating commerce or revenue of ports in a discriminatory manner that would confer preferential treatment for the ports of one state over the ports of another state, nor the uniformity clause, which requires the uniform imposition of taxes throughout the United States, render the regional assessment of antidumping duties unconstitutional. GCCC asserts that the Department can comply with its international obligation by making a simple adjustment to its assessment methodology in this review.

Second, GCCC argues that, if a member's constitutional law prohibits implementing the general assessment rule of Article 4.2, then the member must satisfy two additional conditions before levying antidumping duties on all subject merchandise imports. According to GCCC, the first of these enumerated conditions requires the member to have given exporters an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8. GCCC contends that adequate assurances in this regard have not been promptly given. GCCC argues that the Department has not satisfied the second condition in this case, either generally or specifically, with respect to the respondent. According to GCCC, the Department did not permit it to enter into a suspension agreement at the time of the original investigation because, at the time of the investigation, the Department's policy was one of refusal to enter into suspension agreements. In addition, GCCC maintains that the Department's decision to collapse CEMEX and GCCC in the original investigation diminished GCCC's opportunity further to enter into a suspension agreement. GCCC also argues that the U.S. implementation of the Article 4.2 assessment rules included no provisions by which these rules could apply to orders predating the URAA.

Third, according to GCCC, the final condition precedent to using the Article 4.2 exception is that the antidumping duties cannot be levied only on products of specific producers which supply the area in question. GCCC argues that this condition has not been met. GCCC maintains that the language of Section 218 of the URAA and the Department's regulations demonstrate that assessment on less than a national basis is possible. GCCC contends that the fact that Congress enacted Section 218 of the URAA with language calling for the regional assessment of duties attests to the absence of a U.S. constitutional prohibition against regional assessment. GCCC asserts, however, that Section 218 falls short of implementing the regional industry rule because it does not address producers or exporters which, like GCCC, export merchandise both into and outside the region.

Furthermore, GCCC contends that, in the 1999-2000 review, the Department avoided the issue of whether it can, and should, limit its assessment of duties to only those imports consumed in the Southern Tier region. GCCC argues that the Department's view that no inconsistency exists between the U.S. antidumping law and GATT as stated in the 1999-2000 review would require the opposite result in the case of GCCC. GCCC maintains that, if this holds true, the Department must yield to Article 4.2, which states clearly that antidumping duties may be assessed only on products imported for consumption in the relevant, or Southern Tier, region. GCCC, therefore, argues that the Department should terminate this review and revoke the underlying antidumping duty order. GCCC states that, if the Department determines not to terminate this review, then, alternatively, it should assign a zero margin to all sales made outside the Southern Tier region.

The petitioner argues that GCCC's claims have no merit. The petitioner asserts that GCCC does not allege that the assessment of duties on a nationwide basis is in any way contrary to U.S. law but relies exclusively upon international trade agreements that date back to 1968. The petitioner asserts that, contrary to GCCC's argument, Congress has declared that the collection of antidumping duties on a region-specific basis is unconstitutional. According to the petitioner, Congress has crafted a set of statutory provisions that provides for the assessment of antidumping duties in regional industry cases in a manner that is in accord with both the constitutional constraints and U.S. international obligations. In addition, the petitioner contends that these provisions and only these provisions form the body of law that governs the Department's antidumping determinations. The petitioner asserts that, even if these international agreements cited by GCCC were applicable, they would not prevent the Department from assessing antidumping duties on all entries of cement from Mexico sold to the United States during the review period. The petitioner emphasizes that neither CEMEX nor GCCC appealed the Department's affirmative determination in the LTFV investigation to the appropriate court and within the statutory time limit for appeals with respect to the definition of "industry" in a regional case or the Department's alleged failure to offer an opportunity for a suspension agreement during the original investigation.

The petitioner asserts that GCCC's arguments are based on a fundamental misconception regarding the role of international law, specifically the role that international agreements play in the legal framework of the United States. The petitioner argues that it "is the implementing legislation, rather than the agreement itself that is given effect as law in the United States." The petitioner also argues that GCCC's reliance on Article 4.2 is also misplaced because the Tokyo Antidumping Code was superseded by the WTO Antidumping Agreement. According to the petitioner, thus, the Code can no longer give rise to any obligation whatsoever on the part of the United States.

