for public inspection at each of the following locations:

U.S. Department of Commerce, District Office, 410 East 5th Street, Suite 414–A, Austin, TX 78711;

Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, Room 3716, 14th & Pennsylvania Avenue, NW, Washington, DC 20230.

Dated: March 31, 1997.

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 97–9116 Filed 4–8–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 881]

Grant of Authority for Subzone Status Abbott Manufacturing, Inc. (Infant Formula, Adult Nutritional Products); Altavista, VA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, by an Act of Congress approved June 18, 1934, an Act ''To provide for the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' as amended (19 U.S.C. 81a–81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs ports of entry;

Whereas, the Board's regulations (15 CFR part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved;

Whereas, an application from the Capital Region Airport Commission (Richmond, Virginia), grantee of Foreign-Trade Zone 207, for authority to establish special-purpose subzone status for export activity at the infant formula and adult nutritional products manufacturing plant of Abbott Manufacturing, Inc., in Altavista, Virginia, was filed by the Board on March 12, 1996, and notice inviting public comment was given in the **Federal Register** (FTZ Docket 23–96, 61 FR 12060, 3–25–96); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that approval of the application for export manufacturing is in the public interest;

Now, therefore, the Board hereby grants authority for subzone status at the Abbott Manufacturing, Inc., plant in Altavista, Virginia (Subzone 207A), at the location described in the application, subject to the FTZ Act and the Board's regulations, including § 400.28, and subject to the further requirement that all foreign-origin dairy products and sugar admitted to the subzone shall be reexported.

Signed at Washington, DC, this 31st day of March 1997.

Robert S. LaRussa,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 97–9121 Filed 4–8–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–802]

Industrial Nitrocellulose From the People's Republic of China; Notice of Extension of Time Limits for Preliminary Results of Antidumping Administrative Review

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

ACTION: Notice of extension of time limits for preliminary results of antidumping duty administrative review.

EFFECTIVE DATE: April 9, 1997.

FOR FURTHER INFORMATION CONTACT: Rebecca Trainor or Maureen Flannery, Office of AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0666 or (202) 482–4733, respectively.

The Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act.

Extension of Time Limits for Preliminary Results

The Department of Commerce has received a request to conduct an administrative review of the antidumping duty order on industrial nitrocellulose from the People's Republic of China. On August 15, 1996, the Department initiated this administrative review covering the period July 1, 1995 through June 30, 1996.

Because of the complexity of certain issues concerning the Department's policy with respect to non-market economies, it is not practicable to complete this review within the time limits mandated by section 751(a)(3)(A) of the Act. Therefore, in accordance with that section, the Department is extending the time limits for the preliminary results to July 31, 1997, and for the final results to 120 days after the publication of the preliminary results. These extensions of time limits are in accordance with section 751(a)(3)(A) of the Act.

Dated: April 2, 1997.

Joseph A. Spetrini,

Deputy Assistant Secretary for AD/CVD Enforcement III.

[FR Doc. 97–9122 Filed 4–8–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–802]

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

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

ACTION: Notice of Final Results of Antidumping Duty Administrative Review.

SUMMARY: On October 3, 1996, the Department of Commerce (the Department) published the preliminary results of its administrative review of the antidumping duty order on gray portland cement and clinker from Mexico. The review covers one manufacturer/exporter, CEMEX, S.A. de C.V. (CEMEX), and its affiliated party Cementos de Chihuahua, S.A. de C.V. (CDC), and the period August 1, 1994, through July 31, 1995. We gave interested parties an opportunity to comment on the preliminary results. We received comments from petitioners and respondent. We received rebuttal

comments from the petitioners and respondent.

EFFECTIVE DATE: April 9, 1997.

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

SUPPLEMENTARY INFORMATION:

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to the current regulations, as amended by the interim regulations published in the **Federal Register** on May 11, 1995 (60 FR 25130).

Background

On October 3, 1996, the Department published in the **Federal Register** (61 FR 51676) the preliminary results of its administrative review of the antidumping duty order on gray portland cement and clinker from Mexico covering the period August 1, 1994 through July 31, 1995. The Department has now completed this review in accordance with section 751(a) of the Tariff Act of 1930 as amended.

Scope of the Review

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

Verification

In accordance with section 353.25(c)(2)(ii) of the Department's regulations, we verified information provided by CEMEX and CDC using standard verification procedures, including on-site inspection of the manufacturer's facilities, the examination of relevant sales and financial records, and selection of original documentation containing relevant information.

Analysis of Comments Received

The Ad Hoc Committee of AZ–NM–TX–FL Producers of Gray Portland Cement and the National Cement Company of California (petitioners), and CEMEX and CDC submitted case briefs on November 4, 1996, and rebuttal briefs on November 27, 1996. A public hearing was held on December 11, 1996.

Revocation of the Underlying Order

Comment 1: CEMEX contends that the antidumping duty order should be revoked and considered void *ab initio* due to the Department's alleged failure to investigate petitioners' standing in the original less-than-fair-value (LTFV) investigation. Specifically, CEMEX argues that ''[a]t the time of the original investigation, the relevant U.S. statute that prescribed the requirement to establish standing to file an antidumping petition contained no express language addressing the degree of support necessary for a petition to be filed in a regional industry case * * * the statute simply required that the petition be filed 'on behalf of' an industry but provided no express guidance on how compliance with this criterion was to be determined.'' Faced with this lacuna in the statute, CEMEX asserts, the Department is compelled by the decision in *Murray* v. *Schooner Charming Betsy*, 6 U.S. 64, 2 Cranch 64 (1804), to reinterpret U.S. law in accordance with the international obligations of the United States. In the opinion of CEMEX, this means that the Department is required (in the fifth review) to revisit the issue of initiation in the original investigation and abide by a July 9, 1992, ruling by a three-member panel convened under the auspices of the 1947 General Agreement on Tariffs and Trade (''1947 GATT''). *See Report of the Panel, United States—Anti-Dumping Duties on Gray Portland Cement and Cement Clinker From Mexico*, GATT Doc. ADP/82 (July 9, 1992) (''GATT Report''). According to CEMEX, this panel held that the initiation of the original investigation contravened the requirements of the 1979 GATT Antidumping Code (''GATT AD Code'') because the Department ''failed properly to ascertain'' that ''all or almost all'' of the regional industry supported the original petition. If the Department revisited the issue of initiation in light of the GATT Report, CEMEX maintains, it would revoke the order *ab initio*, terminate all proceedings, and refund ''at the very least, all cash deposits posted during the POR.''

CEMEX further maintains that the Department has the authority to revoke the antidumping order at this stage of the proceeding. Citing *Gilmore Steel Corp.* v. *United States*, 583 F. Supp. 607 (CIT 1984), CEMEX argues that government agencies (like the Department) have the authority to correct ''jurisdictional defects'' at any time. CEMEX also argues that the decision in *Ceramica Regiomontana S.A.* v. *United States*, 64 F.3d 1579 (Fed. Cir. 1995) provides ''specific legal precedent to revoke the order in this case'' and that its failure to challenge the Department's determination on industry support for the petition during the original LTFV investigation should be excused given the ''exception to the doctrine of exhaustion of administrative remedies upheld in *Rhone Poulenc* v. *United States*, 583 F. Supp. 607 (CIT 1984).''

The petitioners claim, in response, that these are the same arguments the Department considered and rejected in the third administrative review of this order. Since ''CEMEX has presented no new arguments or information about any change in circumstances that would justify a departure from the Department's reasoning in the third administrative review,'' Petitioners assert that the Department should reject CEMEX's arguments in this review.

Petitioners note that the GATT Report was never adopted by the GATT Antidumping Code Committee. Therefore, given the legal framework of the 1947 GATT, it imposed no international legal obligation upon the United States which might trigger the doctrine of statutory construction articulated in the *Charming Betsy* case.

Petitioners also contend that U.S. law takes precedence over the 1947 GATT. ''Accordingly, even adopted GATT panel decisions are not binding on the United States to the extent that such decisions are inconsistent with U.S. law or with the intent of Congress.''

Petitioners further note that the Department initiated the antidumping investigation in accordance with U.S. law. According to petitioners, neither the courts nor the Congress has required the Department to affirmatively establish prior to the initiation of regional-industry cases that the petition is supported by ''all or almost all'' of the relevant industry. Indeed, petitioners assert, the Department's longstanding practice of presuming industry support

for a petition in the absence of evidence to the contrary has been upheld by numerous courts, including the Court of Appeals for the Federal Circuit (''Federal Circuit'') in *Suramerica de Aleaciones Laminadas, C.A.* v. *United States,* 966 F.2d 660, 663 (Fed. Cir. 1992).

Finally, petitioners assert that the Department lacks the authority to revoke the order or otherwise rescind its 1989 initiation of the LTFV investigation. Quoting from the final results of the third administrative review, the petitioners argue that CEMEX failed to challenge the Department's determination on industry support for the petition before the Court of International Trade (''CIT'') and, accordingly, under sections 514(b) and 516A(c)(1) of the Act, ''that determination is final and binding on all persons, including the Department.''

Department's Position: For the following reasons, CEMEX's arguments are without merit. First, like the GATT itself, panel reports under the 1947 GATT are not self-executing and thus have no direct legal effect under U.S. law.

Second, neither the 1947 GATT nor the GATT AD Code obligates the United States to affirmatively establish prior to the initiation of a regional-industry case that all or almost all of the producers in the region support the petition. There certainly is no suggestion in either instrument that the standing requirements in regional-industry cases are any more rigorous than the standing requirements in national-industry cases. Furthermore, a GATT panel report, such as the present one, has no legal effect or formal status unless and until it is adopted by the GATT Council or, in the case of antidumping actions, the GATT Antidumping Code Committee. This follows from the fact that the 1947 GATT has, throughout its history, operated on the basis of consensus for purposes of decision-making in general and, the resolution of disputes, in particular. In the present case, it is undisputed that the GATT Report has never been adopted by the Antidumping Code Committee. Thus, the recommendations contained in the report are not binding, do not impose any international obligations upon the United States, and do not trigger the rule of statutory construction set forth in the *Charming Betsy* case.

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

The only party that appealed the Department's final LTFV Determination was the petitioners. They challenged certain aspects of the Department's final determination before the CIT and the Federal Circuit. *See Ad Hoc Committee Of AZ-NM-TX-FL Producers of Gray Portland Cement* v. *United States,* Slip Op. 94–152 (CIT), aff'd, 68 F.3d 487 (Fed. Cir. 1995). CEMEX participated in that litigation as an intervenor on the side of the Department. On October 10, 1995, the Federal Circuit issued an opinion which disposed of the last issue in that case.

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

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

Gray Portland Cement and Clinker from Mexico; Final Results Third Review, 60 FR 26865 (1995).

In this case, no one challenged the Department's determination on standing before the CIT. Therefore, that determination is final and binding on all persons, including the Department. (emphasis added).

Fourth, no court, including the court in *Gilmore Steel,* has ever held that the Department has the authority, in an administrative review under section 751(a) of the Act, to reach back more than seven years and reexamine the issue of industry support for the original petition. *Gilmore Steel* involved a challenge to the termination of a pending investigation based upon information obtained in the course of that investigation. In particular, the petitioner, in that case, contended that the Department lacked the authority to rescind the investigation based upon insufficient industry support for the petition after the 20-day period provided for in section 732(c) of the Act (19 U.S.C. § 1673a(c)) had elapsed. 585 F. Supp. at 673. In upholding the Department's determination, the court recognized that administrative officers have the authority to correct errors, such as ''jurisdictional defects,'' at anytime during the proceeding. Id. at 674–75. The court did not state or imply that a change in legal interpretation (in this case a non-binding one) authorizes administrative officers to reopen prior agency decisions which are otherwise final. The court simply held that the administering authority may, in the context of the original investigation, rescind an ongoing proceeding after expiration of the 20-day initiation period.

Similarly, in *Ceramica Regiomontana, S.A.* v. *United States,* 64 F.3d 1579 (Fed. Cir. 1995), the respondent did not ask the Department to reconsider and rescind a decision made in a prior proceeding. Indeed, the court's entire analysis was based upon the belief that the prior decision—the issuance of a countervailing duty order under former section 303(a)(1) of the Act against ceramic tile from Mexico—was in accordance with law (i.e., ''properly issued''). *Ceramica Regiomontana* concerned the authority of the Department to assess duties pursuant to a valid order after Mexico became a ''country under the Agreement'' which entitled it to an injury test under section 701 of the Act. The court held that the Department lacked such authority and ordered the agency, on remand, to revoke the order as to all unliquidated entries occurring after this date. *Id.* at 1583.

CEMEX also errs when it relies on *Rhone Poulenc* v. *United States* to support its claim that ''an exception to the doctrine of exhaustion of administrative remedies'' permits the ''retroactive application of the 1992 GATT decision.'' 583 F. Supp. 607 (CIT 1984) (a party may raise a new issue on appeal if the applicable law has changed due to a judicial decision that arose after the lower court or agency issued the contested determination). First of all, whether CEMEX's claim is barred by the

doctrine of exhaustion of administrative remedies is a matter more properly decided by a reviewing court or binational panel under Chapter 19 of the North American Free Trade Agreement. Secondly, even if the issue is timely, the exception claimed by CEMEX does not apply. The GATT Report is not a judicial decision and it did not change U.S. law. In fact, as we explain above, it did not even effect a change in the law on the international plane (*i.e.*, as between Mexico and the United States).

Finally, we note, as we did in the final results of the third review, that numerous courts have upheld the Department's practice of assuming, in the absence of evidence to the contrary, that a petition filed on behalf of a regional or national industry is supported by that industry. *See, e.g., NTN Bearing Corp.* v. *United States,* 757 F. Supp. 1425, 1427–30 (CIT 1991); *Citrosuco Paulista* v. *United States,* 704 F. Supp. 1074, 1085 (CIT 1988); *Comeau Seafoods* v. *United States,* 724 F. Supp. 1407, 1410–12 (CIT 1994).

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

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

> Appellees next argue that the statutory provisions should be interpreted to be consistent with the obligations of the United States as a signatory country of the GATT. Appellees argue that the legislative history of the statute demonstrates Congress's intent to comply with the GATT in formulating these provisions. Appellees refer also to a GATT panel—a group of experts convened under the GATT to resolve disputes—which ''recently rejected [Commerce's] views on the meaning of 'on behalf of.' ''
>
> We reject this argument. First, the GATT panel itself acknowledged and declared that its examination and decision were limited in scope to the case before it. The panel also acknowledged that it was not faced with the issue of whether, even in the case before it, Commerce had acted in conformity with U.S. domestic legislation. Second, even if we were convinced that Commerce's interpretation conflicts with the GATT, which we are not, the GATT is not controlling. While we acknowledge Congress's interest in complying with U.S. responsibilities under the GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did. The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy. See 19 U.S.C. § 2504(a); *Algoma Steel Corp.* v. *United States,* 865 F.2d 240, 242 . . . (Fed. Cir. 1989).
>
> *Id.* at 667–68.

Ordinary Course of Trade

Comment 2: CEMEX contends that the Department improperly concluded that CEMEX's home market sales of Type II cement were outside the ordinary course of trade. In particular, CEMEX contends that the ordinary course of trade provision does not contemplate the elimination of an entire category of identical or similar merchandise from the calculation of normal value. Pointing to language in the statute and the Statement of Administrative Action for the URAA, CEMEX asserts that references to ''sales,'' ''transactions,'' and ''types of transactions'' evidence congressional intent to bar the Department from disregarding ''an entire merchandise category, particularly a category of merchandise identical to the merchandise sold in the United States.'' Rather, CEMEX maintains that the purpose behind the ordinary course of trade provision is to exclude certain individual sales or transactions of comparison merchandise which are unrepresentative of sales in general.