The petitioner asserts that the Department must act within its authority under sections 736(d)(1) and 734(m)(1) of the Act, which were amended by the URAA to conform to the regional-industry provisions of the Antidumping Agreement. The petitioner, however, contends that these provisions are not applicable to GCCC in this review and thus confer no authority upon the Department to refrain from assessing antidumping duties outside the Southern Tier region. The petitioner contends further that these sections of the Act only apply in investigations and not reviews. Moreover, the petitioner contends that, because GCCC exported cement into the Southern Tier region during the period of investigation, it is subject to antidumping duties on all of its exports to the United States.

The petitioner contends that the Department has no obligation under sections 736(m)(1)(2) and 734(m)(1)(2) of the Act to offer GCCC a suspension agreement because the Department may only accept a suspension agreement during the pendency of an investigation or within 60 days after the publication of the antidumping duty order. The petitioner reiterates the fact that no respondent appealed the Department's final LTFV determination in 1990 based on an alleged lack of an opportunity for a suspension agreement. In sum, the petitioner asserts that the statute requires the Department to assess antidumping duties on all of GCCC's exports to the United States, not just those entering the Southern Tier region, and does not permit the Department to offer GCCC a suspension agreement. For these reasons, the petitioner concludes that the Department has complied fully with U.S. law.

Department's Position: As it has in prior reviews, GCCC continues to challenge the consistency of the Department's regional-assessment methodology with the GATT and Uruguay Round Agreements. An administrative review conducted under the U.S. antidumping duty law is not the appropriate forum in which to raise such arguments. Pursuant to U.S. law, in conducting an antidumping duty administrative review, the Department must, first and foremost, make a determination supported by substantial evidence and in accordance with U.S. law. The appropriate topics of discussion in an administrative review concern the consistency of the Department's actions with respect to U.S. law and interpretations of facts on the record. Having utterly failed to make any such arguments, GCCC has raised nothing to which the Department may respond appropriately. As a general matter, however, we observe that the URAA was promulgated to implement the obligations of the United States pursuant to the Uruguay Round Agreements. We believe that the U.S. government has implemented its obligations properly.

5. Bag vs. Bulk

Comment 5: Both CEMEX and GCCC argue that, in matching U.S. and home-market sales, the Department should not compare sales of bulk cement in one market with sales of bagged cement in the other market. Both CEMEX and GCCC agree, however, that the Department's decision in the preliminary results to match sales of CPO 40 cement produced and sold in Mexico (all of which were made in bulk) to sales of all types of cement sold in the United States, which included virtually all bulk cement, renders this issue moot in the instant review. See Memorandum from Case Analysts to the File, Preliminary Analysis Memo of CEMEX, S.A. de C.V. and its affiliate GCC Cemento, S.A. de C.V. for the Eleventh Administrative Review of Gray Portland Cement and Clinker from Mexico, dated September 3, 2002. Thus, CEMEX and GCCC submit that the Department need not address this issue in this review unless the Department changes its product-matching methodology for purposes of the final results of review.

The petitioner agrees that the issue of matching bulk and bagged cement is moot given the Department's selection of CEMEX's sales of CPO 40 cement, all of which were in bulk, as the foreign like product for matches with sales of all cement types sold in the United States by CEMEX and GCCC. According to the petitioner, because no party contests the Department's choice of matching methodology in this review, there is no reason for the Department to consider this issue. In any event, the petitioner reinforces its arguments in previous administrative reviews that the Department's practice of matching cement types sold in the United States and the home market without regard for packaging is consistent with the statute and the Department's longstanding, consistent practice in other cases.

Department's Position: While we continue to find our practice of matching the U.S. merchandise to the foreign like product by cement type to be appropriate and maintain that there is no basis for the use of form of presentation as a matching criterion, we agree with the respondent and petitioner that this is a non-issue in the instant review.

In this review, the cement types the respondents sold in the United States were Type V LA and Type II LA. They sold types III, CPC 30 R, CPC 40, CPO 20, and CPO 40 cement in Mexico during the review period. As discussed in the Preliminary Results, we found identical models upon which to base normal value. We determined that CPO 40 cement produced and sold in the home market is, for purposes of comparison matching, the identical match to Type V LA sold in the United States and a similar match to Type II LA sold in the United States.

Consequently, in this review, we compared monthly average normal values of cement model CPO 40 sold in the home market, which included only bulk cement, with sales of Type V LA in the United States, which also included only bulk cement, and compared monthly average normal values of CPO 40 bulk cement sales in Mexico to each individual U.S. transaction of Type II LA, which primarily consisted of bulk cement. Thus, the Department primarily compared sales of bulk cement in the home market to sales of bulk cement in the U.S. market.

Therefore, as we have not altered our matching methodology from the Preliminary Results and because no party contested our matching methodology in this review, we find no reason to consider this issue for purposes of the final dumping calculation.

6. Customer Misclassification

Comment 6: In its case brief, CEMEX explains that, upon close examination of its home-market sales database, it discovered that, for a small number of transactions, it had identified the customer relationship code incorrectly. CEMEX states that, for these transactions, it reported the same customer as both affiliated and unaffiliated. CEMEX submits that the error is readily apparent from a comparison of the number of transactions reporting the two different customer relationship codes. CEMEX asserts that the disparity in the number of transactions identifying an unaffiliated company compared to the number of transactions reported as sold to affiliated parties is similar for all affiliated customers in CEMEX's October 10, 2002, submission of corrected customer relationship codes, thereby indicating a clear pattern suggesting that those customers are indeed affiliated. CEMEX asserts further that the name of each affiliated customer contained in the correction begins with "CEMEX" or "PROMEXMA," which, as it reported in its December 6, 2001, section A response, is an affiliated company. According to CEMEX, just as was the case with respect to the affiliated customers, the error with respect to several unaffiliated customers is obvious upon close examination of the home-market sales database.

Citing <u>NTN Bearings Corporation v. U.S.</u>, 74 F.3d 1204 (CAFC 1995), CEMEX argues that the miscoding of the customer relationship represents a clerical error rather than an error in methodology or judgement. CEMEX states further that it did not discover the error in the database prior to the preliminary results due to the vast amount of records in the home-market sales database. It explains that the effect of the error was only apparent upon analysis of the Department's arm's-length test in the preliminary results. Thus, CEMEX contends that it has availed itself of the earliest reasonable opportunity to correct this error and has presented the error and the necessary corrective information.

Citing <u>Certain Fresh Cut Flowers From Colombia; Final Results of Antidumping Duty</u>

Administrative Reviews, 61 FR 42833, 42834 (August 19, 1996) (Flowers from Colombia), CEMEX argues that the Department has acknowledged that respondents may correct inadvertent errors in their responses under certain circumstances and, citing Alloy Piping Products, Inc. v. U.S., 201 F. Supp. 2d 1267 (CIT 2002), argues that the Department has had a policy of correcting a respondent's clerical errors submitted prior to the final determination. CEMEX thus submits that, as it believes that it has satisfied the criteria in Flowers from Colombia, the Department should correct the error for the final results.

The petitioner disputes CEMEX's contention that the Department should change the designation of CEMEX's customers, arguing that CEMEX has not demonstrated its entitlement to a revision of its reported customer-relationship code for these sales under at least three of the requirements in Flowers from Colombia. The petitioner asserts that CEMEX has not demonstrated the reliability of the corrective documentation it provided in support of the alleged clerical error and, citing Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China; Final Results of Antidumping Duty Administrative Reviews, 63 FR 16758, 16767 (April 6, 1998), Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results of Antidumping Administrative Review, 62 FR 61276, 61292 (November 17, 1997), and Roller Chain, Other Than Bicycle, From Japan: Final Results and Partial Recission of Antidumping Duty Administrative Review, 63 FR 63671, 63687 (November 16, 1998), argues that the Department has rejected revision of a claimed clerical error where the respondent has not substantiated the error through reliable documentation.

The petitioner rebuts CEMEX's argument that the error with respect to unaffiliated customers is obvious, asserting instead that, as opposed to the customers listed in the correction as an affiliated company, there is no clear pattern with respect to the customers listed as unaffiliated companies. The petitioner argues that, if the pattern of reported customer relationships is meaningful in indicating that the customers listed as affiliates in the correction were indeed affiliated companies, then the lack of such a pattern in the corrected list of unaffiliated customers must be meaningful in not indicating whether the customers were affiliated or unaffiliated.

Furthermore, the petitioner refutes CEMEX's claim that it availed itself of the earliest reasonable opportunity to correct the alleged errors and argues that, as the designations of customer affiliation at issue have been present since CEMEX's first submitted database and since CEMEX recognized that there were problems with its reported customer relationships at the time of the Department's home-market sales verification, CEMEX had every reason to be especially careful to ensure the accuracy of its reporting of these sales and should have discovered the claimed errors earlier. The petitioner contends that CEMEX was required to inform the Department of any such changes at the beginning of verification and, not having done so, any change at this time would be inconsistent with information that was verified by the Department. Thus, the petitioner maintains that CEMEX has provided no basis for the Department to make any changes with respect to the customer-relationship codes it reported with respect to home-market sales.

Department's Position: After evaluating CEMEX's submission of corrected customer-relationship codes for home-market sales and comparing it to other information on the record of this review, we find that CEMEX has fulfilled the criteria for demonstrating that it made a clerical error and that the correction is appropriate and accurate.