CEMEX suggests that the Department has confused the ordinary course of trade provision with the ''fictitious market'' provision, which according to CEMEX, has sufficient scope to serve as the basis for excluding an entire category of such or similar merchandise. This is because, CEMEX contends, the fictitious market provision refers to sales made to create a ''fictitious market'' and thus, by its nature, may encompass all home market sales as opposed to merely individual sales or transactions. CEMEX argues that the ordinary course of trade provision, on the other hand, is limited to excluding only certain home market sales of comparison merchandise.

CEMEX concludes that if the Department continues to interpret the statute as permitting the entire universe of identical merchandise to be disregarded, the statute requires the Department to rely upon normal value calculated on the basis of constructed value rather than home market prices of similar merchandise. This is because, CEMEX maintains, 19 U.S.C. § 1677(b)(a)(4) provides that if ''normal value cannot be determined by use of home market prices, the (Department) should resort to constructed value.''

In addition, CEMEX claims that even if the Department continues to apply the ordinary course of trade provision to determine whether to exclude CEMEX's universe of home market sales of identical merchandise, the administrative record demonstrates that CEMEX's home market sales of Type II cement were made within the ordinary course of trade during the fifth administrative review. To support this argument, CEMEX maintains that the Department should focus on the actual sale terms and practices surrounding the sales of Type II cement as compared to other cement types subject to the order (Type I cement and Type V cement.) In this regard, CEMEX notes that shipping terms for all cement types were identical (C.I.F. or F.O.B.) which is ''indicative'' of sales in the ordinary course of trade. Moreover, CEMEX notes that all pre-sale freight expenses absorbed by CEMEX for Type II sales were incurred in precisely the same manner as pre-sale freight expenses for all other cement types, including Type I cement.

CEMEX further argues that the Department should not have focused on shipping distances to the customer. According to CEMEX, shipping distance is not a relevant factor in the ordinary course of trade determination. Moreover, CEMEX contends, even if shipping distance was relevant ''the administrative record established that it was not extraordinary to ship cement distances greater than what Department has characterized as an optimum maximum distance of 150 miles from a given plant and to absorb such transportation costs.''

Next, CEMEX argues that in the current review, relative profitability was

the only factor supporting a finding that home market sales of Type II cement were outside the ordinary course of trade. CEMEX contends, however, that this fact is an insufficient basis to determine that sales of Type II cement are outside the ordinary course of trade and was given too much weight in the preliminary determination. CEMEX argues that ''divergent profit levels are neither necessary nor sufficient to sustain an 'outside the ordinary course of trade decision' absent other supporting factors.'' Citing *Certain Welded Carbon Steel Standard Pipes and Tubes from India,* CEMEX notes that ''the Department has not imposed a requirement that sales be made at a different level of profit in order to be considered outside the ordinary course of trade.'' 56 FR At 64,755. Likewise, in *Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand,* 61 FR 1328 (1996), CEMEX maintains the Department ''reversed (a) preliminary finding that sales * * * were outside the ordinary course of trade * * * despite the existence of a profit disparity between the two types of pipe analyzed.''

CEMEX also argues that the fact that home market sales of Type II cement promote CEMEX's corporate image does not indicate that such sales are outside the ordinary course of trade. According to CEMEX, promotion of corporate image is not a relevant factor in the Department's ordinary course of trade determination.

CEMEX also argues that the relative sales volume of Type II cement as compared to other cement types is not indicative of Type II cement being sold outside the ordinary course of trade. In particular, CEMEX argues, Department precedent establishes that low relative sales volume is a factor indicative of sales outside the ordinary course trade only in situations where there is no *bona fide* demand or ready market for the product. For example, in *Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand,* CEMEX asserts that the Department found certain sales to be in the ordinary course of trade not withstanding low relative sales volume because there was a *bona fide* demand for the product in the home market. CEMEX maintains that the administrative record in this case establishes both a significant volume of home market sales for Type II cement in absolute terms and the existence of a *bona fide* home market demand of Type II cement. Therefore, CEMEX maintains ''the existence of a *bona fide* home market for Type II cement negates any possible inference that a low sales volume relative to other cement types indicates that such sales are outside the ordinary course of trade.''

Likewise, CEMEX argues that the historical sales trends indicate that CEMEX's home market sales of Type II cement were made within the ordinary course of trade. CEMEX contends that it began to manufacture and sell Type II cement in Mexico in the mid 1980's, at the same time manufacture and sale of Type II cement began for export. This is consistent, CEMEX maintains, with the definition of ordinary course of trade which provides ''the conditions and practices for which, for a reasonable time prior to the exportation of the merchandise which is the subject of an investigation, have been normal in the trade under consideration.''

Petitioners maintain that the Department correctly applied the statute by excluding all home market sales of Type II cement from normal value. In particular, petitioners argue that CEMEX incorrectly asserts that the statute and the SAA preclude the Department from excluding an entire category of sales. Rather, petitioners explain, ''Congress nowhere expressed a limitation on the number of sales or transaction that may be excluded from normal value.'' Therefore, petitioners conclude that the sales or transactions in question may be a handful of sales or all the sales of a particular type of merchandise.

Petitioners also argue that the Department correctly applied the statute by basing normal value on sales of Type I cement. Petitioners note that in *CEMEX S.A.* v. *United States,* Slip Op. 95–72, at 24–28 (CIT 1995), the court rejected the Department's use of the constructed value of Type II cement as the basis for foreign market value, rather than home market sales of Type I cement, after the Department excluded Type II sales as outside the ordinary course of trade. Petitioners point out that the court found the use of similar merchandise was dictated by the statute. Therefore, petitioners conclude that constructed value can only be used if the Department determines that the normal value of the subject merchandise cannot be determined on the basis of home market sales of the foreign like product. In other words, petitioners argue that ''as long as there are home market sales of similar merchandise within the ordinary course of trade—in this case sales of Type I cement—the Department is required to compare those sales to CEMEX's U.S. sales.'' Finally, petitioners point out that the statutory provision cited by CEMEX (19 U.S.C. 1677(b)(1)) directs the Department to use constructed value only when all sales of the comparison merchandise are disregarded as being below cost.

In addition, petitioners argue that there is sufficient evidence on the record to support the Department's determination that sales of Type II cement are outside the ordinary course of trade. First, petitioners note that the Department correctly found in the preliminary results that CEMEX's home market shipping arrangements for Type II cement were unusual compared to its shipments of other types of cement. In particular, petitioners argue that during the period of review, CEMEX shipped Type II cement greater distances and absorbed the freight expense. To support this claim petitioners point out that prior to the antidumping order, CEMEX produced Type II cement at 11 plants throughout Mexico. In direct response to the antidumping order, however, petitioners claim that CEMEX radically altered its production and distribution arrangements for Type II cement by consolidating production at Hermosillo despite the fact that home market demand for this cement type is centered in the Mexico City area.

Petitioners assert that CEMEX's claim that shipping terms were identical for all cement types is misleading. Petitioners argue that CEMEX's claim is ''merely an attempt to divert the Department's attention from the fact that CEMEX's shipping arrangements for Type II cement—not its 'shipping terms'—were highly unusual compared to sales of other cement types.'' Quoting the CIT in the CEMEX case, petitioners argue, ''the statute ... focuses not on the company's similarity of product treatment but on whether the treatment of the particular product at issue, here Types II and V cement, is 'normal in trade.' '' Slip Op. 95–72 at 10. Petitioners point out that CEMEX makes all of its long distance sales of Type II cement C.I.F. Moreover, a significant number of CEMEX's plants sold Type I cement on a F.O.B. basis. In addition, petitioners argue that CEMEX's statement that shipping distances are not relevant to the ordinary course of trade determination is both factually and legally wrong. First, petitioners contend that the record demonstrates that CEMEX consolidated production at Hermosillo in direct response to the antidumping order with the intention of circumventing the order. Further, petitioners state that ''as a matter of law, shipping distances—like all other 'conditions and practices' relevant to the trade under consideration with respect to merchandise of the same class or kind, 19 U.S.C. § 1677(15) are plainly relevant to the Department's consideration of sales outside the

ordinary course of trade.'' Again citing the CEMEX case, petitioners argue that ''it is not unusual for the court to consider shipping arrangements in determining whether sales are outside the ordinary course of trade.'' Slip Op. 95–72, at 10, citing *Porcelain-On-Steel Cookware From Mexico,* 51 Fed. Reg. 36 435, 36 437 (1986.)

Petitioners also distinguish the current fifth review from the administrative reviews involving antifriction bearings from Thailand. Petitioners argue that shipping distances were raised as an issue by the petitioner in that case. Moreover, petitioners note that bearings are not fungible commodities with a low value ratio; therefore, there is no reason to believe that the bearings are not ordinarily shipped long distances.

Petitioners also argue that there is no evidence on the record to support CEMEX's argument that shipping distances of Type II cement are not extraordinary compared to sales of other cement types. For example, petitioners contend that there is no information on the record to show that Type V cement has always been shipped long distances. Moreover, petitioners note, Type V sales were found to be outside the ordinary course of trade in the second administrative review; therefore, sales of Type V hardly buttress CEMEX's claim that Type II sales were within the ordinary course of trade. Likewise, petitioners maintain that CEMEX has not cited specific instances in the record demonstrating that Type I and pozzolanic cement is normally shipped long distances.

Additionally, petitioners argue that ''CEMEX's manipulation of its production and distribution arrangements for Type II cement to increase the freight cost continue to result in CEMEX attaining an unusually low profit on Type II sales during the fifth review period'' in comparison to profits on all cement types. Moreover, petitioners contend that the Department did not just look at profit when making its ordinary course of trade determination in the preliminary results; rather, the Department considered all pertinent factors. Therefore, petitioners question CEMEX's statement that relative profitability is the only factor supporting the Department's determination of sales outside the ordinary course of trade because it fails to explain how the other four factors vanished from the record of the review. Finally, petitioners maintain that the ''Department correctly determined in the preliminary results that, based on the evidence of record in this review, the five factors the Department relied upon in the second administrative review in determining that CEMEX's sales of Type II cement were outside the ordinary course of trade continued to be present during the fifth review period.''

Petitioners also argue that the Department was correct in its finding that sales of Type II cement have a promotional quality to them. Petitioners points out that the Department requested information regarding the promotional aspect of Type II cement sales on July 9, 1996, but CEMEX failed to provide it. This determination is further supported by the fact that Type II was found to be sold for promotional reasons in the second review, and CEMEX conceded the promotional aspect of Type II cement in the fourth review. Moreover, petitioners contend ''CEMEX's case brief does not contest the Department's finding that CEMEX continued to sell Type II cement for reasons other than profit.''

In addition, petitioners argue that CEMEX restricted sales of Type II cement during the fifth review period. Petitioners contend that after the imposition of the antidumping order, CEMEX restricted sales of Type II cement to only those customers that specifically requested it and could demonstrate a need. According to petitioners the fact that CEMEX ''artificially restricted its home market sales of Type II cement'' is further established by the uncontested evidence that CEMEX produced Type II Low Alkali (LA) cement at no fewer than six plants other than the one at Hermosillo prior to the antidumping order. Moreover, petitioners maintain that CEMEX ''produced cement meeting the specifications of Type II LA cement at plants other than Campana and Yaqui during the period of review, but that it restricted sales of cement reported as Type II cement by selling the cement as Type I or Type I modified cement.''

Department's Position: Consistent with the preliminary determination, in examining CEMEX's reported home market sales, the Department has determined that CEMEX's sales of Type II cement were outside the ordinary course of trade during the fifth review. Section 773(A)(1)(B) of the Act states that the normal value of the subject merchandise is ''the price at which the foreign like product is first sold (or, in absence of a sales, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade.'' Section 771(15) defines ordinary course of trade as ''the conditions and practice which, for a reasonable time prior to the exportation of the subject merchandise have been normal in the trade under consideration with respect to merchandise of the same class or kind.'' The SAA, which accompanied the passage of the URAA, further clarifies this portion of the statute, stating: ''Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market.'' SAA, at 164. Thus, the statute and SAA are clear that a determination of whether sales (other than those specifically addressed in section 771(15)) are in the ordinary course of trade must be based on an analysis comparing the sales in question with sales of merchandise of the same class or kind generally made in the home market, *i.e.,* (the Department must consider whether certain cement home market sales are ordinary in comparison with other home market sales of cement.)

An ordinary course of trade determination requires evaluation of sales in each review on ''an individual basis taking into account all of the relevant facts of each case.'' *Nachi-Fujikishi Corp.* v. *United States,* 798F. Supp. 716, 719 (CIT 1992). This means that the Department must review all circumstances particular to the sales in question. Therefore, in the fifth review the Department considered the totality of circumstances surrounding CEMEX's reported home market sales. A full discussion of our conclusions, requiring reference to proprietary information, is contained in a Department memorandum in the official file for this case (a public version of this memorandum is on file in room B–099 of the Department's main building). Generally, however, we have found: (1) The volume of Type II home market sales is extremely small compared to sales of other cement types, (2) shipping distances and freight costs for Type II home market sales were significantly greater than for sales of other cement types, with CEMEX absorbing these costs, and (3) CEMEX's profit on Type II sales is small in comparison to its profits on all cement types. In addition, there are two items, historical sales trends and the ''promotional quality'' of Type II cement sales, which were cited previously as factors in the second review ordinary course analysis, but which are not discussed above. On July 9, 1996 the Department issued a questionnaire that requested CEMEX to support its position that home market Type II cement sales are in the ordinary course of trade by addressing, among

other things, ''historical sales trends'' and ''marketing reasons for sales other than profit.'' CEMEX's response addressed all items in the questionnaire except these two items. Thus, the Department assumes that the facts regarding these items have not changed since the second review and that: (a) CEMEX did not sell Type II until it began production for export in the mid-eighties, despite the fact that a small domestic demand for such existed prior to that time; and (b) sales of Type II cement continue to exhibit a promotional quality that is not evidenced in CEMEX's ordinary sales of cement.

For the reasons stated above, the Department has determined that CEMEX's home market sales of Type II cement during the current review are not representative of its sales of such or similar merchandise in Mexico. We note that while our decision is based solely upon the facts established in the record of the fifth review, those facts are very similar to the facts which led the Department to determine in the second review that home market sales of Type II cement were outside the ordinary course of trade. This determination, as noted above, was affirmed by the CIT in the CEMEX case. (''Commerce's determination that CEMEX's sales were outside the ordinary course of trade involved a weighing of data and is supported by substantial evidence.'' *CEMEX,* Slip Op. 95–72 at 14.

The Department disagrees with CEMEX's argument that the ordinary course of trade provision in the statute precludes the exclusion of an entire category of sales. Importantly, the statute provides no limits on the number of sales or transactions that may be excluded from normal value. Moreover, the SAA notes that ''Commerce will interpret section 771(15) in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.'' As petitioners point out and the Department agrees, failure to exclude all sales of Type II cement would violate this intent because normal value would be based on Type II sales despite evidence that those sales were made under unusual and unrepresentative conditions.

The Department also disagrees with CEMEX's claim that if the Department continues to disregard all Type II sales, the statute requires the Department to base normal value on constructed value rather than home market prices of similar merchandise. In examining the universe of CEMEX's home market sales, the Department has found that sales of Type II cement are extraordinary, unusual, and unrepresentative transactions, and, therefore, are outside the ordinary course of trade. As a result, such sales could not constitute the foreign like product. However, sales of Type I cement are usable for identifying the foreign like product, and subsequently in calculating NV. In situations where identical product types cannot be matched, the statute expresses a preference for basing normal value on similar merchandise (see section 773(a)(1)(A) of the Act and section 353.46(a) of the Department's regulations). *Gray Portland Cement and Clinker from Mexico,* 58 Fed. Reg. 47253, 47255 (1993); see also CEMEX, Slip Op. 95–72 at 26. ''Constructed value should only be used where Commerce has made a determination that the exporter's home market prices are inadequate or unavailable for the purposes of calculating FMV.'' CEMEX, Supra at 26, citing H.R. Rep. No. 317, 96th Cong., 1st Sess. 76 (1979). In the fifth review, there are home market sales of similar merchandise (Type I cement) as well as sales of identical merchandise (Type II cement.) For the reasons stated above, we have not based our calculation of normal value upon market sales of Type II cement. However, the Department has followed the dictates of the statute and our regulations and compared sales of similar merchandise (i.e., Type I cement) to the product sold in the United States, adjusted for DIFMER (see Comment 6, below).

Comment 3: Petitioners claim that CEMEX established a fictitious niche market for home market sales of Type II cement. In particular, petitioners argue that CEMEX, in reaction to the antidumping order, created an artificial and highly restricted niche market and channel for Type II cement with the intention of manipulating normal value of identical merchandise ''to mask the fact that the average home market price of the entire class of subject merchandise covered by the order (including Type I cement and pozzolanic cement) continued to greatly exceed the U.S. price of the imported merchandise.'' As a result, petitioners claim that CEMEX's dumping is disguised.

CEMEX, on the other hand, argues that the Department was correct not to initiate a fictitious market investigation during the context of the fifth administrative review. CEMEX maintains that since the Department disregarded ''CEMEX's home market sales of Type II cement in the preliminary results on the basis of their being outside the ordinary course of trade, other basis for disregarding those sales, such as (petitioner's) fictitious market allegation and its allegation that Type II cement was sold at prices below production costs, became moot and did not have to be further addressed by the (Department) in the preliminary results.''

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

Collapsing

Comment 4: CDC contends that the Department's decision to collapse it and CEMEX is contrary to administrative practice and is not justified by the record. CDC concedes that it is affiliated with CEMEX; however, CDC does not believe that the two affiliated companies should be collapsed. CDC asserts that collapsing two affiliated parties is the exception, not the rule. CDC asserts that the Department's policy is based on the principle that a company's liability under the antidumping law should be based on the company's own pricing decisions. The Department has consistently relied on factors other than percentage ownership and common board members, the two factors relied upon in this case, when considering whether to collapse two companies. CDC cites *Nihon Cement Co.* v. *United States,* 17 CIT 400 (1993), in which the Department summarizes the factors it considers to be relevant in its determination to collapse affiliated entities, and *FAG Kugelfischer Georg Schafer KGaA* v. *United States,* 932 F. Supp. 315 (CIT 1996), in which the court reversed the Department's decision to collapse two sister companies because it determined that there was not a strong possibility of price manipulation.

CDC asserts that the possibility of price manipulation which could undermine the effectiveness of the order is insignificant. CDC centers its argument around the three factors the Department considers to be evidence of the potential for price manipulation: stock ownership, management/director overlap, and intertwined business operations. CDC contends that stock ownership does not necessarily indicate control. CDC claims the record establishes that CEMEX has no control over CDC's business operations, as evidenced by the following factors: (1) Sales listings for sections B and C demonstrate that there is no correlation

in CEMEX and CDC's pricing. (2) CDC has its own facilities, distribution, sales, and marketing network in Mexico and in the United States. CDC states that it does not share information with CEMEX on possible sales opportunities in the U.S. or Mexico. (3) There is no coordination between CEMEX and CDC of sales, pricing, or marketing policies in the Mexican market; CDC claims that because of the regional nature of the cement market, the natural markets of CDC and CEMEX do not overlap. Moreover, CDC claims that the high cost of freight and the fact that CDC's facilities are in the land-locked state of Chihuahua prohibits CDC from switching its production to meet the needs of CEMEX's U.S. and Mexican customers. (4) No commercial transactions between CDC and CEMEX support a ''strong possibility'' of price manipulation. In addition, the companies do not supply any material inputs for the subject merchandise to each other. (5) The companies are listed separately on the Mexican stock exchange.

CDC argues that in the absence of any possibility of price manipulation, there is no policy reason in this case to collapse CEMEX and CDC. CDC claims that it cannot increase its operations beyond its natural geographic markets of Chihuahua in Mexico, and Texas and New Mexico in the United States, due to prohibitively high freight costs. CDC also asserts that the possibility of price and production manipulation is small, due to the corporate structure. CDC claims it is being penalized for occurrences of dumping over which it has no control, but which it must pay for. CDC contends that as the Department has full access to both CDC and CEMEX pricing, cost and production information through its questionnaires and verification, it could decide to collapse the companies in future annual reviews if warranted by evidence of manipulation. CDC insists that there would be no incentive for its owners or managers to agree to any plan that would result in unpredictable monetary liability for CDC's past imports.

Petitioners contend that the Department's preliminary results analyzed all relevant factors and correctly determined that CEMEX and CDC should be collapsed. Petitioners note that cement is a bulk commodity which cannot be distinguished from producer to producer; thus the potential for production manipulation is much greater for cement than for differentiated products. Petitioners argue that both CEMEX and CDC produce the subject merchandise, and have similar production facilities that could be easily retooled to restructure manufacturing.

Petitioners stress that the correct focus of analysis is the potential for future price manipulation, and that CEMEX's and CDC's relationship harbors significant potential for price manipulation, as evidenced by the following factors: (1) According to petitioner, CEMEX's level of stock ownership of CDC is more than sufficient to warrant collapsing the two companies. Petitioners hold that CDC has not established on the record that CEMEX has no ability to influence CDC's pricing and production decisions, either at present or in the future. (2) Petitioners claim control over the board of directors is not necessary to warrant collapsing; however, the cross-board membership between CEMEX and CDC clearly presents ''potential sharing of information.'' (3) The record contains substantial evidence of intertwined business operations between CEMEX and CDC. (4) Petitioners contend that ''control'' of one party over another is not a condition precedent to a decision to collapse affiliated parties. Petitioners cite *Nihon Cement*, 17 CIT at 425, *Notice of Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy*, 61 FR 30326, 30352 (June 14, 1996) (''*Certain Pasta From Italy*''), and *Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Corrosion-Resistant Carbon Steel Flat Products From Japan*, 58 Fed. Reg. 37154, 37159 (1993) (''Japanese Steel''), to support this argument. (5) Petitioners refute CDC's claim that price manipulation between CEMEX and CDC is unlikely to occur because CDC could not extend its market beyond its current geographical area. Moreover, petitioners state that CDC and CEMEX could easily maximize their combined profits by increasing CDC's shares of U.S. sales and increasing CEMEX's share of Mexican sales.

Department's Position: The Department agrees with CDC that it must consider all relevant factors when collapsing two affiliated parties. *Section 351.401(f) of the Proposed Rules*, 61 FR at 7330, describes the Department's current policy regarding when it will treat two or more affiliated producers as a single entity (i.e., ''collapse'' the firms) for purposes of calculating a dumping margin. In order for the Department to treat two or more producers as a single entity, (1) The producers must be affiliated; (2) the producers must have production facilities that are sufficiently similar so that a shift in production would not require substantial retooling; and (3) there must be a significant potential for the manipulation of price or production.

First, because CEMEX indirectly owns more than five percent of the outstanding voting shares of CDC, the Department considers CEMEX and CDC to be affiliated within the meaning of section 771(33) (F) of the Act. The Department also finds that CEMEX and CDC are affiliated within the meaning of section 771(33)(G) of the Act, as detailed in the Proposed Regulations. CEMEX is ''in a position to exercise restraint or direction'' over CDC via the following means of control: (1) cross-board of directors membership between CEMEX and CDC and/or its affiliates and (2) joint activities between CDC and CEMEX. In addition, both CEMEX and CDC manufactured Type I and Type II cement during the period of review. Second, as CDC and CEMEX have similar production processes and facilities, a shift in production would not require substantial retooling. Record evidence for the fifth administrative review also reveals intertwined business operations between CDC and CEMEX. (A complete analysis surrounding the Department's decision to collapse CDC and CEMEX, requiring reference to proprietary information, is contained in the Department's Memorandum from Roland L. MacDonald to Joseph A. Spetrini, dated March 24, 1997, located in the official file for this case.

A public version of this memorandum is on file in room B–099 of the Department's main building.)

Third, no aspect of CDC and CEMEX's affiliation via stock ownership and cross board members, nor the location of their facilities and distribution network, precludes the potential for price manipulation. Given the level of common ownership and cross board members, which provides a mechanism for the two parties to share pertinent pricing and production information, similar production facilities that would not require substantial retooling, as well as intertwined business operations, the Department finds that if CDC and CEMEX are not collapsed, there is significant potential for price manipulation which could undermine the effectiveness of the order.

Level of Trade (LOT)/ CEP Offset

Comment 5: Petitioners argue that a CEP offset adjustment should not be granted. Petitioners cite the SAA which establishes two conditions for a CEP offset: first that ''different functions at different levels of trade are established under section 773 (a)(7)(A)(i)''; and second, that the ''data do not form an appropriate basis for determining a level of trade adjustment under section 773

(a)(7)(A)(ii).'' Petitioners assert that it is not sufficient for a respondent to establish that sales in the home and U.S. markets are at different levels of trade, thus satisfying the first criteria. Petitioners state that the respondent must also establish that the different levels of trade affect the comparability of prices, based on 19 U.S.C. 1677b(a)(7)(A)(ii). Petitioners assert that neither CDC nor CEMEX has satisfied the criteria, and are not entitled to a CEP offset adjustment.

CDC argues that under the URAA, the CEP offset should be granted when there is an unquantifiable difference in level of trade between the home and U.S. markets. The Department must consider those differences in selling functions that exist after the deduction from the U.S. price of selling expenses associated with selling functions in the United States. CDC asserts that the Department verified that the majority of selling functions performed in the home market were not performed for CEP sales; thus the home market LOT is different from, and more advanced than the CEP LOT, which satisfies the first criteria for the CEP offset. Second, CDC asserts that under section 773(a)(7)(A), a price adjustment can only be quantified where there are at least two different levels of trade in the home market. As the Department found that CDC reported only one level of trade in the home market, CDC claims it has satisfied the second criteria for a CEP offset (i.e., the available data does not provide an appropriate basis for a LOT price adjustment).

Similarly, CEMEX argues that its claim for a level of trade adjustment should be analyzed under 19 U.S.C. 1677b(a)(7)(B), which authorizes the CEP offset. The Department's Proposed Regulations at 19 CFR 351.412(b)(2) instruct the Department to ''identify the level of trade based on the price after the deduction of expenses and profit under section 772(d) of the Act.'' CEMEX claims that while the starting prices for U.S. and home market sales were initially made at the same level of trade, significant differences in selling functions exist between U.S. and home market sales, when the CEP, with all indirect selling expenses incurred for selling functions deducted under the statute, is compared to normal value.

Department's Position: In accordance with section 773(a)(7)(A) of the Act, to the extent practicable, we determine normal value for sales at the same level of trade as the U.S. sales (either export price (EP) or constructed export price (CEP)). When there are no sales at the same level of trade we compare U.S. sales to home market sales at a different level of trade. The normal value (NV) level of trade is that of the starting-price sales in the home market. When NV is based on constructed value (CV), the level of trade is that of the sales from which we derive selling, general and administrative expenses, and profit.

For both EP and CEP the relevant transaction for level of trade is the sale from the exporter to the importer. While the starting price for CEP is that of a subsequent resale to an unaffiliated buyer, the construction of the EP results in a price that would have been charged if the importer had not been affiliated. We calculate the CEP by removing from the first resale to an independent U.S. customer the expenses specified in section 772(d) of the Tariff Act and the profit associated with these expenses. These expenses represent activities undertaken by, or on behalf of, the affiliated importer. As such they tend to occur after the transaction between the exporter and the importer for which we construct CEP. Because the expenses deducted under section 772(d) represent selling activities in the United States, the deduction of these expenses normally yields a different level of trade for the CEP than for the later resale (which we use for the starting price). Movement charges, duties and taxes deducted under section 772(c) do not represent activities of the affiliated importer, and we do not remove them to obtain the CEP level of trade.

To determine whether home market sales are at a different level of trade than U.S. sales, we examine whether the home market sales are at different stages in the marketing process than the U.S. sales. The marketing process in both markets begins with goods being sold by the producer and extends to the sale to the final user, regardless of whether the final user is an individual consumer or an industrial user. The chain of distribution between the producer and the final user may have many or few links, and each respondent's sales occur somewhere along this chain. In the United States this is generally to an importer whether independent or affiliated. We review and compare the distribution systems in the home market and U.S. export markets, including selling functions, class of customer, and the extent and level of selling expenses for each claimed level of trade. Customer categories such as distributor, OEM, or wholesaler are useful as they are commonly used to describe levels of trade by respondents; however, without substantiation, these categories are insufficient to establish that a claimed level of trade is valid. An analysis of the chain of distribution and of the selling functions substantiates or invalidates claimed customer classification levels. If the claimed customer levels are different, the selling functions performed in selling to each level should also be different. Conversely, if customer levels are nominally the same, the selling functions performed should also be the same. Different levels of trade necessarily involve differences in selling functions, but differences in selling functions, even substantial ones, are not alone sufficient to establish a difference in the level of trade. A different level of trade is characterized by purchasers at different places in the chain of distribution and sellers performing qualitatively or quantitatively different functions in selling to them.

When we compare home market sales at a different level of trade than U.S. sales, we make a level of trade adjustment, if the difference in level of trade affects price comparability.

We determine any effect on price comparability by examining sales at different levels of trade in a single market (i.e., the home market). Any price effect must be manifested in a pattern of consistent price differences between home market sales used for comparison and sales at the equivalent level of trade of the export transaction. To quantify the price differences, we calculate the difference in the weighted average of the net prices of the same models sold at different levels of trade. Net prices are used because any difference will be due to differences in level of trade rather than other factors. The average percentage difference between these weighted averages is used to adjust the normal value when it is different from the level of trade of the export sale. If there is no pattern, then the difference in level of trade does not have a price effect, and no adjustment is necessary.

In terms of granting a CEP offset, the statute also provides for an adjustment to normal value if it is compared to U.S. sales at a different level of trade, provided the normal value is more remote from the factory than the CEP sales, and we are unable to determine whether the difference in levels of trade between CEP and NV affects the comparability of their prices. This latter situation can occur where there is no home market level of trade equivalent to the U.S. sales level, or where there is an equivalent home market level, but the data are insufficient to support a conclusion on price effect. This adjustment, the CEP offset, is identified in section 773(7)(B) and is the lower of the: (1) Indirect selling expenses on the home market sale; or (2) indirect selling expenses deducted from the starting

price used to calculate CEP. The CEP offset is not automatic each time export price is constructed. The CEP offset is made only when the level of trade of the home market sale is more advanced than the level of trade of the U.S. (CEP) sales and there is not an appropriate basis for determining whether there is an effect on price comparability.