According to the Department’s policy regarding the correction of alleged clerical errors as outlined in Flowers from Colombia, the Department will accept corrections of clerical errors under the following conditions: (1) The error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; (2) the Department must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical error allegation, and any corrective documentation, must be submitted to the Department no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the response; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification.

Section 771(33) of the Act defines the criteria for finding that parties are affiliated. It does not, however, allow for the Department to find a single party to be both affiliated and unaffiliated. Upon reviewing CEMEX’s home-market sales database for this review, we agree that CEMEX misclassified certain customers as both affiliated and unaffiliated. Thus, we find that this error was indeed clerical in nature, therefore satisfying the first condition for accepting corrections. We also find that there is no information on the record of this proceeding that would cause us to doubt the reliability of the corrective documentation CEMEX submitted. In fact, CEMEX was able to substantiate its affiliations at verification and we found no discrepancies in the information it provided in its section A response. Therefore, we find that this corrected information neither contradicts the information we verified nor does it give us reason to doubt the validity of the submitted corrections.

Furthermore, considering that CEMEX submitted minor corrections prior to verification regarding its customer relationships and that there would be no reason for CEMEX to have withheld this information purposefully during verification, we find that CEMEX has availed itself of the earliest reasonable opportunity to correct the error. We also find that, as CEMEX submitted this correction as an appendix to its administrative case brief, CEMEX provided the clerical-error allegation and relevant documentation in a timely manner.

Finally, as this correction affects only a very small percentage of CEMEX's total home-market customers, we find that the clerical error does not entail a substantial revision of its response. Therefore, we find it appropriate to include the corrections of the clerical error in our final dumping calculation in this review.

7. Ordinary Course of Trade

Comment 7: The petitioner argues that the Department should find that CEMEX's sales of CPO 40 cement produced at the Campana plant and sold in the home market are outside the ordinary course of trade. The petitioner claims that the record evidence demonstrates that many of the factors on which the Department relies to make an outside-the-ordinary-course-of-trade determination are present in this review. For example, according to the petitioner, sales of CPO 40 produced at the Campana plant are negligible in terms of sales volume and have extraordinary shipping distances, unusual freight costs, and unusual profitability. The petitioner asserts that, based on the totality of the evidence and the relevant factors, it is clear that CEMEX's conditions and practices for home-market sales of CPO 40 from the Campana plant are well outside the norm compared with those home-market sales of CPO 40 from other cement plants.

With regard to the sales volume, the petitioner asserts that the record indicates that most of the production of CPO 40 cement at the Campana plant was exported to the United States. Therefore, according to the petitioner, the sales of CPO 40 cement from the Campana plant sold in the home market appear to constitute production overruns of Type V LA cement produced for export and, thus, are outside the ordinary course of trade. The petitioner contends that the Department has frequently relied upon relative sales volume and number of sales as factors in determining whether sales of a particular product are outside the ordinary course of trade.

With regard to freight costs, the petitioner argues that CEMEX's shipping distances and freight expenses on sales of CPO 40 cement from the Campana plant are unusually high. The petitioner asserts that the ordinary practice in the industry is to disperse production in order to lower shipping distance and minimize freight costs. The petitioner argues that in this review the record indicates that CEMEX shipped CPO 40 cement from the Campana plant to locations requiring long shipping distances throughout Mexico, despite the fact that CEMEX has other cement plants that produced CPO 40 cement that are much closer to these markets than the Campana plant.

With respect to profitability, the petitioner asserts that, as a result of such high freight costs, discounts, and rebates, the profitability of sales of CPO 40 from the Campana plant appears to be unusual. The petitioner argues that the Department has frequently relied upon differences in profitability as a factor in determining whether sales are outside the ordinary course of trade. The petitioner contends that, in this case, such differences exist, therefore reinforcing its contention that these sales are outside the ordinary course of trade.

The petitioner also argues that sales of CPO 40 from the Campana plant are the only home-market product that CEMEX produced to ASTM specifications. The petitioner contends that all of CEMEX's other cement plants in the home market produce CPO 40 to the Organismo Nacional de Normalizacion y Certificacion de la Construccion y Edificacion, S.C. (ONNCCE) specifications. According to the petitioner, the Department has found consistently in prior administrative reviews that selling cement in Mexico meeting one standard as cement meeting a different standard is not the ordinary practice in the industry. Thus, according to the petitioner, it is the normal practice to produce and sell cement on the same basis. In addition, citing Certain Welded Carbon Steel Standard Pipes and Tubes From India, Final Results of Antidumping Duty Administrative Reviews, 56 FR 64753 (December 12, 1991), the petitioner argues that those sales produced at the Campana plant and sold in the home market are outside the ordinary course of trade because there is no market in Mexico for cement meeting ASTM specifications. For all these reasons, the petitioner argues that the Department must find that sales of CPO 40 from the Campana plant sold in the home market are outside the ordinary course of trade and should not be used in the determination of normal value.