In implementing this principle in this review, we examined information regarding the selling activities of the producers/exporters associated with each stage of marketing, or the equivalent. However, we were unable to utilize the analysis submitted by the respondent (CEMEX and CDC) due to the fact that it reported the selling functions performed by the producer/exporter to the unaffiliated purchaser in the home market, as compared to the selling functions performed by the related reseller to the unaffiliated purchaser in the U.S. market. The statute directs the Department to determine normal value at the level of trade of the CEP sales, which includes any CEP deductions under section 772(d) of the Act, (*i.e,* the price as reflected by the ''sale'' from the producer/exporter to the U.S. affiliate). As such, the CEP reflects a price exclusive of those selling expenses and profit associated with economic activities in the United States. *See* SAA at 823.

In reviewing the selling functions reported by CEMEX and CDC, we considered the selling functions performed by CEMEX and CDC to its customers in the home market (as reported in the variables, INVCARH, INDIRSH, and DISWARH), and the selling functions performed by CEMEX and CDC, in the home market on its ''sales'', to its affiliated reseller in the United States (as reported in the variables, DINVCARH, DINDIRSU, and DISWARU). In analyzing whether separate LOTs existed in this review, we found that no single selling activity in the cement industry was sufficient to warrant a separate LOT (*see Notice of Proposed Rulemaking and Request for Public Comments,* 61 FR 7307 (February 27, 1996). For this review, we determined that the following selling functions and activities occur in relation to CEMEX and CDC's sales of cement: (1) Inventory maintenance, (2) presale warehousing, and (3) other indirect selling expenses. We did not consider packing arrangements to be a selling function since packing is accounted for in the Department's calculations as a separate adjustment.

CEMEX

CEMEX claimed that it has two LOTs in the home market—bulk sales and bagged sales of cement. It also reported two LOTs in the U.S. market—sales of bulk cement to end-users and ready-mixers. We disagree with CEMEX that there are two LOTs in the home market and two LOTs in the U.S. market. Therefore, based on our practice, as stated in *Steel from Canada,* we have determined, for the reasons described below, that CEMEX sells to one level of trade in the home market and one level of trade in the U.S. market.

First, we looked for different stages of marketing. We found that there is one stage of marketing—sales of cement shipped to end-users and ready mixers in bulk and bagged form. After determining the number of marketing stages, we then examined whether the selling functions performed by the seller support CEMEX's claimed LOTs or the marketing stages determined by the Department. For the claimed LOTs in the home market, we did not find that there were two distinct sets of selling functions performed by the seller. Rather, we found one distinct set of selling functions performed by CEMEX which reflect the one stage of marketing determined by the Department. Both in terms of their amount and nature. CEMEX essentially performed the same selling functions in the home market on both its end-users and ready-mixer sales. Specifically, these functions were pre-sale warehousing (DISWARH and DISWARU), inventory maintenance (INVCARH and DINVCARU), and other indirect selling functions (INDIRSH and DINDIRSU).

Next we examined the selling functions performed by CEMEX with respect to both markets to determine if U.S. sales can be matched to home market sales at the same LOT. For the U.S. market, CEMEX reported that all sales were made on a CEP basis. The level of trade of the U.S. sales is determined for the CEP rather than for the starting price. In the instant review, the CEP sales reflect certain selling functions such as inventory maintenance, pre-sale warehouse expenses, and indirect selling expenses incurred in the home market for the U.S. sale. As explained above, these same selling functions are also reflected in CEMEX's home market sales to end-users and ready-mixers. Therefore, the selling functions performed for CEMEX's CEP sales are not sufficiently different from those performed for CEMEX's home market sales to consider CEP sales and home market sales to be at a different level of trade. Although there may be differences between the marketing stages, these differences are not borne out by an analysis of the selling functions for the home market and CEP sales, which are largely the same. Therefore, we have determined that there are no differences in levels of trade and neither a level of trade adjustment nor a CEP offset was warranted in the instant review.

CDC

CDC has claimed two levels of trade in the home market—sales of bulk cement to end-users and ready-mixers, and bagged cement sales to end-users. CDC has also reported two LOTs for its U.S. sales—bulk cement to end-users and ready-mixers. We disagree with CDC that there are two LOTs for its home market sales and two LOTs for its U.S. sales. Therefore, based on our practice, as stated *Steel from Canada,* we have determined, for the reasons described below, that there is one level of trade in the home market and one level of trade in the U.S. market.

First, we looked for different stages of marketing. We found that there is one stage of marketing—sales of cement shipped to end-users and ready-mixers in bulk and bagged form. After determining the number of marketing stages, we then examined whether the selling functions performed by the seller support CDC's claimed LOTs or the marketing stages determined by the Department. For the claimed LOTs in the home market, we did not find that there were two distinct sets of selling functions performed by the seller. Rather, we found one distinct set of selling functions performed by CDC which reflect the one stage of marketing determined by the Department. Both in terms of their amount and nature, CDC essentially performs the same selling functions in the home market on both its end-user and ready-mixer sales. Specifically, these functions were pre-sale warehousing (DISWARH and DISWARU), inventory maintenance (INVCARH and DINVCARU), and other indirect selling functions (INDIRSH and DINDIRSU).

Next we examined the selling functions performed by the seller with respect to both markets to determine if U.S. sales can be matched to home market sales at the same LOT. For the U.S. market, we examined those sales that CDC reported were made on a CEP basis. The level of trade of the U.S. sales is determined for the CEP rather than for the starting price. In the instant review, the CEP sales reflect certain selling functions such as inventory maintenance, pre-sale warehouse expenses, and indirect selling expenses

incurred in the home market for the U.S. sale. As explained above, these same selling functions are also reflected in CDC's home market sales to end-users and ready-mixers. Therefore, the selling functions performed for CDC's CEP sales are not sufficiently different from those performed for CDC's home market sales to consider CEP sales and home market sales to be at a different level of trade. Although there appears to be differences between the marketing stages, this difference is not borne out by an analysis of the selling functions for the home market and CEP sales, which are largely the same. Therefore, we have determined that there are no differences in levels of trade and neither a level of trade adjustment nor a CEP offset was warranted in the instant review.

Although we are ''collapsing'' CEMEX and CDC as explained above (see Comment 4), we are not comparing CEMEX home market sales to CDC U.S. sales, nor are we comparing CDC home market sales to CEMEX U.S. sales. This is due to the fact that there were enough comparable sales (i.e., CEMEX to CEMEX, and CDC to CDC) to enable the Department to make an accurate comparative analysis.

Differences in Merchandise (DIFMER)

Comment 6: CDC asserts that the Department incorrectly weight-averaged CDC's DIFMER with that of CEMEX. CDC claims that the Department's decision to weight-average DIFMER information penalizes CDC unfairly, when CDC fully cooperated with the Department.

Petitioners argue that the Department should use an adverse 20 percent DIFMER adjustment based on facts available for CDC as well as for CEMEX. Petitioners claim that CDC failed to provide a detailed listing of all expenses in order to satisfy its burden of isolating and quantifying the costs solely attributable to physical differences in merchandise

Department's Position: As noted in CDC's home market verification report, the Department verified that CDC uses the same kiln for production of Type I and Type II cement. Moreover, CDC provided a detailed listing of differences in raw material inputs and variable overhead at all facilities for Type I and Type II cement, which sufficiently explained the differences in costs attributable to the physical differences of Type I and Type II cement. Differences in plant efficiencies are not an issue for CDC, as CDC produces both Type I and Type II cement at only one plant, and has based its DIFMER on the differences between costs of production at this single facility. In short, CDC sufficiently isolated and quantified its costs solely attributable to the physical differences in comparison merchandise, and has calculated DIFMER using the variable cost of manufacturing information from the one plant which produced both Type I and Type II cement. As CDC and CEMEX have been ''collapsed'' for purposes of this review (see Comment 4 above), the Department holds that it appropriately weight-averaged CDC and CEMEX's DIFMER information, consistent with its calculation of monthly weight-averaged costs for use in the cost of production analysis.

Comment 7: CEMEX claims that the Department improperly made a DIFMER adjustment based on facts available equal to 20 percent of total cost of manufacturing. CEMEX claims that it has established that there were physical differences between Type I and Type II by providing all supporting documentation for the reported weight-averaged VCOM for Type I and Type II for each plant, which the Department then verified. CEMEX also claims that the Department's own reporting requirements for COP and CV require the weight-averaged costs incurred at all facilities to be reported, and that the Department has granted claimed DIFMER adjustments in other cases when such adjustments were based on weighted average costs at several facilities. Therefore, CEMEX should not be penalized for not being able to exclude from its DIFMER data costs associated with differences in production efficiencies at the different plants. CEMEX cites *Gray Portland Cement and Clinker from Japan*, 60 FR 43761, 762–763 (1995), in which the Department granted the respondent a DIFMER adjustment, as the Department was satisfied that the respondent reasonably tied cost differences to physical differences in merchandise, not withstanding reported differences in plant efficiencies. CEMEX further contends that even if the Department relies on facts available, alternate facts available should be used. CEMEX contends that the Department's upward adjustment of 20 percent is punitive, when verified information established CEMEX's entitlement to a downward adjustment. Moreover, it is the Department's policy to use verified information to the greatest extent possible. CEMEX proposes one of the following alternatives for its DIFMER adjustment: 1) As CEMEX claimed a downward adjustment, the Department should make no DIFMER adjustment; 2) the Department could limit the DIFMER adjustment to only those components it believes are attributable solely to differences in physical characteristics and the production process (i.e., base the DIFMER adjustment only on verified raw material differences); 3) the Department could use verified cost differences from only one plant (i.e., the Yaqui plant, which produces both Type I and Type II); or 4) the Department could substitute CDC's verified DIFMER for CEMEX.

Petitioners maintain that CEMEX did not provide information to isolate the costs attributable solely to physical differences in merchandise, as opposed to plant efficiencies, despite repeated Department requests for such information. Petitioners rebut CEMEX's claim that its reported DIFMER adjustment information is similar to the DIFMER information in *Japanese Cement*. Petitioners argue that the DIFMER information provided in the Japanese case was vastly more detailed (respondent's information included actual chemical and physical characteristics, as well as plant-by-plant and product-by-product cost data) than the information provided by CEMEX. Furthermore, whereas in the Japanese case no record evidence demonstrated that cost differences were attributable to factors other than physical differences between the products, CEMEX has indicated on the record that the costs of its products vary from plant to plant according to the availability of raw material inputs. In the same exhibit, petitioners note that CEMEX also indicates that cost is affected by the amount of energy required to grind the clinker. Petitioners concede that there are physical differences between Type I and Type II cement; however, the tighter specifications, longer grinding time, and higher kiln temperatures for Type II cement result in higher variable costs of producing Type II cement. Therefore, any DIFMER adjustment should be unfavorable to CEMEX.

Petitioners further argue that the Department correctly selected an adverse 20 percent DIFMER adjustment as facts available. Petitioners note that the court affirmed the Department's use of a 20 percent DIFMER adjustment as BIA in the second review. Petitioners further insist that the Department must apply an *adverse* DIFMER adjustment as facts available under 19 U.S.C. 1677e(b) because CEMEX failed to comply with the Department's requests for information. Finally, petitioners dismiss CEMEX's argument that any DIFMER adjustment would be small (less than 3 percent of total manufacturing costs), as well as CEMEX's suggestions for alternate choices of facts available because these amounts do not represent

the use of adverse facts available, which petitioners argue is required in this case due to CEMEX's failure to cooperate.

Department's Position: We have reconsidered our decision in the preliminary results of this review determination in which we applied an adverse 20 percent DIFMER adjustment to CEMEX's reported home market sales of Type I cement due to the fact that upon review of the administrative record, we found evidence to support CEMEX's claim for a DIFMER adjustment based on cost differences at the Yaqui facility. Evidence on the record shows that CEMEX's Yaqui facility produces both Type I and Type II cement using a single production line. Therefore, consistent with the Department's treatment of CEMEX's affiliated party, CDC, we have allowed CEMEX a DIFMER adjustment based on the differences between the variable costs incurred by CEMEX in producing Type I and Type II cement at its Yaqui facility. Although CEMEX's claimed DIFMER adjustment was based on the weight-averaged difference in variable costs from all its facilities, the DIFMER adjustment utilized in this instant review is based on the differences in the variable cost of manufacturing incurred at a single producing facility. By relying on the differences in variable costs incurred at a single facility, we have accounted for differences in plant efficiencies if they are the source of the cost differences identified by CEMEX. Cost differences at the single facility are more likely to be due to differences in material inputs and the physical differences which result from different production processes.

First, the Department compared the Type II cement sold in the United States with the Type I cement sold in the home market. The specific differences in costs among the cement types are due to varying costs of the inputs, including material inputs (limestone, clay, silica, etc.), fuel inputs (fuel oil, coal, etc.) and electricity (mixing, grinding, burning, etc.). For example, Type I cement contain clinker, gypsum, and minor grinding agents, whereas Type II cement contains, clinker, gypsum, minor grinding agents, and additives. Additionally, Type I cement has a lower tricalcium aluminate level than Type II.

Second, for the purposes of this final analysis, the Department utilized the verified cost of producing Type II cement at the Yaqui facility and found these costs to be an accurate representation of the relevant variable costs of production as reflected in CEMEX's actual cost accounting records and compared the costs of producing Type II to the costs of producing Type I cement at the same facility. Therefore, the calculated DIFMER adjustment is based on the relative costs of producing Type I and Type II cement at a single facility. Given the fact that physical differences between types of cement arise from differences in the production process (e.g., amount and duration of heat), and from differences in component materials, we are satisfied that CEMEX has reasonably tied cost differences to physical differences in merchandise.

In those months where a calculated DIFMER adjustment could not be determined for CEMEX's Yaqui facility, we have utilized the relevant DIFMER adjustment for CEMEX's affiliated party, CDC, as the facts otherwise available.

Comment 8: Respondent claims that the Department incorrectly quantified and calculated the DIFMER adjustment in its preliminary results. CDC and CEMEX claim that the Department incorrectly omitted CDC's July, 1995, DIFMER information from its calculations. CEMEX also argues that the Department incorrectly calculated CDC's DIFMER, and that the correct calculation should subtract the variable cost of manufacturing of Type I cement (VCOMH) from the variable cost of manufacturing Type II (VCOMU). CEMEX further claims that because the individual DIFMER percentages were calculated by dividing DIFMER by the total cost of manufacturing for the U.S. product (Type II) (TOTCOMU), the DIFMER percentage should be multiplied by the total cost of manufacturing for Type II.

Petitioners argue that DIFMER information for CDC and CEMEX should be weight averaged based on relative production quantities of Type I, not Type II cement. Petitioners argue that the appropriate methodology is to base the weight average on the relative production of the product used as the basis for normal value (i.e., Type I cement). Petitioners argue that the Department correctly applied the DIFMER percentage to the cost of manufacture of the home market comparison product, Type I cement.

Department's Position: We agree that CDC's July 1995 cost data, as provided in the response, was incorrectly omitted from the DIFMER calculation. We have accounted for this error in our final results. We agree with respondents that DIFMER is correctly calculated by subtracting the variable cost of manufacturing for the product sold in the home market (Type I) from the variable cost of manufacturing for the product sold in the U.S. market (Type II). Following standard Department practice, this difference in variable cost of manufacturing is not to exceed 20 percent of the total cost of manufacturing of the product sold in the U.S. market. We disagree with petitioners that CDC and CEMEX's DIFMER should be weight-averaged based on relative production quantities of Type I cement. Because the individual DIFMER percentages were calculated by dividing differences in variable manufacturing costs by the total cost of manufacturing for the U.S. product (Type II), CDC and CEMEX's DIFMER information should be weight-averaged by the relative production of Type II cement. Finally, the Department has recalculated the DIFMER adjustment to normal value for its final results. The weight averaged DIFMER percentage has been multiplied by the total cost of manufacturing of the U.S. product (Type II) used in the comparison to normal value. This amount was then added to normal value.

Cost of Production (COP)

Comment 9: Petitioners contend that COP should be based entirely on facts available because CEMEX failed to provide the costs incurred at all of its plants during the period of review. Petitioners argue that CEMEX failed to provide any cost data (including shutdown costs) for the Atoyac plant for the entire period of review. Because CEMEX did not even provide information on the tons produced at the Atoyac plant, the Department cannot weight average the reported costs with those of other producing plants. Petitioners argue that the Department should base the cost of manufacture for the Atoyac plant on the highest monthly cost of manufacture reported for any other plant.

CEMEX states that in its May 20, 1996, supplemental cost questionnaire response, it provided costs for the Atoyac plant for those months in which there was production. CEMEX contends that any shutdown costs incurred while the Atoyac plant was producing cement were included in CEMEX's production cost for that period. CEMEX further contends that it reported other incidental costs of the shutdown as general and administrative expenses on the company's financial statements.

Department's Position: We agree with CEMEX. At verification we reviewed CEMEX's reported costs of production and found only minor errors as stated in our verification report dated July 22, 1996. In addition, as stated in the same verification report, we verified that all costs associated with the shutdown of the Atoyac facility were properly reported as a component of cost of

manufacturing, and the incidental costs were captured in the reported general and administrative expenses. Therefore, we are utilizing the verified costs that were reported to the Department.

Comment 10: Petitioners argue that the Department should recalculate CEMEX's reported financial expenses to include all foreign exchange translation losses on long-term foreign currency denominated debt. Petitioners assert that the Department's failure to do so is inconsistent with its past practice, and distorts actual interest expense. Citing *Certain Pasta from Italy; Semiconductors from the Republic of Korea; Certain Flat Rolled Steel Products and Plate from Korea;* and *Micron Technology, Inc.* v. *United States,* petitioners assert that the Department should include all costs incurred during the period of review, including those losses that are deferred to a future time.

CEMEX argues that there is no basis in law or administrative practice to attribute all foreign exchange translation losses to interest expense. CEMEX argues that it treated foreign exchange losses associated with foreign currency denominated debt incurred to purchase foreign subsidiaries as a reduction of the foreign exchange gain recognized on the translation of the subsidiaries financial statements. According to CEMEX, this comported with Mexican GAAP, the Statement of International Accounting Standards No. 21, and Financial Accounting Standards Board No. 52. CEMEX argues that if the Department decided that foreign exchange loss on the debt associated with assets held outside Mexico should be included in cost of production, then both the foreign exchange gain and the associated loss should be included in the reported income and cost of production. CEMEX argues that unlike in *Micron Technology Inc.* v. *United States,* CEMEX's independent auditor determined that the foreign currency losses reflected in CEMEX's financial statement were loans directly related to foreign assets located in countries other than the U.S. or Mexico.

Department's Position: We agree in part with CEMEX and in part with petitioners. The Department has included foreign-exchange translations gains and losses in net interest expense. The translation gains and losses at issue are related to the cost of acquiring debt and thus are related to production and are properly included in the calculation of CEMEX's consolidated financing expense. The CIT has upheld this practice, stating in *Micron* that ''[t]o the extent that respondent's translation losses resulted from debt associated with production of the subject merchandise, such losses are a legitimate component of COP.'' *See Micron* at 33. In addition, in the past we have found that translation losses represent an increase in the actual amount of cash needed by respondent to retire their foreign-currency-denominated loan balances. *See, e.g., Notice of Final Determination of Sales at Less than Fair Value: Fresh Cut Roses from Ecuador,* 24 FR 7019, 7039 (February 6, 1995). Using the same reasoning, for purposes of these final results we have included CEMEX's net gains on foreign-currency translations in COP as an offset to financing cost, since the gains represent a decrease in the actual amount of cash needed by respondent to retire their foreign-currency-denominated loan balances. Therefore, we have included total gains and losses associated with foreign-currency denominated debt in the calculation of consolidated financing expense.

Comment 11: Petitioners contend that CEMEX's claimed monetary position gain as an offset to financial expense should not be granted. Petitioners claim that CEMEX's total monetary position gain is based on transactions with unconsolidated affiliates, notably loans from Cementos del Norte and CEMEX Control, that are not at arm's length. Furthermore, petitioners argue that denying the offset would be consistent with the Department's well-established practice of denying interest income on long-term investments as an offset to interest expense. Petitioners claim that the monetary position gain earned by CEMEX from electing to hold long-term debt reflects income derived from investment-type activities that are unrelated to the product under review.

CEMEX argues that the Department was correct to include CEMEX's claimed monetary position gain in the calculation of net financial expense. CEMEX argues that the Department's actions in this review were in accord with the Department's practice, as established in the first and second administrative reviews of this case, as well as in *Porcelain-on-Steel Cookware from Mexico.* CEMEX further argues that Cementos del Norte and CEMEX Control are included in CEMEX's consolidated financial statements and the effect of transactions between these entities are eliminated in consolidation. CEMEX also dismisses petitioners' argument that the Department should treat monetary gain like interest income on long-term investment. CEMEX argues that monetary gains are related to liabilities and financial expenses, and are completely unrelated to assets that generate short-term and long-term interest revenue. Because monetary position gains are generated by liabilities, the Department should treat monetary position gain in the same way that it treats interest expenses that arise from those same liabilities (i.e., include them in the calculation of net financial expense).

Department's Position: We agree with CEMEX. It is the Department's longstanding practice to calculate the respondent's net interest expense based on the financing expenses incurred on behalf of the consolidated entity, CEMEX. In general, this practice recognizes the fungible nature of invested capital resources (*i.e.,* debt and equity) within a consolidated group of companies. In *Camargo Correa Meais, S.A.* v. *United States,* Slip Op. 93–163 (CIT 1993), the Court of International Trade ruled that the Department's practice of allocating financial expense on a consolidated basis due to the fungible nature of debt and equity was reasonable. The court specifically quoted the following from *Final Determination of Sales at Less than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof from Korea,* 54 Fed. Reg. 53,141, 53149 (1989):

> ''The Department recognizes the fungible nature of a corporation's invested capital resources, including both debt and equity, and does not allocate corporate finances to individual divisions of a corporation ... Instead, [Commerce] allocates the interest expense related to the debt portion of the capitalization of the corporation, as appropriate, to the total operations of the consolidated corporation.''

Furthermore, the SAA and the URAA do not address any specific change in the Department's practice of calculating financing expense. Therefore, consistent with the approach outlined in *Gray Portland Cement and Clinker from Mexico; Final Results Antidumping Duty Administrative Review,* 58 FR 25803, 25806 (1993), and *Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review,* 58 FR 47253 (1993), we have included the effect of the monetary gain in our calculation of the financing costs of CEMEX.

Comment 12: Petitioners argue that CDC's foreign exchange transaction gains should not be attributed to interest expense. Petitioners contend that the Department only includes foreign exchange transaction gains as an offset to interest expense if the gains are directly related to the subject merchandise (for example, if the gains are realized from the importation of raw materials or other inputs needed to

produce the merchandise). Petitioners claim that CDC has made no effort to link its foreign exchange transaction gains to the subject merchandise.

CDC counters that these monetary gains are translation gains, and not transaction gains, as petitioners have claimed. CDC argues that in *Silicomanganese from Venezuela,* 59 FR 55436, 55440 (1996), the Department determined that exchange gains and losses on financial assets and liabilities should be included in COP and CV. CDC explains that it has characterized this offset on the record as holdings in dollars related to overall operations. CDC elected to hold a portion of its assets in a foreign currency to hedge against devaluation of the local currency. CDC argues that details in its financial statements showing net exchange rate differences show that there is no basis for petitioners' concern that CDC's foreign exchange gains may have been generated entirely from transactions related to non-comparison or out-of-scope merchandise.

Department's Position: We disagree with petitioners' assertion that monetary position gains should be limited to the portion that can be specifically tied to the cost of producing the subject merchandise. The Department has long held the view that financing expenses are fungible. Accordingly, consistent with past Departmental practice, we do not distinguish whether interest expense is related or unrelated to the merchandise under review (*see, e.g., Final Determination of Sales at Less than Fair Value; Steel Wire Rope from Korea,* 58 FR 11035 (1993)). Therefore, we have used CDC's reported financial expenses including monetary corrections allocated over the cost of goods sold for all products.

Furthermore, the SAA and the URAA do not address any specific change in the Department's practice of calculating financing expense. Therefore, consistent with the approach outlined in *Gray Portland Cement and Clinker from Mexico; Final Results Antidumping Duty Administrative Review,* 58 FR 25803, 25806, (1993), and *Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review,* 58 FR 47253 (1993) we have included the effect of the monetary gain in our calculation of the financing costs of CDC.

Comment 13: Petitioners claim that the Department should use partial facts available because CDC and CEMEX failed to demonstrate that transfer prices for raw material inputs purchased from affiliated producers were at arm's length and reflected market value. Moreover, petitioners claim that CEMEX and CDC have not demonstrated that the affiliated party costs are fully-absorbed costs of production, because they do not demonstrate that reported costs included revalued depreciation, profit-sharing expenses, depletion expenses, and financial expenses. As partial facts available, petitioners suggest that the Department add an amount for profit to reported transfer prices. Petitioners suggest that this amount be determined by multiplying the profit rate in CEMEX's consolidated financial statement, by reported cost of production.

CEMEX argues that the Department should disregard petitioners' argument based on the fact that CEMEX provided all information that the Department requested with respect to raw material inputs, intermediate product costs, and transfer prices. CEMEX argues that petitioners' argument should be disregarded because the level of input materials purchased from affiliated parties is far below the level at which such purchases are considered by the Department to be material inputs and can be considered to have a significant impact on the overall cost of manufacture. In addition, CEMEX argues that its current reporting methodology is consistent with that used in all prior reviews, therefore the Department should not use facts available as a basis for calculating raw material input costs.

CDC argues that in accordance with the statutory requirements of 19 U.S.C. § 1677b(f)(3) and the Department's questionnaire, it demonstrated that raw material inputs were purchased at arm's length. CDC argues that for certain major inputs purchased from affiliates, it provided transfer prices when the transfer price was greater than the cost of production. In addition, it also provided the production costs for those inputs where the average production cost was higher than the purchase price from the affiliated party. CDC dismisses petitioners' claim that the Department should have obtained market values in addition to transfer prices and costs of production information. CDC asserts that it fully complied with the Department's request to provide cost of production information for all major inputs of production and, therefore, the Department should utilize the cost of production reported by CDC.

Department's Position: As noted in *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al; Final Results of Antidumping Administrative Reviews,* 62 FR 2081, 2115 (January 15, 1997), Section 773(f)(2) of the Tariff Act, which refers to both minor and major inputs, states that, with regard to calculating COP and CV * * *

> A transaction * * * between affiliated persons may be disregarded if, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration.

To the extent practicable, the Department generally prefers the use of the transfer price of inputs purchased from an affiliated supplier in determining COP and CV, provided that the transaction occurred at an arm's-length price. In determining whether a transaction occurred at an arm's-length price, we generally compare the transfer between the affiliated parties to the price of similar merchandise between two unaffiliated parties. If transactions of similar merchandise between two unaffiliated parties are not available, we may use the affiliated supplier's cost of production for that input as the information available as to what the amount would have been if the transaction had occurred between unaffiliated parties.

In the case of a transaction between affiliated persons involving a major input, we will use the highest of the transfer price between the affiliated parties, the market price between unaffiliated parties, and the affiliated supplier's cost of producing the major input.

In the instant review CEMEX and CDC have provided all raw material input data in accordance with the Department's methodology as discussed above. In addition, the Department verified that respondent's reported cost of production included either the higher of production costs or transfer prices for raw material inputs purchased from affiliated parties. Market prices for the raw material inputs were unavailable. Therefore, in accordance with prior practice, the Department has utilized CEMEX and CDC's reported cost of production in its analysis.

Comment 14: Petitioners argue that fixed overhead and labor costs should be reallocated based on the clinker content of the finished cement type. Whereas CEMEX based the allocation of variable overhead costs on clinker volume, it allocated fixed overhead and labor on tons produced of finished product. Petitioners claim that this allocation methodology understates the actual cost of producing Type I cement by shifting disproportionate amounts of the direct labor and fixed overhead costs to the production of pozzolonic and other types of cement, which contain less amounts of clinker. Petitioners maintain that the production of clinker

incurs substantially more direct labor and fixed overhead costs than either the acquisition or production of pozzolanic cement. In particular, pozzolanic cement is never calcined in a kiln, unlike clinker. Petitioners maintain that the kiln is a cement plant's greatest capital asset, and that this stage constitutes a substantial cost of production.

CEMEX rebuts petitioners' argument that fixed overhead and labor should be reallocated based on clinker content of the finished cement type. CEMEX claims that it followed the Department's instructions by submitting fixed overhead costs that were based on the methods used in the normal course of business to allocate costs to various cement products. CEMEX also notes that the Department verified the accuracy of CEMEX's reported fixed costs. In addition, CEMEX claims that it provided an analysis showing that it was reasonable to use CEMEX's methodology in its May 20, 1996, response and demonstrated that the effect on the overall weighted-average fixed costs for Type I cement was minimal.

Department's Position: We agree with CEMEX. The reported fixed overhead costs and labor costs were reported in accordance with Departmental methodology and verified by the Department during the course of the cost verification. Accordingly, we accepted CEMEX's submitted methodology which valued the cost of fixed overhead and labor on the tons produced of finished cement.

Comment 15: Petitioners claim that CEMEX and CDC incorrectly granted themselves a ''startup adjustment'' by amortizing their costs over a period beyond the POR for operations at the Tepeaca and Samalayuca plants, rather than including them as reported startup costs. Petitioners claim that the burden is on respondents to establish their entitlement to a startup adjustment (*i.e.*, to demonstrate that production levels were limited by technical factors associated with the initial phase of commercial production). Petitioners claim that CDC and CEMEX failed to do so for both plants mentioned above, thus the Department should include all costs incurred by these plants in the calculation of cost of production. Furthermore, petitioners state that CDC used clinker purchased from other affiliated plants at Samalayuca and that the Department should adjust these clinker costs to reflect arm's length transactions.

CEMEX contends that it properly reported all start-up costs for the Tepeaca plant. CEMEX states that the Tepeaca plant only produced Type I cement during the first two months of production and never in commercial quantities. Therefore, calculating a cost of producing Type I at Tepeaca was not possible. In addition, CEMEX states that the cement produced by Tepeaca was sold through the Atotonilco plant and valued at the weighted-average cost of producing Type I cement by all CEMEX's plants. CEMEX argues that the cost of producing Type I cement at the new, efficient Tepeaca plant would presumably be lower than the cost of producing cement at the older plants. Therefore, by not including the cost of producing cement at the Tepeaca plant, CEMEX claims it is overstating the overall weighted-average cost of production.