CEMEX argues that the record establishes that the terms and conditions of sales of CPO 40 cement from the Campana plant are well within the range of sales of CPO 40 from other plants. CEMEX argues that the petitioner is mistaken when it states that CPO 40 cement produced at the Campana plant is the only home-market product that CEMEX produced to ASTM standards rather than ONNCCE specifications. According to CEMEX, it stated in its original December 6, 2001, questionnaire response and in its June 28, 2002, supplemental questionnaire response that all cement produced and sold in Mexico was produced according to the ONNCCE specifications. In addition, CEMEX contends that it also stated that all cement exported by CEMEX to the United States and produced at the Campana plant met both the ONNCCE classification of CPO 40 and the ASTM specifications for Type V LA cement. CEMEX claims that, because of the properties of the soil near Hermosillo, Mexico, the Campana plant was able to meet the ONNCCE specifications and also able to (because of low alkali) make the product meet the specifications of ASTM C150.

With regard to profitability, CEMEX contends that when profitability is properly considered (prices adjusted for all pertinent expenses), the profitability range of the sales at issue is well within the range of the norm of CPO 40 sales. CEMEX asserts that the Department recently addressed and rejected the arguments the petitioner is now making in the Final Results of Redetermination pursuant to NAFTA Panel in the 1996-97 administrative review. In that redetermination, according to CEMEX, the Department concluded correctly that, because profit is calculated by subtracting costs from revenue, the net effect of the difference is ultimately reflected in the profitability of the types of cement. CEMEX contends that, having determined that profit levels were comparable in the 1996-97 administrative review redetermination, the Department found that differences in freight and handling charges do not indicate that sales were outside the ordinary course of trade. CEMEX asserts that the same is true in this case and, therefore, the Department should disregard the petitioner's allegation that sales of CPO 40 produced at the Campana plant and sold in the home market are outside the ordinary course of trade.

Department's Position: As we stated in our recent 1996-97 administrative review redetermination pursuant to a court remand, when we determine whether sales were made in the ordinary course of trade, we examine the sales 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 simply 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. In this case, we have examined the sales in question and have found that, based on our analysis, any differences that exist between sales of CPO 40 produced at the Campana plant and sales of other subject merchandise produced at various cement plants throughout Mexico are insufficient to exclude these sales from our normal-value analysis. For example, in terms of freight expenses, we found that, although CEMEX delivers its sales of CPO 40 cement from the Campana plant to long-distance destinations throughout Mexico, the same delivery patterns for other cement plants exist for all cement types in the home market. Due to the proprietary nature of the information we examined, we are unable to discuss the details behind our analysis. For a detailed description of our analysis, see the Ordinary Course of Trade Memorandum from Hermes Pinilla to Laurie Parkhill, dated December 13, 2002 (Ordinary Course of Trade Memorandum). Therefore, based on this information, there is nothing unusual about CEMEX's shipping pattern associated with sales from the Campana plant.

While it is true that freight expenses for the Campana plant differed when compared with other cement plants, whatever differences that do exist in freight or handling charges do not indicate that the sales in question are outside the ordinary course of trade. In addition, based on our analysis, we found that a range of freight expenses exists for all plants and all cement types. Specifically, we found that freight expenses ranged from low to high in terms of cost with regard to all subject merchandise from all cement plants. See Ordinary Course of Trade Memorandum for an analysis of proprietary information.

With regard to profitability, we examined the record and found that, while there are some differences in terms of profitability between the Campana plant and other cement plants in the home market, these differences are not substantial enough for us to determine that these sales are outside the ordinary course of trade. Based on our analysis of the record, we found that, for sales of CPO 40 cement produced at the Campana plant, a range of profitability tied to shipping costs exists. We found this to be true with regard to CEMEX's other cement plants. Although differences exist, we find that these differences are not so substantial, in light of the fact there are really not any other distinguishing characteristics to warrant an outside-the-ordinary-course-of-trade finding. In addition, as we stated in the 1996-97 administrative review redetermination, profitability can vary due to a number of factors, such as whether the sale occurs early or late in the period of review. Because profit is calculated by subtracting expenses from revenue, differences in profitability are dependent on differences in expenses and prices. Therefore, the net effect of any difference is ultimately reflected in the profitability of cement types.