CDC asserts that the Samalayuca plant did not produce any cement during the POR. Therefore CDC did not include ''start-up'' costs for the Samalayuca plant and did not grant itself a ''start-up'' adjustment by amortizing the cost.

Department's Position: We agree with respondents. As stated in the Department's verification report, the Type I cement produced at Tepeaca and Samalayuca was only produced in testing quantities and not in commercially viable quantities. In addition, the Department verified that any start-up costs associated with the cost of producing the Type I cement at Tepeaca was transferred to the Atotonilco facility and was properly reported in CEMEX's cost of manufacturing. Second, due to the fact that CDC's Samalayuca facility was not fully operational during the POR (a fact verified by the Department), and did not incur any start-up costs, and therefore, we were not able to include the cost of producing cement at Samalayuca in our cost analysis. For purposes of the instant review, we are utilizing the costs reported by CDC and CEMEX and substantiated at verification in our final analysis.

Comment 16: Petitioners argue that the Department should include CDC's employee profit sharing expense in COP as a labor expense. In the preliminary results, these expenses were treated as part of G&A. Petitioners note that the treatment of profit sharing expense affects the calculation of DIFMER, which is a percentage of manufacturing costs; while labor expenses are included in manufacturing costs, G&A is excluded.

CDC responds that in light of the Department's previous decisions regarding profit sharing distributions, CDC does not disagree with the principle of including the profit sharing distributions in this case as labor costs. However, CDC states that its unconsolidated income statement shows that this expense is not included in cost of sales, and must be added to cost of goods sold before calculating the G&A factor, the CEP profit factor, the interest factor, and any other factor calculated as a percentage of cost of sales. CDC asserts that the Department must use this revised G&A factor if it adds employee profit sharing to labor costs.

Department's Position: In the final results of *Porcelain-on-Steel Cookware From Mexico*, 61 FR 54620 (1996), the Department included employee profit-sharing expense in COP and CV because it ''relates to the compensation of direct labor, a factor of production.'' The Department agrees with petitioners and respondents that employee profit sharing should be included as a direct labor cost and not as part of G&A. Accordingly, cost of production, constructed value, DIFMER, the CEP profit factor, and the interest factor have been recalculated for the final results with the correct amounts for employee profit-sharing included as a direct labor expense. We have also changed our calculation of CEMEX's employee profit sharing expenses. In our preliminary determination, we included employee profit sharing in G&A, however, in our final analysis we have included employee profit sharing as a portion of direct labor expense not as a part of G&A.

Normal Value

Comment 17: Petitioners argue that the Department should deny CEMEX a freight deduction for home market sales of bulk Type I cement. Petitioners base this argument on the following assertions; (1) CEMEX did not report freight expenses on a transaction-specific, customer-specific, plant, or company-specific basis. Petitioners contend that freight expenses vary greatly from transaction to transaction depending on the location of the plant, warehouse and customer, as well as the mode of transportation used. The Department requested this information in its November 1, 1995 questionnaire and its April 12, 1996, letter. Petitioners note that CEMEX provided no explanation for its refusal to provide such information. (2) CEMEX did not separate freight expenses from plant to warehouse and from plant/warehouse to customer. (3) For most bulk sales, CEMEX failed to report freight expenses specific to Type I cement. Petitioners claim that CEMEX's calculated freight factor was based on multiple types of cement for several companies. Moreover, petitioners found that the shipment volumes used to calculate the

freight factor greatly exceeded the actual volume of bulk Type I cement shipped, indicating that other types of cement were included in the calculation. Petitioners also point to the Department's redetermination on remand in the second administrative review of this order in which the agency denied any adjustment where CEMEX's freight factor was based on multiple cement types. (4) CEMEX included affiliated-company freight expenses into the freight factor and failed to segregate expenses from affiliated and unaffiliated companies. Furthermore, CEMEX failed to demonstrate that transfer prices charged to CEMEX by affiliates were at arm's length. Petitioners suggest that the Department disallow CEMEX's home market freight deduction for companies whose freight factor included affiliated freight charges. (5) CEMEX failed to demonstrate that its allocation methodology is not distortive. Petitioners argue that CEMEX did not demonstrate that its freight factors excluded Type II cement, which necessarily distorts the freight allocation. Petitioners also contend that CEMEX failed to demonstrate that inclusion of non-subject merchandise in the freight allocation is not distortive.

CEMEX, in turn, argues that the Department appropriately deducted CEMEX's freight expenses on home market sales of Type I bulk cement in the calculation of normal value.

CEMEX argues that the Department verified CEMEX's reported inland freight expense, and that computing freight expense on a plant-specific basis, as suggested by petitioners, would not result in a more precise calculation of normal value.

Department's Position: We agree with CEMEX. The Department has allowed a deduction for freight expenses for Type I bulk sales because the reported expenses provided are in accordance with Departmental methodology, consistent with the company's accounting practices, and were substantiated at verification. (*See* July 22, 1996 Verification Report). CEMEX has reported home market bulk Type I freight in accordance with their accounting system and provided the data on a company, cement type, and presentation specific basis. In fact, the manner in which CEMEX reported the freight expenses, as verified by the Department, tends to understate the per ton freight amounts deducted from normal value. Based on our findings at verification, the Department determined that respondent's reported freight costs for sales of Type I bulk cement are not distortive and provide a conservative estimate of actual transaction specific freight expenses. Therefore, we are granting CEMEX the home market freight adjustment for bulk Type I sales.

Comment 18: Petitioners argue that a credit expense adjustment should not be granted because CEMEX and CDC have failed to prove that its use of aggregate data to calculate credit expense is not distortive. Petitioners contend that the total sales and total accounts receivable data used by CEMEX and CDC to calculate average credit days outstanding includes non-comparison, outside the ordinary course, and out of scope merchandise for all customer categories and for affiliated and unaffiliated customers. Petitioners claim that CEMEX and CDC have also failed to use a transaction-specific, or even customer-specific allocation methodology. Petitioners argue that, as demonstrated in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.,* 58 FR 39729, 39747 (1993); *Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured From Japan,* 58 FR 30018, 30023 (1993); and *NSK Ltd.* v. *United States,* 896 F. Supp. 1263, 1274–76 (CIT 1995), the Department normally requires transaction-specific methodology in the calculation of credit expense and allows customer specific allocation methodology only in exceptional cases.

CEMEX asserts, in response, that the Department properly granted CEMEX's claimed credit expense adjustment, regardless of whether the days were calculated on a transaction-specific basis or as average days outstanding. CEMEX insists that it simply could not report actual payment dates for all transactions. CEMEX notes that the Department accepted and verified CEMEX's calculation of average credit days outstanding for those sales for which transaction-specific data were not available. CEMEX also notes that its calculation methodology for average credit days outstanding based on total accounts receivable (as opposed to customer-specific credit day calculations) is fully consistent with the Department's administrative practice, as evidenced in recent decisions in *Fresh Cut Flowers from Mexico,* 61 FR 40604 (1996), and *Color Television Receivers from Korea,* 56 FR 12701, 12708 (1991). To confirm that CEMEX's average credit day calculation was non-distortive, CEMEX compares the average number of credit days it calculated with the average number of credit days based on the August 9, 1996, home market sales tape.

CDC asserts that the guiding principle in evaluating this argument must be the standard established in the statute for differences in circumstance of sale, such as credit expenses—that is, the adjustment must be established ''to the satisfaction of the administering authority.'' 19 U.S.C. § 1677b(a)(6)(C). CDC states that the proposed rules (which petitioners refer to in their brief) simply reiterate the Department's preference for transaction-specific adjustments, and states the general rule that any alternative reporting must not be distortive.

CDC claims that the Department may accept averages (as CDC has provided) when a respondent can demonstrate that its books and records do not permit reporting of the costs on an individual-sale basis, and can demonstrate that the claimed adjustment is based upon a reasonable allocation of costs involved. *See Color Picture Tubes From Canada,* 52 FR 44161 (1987). CDC states that given its accounting methods and the way in which its customers make payments, transaction-specific reporting is not feasible, and CDC had little alternative but to calculate an average credit period for home market sales. CDC asserts that in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al. (''AFBs''),* 58 FR 39729 (1993) (which petitioners cite in their brief), the respondent's accounting system in that case permitted it to calculate customer-specific credit periods, unlike CDC in this case. In *Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Japan,* 58 FR 30018, 30023 (1993), CDC notes that the Department accepted the respondent's weighted average allocation over the POR. Finally, CDC asserts that there is no evidence in the record that the average method it used is distortive.

Department's Position: We agree with respondent. The Department has allowed CEMEX's and CDC's claimed credit expense adjustment for the following reasons. For the purposes of calculating imputed credit costs, it is our practice to calculate the number of credit days based on the number of days between the date of shipment and the date of payment. If actual payment dates are not readily accessible, we normally allow respondents to base the number of credit days on the average age of accounts receivables. *See, e.g., Color Television Receivers from the Republic of Korea; Final Results of Antidumping Duty Administrative Review,* 56 FR 12701, 12708 (Comment 28)(1991). Based on our findings at verification, the Department determined that respondent's use of the average age of accounts receivables to calculate credit expenses is reasonable (*See Fresh Cut*

Flowers from Mexico; Final Results of Antidumping Duty Administrative Review, 61 FR 6812 (Comment 2) (1996)).

Comment 19: Petitioners object to the Department's decision to grant CDC's so-called ''other'' adjustments. The Department categorized the other adjustments in the same manner as rebates and deducted them as a direct expense. Petitioners argue that CDC has not demonstrated that it is entitled to such an adjustment. ''Other'' adjustments include three types of post-sale adjustments to selling price: (1) A ''concrete pavers incentive discount'' provided to CDC's ready-mix customers as an incentive for municipalities to use concrete as a pavement material; (2) a price protection adjustment for all bulk cement customers in CDC's Juarez market in order to meet competition from other cement producers in that market; and (3) billing errors corrected subsequent to the sale.

Petitioners claim that the Department erred in granting an adjustment for these items for the following reasons. (1) The Department's uniform practice is to disallow a respondent's claim for a rebate unless the respondent provides a written agreement or other documentation that its customers were aware prior to the sale of both the conditions to be fulfilled to qualify for the rebate, and the amount of the rebate. Petitioners claim that CDC has provided no such documentation. (2) CDC has not reported expenses on a transaction-specific basis. Petitioners argue that the reported other adjustments merely represent an average of three different types of post-sale adjustments, none of which can be tied to a particular transaction. (3) Petitioners claim that at least one of the other adjustments is a direct selling expense for which an indirect selling adjustment may not be granted, similar to the adjustment claimed by the respondent and rejected by the court in *Torrington Co.* v. *United States,* 82 F.3d 1039 (Fed. Cir. 1996). (4) Petitioners claim that the ''concrete pavers discount'' granted to CDC's customers actually benefits the downstream customers on purchases of concrete, a product outside the scope of this review.

In response, CDC asserts that it does not collect as revenue the gross price listed on its invoices. CDC asserts that a normal value based on anything other than the revenue generated from a sale is unfair. CDC states that its claimed adjustments are product-specific and customer-specific. CDC claims that while it is unable to tie the adjustments to the specific invoices, there is no question that the adjustments are directly related to sales of the subject merchandise. As adjustments directly related to the sales and directly affecting the price at which the subject merchandise is sold, the so-called ''other'' adjustments are properly treated as an adjustment to gross price.

Department's Position: We agree with CDC. The Department has allowed CDC's claimed adjustments because these adjustments were reported in accordance with Departmental methodology and substantiated at verification. (*See* July 22, 1996 Verification Report.) As stated in the verification report, CDC was able to allocate these adjustments on a customer specific basis for the month in which the sale occurred. Therefore, we are granting CDC these adjustments.

Comment 20: Petitioners argue that CEMEX's rebate adjustment should not be granted. CEMEX failed to provide information and sample documentation on its rebate policy and claimed adjustment. Petitioners claim that the Department cannot, therefore, determine whether the claimed rebates are direct or indirect expenses or whether they relate to specific sales. Petitioners also note that CEMEX admitted at verification that a large number of rebates were not granted on a transaction-specific basis. Thus, petitioners suggest, the Department should, at most, accept the rebates as an indirect selling expense.

CEMEX asserts that the Department properly deducted its reported post-sale billing adjustments and post-sale rebates, allocated on a company specific basis, from the calculation of normal value. CEMEX states that the transaction-specific post-sale price adjustments reported as rebates were fully verified by the Department. CEMEX dismisses petitioners' suggestion that its customer-specific rebates are, at most, an indirect selling expense because they are not allocated on a transaction-specific basis. CEMEX counters that it has properly claimed these rebates as direct adjustments to price. Relying on *Corrosion Resistant Carbon Steel Flat Products from Canada,* 61 FR 13821 (1996), CEMEX asserts that rebates allocated on a customer-specific basis may be treated as adjustments to price in the same manner as rebates reported on a transaction-specific basis. In addition to being customer-specific, CEMEX maintains that the allocation at issue was made on a product-specific basis (Type I or Type II) and by method of distribution (bagged or bulk). Moreover, CEMEX argues that the calculation did not include non-subject merchandise, and that a customer-specific allocation methodology ensures that the rebates are directly related to sales of the merchandise at issue. Even if the Department determines that rebates can be direct adjustments to price only if they are incurred on a transaction-specific basis, CEMEX argues that rebates should still be deducted from normal value as indirect selling expenses pursuant to the CEP offset.

Department's Position: We agree with CEMEX. The Department has allowed CEMEX's claimed rebate adjustments because the data was submitted in accordance with Departmental methodology and was substantiated at verification. While the Department prefers that discounts, rebates and other price adjustments be reported on a transaction-specific basis, the Department has long recognized that some price adjustments are not granted to customers on that basis, and thus cannot be reported on that basis. Generally, ''we have accepted claims for discounts, rebates, and other billing adjustments as direct adjustments to price if we determined that the respondent, in reporting these adjustments, acted to the best of its ability and that its reporting methodology was not unreasonably distortive.'' *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et al., Final Results of Antidumping Duty Administrative Reviews,* 62 FR 2081 (January 15, 1997).

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

Comment 21: Petitioners assert that partial facts available should be used for

unreported downstream sales by CEMEX's affiliated distributors. Petitioners assert that there is no downstream sales data used in the calculation of normal value for affiliated customers failing the arm's length test. Moreover, petitioners claim that the excluded sales account for a percentage of total home market sales during the period of review that could potentially distort the calculation of normal value. Petitioners claim the use of facts available is appropriate because CEMEX did not act to the best of its ability to provide downstream sales data. Petitioners suggest that the Department use the highest normal value calculated for CEMEX to an unaffiliated distributor as adverse facts available for the excluded downstream sales.

CEMEX rebuts the petitioners' argument that the Department should substitute the highest calculated normal value for all sales made to CEMEX's affiliated distributors that do not pass the arm's length test. CEMEX contends that reporting downstream sales was not necessary, as these sales represented a small amount of home market sales, and would not have measurably increased the number of value matches between U.S. and home market sales. CEMEX argues that the questionnaire states that downstream home market sales need not be reported in cases where resales by affiliates constitute ''a small percentage of your total sales in the comparison market.'' CEMEX states that in this case, sales to affiliated distributors were of a percentage sufficient to satisfy this requirement.

CEMEX further argues that petitioners' suggestion that the Department substitute the highest calculated normal value is unduly harsh. In cases where downstream sales are small and sufficient price comparisons can be made without the use of the additional downstream sales, the Department will apply partial adverse facts available only in those cases in which there is no normal value match. CEMEX refers to various cold rolled carbon steel cases, which it believes established this general rule.

Department's Position: We agree with CEMEX. Consistent with our methodology in *Brass Sheet and Strip from Germany* 61 FR 49727 (1996), the Department has not included unreported downstream sales in the home market because these sales constitute an amount sufficiently small not to distort the calculation of normal value. Therefore, the Department has not relied on partial facts available for these sales.

Comment 22: CEMEX argues that pricing comparisons should be made between the same class of customer in each market. CEMEX claims that the Department's analysis memo for the preliminary results correctly indicated that the Department intended to calculate monthly normal value for each customer category, but failed to do so in the computer program. CEMEX states that it has established distinct customer classifications in both markets, and that there are significant price differences between such customer categories.

Petitioners argue that the Department should not average prices by customer category for the following reasons. (1) There is no basis in the statute or the SAA for averaging prices by customer category in administrative reviews. (2) CEMEX has not demonstrated that it is necessary to compare prices by customer category. Petitioners assert that the preamble to the Department's proposed regulations conditions the comparison of prices by customer category upon a showing that ''prices within a single level of trade, defined by seller function, [were] affected by the class of customer * * *'' Petitioners rebut CEMEX's claim that the amount of discount offered varies by customer, noting that CEMEX stated in its March 15, 1996 questionnaire response that ''the discounts granted did not vary by type of customer.''

Department's Position: We agree with the petitioners. As stated in the level of trade section of this notice (see Comment 5, above), the Department has determined that CEMEX sold at one level of trade in the home market. Therefore, we have not calculated normal values for each customer category as requested by CEMEX and have used our standard methodology for comparing normal value to U.S. price for purposes of this final results of review.

Comment 23: CEMEX asserts that calculation of normal value should be limited to home market sales of bulk cement. CEMEX argues that home market sales of bagged Type I cement are made through different channels of distribution than home market bulk cement sales. As prices differ between distribution channels, including home market bagged cement sales in normal value would be distortive, and represents an abrupt departure from past administrative practice in the second, third, and fourth reviews, as well as in cement cases pertaining to Venezuela, *Gray Portland Cement and Clinker from Venezuela,* 56 FR 56390 (1991) and Japan, *Gray Portland Cement and Clinker from Japan,* 56 FR 12156 (1991).

Petitioners respond that the Department correctly included bagged Type I cement in the calculation of normal value. Petitioners state that Type I bagged and bulk cement are identical in all regards except for packing. Petitioners state that inclusion of bagged cement sales in the normal value calculation is consistent with both Department precedent (petitioners cite *Japanese Cement*) and the statute. Petitioners claim that, except in instances prescribed by the statute, the Department is not authorized to exclude sales of the comparison merchandise from normal value. Petitioners argue that the Department's comparison of home market sales of both bulk and bagged cement to U.S. sales of only bulk Type I cement does not represent ''an abrupt departure'' from the Department's practice because ''in the second, third, and fourth reviews, the Department reached no definitive conclusion on this issue.'' Petitioners claim that the Department departed from practice in the original investigation by comparing only bulk cement sales, and has properly corrected its error in this review.

Department's Position: We agree with petitioners. The Department has included the entire universe of Type I sales in its calculation of normal value because bulk and bagged sales constitute identical merchandise. The only difference between these products is the packaging; therefore, the Department has made an adjustment for packaging differences. In addition, as stated in the level of trade section of this notice (see Comment 5, above), the Department has determined that CEMEX sold at one level of trade in the home market; therefore, comparing by discreet channel of distribution is not warranted as there is only one level of trade and one channel of distribution in that level. Therefore, we have not calculated normal values for each channel of distribution as requested by CEMEX and have used our standard methodology for comparing normal value to U.S. price for purposes of this final results of review.

Comment 24: CEMEX asserts that the Department should use the inland freight expenses reported for Type I bagged sales. CEMEX claims that reporting freight expenses on a plant-specific basis does not change the accuracy of the normal value calculation. CEMEX also claims that it reported inland freight expense by cement type at the greatest level of detail available. CEMEX asserts that the Department should use the verified freight information for bagged sales, and use the inland freight expense for Type I bulk sales as facts available for the non-sampled companies.

Petitioners respond that the Department correctly disallowed CEMEX's reported deduction of home market freight for Type I bagged cement. Petitioners maintain that CEMEX failed to cooperate with the Department's requests for plant-specific sales adjustment information. Furthermore, freight expenses were not reported on a transaction-specific, customer-specific, point-of-sale-specific, or plant-specific basis. Petitioners also state that CEMEX failed to separate freight expenses from plant to warehouse and from plant/warehouse to customer; failed to report freight expenses specific to Type I cement; and failed to report whether freight was provided by affiliated freight companies, or whether such freight charges were at arm's length. Finally, petitioners contend that the Department correctly denied CEMEX's freight adjustment for Type I bagged cement because CEMEX did not demonstrate that inclusion of out-of-scope merchandise in the freight allocation is non-distortive.

Department's Position: We agree with petitioners and have not allowed CEMEX's adjustment for freight on sales of bagged Type I cement in the home market. For the same reasons stated in our preliminary determination (October 3, 1996), the Department relied on partial facts available, in accordance with section 776(a) of the Act, because despite our attempts, the Department could not verify the information as required under section 782(i) of the Act. In addition, even after repeated requests by the Department, CEMEX refused to provide home market freight expenses for bagged Type I sales on a plant-specific basis. CEMEX, in a March 11, 1996 letter to the Department, proposed reporting bagged sales and transaction specific data, including plant-specific freight costs, if the Department was willing to sample sales of bagged cement in the home market. After considerable discussion and analysis, the Department determined that sampling was reasonable if the data provided was based upon a representative sample. The Department chose the plants to sample and provided CEMEX with explicit instructions in a March 27, 1996 letter outlining the methodology and the plants which we were sampling. Upon receipt of the database on April 30, 1996, it was discovered that CEMEX had not reported freight costs for bagged sales on a plant-specific basis for the plants selected in our sample and had reported the data on a company-wide basis. This called into question the validity of our sample; therefore, the Department issued a supplemental questionnaire, and CEMEX's response, submitted on May 24, 1996, stated that the freight data could not be provided on a plant-specific basis and they were providing the data on a company-wide basis. Due to the fact that CEMEX's reported data was inconsistent with the Department's explicit instructions, we are disallowing CEMEX's claimed home market bagged freight adjustment for purposes of this final results of review.

Comment 25: CEMEX argues that the Department should use the actual daily exchange rates for the hyper-inflationary period (January–July 1995), rather than the rates computed by the exchange rate model.

Department's Position: We agree with CEMEX. The Department's proposed regulations at section 351.415 state: ''[t]his [exchange rate] model is not suitable for use with hyper-inflationary currencies. In these cases, we intend to use the daily rate absent compelling evidence that a fluctuation or sustained movement in the currency's value has occurred.'' The actual daily exchange rate has been used in the final results for all currency conversions for the hyper-inflationary portion of this review (i.e., January–July 1995). In the case of hyper-inflationary currencies, not using the actual daily exchange rates could result in distortions in the margin calculations.

Comment 26: CEMEX asserts that the Department had no basis to disregard CEMEX's reported interest rate. CEMEX claims that there is no evidence on the administrative record that the Department requested CEMEX to revise its interest rate calculation to exclude long term loans. CEMEX claims that it did not have any short-term loans during the period of review, and that it provided the Department with two alternative short term rates—the Mexican treasury rate and the Interbank interest rate.

Petitioners argue that the Department properly resorted to facts available in calculating CEMEX's home market interest rate. Petitioners rebut CEMEX's assertion that use of facts available was unwarranted because the Department ''did not request CEMEX to provide additional interest rate data or request CEMEX to 'change their calculation'.'' Petitioners note that in its first and second supplemental questionnaires (dated February 14, 1996 and April 12, 1996, respectively), the Department requested worksheets showing how CEMEX calculated its monthly short-term debt. Petitioners assert that CEMEX failed to provide the Department with the requested information on the debt figures underlying CEMEX's interest rate calculation. Furthermore, petitioner argues that CEMEX contradicts itself by claiming in its case brief that it ''did not have any short term loans during the POR'', when the original and supplemental questionnaire responses indicate that CEMEX calculated the short-term interest rate based on its ''short term debt''. Furthermore, petitioners note that CEMEX's 1995 annual report shows peso denominated short term bank loans and notes payable. Petitioners dismiss CEMEX's assertion that the Department should use its reported interest rate because it is based on ''the current portion (short term) of CEMEX's long term loans'' (CEMEX case brief at 87), as an attempt to ''relabel'' the underlying figures used in the calculation, and that CEMEX still failed to provide any information about its methodology for calculating these source figures.

Department's Position: We agree with petitioners. CEMEX incorrectly included the long-term interest rate in its reported calculation. The Department has used the interest rate reported by CDC as a surrogate value for CEMEX's interest rate as facts available because it is a short-term market interest rate and was substantiated at verification.

Comment 27: Petitioners argue that CDC's freight adjustment should be denied. Petitioners assert that CDC failed to demonstrate that freight charges from affiliated companies were at arm's length. In addition, CDC did not segregate affiliated and unaffiliated expenses. Petitioners note that CDC ignored the Department's request, in the November 1, 1995 questionnaire, that CDC explain how it calculated the freight cost for each sale and provide the total expense incurred by type of expense (*e.g.*, fuel).

In response, CDC claims that it explained in its questionnaire responses the freight calculation for each sale, and that it provided information regarding expenses. CDC also claims that it provided information to support the arm's length nature of the freight charges from affiliated companies. CDC states that the Department verified that the reported freight charges are at arm's length by comparing unrelated and related transactions. Finally, CDC asserts that it did not segregate unaffiliated companies' expenses because it did not use the services of any unaffiliated companies.

Department's Position: We agree with CDC. The Department has allowed a deduction for freight expenses due to the fact that CDC reported its freight expenses in accordance with Departmental instructions and these expenses were substantiated at

verification. (*See* July 22, 1996 Verification Report.) Based on our findings at verification, the Department has determined that CDC's reported freight costs were at arm's length and therefore appropriately utilized in calculating normal value. Therefore, for the instant review, we have utilized all reported home market freight expenses in our final results of review.

Export Price/Constructed Export Price

Comment 28: Petitioners maintain that the Department should include all expenses associated with U.S. sales in calculating CEP profit. Specifically, petitioners claim that the Department should revise its calculation of total U.S. expenses to include imputed credit expense, inventory carrying costs, indirect selling expenses incurred in the home market, home market inventory carrying costs, and home market warehousing expenses incurred for the U.S. sale. Petitioners assert that, according to 19 U.S.C. § 1677a(f)(1) and (2)(A), profit is determined by multiplying the total actual profit by the ratio derived by dividing the ''total United States expenses'' by the ''total expenses.'' Total United States expenses are defined by 19 U.S.C. § 1677a(f)(2)(B) to include all the expenses that the Department is required to deduct in calculating CEP. These include any of the expenses ''generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise.'' Petitioners contend that the fact that certain expenses listed above were incurred in the home market does not affect whether they should be deducted from CEP or included in the ''total U.S. expenses'' for purposes of the CEP profit calculation. In particular, petitioners note that indirect selling expenses, inventory carrying costs, and warehousing expenses incurred in the home market for the sale to the U.S. are the same types of expenses that the Department deducted from CEP in *Pasta from Italy*, and *Printing Presses from Germany*.

CEMEX argued in its original brief that the Department should include in the calculation of CEP profit, foreign indirect selling expenses, as these are expenses associated with the U.S. sale. In addition, CEMEX argued that U.S. ''other'' transportation expenses and indirect selling expenses associated with further manufactured sales should also be included in the CEP profit calculation. However in their rebuttal brief, CEMEX reversed its position and agreed with the Department's methodology in the preliminary determination and stated that the Department properly calculated CEP profit by not including indirect selling expenses, pre-sale warehousing expenses, and inventory carrying costs, incurred in the home market for the sale to the U.S. affiliate.

Department's Position: Consistent with our methodology outlined in the discussion of foreign indirect selling expenses (See Comment 31, below) we will continue to use the same methodology for calculating CEP profit in our final results, as was done for the preliminary results. Due to the fact that indirect selling expenses incurred in Mexico, inventory carrying costs incurred in Mexico, and pre-sale warehousing expenses incurred in Mexico are expenses associated with the sale of the merchandise from the producer/exporter to the affiliated importer, these expenses are not considered U.S. selling expenses as defined by section 772(f)(2)(B) of the Act. The statute defines ''total United States expenses'' for use in the CEP profit calculation as ''the total expenses deducted in subsection (d)(1) and (2)'' (*i.e.*, those expenses ''generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise * * *''). By definition, these are not expenses incurred by the producer/exporter for sale of the merchandise to the affiliated importer. Thus, the Department will not include for purposes of the CEP profit calculation, those expenses not considered as an adjustment to CEP under subsection (d)(1) and (2) (see Comment 31, below), that is, the indirect selling expenses incurred by CEMEX in the home market for the sale to the affiliated importer: foreign indirect selling expense, presale warehousing expense, and foreign inventory carrying cost.

For those expenses associated with further manufacturing, the Department is substituting the surrogate value of CEP sales for further manufactured sales (see Comment 30, below) and is therefore not including those expenses associated with further manufactured sales in the calculation of CEP profit.

Comment 29: Petitioners state that the Department should recalculate CDC's credit expense based on its standard practice of using the difference between the shipment date and the payment date for each sale. CDC had calculated number of days outstanding based on the difference between the date of invoice and the date of payment.

CDC agrees with Petitioners that CDC's U.S. credit days outstanding should be recalculated based upon the difference between the date of payment and the date of the bill of lading, which represents the shipment date.

Department's Position: We agree with petitioners and CDC, and have revised CDC's U.S. credit days outstanding and U.S. credit expense.

Comment 30: CEMEX argues that its CEP sales through the Long Beach terminal should be excluded from the calculation of average net U.S. price for further manufactured sales. CEMEX believes that the Department should limit the calculation for the average net U.S. price to the geographic area in which the further manufactured product was sold, (e.g., the Arizona region).

Petitioners contend that CEMEX's argument is contrary to language in the statute which requires the Department to use all of CEMEX's non-further manufacturing sales in the calculation of the surrogate CEP. Petitioners refer to 19 U.S.C. 1677a(e)(1) & (2) which states that the surrogate price is ''[t]he price of identical subject merchandise sold by the exporter or producer to an un affiliated person'' or ''[t]he price of other subject merchandise sold by the exporter or producer to an un affiliated person.'' Petitioners claim that this language requires the Department to use as the surrogate price the price at which CEMEX—the exporter or producer—sold the merchandise in the United States. Petitioners claim that the statute does not permit the Department to carve up the universe of U.S. sales in the calculation of the surrogate price.