With regard to the petitioner's argument that we should find sales of CPO 40 cement produced at the Campana plant to be outside the ordinary course of trade because these sales only meet the ASTM specifications and not the ONNCCE specifications, we disagree. Contrary to the petitioner's assertion, the fact that these sales were made in the home market indicates that not only do these sales have a market in Mexico, but they must meet the ONNCCE specifications as required by the Mexican government. Furthermore, CEMEX indicated in its original December 6, 2001, questionnaire response at page 35 and in its June 28, 2002, supplemental questionnaire at page 24 that CPO 40 produced at the Campana plant meets both the ASTM and ONNCCE specifications. In addition, there is no evidence on the record to suggest otherwise nor has the petitioner submitted any evidence on the record that indicates that sales of CPO 40 produced at the Campana plant do not meet both specifications.

We also disagree with the petitioner's characterization of these sales as overruns. First, the petitioner cited no record evidence demonstrating that such cement constituted overruns. Rather, the petitioner based its argument purely on speculation based on the quantities of cement sold. Second, although the sales of CPO 40 cement produced at the Campana plant and sold in the home market were small in proportions to sales for export, we find that this volume of sales, 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.

As stated above, based on our examination of information on the record, we determine that there is an insufficient basis to find that sales of CPO 40 cement produced at the Campana plant were made outside the ordinary course of trade. Accordingly, for the final results of administrative review we have continued to use these sales in our determination of normal value.

8. Interest Rate for Credit Expenses

<u>Comment 8</u>: The petitioner states that the Department should base the interest rate for CEMEX's U.S. credit expenses on facts available because, the petitioner asserts, CEMEX did not report its U.S.-denominated, short-term borrowings. According to the petitioner, contrary to the Department's instructions, CEMEX did not provide information in its December 6, 2001, response with respect to whether it had any short-term borrowings in U.S. dollars during the period of review and, if it did, what the interest rate was. The petitioner asserts further that, although CEMEX used published London Interbank Offering Rates (LIBOR) as the basis for calculating credit expenses for its U.S. sales, it did not provide information to establish that it had received or was qualified to receive the

LIBOR rate.

The petitioner contends that CEMEX's assertion in its June 7, 2002, supplemental questionnaire response that neither it nor its United States affiliates had any short-term U.S. dollar borrowings during the instant review contradicts information provided in the verified financial statements in CEMEX's 2001 Annual Report, which, according to the petitioner, show clearly that CEMEX had short-term debt denominated in dollars in 2000 and 2001.

The petitioner argues that CEMEX did not cooperate in providing information that was requested and that was available to CEMEX with respect to the interest rate for its dollar-denominated loans and asserts that the Department should use the rate GCCC reported as its source of facts available. The petitioner contends that this rate would not affect CEMEX adversely and, as CEMEX and GCCC are closely related companies the Department has collapsed for purposes of determining the dumping margin, GCCC's reported rate would be the closest surrogate for the rate that CEMEX did not provide.

The petitioner argues further that, even if the Department does not use GCCC's interest rate as facts available, the Department must still reject CEMEX's reported LIBOR rate. Instead, the petitioner contends, precedent dictates that the Department should use the Federal Reserve interest rate for the period of review.

CEMEX refutes the petitioner's arguments, asserting instead that CEMEX informed the Department in its questionnaire responses, which the Department verified, that it had no short-term dollar loans. CEMEX asserts further that it calculated its U.S. credit costs based on LIBOR interest rates in accordance with Department policy.

CEMEX argues that its 2001 Annual Report indicates clearly that the short-term debt in CEMEX's financial statements includes the current maturities of long-term debt. According to CEMEX, for the final results of the 1994/95 and 1995/96 administrative reviews, the Department specifically rejected the use of an interest-rate calculation that included the current portion of long-term loans. Thus, CEMEX contends, contrary to the petitioner's assertion, there is no evidence on the record indicating that CEMEX had short-term dollar loans and that the Department has substantial evidence supporting its determination that CEMEX reported correct information pertaining to the interest rate for its U.S. credit expenses.

CEMEX also submits that its use of the LIBOR interest rates for short-term loans is appropriate. According to CEMEX, the financial statements indicate clearly that CEMEX is a large multinational corporation that secures its financing needs in the international financial market and has access to financing at the LIBOR rates. CEMEX asserts further that CEMEX's calculation of its U.S. credit expense in this review reflects the same methodology the Department accepted in the previous administrative review, including the use of the LIBOR rate. Thus, CEMEX argues, it reported accurately that it had no U.S. dollar denominated short-term debt during the period of review and properly calculated the U.S. credit expense properly based upon publically available short-term interest rates.

<u>Department's Position</u>: We find that there is no evidence on the record indicating that CEMEX had U.S.-denominated, short-term borrowings during the period of review. Nor do we find any discrepancies in the information CEMEX provided to the Department concerning its calculation of credit expenses at verification. See <u>Verification Report for CEMEX, S.A. de C.V.: Administrative</u>

Review of the Antidumping Duty Order on Gray Portland Cement and Clinker from Mexico, September 5, 2002, and Verification of Home-Market Sales Information Submitted by CEMEX, S.A. de C.V., in the 2000/2001 Administrative Review of the Antidumping Duty Order on Gray Portland Cement and Clinker from Mexico, August 28, 2002.

Furthermore, we agree with CEMEX that, although it appears that its 2001 financial statements indicate that it had short-term debt denominated in dollars in 2000 and 2001, the short-term debt in CEMEX's financial statements includes the current maturities of long-term debt. Considering as much, it is the Department's practice to exclude long-term loans from the calculation of interest rates for U.S. credit expenses. See, e.g., Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review, 62 FR 17148, 17166.

As CEMEX had no U.S. dollar-denominated short-term borrowings, consistent with the Department policy established in Import Administration Policy Bulletin 98.2, "Imputed Credit Expenses and Interest Rates" (February 23,1998) (Policy Bulletin 98.2), the Department must select surrogate interest rates with which to calculate the credit expense on CEMEX's U.S. sales. In these cases, as stated in Policy Bulletin 98.2, the Department uses publicly available information to establish a short-term interest rate applicable to the currency of the transaction. For dollar transactions, we generally prefer to use the average short-term lending rates calculated by the Federal Reserve unless a party demonstrates affirmatively that it has access to another rate. In this case, we find that CEMEX has established that it has access to the LIBOR rate. See CEMEX's May 29, 2002, response to section D of the Department's questionnaire at footnotes 10 and 11. Therefore, we have accepted the use of published LIBOR average short-term lending rates for the final results of this review. In addition, given that CEMEX provided the requested information, we find no reason to base the interest rate for CEMEX's U.S. credit expenses on facts available.

9. Cash Deposits

Comment 9: The petitioner contends that the Department should establish the cash-deposit requirements for CEMEX and GCCC on a per-unit amount because, it claims, both respondents are understating the entered value of subject merchandise. According to the petitioner, all of the respondents' exports to the United States for this review period were to affiliated importers and the entered values the respondents reported to the Department reflect an arbitrary transfer price, not the arm's-length price between unrelated buyers and sellers preferred under the customs law. The petitioner asserts further that the substantial discrepancy between the cash-deposit and assessment rates the Department calculated demonstrates the inability of the ad valorem cash-deposit rate to provide the security required for future payments of antidumping duties. Consequently, the petitioner contends that the importer receives a substantial benefit by retaining funds for its own use rather than making larger deposits on its imports. The petitioner also comments that, in the event no party requests a review of a period, the understated cash-deposit rate would become the final duty rate at liquidation of the entries. According to the petitioner, calculating the cash-deposit amount on a per-unit basis is more accurate than using an ad valorem cash-deposit rate, particularly where there is a significant disparity between entered value and net U.S. price.

The petitioner contends that a per-unit cash-deposit amount is supported by the Department's precedent, including a decision the Department made in a prior segment of this proceeding. The petitioner asserts that, after discovering in the 1997-98 administrative review that CEMEX had reported gross invoice values rather than net entered values for use in calculating the assessment rate, the Department did not follow its normal practice of calculating an assessment rate using total entered value in the denominator. Instead, the petitioner explains, the Department calculated a per-unit duty amount to apply the results of that review to entries during the 1997-98 period.

The petitioner asserts that the Department's choice of method for calculating cash-deposit rates and antidumping duty assessment rates is not restricted to the one it uses normally. Citing section 752(2) of the Act, the petitioner argues that the Department is not required to use the same methodology for calculating the assessment rates and cash-deposit rates. Nor does the Department's regulation, according to the petitioner, specify a particular divisor when calculating either assessment rates or cash-deposit rates. Thus, the petitioner asserts, the Department's regulations require only cash-deposit estimates, not absolute accuracy. The petitioner claims that the Department's regulation dictates, however, that these estimates should be reasonably correct pending the submission of complete information for an actual and accurate assessment.

The petitioner also claims that the Department's reluctance in prior cases to correct disparities between cash-deposit and assessment rates has generally been based on the conclusion that any difference between the estimated and final assessment is collected or refunded with interest when entries are liquidated. The petitioner argues that the refund provision, however, is not an appropriate remedy for correcting a grossly inaccurate estimate of antidumping duties of the magnitude that exists in this case because such significantly understated cash deposits provide inadequate security and a substantially reduced remedial benefit to the domestic industry.

Based on the reasons stated above, the petitioner requests that the Department adopt the dollars-per-metric-ton methodology for calculating and establishing cash-deposit rates applicable to future entries of subject merchandise.

GCCC rebuts by arguing that the Department followed its normal practice in calculating the cash-deposit rate in this review period. GCCC asserts that, in the event the final assessment rate differs from the deposit rate, the U.S. Government will collect a payment for the difference with interest. Therefore, GCCC argues, the Department should adhere in the final results to its normal practice with respect to the calculation of the cash-deposit rate.

CEMEX contends further that the petitioner's concern regarding any difference between deposited and assessed duties is unfounded because the law recognizes that cash deposits are nothing but estimates of future dumping liabilities. Citing sections 737 and 778 of the Act, CEMEX asserts that the antidumping statute provides specifically for the collection of the difference between deposited and assessed duties with the required interest for the underpayment of duties upon assessment. Therefore, according to CEMEX, any difference between deposited and assessed duties will be reconciled when the entries are liquidated.
For these reasons, CEMEX requests that the Department reject the petitioner's argument and calculate the cash-deposit rate based on its normal practice.

<u>Department's Position</u>: The petitioner made the same argument in the 1999-2000 administrative review and our position regarding this issue remains the same. In this review, we followed our standard practice and calculated a cash-deposit rate for future entries by dividing the

dumping duties we found to be due on the subject merchandise by the U.S. price of that merchandise. The cash-deposit amount is collected as security for the estimated antidumping duty. Any difference between the estimated cash deposited and the actual assessed amount will be collected or refunded with interest. See, e.g., Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom, 66 FR 36551, 36554 (July 12, 2001).

In accordance with 19 CFR 351.212(b)(1), normally we calculate the assessment rate by dividing the dumping duties we find on the sales subject to the review by the entered value of that merchandise. We then instruct the U.S. Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise as recorded on the customs documentation. As indicated by the petitioner, in the 1997-98 administrative review of this proceeding we found that the respondent reported the incorrect entered values in its responses to our questionnaire and, consequently, we found that use of the reported entered values in the calculation of the assessment rates was not appropriate. Therefore, we departed from our normal practice of using total entered value in the denominator of the assessment-rate calculation and calculated a per-unit assessment amount by dividing the total duties for the reviewed sales by the total quantity of those sales. In this segment of this proceeding, however, we verified the entered rates accepted by the U.S. Customs Service and, thus, do not have the same problem. Further, any difference between the estimated duties paid and the actual duties we have calculated for assessment purposes will be collected or refunded with interest at the time of liquidation of the entries. Accordingly, we have not altered our calculation of the cash-deposit rate for future entries of subject merchandise.

10. Ministerial Errors

a. Packing Expense

Comment 10: The petitioner asserts that the Department erred in its conversion of CEMEX's home-market packing expense from short tons to metric tons. The petitioner claims that the record indicates that CEMEX reported its home-market packing expenses properly on a pesos-per-metric-ton basis and, therefore, no conversion was necessary. The petitioner requests that the Department remove its conversion of home-market packing expenses to metric tons.

The respondent did not rebut this argument.

Department's Position: We agree with the petitioner and have made the necessary changes to our calculations for the final results of this review. For more information, see Analysis Memorandum dated December 31, 2002.

b. Credit/Debit Note

Comment 11: The petitioner asserts that the Department erred by assigning a negative value to GCCC's U.S. credit/debit note expense. The petitioner claims that the Department should have made this calculation only with respect to CEMEX's U.S. credit/debit note and not for GCCC. The petitioner requests that the Department make the necessary changes for the final results to correct this error.

The respondent did not rebut this argument.

Department's Position: We agree with the petitioner and we have made the necessary changes to our calculations for the final results of this review. For more information, see Analysis Memorandum dated December 31, 2002.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final results of review and the final weighted-average dumping margins for the reviewed firms in the Federal Register.

AGREE ______ DISAGREE______

____
Faryar Shirzad
Assistant Secretary
for Import Administration

____
(Date)