Department's Position: We agree with petitioners, and have substituted as the surrogate value for further manufactured sales the CEP for all sales made by CEMEX, the exporter and producer, to unaffiliated customers in the U.S., as required by the statute at 19 U.S.C. 1677 a(e)(1) & (2).

Comment 31: CEMEX argues that the Department should not deduct indirect selling expenses incurred in the country of manufacture from the calculation of net U.S. price. CEMEX claims that the SAA states at 153 that the deductions from the U.S. price for CEP sales under section 772(d) represent expenses ''associated with economic activities in the United States.'' Furthermore, CEMEX cites the preamble to the proposed regulations, which states that ''[c]onsistent with the SAA at 823, the Department will make deductions under 772(d) for those expenses enumerated in the Act which are due to economic activities in the United States * * * the foreign seller's expenses associated with selling to the affiliated reseller in the United States would not be deducted under 772(d) * * *'' 61 FR 7331. CEMEX claims that the indirect selling expenses it incurred in Mexico (indirect

selling expense, inventory carrying cost, and presale warehousing expense) included only those expenses associated with selling to the affiliated reseller, and are not related to economic activity in the United States. CEMEX claims that deducting indirect selling expenses incurred in Mexico is inconsistent with the Department's practice.

Furthermore, CEMEX contends that deducting foreign indirect expenses is inconsistent with the intent of the statute, which as described in the SAA at 153, seeks to construct an export price that is ''* * * as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers.'' CEMEX claims that expenses not incurred on behalf of an importer should not be deducted to construct a price that an unaffiliated importer would be willing to pay, just as the same expenses are never deducted from a true export price.

Petitioners counter that the statute clearly directs the Department to deduct ''any * * * expenses generally incurred by or for the account of the exporter or producer or the affiliated seller in the United States, in selling the subject merchandise * * *'' Petitioners cite the House report from the URAA, which states that ''[n]ew sections 772(d)(1) and 772 (d)(2) retain current U.S. law with respect to the deduction made for direct and indirect expenses * * *'' (H.R. Rep. No. 826, 103rd Cong., 2d Sess. 79 (1994)). Petitioners assert that the Senate report similarly indicates that Congress intended the deduction of indirect selling expenses in calculating CEP to be made in the same manner as it was made in calculating ESP under the pre-1995 law. Petitioners assert that the Department's prior practice of deducting from ESP all foreign indirect selling expenses related to U.S. sales was affirmed by the CIT. Petitioners also cite the Department's proposed regulations at 351.402(b): the Department ''will make adjustments to constructed export price under section 772(d) of the Act for expenses associated with commercial activities in the United States, no matter where incurred.'' Petitioners contend that the proposed regulations are consistent with the statute and legislative history. Petitioners further argue that recent determinations decided under the new law in *Certain Pasta from Italy* and *Large Newspaper Printing Presses from Germany*, support the subtraction from CEP of all those selling expenses incurred in the home market to support export sales.

Petitioners argue that nothing in the language of the SAA or the preamble to the Department's proposed regulations, which CEMEX relies upon as the basis for its argument, directs the Department not to deduct expenses incurred in the home market on U.S. sales. Petitioners claim that the preamble is highly ambiguous in its reference to circumstances of sale adjustments, as such an adjustment may only be granted for direct, not indirect selling expenses. Moreover, the preamble does not provide a complete listing of those expenses considered to be associated with selling to the affiliated reseller. Petitioners rebut CEMEX's argument that language in the SAA at 823 intends CEP to reflect as closely as possible a price corresponding to an export price between non-affiliated exporters and importers. Petitioners state that the statute at 19 U.S.C. 1677a(d)(1) clearly requires the Department to account for the expenses incurred by the foreign producer or exporter. Finally, Petitioners contend that CEMEX's interpretation of the statute would open a loophole in the law which would allow respondents to avoid deduction of any selling expense by shifting offshore all selling activities relating to U.S. sales, or by shifting U.S. selling expenses from the books of their U.S. affiliates to those of the offshore parent companies.

Department's Position: Section 772(d)(1) of the Act instructs the Department to deduct from CEP ''the amount of * * * the expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise.'' Section 351.402(b) of the proposed regulations states that the Secretary will make adjustments to CEP under section 772(d) of the Act for expenses associated with commercial activities in the United States, no matter where incurred. The CEP is, by definition, the price obtained after removing from the first resale to an independent U.S. customer, profit and the activities for which expenses are deducted under section 772(d). Section 772(d) defines expenses to be deducted from CEP as those expenses representing activities undertaken by the affiliated importer to make the sale to the unaffiliated customer. As such they tend to occur after the transaction for which export price is constructed and the Department has properly deducted these expenses in calculating the CEP for comparison purposes.

In the instant review, we disagree with petitioners. The Department does not deduct indirect expenses incurred in selling to the affiliated U.S. importer under section 772(d) of the Act. *See Notice of Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy*, 61 FR 30326, 30352 (1996). As stated clearly in the SAA, section 772(d) of the Act is intended to provide for the deduction of expenses associated with economic activities occurring in the United States. *See* SAA at 823. The Department, upon analysis, has determined that the indirect selling expenses involved in this case relate solely to the sale to the affiliated importer. For example, presale warehousing (DISWARU), inventory carrying costs (DINVCARU), and indirect selling expenses (DINDIRSU), occurred in the home market prior to exportation and relate solely to the sale to the affiliated importer and are not assumed by the producer/exporter on behalf of the U.S. affiliate for the ultimate sale to the unaffiliated customer. Due to the fact that the expenses under discussion are not associated with U.S. economic activity (the sale to the unaffiliated customer) and are incurred by the producer/exporter for the sale to U.S. affiliate, we have not deducted these expenses as indirect selling expenses for calculation of the net U.S. price in this final results of review.

Arm's Length

Comment 32: Petitioners contend that the Department should modify the arm's length test to account for inflation by calculating and comparing monthly prices, rather than period-wide averages.

CDC responds that the Department has conducted its standard arm's length test comparing period-wide prices in several cases where the home market experienced hyper-inflationary conditions. CDC claims that there is no basis in the record for the distortion petitioners fear would result from an arm's length test that does not account for hyper-inflation, because affiliated and unaffiliated customers made purchases on a regular basis throughout the POR.

Department's Position: Consistent with previous hyper-inflationary situations in *Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line, and Pressure Pipe from Brazil*, 60 FR 31960, 31965 (1995) and *Certain Welded Carbon Steel Pipe and Tube from Turkey*, 61 FR 69071 (1996), the Department will continue to use its standard arm's length test comparing period-wide average prices to affiliated and unaffiliated customers.

Comment 33: CEMEX argues that the Department should perform the arm's length test comparing CEMEX's sales to each affiliated party with all sales to unaffiliated customers in the same customer category, and channel of

distribution. CEMEX argues that the Department's test is distortive as it compares affiliated-party sales to an inappropriate group of sales to unaffiliated customers. CEMEX relies on *Certain Hot-Rolled Carbon Steel Products from France*, 58 FR 37062 (1993), where the Department allegedly performed the arm's length test using only sales of the identical product to the same customer category in situations where sales of identical products occurred at both the same and different levels of trade. CEMEX also argues that the arm's length test should be conducted within the same channel of distribution, *i.e.*, comparing sales of bagged sales to bagged sales, and bulk sales to bulk sales.

Petitioners argue that no basis exists for performing the arm's length test by customer category or channel of distribution. Petitioners state that the SAA only permits the Department to compare prices by customer category in an investigation and not in an administrative review. Petitioners also argue that CEMEX's reliance on the Department's arm's length methodology in the flat-rolled steel investigations is misplaced. In those investigations, petitioners assert, the Department performed the arm's length test by comparing sales made at the same level of trade, which under the law at that time, was determined by customer category. Petitioners state that under current law, level of trade is determined by selling functions. Finally, petitioners maintain that CEMEX failed to establish that its prices varied significantly by customer category or channel of distribution.

Department's Position: We agree with the petitioners. As stated under the level of trade section of this notice (see Comment 5: above), the Department has determined that CEMEX sold at one level of trade in the home market; therefore comparing by discreet channel of distribution or customer category is not warranted as there is only one level of trade and one channel of distribution in that level. We have not revised our arm's length test and have compared sales to affiliated customers to sales to unaffiliated customers for purposes of this final results of review.

Facts Available

Comment 34: Petitioners argue that CEMEX's dumping margin should be based entirely on facts available because CEMEX has significantly impeded this administrative review. Petitioners claim that CEMEX failed to cooperate on several occasions with Department requests for Type I bulk and bagged cement sales information, and misrepresented its burden for providing Type I bagged cement sales data. Furthermore, petitioners hold that CEMEX further impeded the review by refusing to provide the Department with certain plant-specific data (i.e., selling expense information) which CEMEX claimed it could provide under the sampling methodology it devised. Petitioners assert that CEMEX's database is ''irreparably flawed,'' as it contains only partial transaction-specific data on CEMEX's home market sales of Type I bagged cement.

Citing to *Fresh Cut Flowers from Mexico and* Certain Pasta from Turkey, petitioners argue that the Department's practice is to apply total adverse facts available when a respondent ''significantly impedes'' a proceeding. Petitioners assert that the Department should find that CEMEX significantly impeded this review for the reasons stated above. Petitioners suggest that the Department use as total adverse facts available the highest margin calculated in any previous administrative review (i.e., the 109.43 percent margin calculated on remand for the second administrative review).

CEMEX counters that the Department's final determination must be based on evidence contained in the verified administrative record. CEMEX claims that the Department recognized it was a cooperative respondent by successfully conducting extensive verifications in the home and U.S. markets of the information that CEMEX provided. CEMEX states that petitioners' appeal for total facts available confirms its ''unrelenting desire'' for the Department to impose the highest mathematically possible antidumping margin to CEMEX. CEMEX states that petitioners should not be permitted to ''usurp the DOC's authority'' by insisting upon the imposition of total facts available.

Department's Position: Section 782(e) of the Act provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the Department if

(1) the information is submitted by the deadline established for its submission,

(2) the information can be verified,

(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the Department with respect to the information, and,

(5) the information can be used without undue difficulties.

We find that the information provided by CEMEX was submitted within the deadlines established by the Department, the information submitted was verified, the information provided is not incomplete and can serve as a reliable basis for reaching our current determination, CEMEX has demonstrated that it acted to the best of its ability to provide the information required by the Department, and we are able to use the submitted data without undue difficulties. In addition, the Department conducted extensive verification of CEMEX's home market sales, U.S. sales, cost of production, and found that the information provided was accurate and usable for purposes of a preliminary and final determination. Therefore, we are not basing this determination on facts otherwise available and have used the CEMEX's submitted data, except where noted above, in reaching our determination.

Reimbursement

Comment 35: Petitioners contend that the Department should determine that CEMEX has reimbursed Sunbelt Cement, its U.S. affiliated party, for antidumping duties. Petitioners note that CEMEX's 1995 annual report shows an unexplained long-term intra-corporate receivable account from Sunbelt Enterprises. Petitioners contend that at verification, Sunbelt implied that its earnings were sufficient to cover its antidumping duty cash deposit. However, based on the sum of Sunbelt, PCC's, Fenton's and Sunward's earnings before interest and taxes during the POR, as reported on their income statement summaries, petitioners infer that Sunbelt does not appear to be capable of paying antidumping cash deposits without significant assistance from CEMEX. Petitioners recommend that the Department assess double the amount of antidumping duties calculated in this review upon liquidation of entries of the subject merchandise.

CEMEX argues that petitioners failed to provide any evidence that CEMEX reimbursed its U.S. subsidiary, Sunbelt Cement, for antidumping duties. CEMEX states that Sunbelt Enterprises is a holding company for CEMEX's operations in Spain, the Caribbean, Venezuela, and the United States. Furthermore, CEMEX states that the Department inquired into Sunbelt's payment of antidumping duties at verification. CEMEX argues that the mere existence of a loan between

affiliated parties is insufficient to establish the reimbursement of antidumping duties, absent other evidence. CEMEX also cites *Torrington Co.* v. *United States,* in which the Court of International Trade ruled that the Department properly decided not to make a deduction to U.S. price, absent any evidence of a link between intra-corporate transfers and the reimbursement of antidumping duties. Second, CEMEX claims that petitioners' argument is without merit on factual grounds. CEMEX, in their rebuttal brief, provides a detailed analysis of Sunbelt's cash flow (or earnings before income taxes, depreciation, and amortization), which it claims is more than sufficient to cover antidumping duty liabilities.

Department's Position: We agree with CEMEX. At verification, the Department inquired into Sunbelt's financial situation and its antidumping duty liability, and found no evidence that Sunbelt was reimbursed by CEMEX for the payment of dumping duties (see verification report dated July 22, 1996). Therefore, we are not assessing double the amount of antidumping duty for purposes of this final results of review.

Other Issues

Comment 36: Respondents claim that the Department made the following errors in the computer program: 1) The Department should convert U.S. sales information, which was reported per short ton of cement, should be converted to the same unit of measure as the home market sales reported in metric tons; 2) the semicolon at line 1505 should be removed so that USOTREU and INDIRS2U are included in the calculation of USMOVEU and INDEXUS; and 3) the Department should correct the arm's length test such that sales are assigned the appropriate customer code. In addition, DIFMER should be converted to the same unit of measure as the normal value.

Department's Position: The Department has corrected these errors in the final results.

Final Results of Review

As a result of this review, we have determined that the following margins exist for the period August 1, 1994, through July 31, 1995:

Company	Margin percentage
CEMEX, S.A.	103.82
All Other	61.85

The Department shall determine, and the U.S. Customs Service shall assess, antidumping duties on all appropriate entries. The Department shall issue appraisement instructions directly to the Customs Service.

Furthermore, the following deposit requirements shall be effective upon publication of this notice of final results of review for all shipments of gray portland cement and clinker from Mexico, entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Tariff Act: (1) The cash deposit rates for the reviewed companies named above which have separate rates will be the rates for those firms as stated above; (2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in these reviews, or the original LTFV investigations, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in these reviews, the cash deposit rate for this case will continue to be 61.85 percent, which was the ''all others'' rates in the LTFV investigations. *See Final Determination of Sales at Less Than Fair Value: Gray Portland Cement and Clinker from Mexico,* 55 FR 29244, (1990).

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

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

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

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

Dated: April 2, 1997.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

[FR Doc. 97–9123 Filed 4–8–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–429–601]

Notice of Extension of Time Limit for Antidumping Duty Administrative Review of Solid Urea From the Former German Democratic Republic

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

EFFECTIVE DATE: April 9, 1997.

SUMMARY: The Department of Commerce (the Department) is extending the time limit for the preliminary results of the antidumping duty administrative review of the antidumping order on Solid Urea from the Former German Democratic Republic, pursuant to the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (hereinafter, ''the Act'').

FOR FURTHER INFORMATION CONTACT: Steven Presing, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone (202) 482–0194.

SUPPLEMENTARY INFORMATION: Under section 751(a)(3)(A) of the Act, the Department may extend the deadline for completion of an administrative review if it determines that it is not practicable to complete the review within the statutory time limit of 365 days. In the instant case, the Department has determined that it is not practicable to complete this review within the statutory time limit. *See* Memorandum from Joseph A. Spetrini to Robert S. LaRussa (March 24, 1997).

Because it is not practicable to complete this review within the time limits mandated by the Act (245 days from the last day of the anniversary month for preliminary results, 120 days after publication of the preliminary determination for final results), in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time limits as follows: