Dated: March 11, 1999.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–802]

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

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

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

SUMMARY: On September 10, 1998, the Department of Commerce 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 an affiliated party, Cementos de Chihuahua, S.A. de C.V. (CDC), and the period August 1, 1996, through July 31, 1997. We gave interested parties an opportunity to comment on the preliminary results. Based on our analysis of the comments received, we have made changes, including corrections of certain inadvertent programming and clerical errors, in the margin calculation. These corrections and adjustments to margin calculation program are described in the sections entitled ''6. Difference-in-Merchandise Information'' and ''18. Ministerial Errors,'' of the Issues Appendix. The final weighted-average dumping margin for CEMEX and CDC is 49.58 percent *ad valorem*.

EFFECTIVE DATE: March 17, 1999.

FOR FURTHER INFORMATION CONTACT: Diane Krawczun, Anne Copper, or George Callen; Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC. 20230; telephone (202) 482–0198, (202) 482–0090, and (202) 482–0180, respectively.

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 of Commerce's (the Department's) regulations are to the regulations at 19 CFR part 351 (1998).

Background

On September 10, 1998, the Department published in the **Federal Register** the preliminary results of its administrative review of the antidumping duty order on gray portland cement and clinker from Mexico. *Preliminary Results of Antidumping Duty Administrative Review: Gray Portland Cement and Clinker From Mexico*, 63 FR 48471 (1998) (preliminary results). The Southern Tier Cement Committee (the petitioner) submitted its case brief on October 13, 1998; CEMEX and CDC submitted case briefs on October 30, 1998. CDC re-submitted its case brief on December 2, 1998. The petitioner, CEMEX, and CDC submitted their rebuttal briefs on November 3, 1998. The Department held a public hearing on November 20, 1998. All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the ''Issues Appendix,'' which is appended to this notice of final results. The Department has now completed this review in accordance with section 751(a) of the Act.

Scope of the Review

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

Verification

Pursuant to section 782(i) of the Act, we verified information provided by CEMEX using standard verification procedures, including on-site inspection of the manufacturer's facilities and the examination of relevant sales and financial records, and selection of original documentation containing relevant information. Our verification results are outlined in public versions of the verification reports, dated August 21, 1998, and located in the public file in Room B–099 of the Department's main building.

Final Results of Review

We determine that the following weighted-average margin exists for the period August 1, 1996, through July 31, 1997:

Company	Margin
CEMEX/CDC	49.58%

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. The Department shall issue appraisement instructions directly to the Customs Service. For assessment purposes, we have calculated an importer-specific duty assessment rate for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of sales examined.

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 Act: (1) The cash deposit rate for CEMEX/CDC will be 49.58 percent; (2) for previously investigated or reviewed companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this or any previous reviews or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this review, the cash deposit rate will continue to be 61.85 percent, which was the ''all others'' rate in the LTFV investigation. *See Final Determination of Sales at Less Than Fair Value: Gray Portland Cement and Clinker from Mexico*, 55 FR 29244 (1990).

The deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a final reminder to importers of their responsibility

under 19 CFR 351.402(f) 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 19 CFR 351.305. 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.

We are issuing and publishing this determination in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: March 9, 1999.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

Issues Appendix Contents

1. Revocation of the Underlying Order

CEMEX and CDC argue that the Department must terminate this review and revoke the underlying antidumping duty order. CEMEX contends that at the time of the initiation of the original LTFV investigation (October 16, 1989), the Department assumed that the petition was filed ''on behalf of'' a regional industry without measuring whether a majority of the industry actually supported the request. The Department should have done so, CEMEX argues, because a July 1992 General Agreement on Tariffs and Trade (GATT) panel decided that the 1979 antidumping code required that an antidumping petition filed ''on behalf of'' an industry must be supported by an appropriate majority of the industry and that such support must be ascertained prior to initiating an investigation. According to CEMEX, the panel's decision applies to the instant administrative review for two reasons:

(1) The Antidumping Agreement resulting from the Uruguay Round negotiations adopted the requirement of industry support articulated by the GATT panel. CEMEX asserts U.S. law incorporated the new standing requirements contained in the Antidumping Agreement, citing section 732(c)(4)(C) of the Act.

(2) Even if the pre-URAA antidumping law applies, the antidumping statute that was in effect in 1989 did not define the term ''on behalf of.'' CEMEX argues that 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.

Based on the above, CEMEX asserts that the Department is therefore required in this review to revisit the issue of initiation in the original LTFV investigation.

According to CDC, the plain language of section 771(4)(C) of the Act requires petitions in regional-industry cases to be filed on behalf of the producers which account for ''all, or almost all, of the production in the region.'' Since the antidumping order covering cement from Mexico was based on a petition that was unsupported by producers accounting for all or almost all of the region's production, CDC asserts, the Department issued the order in violation of U.S. law.

CDC argues that lack of standing to file an antidumping duty petition is a ''jurisdictional'' defect which parties may raise at any time. Citing *Zenith Electronics Corp.* v. *United States,* 872 F. Supp. 992 (CIT 1994) (*Zenith Electronics*), *Gilmore Steel Corp.* v. *United States,* 585 F. Supp. 670 (CIT 1984) (*Gilmore Steel*), and *Oregon Steel Mills, Inc.* v. *United States,* 862 F.2d 1541 (Fed. Cir. 1988) (*Oregon Steel Mills*), CDC contends that the Department has the authority to revoke an order that never had the requisite level of industry support.

The petitioner argues that the Department initiated the original antidumping investigation properly. The petitioner notes that CEMEX and CDC raised the issue of whether the Department initiated the investigation improperly in the third, fourth, fifth, and sixth reviews and were unsuccessful without exception. The petitioner also notes that both parties challenged the initiation of the LTFV investigation before a North American Free Trade Agreement (NAFTA) panel to review the final results of the third administrative review. In a unanimous opinion issued on September 13, 1996, according to the petitioner, the panel rejected the claims that CEMEX and CDC advance here.

The petitioner also contends that respondents' claim is barred by the statute of limitations, requiring that appeals to the decision to initiate an investigation be filed within 30 days of the publication of the antidumping order. The petitioner also contends that respondents did not raise the issue in the now-concluded U.S. Court of International Trade (CIT) appeal from the Department's final determination in the original investigation. Furthermore, the petitioner cites the Department's sixth review final results (*Gray Portland Cement and Clinker From Mexico,* 63 FR 12764 (March 16, 1998) (*Sixth Review Final Results*)), in which the Department noted that panel reports under the 1947 GATT were not self-executing and had no legal effect under U.S. law and that neither the 1947 GATT nor the 1979 GATT Antidumping Code obligated the United States to establish industry support in regional-industry cases.

The petitioner contends that the Department lacks authority under the statute to rescind its decision to initiate or to re-examine the issue of industry support in a review. Finally, citing *Suramerica de Aleaciones Laminada, C.A.* v. *United States,* 966 F. 2d 660 (Fed. Cir. 1992) (*Suramerica*), and the *Sixth Review Final Results,* the petitioner asserts that courts have affirmed the Department's presumption of industry support.

Department's Position: We agree with the petitioner that, as we stated in our *Sixth Review Final Results,* the Department has no obligation to determine whether a majority of the industry or the region supported the petition.

Neither the 1947 GATT nor the 1979 GATT Antidumping Code obligated the United States to establish affirmatively prior to the initiation of a regional-industry case that all or almost all of the producers in the region supported the petition. Neither instrument suggested that the standing requirements in regional-industry cases were any more rigorous than the standing requirements in national-industry cases.

Furthermore, GATT panel reports, such as the report issued in 1992, had no legal effect or formal status unless and until they were adopted by the

GATT Council or, in the case of antidumping measures, the GATT Antidumping Code Committee. This followed from the fact that the 1947 GATT operated, throughout its history, on the basis of consensus for purposes of decision-making in general and the resolution of disputes in particular. It is undisputed in the present case that the Antidumping Code Committee never adopted the GATT panel report. Thus, the recommendations contained in the report were never binding, did not impose any international obligations upon the United States, and did not trigger the rule of statutory construction set forth in *Murray* v. *Schooner Charming Betsy*.

The object of respondents' comments is not the preliminary results of this review. Rather, respondents challenge the initiation of the original LTFV investigation—an event which occurred almost ten years ago and over five years before the effective date of the URAA. The time to voice such objections before the Department was during the investigation. Instead, CEMEX and CDC, as well as the other Mexican cement producer that participated in the original investigation (Apasco, S.A. de C.V.), did not raise this argument before the Department. *See Final Determination of Sales at Less Than Fair Value; Gray Portland Cement and Clinker From Mexico,* 55 FR 29244 (1990) (*Original LTFV Investigation*). 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 deadline for doing so has long expired. *See* section 516A of the Act. Therefore, even if the Department, of its own volition, were to reinterpret U.S. law in light of the 1992 GATT panel report, it lacks the legal authority in this review to revoke the order or otherwise rescind the initiation of the underlying investigation. *See also Gray Portland Cement and Clinker from Mexico; Final Results of Antidumping Duty Administrative Review,* 62 FR 17581 (1997) (Fourth Review Final Results); *Gray Portland Cement and Clinker from Mexico; Final Results of Antidumping Duty Administrative Review,* 62 FR 17148 (1997) (*Fifth Review Final Results*); *Sixth Review Final Results.*

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

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

Finally, we note, as we did in the final results of the third, fourth, fifth, and sixth administrative reviews, that numerous courts upheld our practice under the pre-URAA statute 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* at 1085, and *Comeau Seafoods* v. *United States,* 724 F. Supp. 1407, 1410–12 (CIT 1989). Indeed, this issue raised by CEMEX and CDC was before the Federal Circuit in the *Suramerica* case (966 F.2d at 665, 667). In *Suramerica* the plaintiffs challenged the Department's interpretation of the phrase ''on behalf of'' which applied to both national- and regional-industry cases. In affirming the Department's practice, the court 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.* Therefore, we reject respondents' arguments that we lack the authority to assess antidumping duties pursuant to these final results of review and that we must revoke the underlying duty order.

2. Collapsing

CDC argues that the Department's decision to collapse CDC and CEMEX is contrary to law and the Department's established practice, and it is unsupported by the record of this review. CDC cites *Antifriction Bearings (Other Than Tapered Rolling Bearings) and Parts Thereof From the Federal Republic of Germany, Final Determination of Sales at Less Than Fair Value,* 54 FR 18992, 19089 (1989), in which the Department stated that ''it is the Department's general practice not to collapse related parties except in relatively unusual situations, where the type and degree of relationship is so significant that we find that there is strong possibility of price manipulation.''

CDC asserts that the preamble to the Department's 1997 regulations supports this policy by rejecting a recommendation that the Department collapse upon finding ''any potential for price manipulation.'' CDC notes further that, in *Nihon Cement Co.* v. *United States,* 17 CIT 400 (1993), the court criticized the Department for failing to discuss key collapsing criteria, adding that the Department had to consider all the criteria, although each of them need not be met.

CDC contends that the Department based its decision to collapse on an inadequate analysis of the collapsing factors (*i.e.,* affiliation, similar production facilities and the potential for price manipulation) and a lack of record evidence. CDC asserts that, although it is affiliated with CEMEX, affiliation alone is insufficient for

collapsing producers, according to the Department's policy.

CDC contends that the Department's conclusion regarding whether CEMEX and CDC have similar production facilities is without basis. CDC claims that the cement CEMEX and CDC export to the United States are not the same type product and that CDC would have to take on substantial retooling at its plant in order to produce the cement type that CEMEX exports to the United States.

CDC also contends that the Department erroneously determined that there was a significant potential for price manipulation. According to CDC, the Department relied on evidence of the level of common ownership and overlapping boards of directors, but not on intertwined business operations. Regarding common ownership, CDC notes that CEMEX is only a minority shareholder in CAMSA (CDC's parent company) and the majority of shares are still retained by CDC. CDC asserts that its sale of stock to CEMEX was purely a business decision and CEMEX's share does not constitute a controlling interest under Mexican law.

Regarding overlapping boards of directors, CDC acknowledges that members of CEMEX's management sit on the boards of directors of CDC and its affiliated companies. However, CDC asserts, (1) CEMEX's representatives are in the minority on all of these boards; (2) CDC's pricing and production are not discussed at the board meetings of CDC or any of the group's companies; (3) the Terrazas/Marquez families are in the majority on all boards; and (4) CEMEX's interest in CDC is only that of a passive investor.

As mentioned above, CDC argues that the Department did not address the criteria of intertwined business operations. CDC asserts that the factual basis upon which the Department relied in finding that this criterion was satisfied in prior reviews does not exist in this review. CDC claims that: (1) The companies do not share information on possible sales opportunities in Mexico or the United States and there is no coordination of sales, pricing or marketing policies; (2) CEMEX has no involvement in CDC's pricing, sales and production decisions; (3) CDC states that CDC and CEMEX do not share facilities or employees and that each company has its own facilities, employees, and accounting records; and (4) there were no commercial transactions between the parties during the POR.

CDC states that, in past cases, the Department has relied on other factors in determining whether to collapse affiliated companies and that all these factors support not collapsing. CDC claims that suppliers do not bill CDC and CEMEX jointly, each company has its own distinct sales and distribution process and U.S. importer, and the companies do not supply any material inputs to each other.

CDC distinguishes the facts in this case from those in *Queen's Flowers de Colombia* v. *United States,* 981 F. Supp 617 (CIT 1997) (*Queen's Flowers*). CDC asserts that, unlike the *Queen's Flowers* decision, collapsing is not needed to prevent circumvention of the antidumping law by means of significant manipulation of pricing or production. CDC asserts that in the cement industry high inland freight costs limit CDC's natural market; therefore, regardless of the antidumping margin, CDC cannot increase its market beyond these geographic constraints. Finally, CDC argues that CEMEX, as an indirect minority shareholder, cannot authorize CDC to change its pricing and production policies.

The petitioner argues that the Department should collapse CDC and CEMEX as it has in previous reviews and in the LTFV investigation. The petitioner asserts that CDC has provided no new evidence which would reverse the Department's position.

The petitioner states that CDC concedes that the first prong of the collapsing test (*i.e.,* affiliation) is met. Regarding similar production facilities, the petitioner asserts that the Department found that substantial retooling of CEMEX or CDC's facilities would not be necessary to produce cement Types II and V. The petitioner argues that CDC's claim that CDC and CEMEX do not produce the same product for export to the United States was rejected by the Department as untimely. However, even if the Department considers CDC's assertions, the petitioner argues, there is no evidence to support CDC's claims.

The petitioner agrees with the Department's determination that there is a potential for price manipulation. The petitioner asserts that the level of common ownership between CEMEX and CDC and other relationships demonstrates that CEMEX has effective control of CDC. The petitioner argues that the Department has collapsed in numerous cases where there is less than a majority interest in another party, focusing on joint manipulation of prices or production, not control.

Next, the petitioner claims that the level of shared board members indicates a significant potential for the sharing of information about pricing and production. Despite CDC's argument that pricing and production issues are not discussed at board meetings, the petitioner notes that nothing in Mexican law or company policy prohibits these issues from being discussed, including a scheme to manipulate production or price.

Furthermore, the petitioner asserts that the following facts demonstrate that CEMEX and CDC have intertwined business operations: (1) CEMEX and CDC formerly shipped to the United States through the same distribution channel; (2) CEMEX provides CDC with consulting services and assistance in marketing and exports; and (3) a 1996 financial report stated that CDC's affiliation with CEMEX positively influenced CDC's stock.

Finally, the petitioner claims that the Department has expressly rejected the argument that it may only collapse affiliated producers in ''exceptional'' circumstances. The petitioner cites the Department's determination in *Stainless Steel Wire Rod from Sweden,* 63 FR 40449, 40453 (1998). The petitioner disagrees with CDC's assertion that circumvention as described by the Department in *Fresh Cut Flowers from Columbia* is not practicable because of the special characteristics of the cement industry and ''the unique geographical features of CDC's market.'' According to the petitioner, the record evidence demonstrates that there is a natural overlap in the U.S. market for imports from CDC and CEMEX. The petitioner states that the two producers can reallocate their geographic shares of the Mexican market in a manner that manipulates the dumping margin and circumvents the order.

Department's Position: We agree with CDC that we must consider all relevant factors when collapsing two affiliated parties. Section 351.401(f) of the Department's regulations describes when the Department will treat two or more affiliated producers as a single entity (*i.e.,* ''collapse'') for purposes of calculating a dumping margin: (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, it is uncontested that CEMEX and CDC are affiliated within the meaning of section 771(33)(E) of the Act.

Second, a shifting of production between CEMEX and CDC would not require substantial retooling given the descriptions of respondents' production facilities and the fact that respondents produce a fungible product, gray

portland cement. (*See* CEMEX's December 8, 1997, submission and CDC's November 10, 1997, submission.) Furthermore, we have not considered CDC's argument regarding the shifting of production since we rejected the information as untimely. (*See* Memorandum to File Removing Untimely Information Submitted by CDC, dated November 30, 1998.) Thus, based on the evidence on the record we have concluded that a shift in production would not require substantial retooling.

Third, the Department may consider, *inter alia*, the following factors in identifying the potential for manipulation of price or production: (1) Level of common ownership; (2) whether managerial employees or board members of one of the affiliated producers sit on the board of directors of the other affiliated person; and (3) whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producer. The level of common ownership and cross-board members, provides a mechanism for the two parties to share pertinent pricing and production information, as well as intertwined business operations, given that CEMEX owns indirectly a large percentage of CDC and that CEMEX's managers and directors sit on the board of directors of CDC and its affiliated companies. The Department finds that, if CDC and CEMEX are not collapsed, there is a significant potential for price manipulation which could undermine the effectiveness of the order. The decision to collapse is based upon the facts established on the record for this period of review. These facts are similar to the facts established on the record of the fifth and sixth reviews. 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 August 31, 1998, located in the official file of this case.

3. Facts Available/CEMEX's Hidalgo Sales

Comment 1: The petitioner argues that the Department should base CEMEX's dumping margin on total adverse facts available, *i.e.*, the 109.43 percent calculated on judicial remand in the second review, for this review completely. The petitioner contends that CEMEX's reporting of incorrect information regarding its Hidalgo sales, its cancellation of verification, its provision of inadequate and delayed explanations to the Department with respect to the cancellation, and its failure to provide requested difference-in-merchandise (DIFMER) information warrant the application of total adverse facts available in this review. The petitioner also argues that the Department should describe more fully, for the final results of this review, the circumstances surrounding the use of adverse facts available with regard to CEMEX's Hidalgo sales in the preliminary results of this review.

The petitioner asserts that, prior to May 15, 1998, CEMEX had represented to the Department that its Hidalgo plant produced only Type I cement and not Type V cement. The petitioner argues that CEMEX, on May 15, 1998, canceled verification unilaterally, which was scheduled to begin on May 18, 1998, because it became obvious that the Department would discover at verification that CEMEX's Hidalgo plant produced and sold cement meeting Type V specifications. The petitioner argues that CEMEX, a highly experienced respondent, could have discovered the Hidalgo sales information readily prior to verification, should have provided the Department with corrected sales information prior to May 15, 1998, and should have proceeded with the verification on the scheduled date. The petitioner maintains that CEMEX provided inadequate and untimely explanations for its cancellation of verification that could only be seen as an effort to engage in damage control, which illustrates CEMEX's failure to provide full and accurate information. The petitioner contends that CEMEX's delay tainted the integrity of the Department's verification conducted July 20 through 31, 1998.

The petitioner asserts that the Department has used adverse facts available or best information available consistently in cases where a respondent refused to allow the Department to conduct verification, as in *Tapered Roller Bearings And Parts Thereof, Finished And Unfinished, From The People's Republic of China*, 62 FR 36,764 (1997), *Silicon Metal From Argentina*, 60 FR 35551 (1995), and *Sweaters Wholly Or In Chief Weight of Man-Made Fiber From Taiwan*, 58 FR 63913 (1993). The petitioner also contends that the Department erred in using partial adverse facts available as it was not sufficiently adverse to CEMEX, given CEMEX's failure to cooperate with the Department.

CEMEX responds that the Department's use of CEMEX's verified sales information as the basis of its dumping margin, rather than total facts available, is proper and that the petitioner's allegation is incorrect in law and fact. CEMEX contends that, after the Department conducted U.S. sales verifications but before the home market (HM) verifications were to begin, CEMEX discovered a discrepancy in its database regarding its Hidalgo sales which amounted to less than one percent of CEMEX's total HM sales. CEMEX argues that, to correct its submissions and reschedule verification, it requested an extension of time in accordance with the Department's statutory scheme. CEMEX notes that the Department verified CEMEX's U.S. and HM database and issued the preliminary results within its statutory deadlines. CEMEX concludes that the Department's decision was in accordance with the statutory requirement that determinations be based upon record information as verified by the Department set forth in section 782(i)(3) of the Act.

CDC asserts that the petitioner's argument that the Department should apply total facts available to CEMEX reinforces CDC's argument that it should not be collapsed with CEMEX. Rather, according to CDC, it should receive a separate rate as discussed in Issue 2, ''Collapsing,'' above. CDC maintains that a decision by the Department to rely on facts available, to any extent, for CDC's indirect minority shareholder punishes CDC unfairly.

Department's Position: Section 776(a) of the Act requires the Department to use facts otherwise available when necessary information is not on the record or an interested party withholds requested information, fails to provide such information in a timely manner, significantly impedes a proceeding, or provides information that cannot be verified. Section 776(b) of the Act authorizes the Department to use an adverse inference in determining the facts otherwise available whenever an interested party has not cooperated with the Department by not acting to the best of its ability to comply with requests for information.

First, with respect to its Hidalgo sales, CEMEX provided inaccurate information and sought to submit corrected information after the deadline for the submission of factual information had passed. Because CEMEX provided information regarding its Hidalgo sales in an untimely manner, we were unable to verify this information. Therefore, pursuant to section 776(d) of the Act, we have used facts available to establish the normal value (NV) of CEMEX's Hidalgo sales in

the home market. In addition, we note that the nature and timing of CEMEX's cancellation of the home-market verification the last business day before it was scheduled to begin was unprecedented. Given CEMEX's actions, we determine that CEMEX did not act to the best of its ability to provide accurate and timely information for use in our review and therefore our use of an adverse inference is appropriate under section 776(b) of the Act. Therefore, as facts available, we substituted the highest calculated NV in this review for all HM sales of cement produced at Hidalgo.

We disagree with the petitioner that we should have used total adverse facts available in determining a margin. In determining whether the use of total adverse facts available was appropriate, we considered several factors. We considered the degree of overall cooperation we received from CEMEX at the time of our initially planned verification and the small proportion of HM sales affected by CEMEX's error. We determined that, despite the delay caused by CEMEX's cancellation, we were able to verify, with the exception of CEMEX's Hidalgo sales data, CEMEX's timely reported data and complete the administrative review within the timelines prescribed by the statute and our regulations. Accordingly, by using the highest calculated NV in this review for all sales of cement produced by Hidalgo as adverse facts available, we have applied facts available in a manner that is significantly adverse to CEMEX's interests. (*See* our response to Comment 2, below.) We consider this decision to be consistent with the Statement of Administrative Action, Agreement on Implementation of Article VI of the GATT (SAA) (at 870), and section 776 of the Act.

Comment 2: CEMEX contends that the Department should use its corrected sales database for the Hidalgo plant to calculate NV. The Department, CEMEX claims, has the authority under § 351.301(c)(2) of the regulations to accept and use this information which the Department rejected as untimely filed. CEMEX also contends that the Department's two-week verification confirms the overall integrity of CEMEX's response, including data not verified.

The petitioner responds that the Department relied correctly upon adverse facts available for CEMEX's Hidalgo sales and that CEMEX provided no reason why the Department erred in using adverse facts available for its Hidalgo sales. The petitioner notes that the Department's regulations require the rejection of Hidalgo sales information as untimely filed and that for the Department to accept CEMEX's Hidalgo sales information would deprive the petitioner of the chance to comment. The petitioner rejects CEMEX's argument that the Department verified the overall integrity of CEMEX's home-market data, noting that the Department rejected and returned CEMEX's revised Hidalgo sales data.

Department's Position: As noted in the preliminary results, although all data from the Hidalgo plant was reported as relating to sales or production of only Type I cement, prior to the commencement of verification, CEMEX notified the Department that the merchandise produced at its Hidalgo plant was either Type V or Type I. *See* CEMEX's June 3, 1998, submission explaining the discovery of misreported sales at Hidalgo. CEMEX filed a submission on June 16, 1998, revising the home-market sales database for sales of Type V cement from Hidalgo. As this submission constituted unsolicited factual information received after the deadline for submitting factual information under § 351.302(d)(1)–(2) of our regulations, we rejected the submission on June 25, 1998. (*See* Department's Letter to CEMEX Rejecting Revised Database as Untimely Filed Information, dated June 25, 1998.)

While we recognize that § 351.301(c)(2) of our regulations authorizes us to request factual information at any time during the proceeding, allowing a party to re-submit information already rejected as untimely would contravene the purpose of the established deadline for the submission of factual information. As a result, we did not request this information pursuant to § 351.301(c)(2) of our regulations. In addition, we reject CEMEX's assertion that we should accept its untimely filed Hidalgo information because we verified the overall integrity of its HM database. We did not verify the accuracy of the Hidalgo information that CEMEX submitted improperly; rather we rejected it as described above. Accordingly, CEMEX's revised, rejected HM database cannot be considered part of the information we verified.

4. As Invoiced vs. As Produced

The petitioner contends that the Department erred by matching merchandise in this review on the basis of the ASTM cement type ''as produced'' rather than matching, as it had done in the original investigation and in the first five administrative reviews, on an ''as invoiced'' basis. The petitioner notes that the Department departed from its consistent ''as invoiced'' matching methodology at CEMEX's request after the Department discovered in the sixth review that all cement produced in the Hermosillo plants, though sold as Types I, II, and V, was physically Type V. The petitioner asserts that CEMEX altered its production and shipping arrangements for Type II cement to lower the dumping margin artificially.

The petitioner contends that matching identical products by ASTM type ''as invoiced'' reflects commercial reality and allows for a fair comparison as required by the statute. The petitioner asserts that the Department has noted that courts have recognized the Department's ''broad discretion 'to choose the manner in which ''such or similar' merchandise shall be selected,'' '' citing *Certain Cold-Rolled Carbon Steel Flat Products From Germany*, 60 FR 65264, 65271 (1995) (*Cold-Rolled From Germany*). The petitioner states further that cement customers are only concerned that the cement they purchase meets the ASTM type they have specified and are indifferent to whether the type they purchase may satisfy the specifications of another cement type. Thus, the petitioner maintains, prices of cement vary according to the invoiced type and not the actual physical specifications. In addition, the petitioner argues, no cement meeting the same ASTM specifications is identical and cement can possess a broad range of characteristics. The petitioner contends that to base matching criteria on physical characteristics, as CEMEX propounds, results in a commercially meaningless and an ''apples-to-oranges'' comparison. Indeed, the petitioner asserts, CEMEX's arguments in prior segments of this proceeding establish that the differences in specifications of cement CEMEX sells are commercially significant.

The petitioner asserts that the Department should remain consistent with its longstanding approach of matching identical merchandise based on whether the products meet the same commercially significant characteristics, citing, *e.g., Certain Cut-To-Length Carbon Steel From Finland*, 62 FR 18468, 18470 (1997) (*Cut-To-Length From Finland*). The petitioner argues that neither new facts nor legal justification exist for departing from the Department's longstanding methodology of matching cement ''as invoiced'' in the final results of this review. Citing *Cut-To-Length From Finland*, the petitioner notes the Department's finding that it would be inconsistent with its matching criteria to consider products sold to

different specifications as identical. *Id.* at 18470.

CEMEX responds that the Department matched identical merchandise properly on the basis of the ASTM specification to which the cement was produced. CEMEX argues that matching merchandise according to how it was sold does not meet the statutory requirement of section 771(16) of the Act, which requires ''foreign like product'' to include only merchandise sold in the home market that is physically identical with the merchandise produced for sale to the United States. CEMEX argues that, as the Department recognized in the *Sixth Review Final Results*, the statute compels the Department to base NV on its sales of cement that meet the customers' specifications physically. CEMEX notes that the petitioner raises the same arguments and cites to the same cases already rejected by the Department in the sixth review and in the preliminary results of this review. CEMEX contends that the prior determinations which the petitioner cites do not support its argument because they involved the identification and order of matching characteristics, which are not at issue here. CEMEX notes that, in this case, no party disputes that product characteristics of cement are determined on the highest ASTM specifications that it meets. Therefore, CEMEX concludes, the Department's identification of HM cement sales pursuant to the highest ASTM specifications to which the cement is produced continues to be in accordance with law.

CDC, like CEMEX, argues that the Department's decision to match sales on cement type ''as produced'' is justified on the record of this review and that this methodology should be applied consistently to CDC's margin calculations.

Department's Position: We agree, in part, with CEMEX. Section 771(16)(A) of the Act expresses a clear preference for matching sales in the United States with sales in the home market of merchandise that is ''identical in physical characteristics.'' *See CEMEX, S.A.* v. *United States*, 133 F.3d 897 (Fed. Cir. 1988) (*CEMEX* v. *U.S.*). When circumstances require the Department to compare non-identical merchandise, the statute, at section 773(a)(6)(C)(ii) of the Act, provides for a ''difference-in-merchandise'' adjustment (DIFMER) which is normally equal to the difference in cost of production attributable to differences in physical characteristics. *See also* 19 CFR 351.411.

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

During the period covered by the original investigation, the Department discovered one or more instances where Mexican producers sold cement meeting one ASTM standard on the basis of cement meeting a lower (included) ASTM standard. However, in the final determination, the Department described these sales as a mistake and not ''the ordinary practice in the industry.'' Original LTFV Investigation, 55 FR at 29248. Therefore, based on the fact that it was the normal industry practice to produce and sell on the same basis, the Department accepted that ''matching by ASTM standard was the most reasonable basis for making equitable identical merchandise comparisons.'' *Id.* at 29248.

Devising a methodology for matching sales is often a difficult task and the courts have recognized that the Department has broad discretion ''to choose the manner in which * * * merchandise shall be selected.'' *Koyo Seiko Co.* v. *United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995). We have sought, throughout the past reviews, and in the present one, to (i) match based on physical characteristics, (ii) rely on ASTM standards to distinguish one type of cement from another, and (iii) rely on sales documentation as a convenient surrogate for more direct evidence (*e.g.*, mill test certificates) of cement type.

In the instant review, the Department requested CEMEX to report HM and U.S. sales data on both an ''as produced'' basis (*i.e.*, reporting the physical properties of each product sold) and on an ''as sold'' basis. CEMEX reported that it produced cement meeting the physical characteristics of Type V cement and sold this cement in the home market as Types I, II, and V cement. CEMEX produced Type V cement at its Yaqui and Campana plants located in the Hermosillo region of Mexico. CEMEX noted, and the record reflects, that Yaqui and Campana are the only two CEMEX plants which, on a consistent basis, produce cement meeting the physical requirements of one type of cement and sell that cement as another type of cement.

As we stated in our preliminary results, under these circumstances, we believe it would be unreasonable to match merchandise on a ''sold as'' basis. The appropriate product to which U.S. sales should be matched is the HM product that is physically identical to the merchandise produced for U.S.-market sales. Therefore, we appropriately calculated NV based on respondents' sales of cement as produced. Further, such an approach would not address any sales that were merely ''gray portland cement'' or ''cement.'' Finally, a ''sold as'' approach would lend itself to the type of product manipulation about which the petitioner has so often expressed concern. Therefore, for purposes of the final results of this review, the Department has continued to apply the matching methodology applied in the sixth administrative review and the preliminary results of this review.

The petitioner has expressed concern that matching using physical characteristics will enable CEMEX to manipulate HM sales to conform to certain specifications, thereby limiting the Department's ability to review sales of merchandise in the comparison markets properly. In order to address these concerns, the Department will continue to review and monitor closely sales of both identical and similar merchandise in the home market to ensure that, in subsequent reviews, an accurate and reliable database of HM and U.S. sales are reported. For example, we will continue to request that CEMEX report its HM sales on both an ''as sold'' and ''as produced'' basis. This requirement will limit the possibility for manipulation and ensures additional scrutiny of CEMEX's production processes.

Finally, we agree with CDC that we should apply our matching methodology consistently to its margin calculations and have adjusted our analysis accordingly.

5. Ordinary Course of Trade

CEMEX argues that HM sales of cement produced at Hermosillo were in the ordinary course of trade and should be used in the calculation of NV. CEMEX maintains that the Department did not take into account all legally relevant factors, that sales invoiced as Type II and Type V were made pursuant to a *bona fide* home-market demand for

those types of cement, that the merchandise sold was not obsolete or of second quality, that it was sold for its intended purposes, and that there were no special sales arrangements for these sales as a category. CEMEX also argues that the Department applied selected factors in performing its ordinary-course-of-trade analysis and that the Department's analysis was not supported by substantial evidence. CEMEX contends that the Department's analysis relies incorrectly on the volume of the sales at issue relative to sales of Type I cement and that the volume of the sales at issue was significant in absolute terms and pursuant to a *bona fide* demand. CEMEX also argues that judicial precedent and prior administrative practice establish that relatively low sales volume signifies sales outside the ordinary course of trade only when coupled with an absence of *bona fide* HM demand, which does exist in this case.

CEMEX also contends that the Department should focus on the actual terms of delivery for the sales at issue, identical to those of Type I customers, rather than the geographic distance, and that the distance to the customers is a geographic fact rather than a condition or practice of sale. CEMEX argues that the Department has not relied on shipping distances in determining whether sales were outside of ordinary course of trade in prior cases. Furthermore, CEMEX argues, if the Department continues to consider shipping distance in its analysis, it should do so on an individual-sale basis. CEMEX also contends that the Department's reliance on the low profitability of the sales at issue ignores the fact that the profit levels on these sales, though not as high as sales invoiced as Type I, are substantial and significant in absolute terms. Moreover, CEMEX notes that the profit differential is not the result of price disparities but rather higher freight costs. CEMEX contends further that the Department's reliance on the small number and type of customers for these sales is improper because such evidence generally reflects sales outside the ordinary course of trade in cases of sales of export overrun and off-specification sales, rather than when sales are made to a *bona fide* home market, which exists in this case. Moreover, CEMEX argues that the twelve years of domestic sales of these products, before and after the imposition of the order, constitutes a ''reasonable period of time'' regardless of the fact that such domestic sales did not begin until after CEMEX began production for export.

With regard to Type V cement, CEMEX also argues that the Department's preliminary results are factually incorrect because those results failed to appreciate the prior history of this case. Specifically, CEMEX states that, although the Department incorporated portions of the second review analysis memorandum into this administrative review, the Department did not acknowledge that during the second administrative review the Department verified that Tolteca, a CEMEX subsidiary whose production is subject to this review, has made continuous HM sales of Type V cement since 1964. Thus, CEMEX contends that its sales of Types II and V in the home market meet the statutory definition of ordinary course of trade in section 771(15) of the Act. CEMEX maintains that, although the Department relied on facts available to infer that the sales at issue had a ''promotional quality'', there is evidence on the record showing that the sales were no more promotional than Type I sales. CEMEX challenges the overall relevance of ''promotional quality'' as a factor in an ordinary-course-of-trade inquiry and argues that there is no judicial or Departmental precedent which has referred to this factor in any other ordinary-course-of-trade analysis.

Finally, CEMEX argues that Hermosillo-produced cement sold as Type I is within the ordinary course of trade because four out of six factors (shipping distance, profit, promotional nature, and historical pattern of sales) upon which the Department relied for its analysis of Type II and Type V sales were not present and that the Department's two other factors (number and type of customers and freight costs) are not supported by substantial evidence. Specifically, CEMEX notes that the volume of its Hermosillo Type I sales exceeded five percent of its U.S. sales and, thus, constituted a viable basis to calculate NV under section 351.404(b)(2) of the Department's regulations. In addition, CEMEX contends that the freight cost differences upon which the Department relied were insignificant. CEMEX also assserts that the number and type of customers buying Type I from the Hermosillo plants were consistent with the number and type of customers buying from other plants. Last, CEMEX claims that the Department inaccurately relied upon differences in handling charges between Hermosillo and non-Hermosillo sales of Type I cement.

The petitioner maintains that CEMEX's HM sales of cement produced as Type V are outside the ordinary course of trade. First, the petitioner asserts that the Department must evaluate not just one factor taken in isolation but rather all the circumstances particular to the sales in question to determine whether the sales reflect the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal. The petitioner notes that the Department relied upon five key factors in determining that Types II and V sales were outside the ordinary course of trade in the second review and that the CIT and Federal Circuit affirmed reliance on these five factors. The petitioner argues that the Department considered these same factors in the fifth and sixth administrative reviews when it found Types II and V to be outside the ordinary course of trade. The petitioner argues that there has been no material change in the evidence relating to these five factors which would justify a different decision.

In addition to discussing the record evidence regarding the above-described factors, the petitioner argues that there are additional factors (*e.g.*, changes in its shipping and production arrangements for cement Types II and V, absorption of freight costs on sales of cement Types II and V) supporting the Department's past determinations in this matter. The petitioner also states that CEMEX's HM sales produced as Type V but sold as Type I are outside the ordinary course of trade. Among a number of arguments to support this contention, the petitioner notes that the subject HM sales meet physical specifications for Type V and that the customers do not need these traits, suggesting production overruns as one possible explanation. Also, the petitioner notes, sales of this merchandise as Type I cement represent a small percentage of HM sales of Type I cement as well as a small percentage of CEMEX's production of Type V. The petitioner also notes that CEMEX's freight costs for these sales were significantly different from the freight costs for other sales of Type I, that the number and type of customers for these sales are unusual, and that CEMEX's profits on sales of physically Type V cement sold as Type I are unusual.

The petitioner contends that CEMEX's HM sales of all cement produced as Type V, regardless of how they were invoiced and sold, are outside of the ordinary course of trade when considered in the aggregate. In support, the petitioner discusses volume sold, freight cost differences, type of customers, and profit differences. The petitioner asserts that CEMEX's proposed ordinary-course-of-trade analysis is erroneous, that the

Department expressly considered the totality of the circumstances, and that the existence of a limited demand for sales of Type II and Type V does not establish that they are within the ordinary course of trade. Also, the petitioner maintains, only those factors relevant to HM sales of cement are probative with respect to whether CEMEX's sales are outside the ordinary course of trade and that the Department did not consider one factor in isolation. Further, the petitioner contends, the Department's analysis focuses on whether the sales are normal relative to sales of other products of the same class or kind or the respondent's usual practice with respect to the merchandise at issue.

Finally, the petitioner asserts that CEMEX's argument that its sales of Type II and V cement represent sound business judgment is irrelevant. The petitioner maintains that CEMEX has waived its claim that consolidation of production at Hermosillo was a legitimate business decision because it did not mention this argument in its case brief. Also, the petitioner contends, whether CEMEX's decisions regarding production and distribution arrangements were based on sound business judgment is not a factor in determining if those sales were outside the ordinary course of trade.

Department's Position: Consistent with our preliminary results, we have determined that CEMEX's HM sales of Type II and Type V cement produced at the Hermosillo plants were outside the ordinary course of trade during the POR. Section 773(a)(1)(B) of the Act states, in part, that NV is ''the price at which the foreign like product is first sold (or, in absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade.'' The term ''ordinary course of trade'' is defined as ''the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.'' The SAA which accompanied the passage of the URAA clarifies this portion of the statute further when it states: ''Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market.'' SAA, at 164. Thus, the statute and the SAA are clear that a determination of whether sales (other than those specifically addressed in section 771(15) of the Act) 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 HM sales of cement are ordinary in comparison with other HM sales of cement).

The purpose of the ordinary-course-of-trade provision ''is to prevent dumping margins from being based on sales which are not representative'' of the home market. *Thai Pineapple Public Co.* v. *United States,* 946 F. Supp. 11, 15 (CIT 1996) *(quoting Laclede Steel Co.* v. *United States,* Slip Op. 95–144 at 6 (CIT Aug. 11, 1995)). Congress has not specified any criteria that the agency should use in determining the appropriate ''conditions and practices.'' Thus, the Department, ''in its discretion, chooses how best to analyze the many factors involved in a determination of whether sales are made within the ordinary course of trade.'' *Id.* at 14–17.

In the instant review, the Department's decision to exclude sales of Type II and Type V cement from the calculation of NV centered around the unusual nature and characteristics of these sales compared to the vast bulk of CEMEX's other HM sales. The Department's ordinary-course-of-trade inquiry is far-reaching. The agency must evaluate not just ''one factor taken in isolation but rather all the circumstances particular to the sales in question.'' *Murata Mfg. Co.* v. *United States,* 820 F. Supp. 603, 607 (CIT 1993) *(quoting Certain Welded Carbon Steel Standard Pipes and Tubes from India, Final Results of Antidumping Duty Administrative Review,* 56 FR 64753, 64755 (1991)). This broad approach recognizes that each company has its own conditions and practices particular to its trade. In short, the Department examines the totality of the facts in each case to determine if sales are being made for ''unusual reasons'' or under ''unusual circumstances.'' *Electrolytic Manganese Dioxide from Japan; Final Results of Antidumping Duty Administrative Review,* 58 FR 28551, 28552 (1993).

We disagree with CEMEX that our analysis used selective factors and was not supported by substantial evidence. Pursuant to section 773(a)(1)(B) of the Act, the Department has examined the totality of the circumstances surrounding CEMEX's sales of cement in Mexico that are produced as Type V cement and marketed as Types I, II, and V (which are identical in physical characteristics to the cement that CEMEX sells in the United States).

In analyzing the ordinary-course-of-trade issue in arriving at its preliminary results in this administrative review, the Department considered the circumstances surrounding CEMEX's HM sales of Types I, II, and V cement from the Hermosillo plants, Yaqui and Campana. An expanded discussion of the most recent analysis can be found in a memorandum dated August 31, 1998 (Memorandum from Roland L. MacDonald to Joseph A. Spetrini, Seventh Antidumping Administrative Review on Gray Portland Cement and Clinker from Mexico—Ordinary Course of Trade). A public version of this memorandum is on file in room B–009 of the Department's main building. As part of that analysis, the Department considered certain data from the second, fifth, and sixth reviews which were placed on the record of the instant review. CEMEX provided no facts in this review that would alter the analysis. We find that the information on the record continues to support the decision that all three types of cement produced at the Hermosillo plants in the home market are sold outside the ordinary course of trade.

First, we found that during the POR, as in previous reviews, CEMEX sold very small amounts of Type II and Type V in the home market compared to sales of cement produced as Type I. We found that freight costs for Type II and Type V cement were higher than freight costs for Type I sales, with CEMEX absorbing some of these costs. While it is true, as CEMEX has pointed out, that shipping terms for Type II and Type V cement are in some respects similar to Type I, for the years preceding the antidumping order it was CEMEX's *normal* business practice to pass along the cost of pre-sale freight to purchasers of its Type II cement. Thus, we find it an ''unusual circumstance'' for CEMEX to absorb freight costs after the issuance of the order, particularly given the higher freight costs for Type II and Type V cement than for Type I cement. Third, we found that the normal practice for CEMEX is to ship cement, a heavy material, over relatively short distances. Over 95 percent of CEMEX's sales of cement in Mexico were shipped less than 150 miles and, during the POR, shipments of cement produced as Type I conformed to this pattern. Shipments of Type II and Type V, however, occurred over vastly greater distances. Fourth, we found that CEMEX's profits on Type II and Type V cement sales during the POR are small compared to those earned on sales of Type I cement. Fifth, we found that the number and type of customers that purchase Type II

and Type V cement from CEMEX is substantially different from those who purchase other cement types.

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

We also disagree with CEMEX's claim that, instead of considering shipping distances and freight costs, we should focus on shipping terms and practices. In fact, in analyzing this issue, the Department has examined both shipping distances and shipping terms and practices. With respect to shipping distances, we found that the normal practice in Mexico is to ship cement over relatively short distances. As we noted earlier, over 95 percent of all cement shipments in Mexico cover distances of less than 150 miles. While CEMEX's HM shipments of Type I cement conformed to this norm, its shipments of Type II and Type V occurred over substantially greater distances. CEMEX claims that the ''differences in shipping distances is simply a geographic fact'' and the result of a ''legitimate business decision'' and that the Department has not relied on shipping distances in determining whether sales were outside of ordinary course of trade in prior cases. These claims are inapposite. We are not questioning the reasoning behind but the effect of the decision to ship long distances. As we noted in earlier reviews, a company may have sound business reasons for changing its methods of operation but, if sales resulting from this new business practice are not normal for the company (for a reasonable time prior to exportation), then they cannot be said to be within that company's ordinary course of trade. The CIT and CAFC affirmed this analysis in its examination of the second administrative review. *CEMEX* v. *U.S.*

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

CEMEX argues that, in the preliminary results, the Department did not acknowledge a legitimate HM demand for the cement from those plants invoiced as Type II and Type V. However, the Department did consider this information in preparing the preliminary results. As CEMEX itself states in its case brief, the Department acknowledged that a legitimate HM demand existed for Type II and Type V in the second review. The Department acknowledged this in the *Sixth Review Final Results* and continues to recognize that a legitimate HM demand exists for Type II and Type V. But a range of other factors, such as the size of the home market for Type II and Type V cement and other characteristics noted above, were also considered, and we find, based on those factors, that this demand does not compel us to consider sales of Type II and Type V within CEMEX's ordinary course of trade.

Among the selected factors for which CEMEX argues the Department misapplied the record evidence were historical sales trends and ''promotional quality'' of the products. We disagree. On September 25, 1997, the Department issued a questionnaire requesting CEMEX to support its position that HM sales of Type V cement were in the ordinary course of trade by addressing, among other things,''historical sales trends'' and various non-profit motives for making these sales. CEMEX's response (copies of its submission from the fifth and sixth administrative reviews) did not address these two items. Thus, the Department found in the preliminary results that the facts regarding these items have not changed since the second review, that CEMEX did not sell Type II and Type V cement until it began production for export in the mid-eighties, despite the fact that a small domestic demand for such existed prior to that time, and that sales of Type II and Type V cement continue to exhibit a promotional quality that is not evidenced in CEMEX's ordinary sales of cement (for details on the conclusions reached in the second review, *see* memorandum from Holly A. Kuga to Joseph A. Spetrini, dated August 31, 1993).

For the reasons stated above, the Department has determined that CEMEX's HM sales of Type V cement during the review period were outside the ordinary course of trade. We note that the facts established in the record of this review are very similar to the facts which led us to determine in the second, fifth, and sixth reviews that HM sales of Type V cement were outside the ordinary course of trade. The decision in the second review, as noted above, was affirmed by the CIT and CAFC. In conclusion, the decision to exclude sales of Type V cement from the calculation of NV centers around the unusual nature and characteristics of these sales compared to the vast majority of CEMEX's other HM sales. Based upon these differences, the Department has determined that they are not representative of CEMEX's HM sales and, therefore, these sales were not within CEMEX's ordinary course of trade.

With respect to cement from the Hermosillo plants meeting Type V specifications but sold in the HM as Type I, as noted in the memorandum

referred to above (August 31, 1998 Memorandum from Roland L. MacDonald to Joseph A. Spetrini with subject: Seventh Antidumping Administrative Review on Gray Portland Cement and Clinker from Mexico—Ordinary Course of Trade), the record evidence indicates that only at the Hermosillo plants did CEMEX produce consistently a cement meeting one ASTM standard and sell that cement as a different ASTM type. That factor, and others discussed in that memorandum, distinguishes sales of Type I cement produced at Hermosillo from CEMEX's sales of Type I cement produced as Type I from other production facilities.

6. Difference-in-Merchandise Information

Comment 1: CEMEX argues that the Department should revise its treatment of difference-in-merchandise (DIFMER) information for the following reasons. First, CEMEX maintains that the issue of a DIFMER adjustment is moot because CEMEX's HM sales of Type V cement were made in the ordinary course of trade thus requiring no DIFMER adjustment. Second, CEMEX claims that it neither requested a DIFMER adjustment nor withdrew such a request and the Department described the record evidence incorrectly in the preliminary notice. CEMEX claims that its views on various options for a DIFMER adjustment have been consistent. Third, CEMEX contends that cost differences between Types I and V cement are the result of plant efficiencies. CEMEX maintains that the production process for all types of cement is identical. According to CEMEX, cost differences among cement types are solely a function of the extraction costs of clay and limestone, the two raw materials which compose cement. CEMEX argues that the cost of these materials depends upon the condition of the quarry and the distance between the plant and the quarry. Thus, CEMEX maintains, the cost differences among the cement types are not due to physical differences in the merchandise; rather they are a function of the quarry itself. In the alternative, CEMEX argues that the Department should either use CDC's DIFMER adjustment since the Department collapsed CDC and CEMEX or calculate a DIFMER using market values, as authorized by the Department's regulations and in the Department's decision in *Polyvinyl Alcohol From Taiwan*, 63 FR 32810 (June 16, 1998).

The petitioner responds that the Department based CEMEX's DIFMER adjustment on adverse facts available correctly. The petitioner maintains first that the DIFMER issue is not moot because the Department found correctly that all of CEMEX's sales of cement produced as Type V were outside the ordinary course of trade. The petitioner responds next that the inaccuracies contained in the Department's DIFMER discussion in the preliminary results are irrelevant to the Department's conclusion that CEMEX did not provide the requested DIFMER information. Moreover, the petitioner argues, CEMEX's description of the record is inaccurate. The petitioner asserts that CEMEX did not respond to the Department's requests for DIFMER information and that, by its provision of variable cost of manufacturing (VCOM) data and suggestions for DIFMER calculation, it led the Department to believe that it was requesting a DIFMER adjustment. After suggesting previously that a DIFMER adjustment should be made, the petitioner contends that CEMEX requested a DIFMER adjustment expressly in its April 27, 1998, submission to the Department, where it supplied VCOM data for Types V LA and Type I cement. According to the petitioner, CEMEX led the Department to believe that it was claiming a favorable DIFMER adjustment and then, in effect, withdrew its request on May 8, 1998. Third, the petitioner claims that the record evidence demonstrates affirmatively that physical differences between Types I and V cement contribute to different production costs, *e.g.*, Types V and I differ in the amount of an allowable raw material, tricalcium aluminate, and differing production processes are also required. Fourth, the petitioner argues that the Department should not apply CDC's DIFMER adjustment to CEMEX because to do so would reward CEMEX improperly for its lack of cooperation. The petitioner concludes that the Department should not base CEMEX's DIFMER adjustment on market values because CEMEX has not provided any information on which the Department could calculate such an adjustment. Moreover, the petitioner notes, the Department bases a DIFMER adjustment on differences in market value rarely and disfavors basing adjustments on market value rather than actual costs.

Department's Position: We agree with the petitioner that section 773(a)(6)(C)(ii) of the Act directs the Department to make an adjustment to NV to account for differences in the physical characteristics of merchandise where similar products are compared. Section 351.411(b) of our regulations directs us to consider differences in variable costs associated with the physical differences in the merchandise. Where appropriate, we may also consider differences in the market value. We determine that the record evidence demonstrates the existence of differences in the physical characteristics of cement Types I and V, and, therefore, a DIFMER adjustment is appropriate here.

Contrary to CEMEX's assertions, the data and product information on the record reflect the existence of differences in the physical characteristics of cement Types I and V. These physical differences were originally made apparent in CEMEX's reported variable manufacturing costs of producing Type I cement and Type V cement in the home market. In addition, the statements CEMEX made in its April 20, 1998, and May 8, 1998, submissions indicating that no DIFMER adjustment was necessary is contrary to the facts on the record of this and prior reviews (currently on the record of the instant review), wherein CEMEX has demonstrated that there are differences in the physical characteristics of Types I and V cement which contribute to a difference in their production costs.

Next, we note that CEMEX did not provide information regarding process or production differences that are attributable to the differences in physical characteristics of cement Types I and V from which we could calculate a DIFMER adjustment. While we acknowledge that our DIFMER discussion in the preliminary results of review contained some sequential inaccuracies, none of these minor errors affect our conclusion that CEMEX provided conflicting and incomplete DIFMER information. We first requested CEMEX to provide DIFMER information in our original questionnaire on October 3, 1997. CEMEX's response on December 8, 1997, provided no information regarding process or production differences that are attributable to the differences in physical characteristics of Types I and V. CEMEX again did not provide information with which we could make a DIFMER adjustment in its section D response filed on March 3, 1998. On March 31, 1998, we requested parties to submit information to assist in our determination of the appropriate DIFMER calculation. On April 17, 1998, we made a second request for DIFMER information. In response to our March 31 and April 17 requests, on April 20, 1998, CEMEX stated its belief that no DIFMER adjustment was necessary in this review but offered suggestions for the calculation of its DIFMER adjustment based upon hypothetical

data. However, CEMEX again did not demonstrate the existence of variable cost differences between Types I and V resulting from physical differences in the products. In a submission filed April 27, 1998, CEMEX suggested that the Department base the DIFMER adjustment on CEMEX's reported difference in variable costs for the production of Types I and V although CEMEX had not provided the requisite VCOM data. Finally, on May 8, 1998, CEMEX claimed in its second supplemental response that no variable cost differences existed between Types I and V. Thus the record of this review demonstrates that CEMEX did not comply with the Department's requests for data demonstrating the cost differences between cement Types I and V resulting from their physical differences and offered conflicting information several times.

Because record evidence indicates the existence of physical differences between cement Types I and V and because CEMEX did not submit viable bases for a DIFMER adjustment, we have calculated a DIFMER adjustment based upon facts otherwise available. Moreover, because CEMEX failed repeatedly to provide requested information, we conclude that CEMEX did not act to the best of its ability. Thus, in accordance with section 776(b) of the Act, we have used an adverse inference in applying facts available. Therefore, as facts available, and in order to minimize the effect of varying plant efficiencies, the Department has compared CEMEX's VCOM to produce cement at the Hermosillo plants (sold as Types I, II, and V but physically Type V) with the lowest variable costs reported by a CEMEX Type I facility. However, we have found that, in our preliminary results, we calculated DIFMER using the VCOM from CEMEX's second-most efficient plant rather than CEMEX's most efficient plant. We have based this determination on findings at the cost verification and Exhibit C–8 of the cost verification report. *See* Cost Verification Report, dated August 21, 1998. Therefore, we have adjusted the DIFMER calculation using the VCOM of CEMEX's most efficient Type I facility in accordance with the methodology we used in the sixth review. This recalculation results in an upward adjustment to NV in accordance with section 776(a) of the Act.

CEMEX's remaining arguments supporting the use of a different facts available are without merit. First, as we have concluded that CEMEX's HM sales of Type V cement are outside the ordinary course of trade (*see 5. Ordinary Course of Trade*, above), the DIFMER issue remains active. In addition, using CDC's DIFMER adjustment for CEMEX is contrary to our directive under section 776(b) of the Act to apply adverse facts available where an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. We conclude that using CDC's DIFMER, as suggested by CEMEX, would reward CEMEX improperly for its failure to provide the information we requested. Further, we reject CEMEX's proposal that we base our DIFMER adjustment on differences in market value rather than actual costs. CEMEX provided no information upon which we could calculate such an adjustment and, although we retain the discretion to calculate DIFMER based upon market values, we do so rarely. *See* Preamble to the Department's Regulations, 62 FR at 27370.

Comment 2: The petitioner contends that the Department's selection of facts available for DIFMER was not sufficiently adverse. It concedes that CEMEX provided variable cost data for Types I and V but, despite the Department's requests, did not provide information on process/production differences attributable to physical differences. The petitioner argues that, instead, CEMEX offered a suggested DIFMER calculation based upon hypothetical data. The petitioner also notes that CEMEX stated later that there were no variable cost differences between Types I and V but that Type V is in fact more expensive to produce (physically) than Type I. The petitioner claims that CEMEX has also refused repeatedly to provide DIFMER information in the second, fifth, and sixth reviews. According to the petitioner, the Department should apply total facts available based on CEMEX's refusal to provide DIFMER or, at the very least, should use a 20-percent upward DIFMER adjustment to NV as facts available, consistent with the final remand results of the second review.

CEMEX argues that if the Department bases CEMEX's DIFMER on facts available a 20-percent DIFMER adjustment is unreasonable as the Department is authorized to rely on information placed on the record. CEMEX contends that its information was timely, verified, and reliable. According to CEMEX, a 20-percent DIFMER adjustment as applied for the second review is unreasonable because each review is a distinct proceeding and the facts differ. CEMEX argues that, in the second review, the Department had only weighted-average VCOM data for Types I and II and did not have plant-specific, cement type-specific VCOM data, as the Department has here.

Department's Position: We do not agree that a more adverse rate should be used. For the reasons stated in response to comment 1, above, our DIFMER calculation is consistent with prior practice and based upon review- and plant-specific reported data which we verified. We consider our choice of facts available to be sufficiently adverse in order to provide an incentive to respondents to provide complete and accurate responses to our requests for information.

7. Level-of-Trade Determination for CEP Sales

The petitioner argues that the Department's methodology for determining the level of trade (LOT) for CEP sales based on the level of the constructed export price (CEP) from the exporter to the related affiliated importer (after deductions required by section 772(d) of the Act) is contrary to the Act and inconsistent with the methodology the Department used to determine LOT for export price (EP) and NV sales. In *Borden, Inc.* v. *United States*, 4 F.Supp.2d 1221 (CIT 1998), the petitioner notes that the CIT found this methodology to be contrary to the requirements of the plain language of the statute.

The petitioner notes that, for EP and NV, the Department bases LOT on the unadjusted starting price in the relevant market. The petitioner asserts that, in order to make an ''apples-to-apples'' LOT comparison, the statute requires the Department to analyze the LOT for both HM and CEP sales equivalently, based on the selling functions performed with respect to the sales to the first unaffiliated customer in both markets. The petitioner concludes that the Department's practice results in an unfair, skewed comparison between an adjusted CEP and an unadjusted NV.

CEMEX and CDC respond that the Department interpreted section 772(d) of the Act properly and based the CEP LOT appropriately on the U.S. price after adjustments. CEMEX and CDC argue that the petitioner's sole reliance upon the CIT decision in *Borden* is misplaced because, as the Department stated in prior determinations, the decision is not final and the Department is appealing the decision. Respondents also assert that the Department's interpretation of the statute is supported in the SAA and the Department's regulations as well as by Department practice. In light of this interpretation of the statute, argues CDC, any comparison of selling functions for the purpose of determining CDC's eligibility for a CEP

offset must focus on CDC's activities in selling to the two markets, not on the activities of its U.S. affiliate. In addition, CDC argues that the Department applied the proper statutory interpretation in the sixth review.

Department's Position: As we stated in prior determinations, our practice of basing our LOT analysis on the CEP, rather than at the starting price of CEP, is in full compliance with the statute and the regulations. *See Professional Electric Cutting Tools from Japan*, 63 FR 54441, 54444 (1998). In addition, we have stated that the CIT's decision in *Borden* is not binding as we are appealing this decision while we continue to apply our current methodology. *See Porcelain-on-Steel Cookware from Mexico*, 63 FR at 38378. Accordingly, consistent with section 351.412 of our regulations, we have continued to base our LOT analysis on the CEP reflecting the sale from exporter to importer for these final results of review.

8. CEP Offset Justification

Comment 1: The petitioner argues that the Department determined erroneously that CEMEX's and CDC's HM sales were at a different LOT than their sales to the United States and, on that basis, granted CEMEX and CDC an inappropriate CEP offset adjustment to NV. According to the petitioner, the Department found no differences in LOT in the fifth review and the facts in this review are virtually identical to the facts in that review. Also, the petitioner claims that the Department's methodology for analyzing the LOT and CEP offset issues has not changed since the fifth review and, therefore, no basis exists for a different result with respect to the LOT and CEP offset issues in this review.

The petitioner argues that, in the preliminary results of this review, the Department found that CEMEX and CDC perform more selling functions for sales to end-users and ready-mixers in the home market than for sales to affiliated importers in the United States. The petitioner argues that, with regard to CEMEX and CDC, the record either contradicts or does not support the Department's finding that their HM and adjusted CEP sales were at different levels of trade. The petitioner argues that the Department must find more than different levels of selling activities to determine that a respondent's HM and U.S.-affiliate sales are at different levels. Also, the petitioner asserts that HM selling functions must be provided to at least the majority of customers, citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy*, 61 FR 30326, 30338 (1996), and that minor or relatively insignificant selling functions cannot provide the basis for a determination that there are different LOTs and that a CEP offset adjustment is warranted. With regard to both CEMEX and CDC, the petitioner argues that the record does not support the Department's finding that their HM sales were at a more advanced stage of distribution than their CEP sales.

With regard to CEMEX, the petitioner argues that no basis exists for the Department's conclusion that CEMEX's sales to its affiliated U.S. distributor, Sunbelt Cement, were at a different place in the distribution chain than CEMEX's HM sales. To the contrary, the petitioner adds, the record evidence reflects that CEMEX's selling activities with respect to its Sunbelt Cement sales were virtually identical to its selling activities with respect to its HM sales.

The petitioner also contends that the Department's LOT memorandum for the preliminary results contains several inaccuracies. First, the petitioner maintains, for all but one expense, advertising, the activities listed in the Department's chart of expenses relating to CEMEX's indirect selling expenses do not correspond to CEMEX's itemized indirect selling expenses as CEMEX reported in its response. The petitioner next argues the Department relied incorrectly upon five selling functions in its determination that CEMEX's HM sales were at a more advanced LOT than its U.S. sales: strategic and economic planning, market research, personnel training/personnel exchange, procurement and sourcing services and after-sales servicing/warranty service. The petitioner argues that the record demonstrates that the Department found erroneously that CEMEX performs these functions only in the home market. The petitioner also asserts that what the Department describes separately as ''strategic and economic planning'' and ''market research'' are the same activity and should be merged for LOT-analysis purposes. The petitioner maintains further that CEMEX performed sales forecasting in neither the U.S. nor the home market. The petitioner also argues that CEMEX provided insufficient and inconsistent information regarding the after-sale services it provides and failed to establish that the selling functions were applied consistently ''to at least the vast majority of customers and sales in each level of trade,'' citing *Certain Pasta From Italy*. Finally, the petitioner argues that selling functions such as market research, advertising, and technical advice are insignificant in a mature market such as gray portland cement.

CEMEX asserts that, based on the law and verified information on the record, the Department's preliminary results properly included a CEP offset. First, CEMEX concurs with the Department's determination that the sales to CEMEX's unaffiliated U.S. distributor, Sunbelt Cement, were at a less-advanced LOT than the LOT of HM sales. CEMEX notes that the CEP adjustments made under section 772(d) of the Act remove all the marketing and distribution activities of Sunbelt Cement, thereby altering the LOT of the starting price to a less-remote link in the chain of distribution. CEMEX contends that the appropriate comparison is based on the selling functions performed by CEMEX with respect to its sales in Mexico and its sales to the United States.

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

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

To determine whether NV sales are at a different LOT than EP or CEP, we examine stages in the marketing process

and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make a LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and based on the available information, we are unable to determine the amount of a LOT adjustment, we adjust NV under section 773(a)(7)(B) of the Act (the CEP offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 FR 61971 (November 19, 1997).

Based upon our analysis of the record, we determine, as in the preliminary results of review, that CEMEX's HM sales occurred at a different and more advanced stage of distribution than CEMEX's sales to its U.S. affiliate. While we note that the LOT memorandum outlining our analysis contains some minor errors, none of these inaccuracies alters our conclusion that CEMEX performs more selling functions at a more advanced stage of distribution in the home market than its CEP sales in the United States. The record reflects that CEMEX performed eleven selling functions in the home market: (1) Strategic and economic planning; (2) market research; (3) advertising; (4) technical advice; (5) personnel training/personnel exchange; (6) inventory maintenance; (7) procurement and sourcing services; (8) freight and delivery arrangements; (9) packaging; (10) credit; and (11) after-sales services/warranties. We note that our LOT memorandum relied incorrectly upon a function not performed by CEMEX, sales forecasting, and therefore we have excluded this function from our analysis.

Table 6 of our LOT memorandum regarding advertising for CEMEX's CEP sales is in error because the record reflects that CEMEX does not perform advertising functions for its sales to Sunbelt Cement. However, the record demonstrates that CEMEX performs strategic planning, market research, advertising, procurement and sourcing services, personnel training/personnel exchange, packaging, credit and after sales service/warranty service for its sales in the home market but not for its CEP sales to the U.S. affiliate after deducting the expenses pursuant to section 772(d) of the Act. Thus, contrary to the petitioner's assertions, we find adequate basis on the record to conclude that CEMEX performs eight of its eleven selling functions with respect to only its HM sales and not with respect to its CEP sales.

In addition, CEMEX performs a higher degree of inventory maintenance for its HM sales than for its CEP sales. Contrary to the petitioner's assertion, differences in the level of intensity with which a respondent performs a selling function is relevant to our analysis. *See Professional Electric Cutting Tools From Japan; Preliminary Results of Antidumping Duty Review*, 63 FR 30706, 30708 (1998).

Thus, as the record demonstrates, CEMEX performs the majority of its selling functions with respect to its HM sales and not with respect to its CEP sales. In addition, CEMEX performs no services for its CEP sales that it does not perform for its HM sales. Accordingly, we determine that CEMEX's HM sales occur at a different and more advanced stage of distribution than its CEP sales. We also determine that the data provided do not permit us to calculate a LOT adjustment; thus in accordance with section 773(a)(7)(B) of the Act, a CEP offset is appropriate for these final results.

Moreover, we disagree with the petitioner's remaining arguments. The petitioner challenges the Department's decision to grant a CEP offset to CEMEX by asserting that CEMEX's itemized list of indirect selling expenses and its selling functions do not correspond. However, the list to which the petitioner refers (Exhibit B–14 of CEMEX's December 8, 1997, Section B response) itemizes the names of CEMEX's accounts for its indirect selling expenses in the home market and does not provide the services performed as a result of those expenditures. Because the list of accounts upon which the petitioner relies is not an itemization of CEMEX's selling functions but rather lists the accounts to which CEMEX's selling functions are recorded, we would, therefore, not expect CEMEX's indirect selling expenses list and selling-functions chart to correspond. The petitioner also argues that ''strategic and economic planning'' and ''market research'' should be merged for LOT-analysis purposes. We disagree with the petitioner. The record characterizes strategic planning as relating to long-range production activity while market research relates to locating markets and gauging their activity, and these distinctions are commonly recognized and understood. Regardless, assuming *arguendo* that we should merge the two functions, our conclusion that CEMEX's HM sales were at a different and more advanced LOT would remain unchanged since the record demonstrates that CEMEX performed both selling functions for the home market but neither for its U.S. sales

Comment 2: The petitioner argues that the Department found erroneously that CDC's U.S. and HM sales were at different levels of distribution. Furthermore, according to the petitioner, the Department erred in finding that CDC's HM sales were at a more advanced stage of distribution because CDC performed fewer and different selling functions for CEP sales than for its HM sales. The petitioner argues that CDC did not describe in sufficient detail its selling functions, including ''market research,'' ''technical advice,'' ''customer approval,'' ''solicitation of orders/customer visits,'' ''sales promotion discount programs,'' and ''computer/legal/accounting/business system development,'' so that the Department could determine whether they involved distinct selling functions. Moreover, the petitioner contends, CDC's reported selling functions were not provided to at least a vast majority of customers and sales in the home market. Therefore, the petitioner concludes, CDC's claimed selling functions do not provide the basis for a determination that CDC's HM and U.S. sales were at different levels of trade. The petitioner also notes that the Department reported erroneously in its LOT memorandum that it confirmed CDC's selling functions performed in the home market during verification when, in fact, the Department did not verify CDC's response in this review.

CDC argues that the Department granted CDC a CEP offset properly. CDC argues that the record demonstrates that its HM sales were made at a more advanced LOT than its U.S. sales, thus satisfying the Department's standard for a CEP offset.

Department's Position: We disagree with the petitioner that CDC's U.S. and HM sales were at the same levels of distribution. Based upon our analysis of the record, we determine that CDC's HM sales occur at a different and more advanced stage of distribution than CDC's sales to its U.S. affiliate. The record reflects, and our LOT memorandum shows, that CDC performs ten selling functions in the home market: (1) Inventory maintenance; (2) market research; (3) technical advice; (4) advertising; (5) freight and delivery arrangement; (6) customer approval; (7) solicitation of orders/customer visits; (8) sales promotion/discount programs; (9) packing; and (10) computer/legal/accounting/business system

development. The record demonstrates that, with the exception of inventory maintenance and freight and delivery arrangements, CDC performs its selling functions for its sales in the home market but not for its CEP sales to the U.S. affiliate after deducting the expenses pursuant to section 772(d) of the Act. The record also demonstrates in sufficient detail for the Department to determine that the selling functions that CDC provides for its HM sales are greater in number and intensity than those selling functions that it provides for its CEP sales. Accordingly, we determine that CDC's HM sales occur at a different and more advanced stage of distribution than its CEP sales and that a CEP offset is appropriate for these final results. We also determine that the data does not provide an appropriate basis for a LOT adjustment; thus in accordance with section 773(a)(7)(B) of the Act, a CEP offset is appropriate for the final results. We note that although our LOT memorandum refers erroneously to a verification at CDC this error does not alter our conclusion for these final results.

9. CEP Calculation

Comment 1: The petitioner disagrees with the Department's decision not to deduct indirect selling expenses incurred in the home market on sales to its affiliate in the United States in calculating CEP. The petitioner believes that this decision, although consistent with the Department's current practice and regulations as well as the final results of the fifth and sixth reviews, is contrary to the Act, the URAA, the SAA and judicial precedent. The petitioner argues that the indirect selling expenses, inventory carrying costs and general advertising expenses CEMEX and CDC incurred in the home market with respect to U.S. sales to its affiliate all constitute selling expenses deductible under section 772(d)(1)(D) of the Act.

The petitioner challenges the Department's limitation of deductible indirect selling expenses incurred in the home market for its CEP calculation as artificial and unsupported by the statute and by legislative history. First, the petitioner argues that the Department has discretion over which expenses can be deducted from CEP and should deduct all indirect expenses associated with U.S. sales from CEP. Second, the petitioner argues that the Department's use of the term ''U.S. expenses'' is limited incorrectly to expenses incurred in connection with a sale in the United States and that it should be expanded to include expenses incurred in relation to sales by the affiliated importer to U.S. customers. Third, the petitioner disagrees with the Department's narrow interpretation of the language in section 772(d) referring to expenses ''associated with economic activities occurring in the United States'' to be defined as only those expenses related to sales by the affiliated importer to unaffiliated purchasers. The petitioner contends that the language is interpreted more properly to include all expenses related to U.S. sales. Fourth, the petitioner cites the final results of the fifth review to demonstrate that the Department acted inconsistently with section 772(d) by limiting the deduction of ''any'' expenses incurred in selling subject merchandise in the United States. Fifth, because the Department granted a CEP offset, the petitioner maintains that CEP and NV do not represent an ''apples-to-apples'' comparison. Sixth, the petitioner claims that the Department misinterprets Article 2.4 of the Antidumping Agreement to require only the deduction of costs incurred between importation and resale from CEP when the Agreement ''states that those expenses should be deducted in addition to any other expenses that affect price comparability.'' Finally, the petitioner contends that to allow a deduction from CEP of only those indirect selling expenses incurred in the United States permits respondents to avoid deduction of any selling expenses by shifting U.S.-related selling activities offshore. The petitioner also maintains that the Department must interpret section 772(d) according to its plain meaning, *citing Mitsubishi Heavy Industries, Ltd.* v. *United States,* 15 F.Supp.2d 807 (CIT 1998) (*Mitsubishi*). The CIT in *Mitsubishi,* the petitioner asserts, held that the plain language of section 772(d) of the Act requires the deduction, without limitation, of all expenses generally incurred in selling the subject merchandise in the United States, regardless of where or when paid.

CEMEX and CDC respond that the Department is correct in not deducting indirect selling expenses incurred in the home market from CEP calculations. CEMEX and CDC state that the petitioner raised the same argument unsuccessfully in the fifth and sixth administrative reviews. CEMEX argues further that the petitioner attempts to rewrite the legislative history of the URAA and that the Department rejected arguments similar to those advanced by the petitioner in the preamble to the Department's regulations. CDC refutes the petitioner's claim that *Mitsubishi* compels the Department to deduct from CEP expenses incurred in the home market by a foreign producer and distinguishes the facts in *Mitsubishi* from those in this case. Moreover, CDC believes that *Mitsubishi* reinforces the Department's position to limit acceptable deductions from CEP.

Department's Position: We agree with respondents that we calculated CEP correctly. Upon analysis, the Department determined that the indirect selling expenses at issue relate solely to respondents' sales to their affiliated importers and are not associated with economic activities in the United States. The Department does not deduct indirect expenses incurred in selling to the affiliated U.S. importer under section 772(d) of the Act. *See Certain Pasta From Italy,* 61 FR at 30352. Thus, we have used the same methodology for calculating CEP in the final results, as was done for the preliminary results.

Comment 2: The petitioner maintains that the Department neglected to include indirect selling expenses in the home market on sales to the United States in ''total U.S. expenses'' for purposes of calculating CEP profit under section 772(f) of the Act.

The petitioner argues that by including indirect selling expenses in total U.S. expenses in calculating total actual profit but excluding them from total U.S. expenses in determining the expense ratio renders the calculation of CEP profit inconsistent. The petitioner argues that this contradictory treatment of the same expenses cannot be reconciled with the statute. The petitioner also cites *U.S. Steel Group* v. *United States,* No. 97–05–00866, Slip Op. 98–96 (CIT 1998) (*U.S. Steel*), whereby the CIT rejected the Department's inconsistent treatment of movement expenses in the calculation of CEP. The petitioner concludes that if indirect selling expenses incurred in Mexico are properly attributable to U.S. sales for the purpose of calculating U.S. selling expenses in the computation of ''total actual profit'' they must be similarly attributable to U.S. sales for purposes of calculating ''total U.S. expenses'' for the purpose of applying the ''actual percentage.''

CEMEX and CDC argue that the Department calculated ''total U.S. expenses'' correctly in its ''total expenses'' calculations for CEP profit. CEMEX contends that the petitioner has not cited a determination supporting its argument that the Department excluded foreign indirect selling in ''total U.S. expenses'' incorrectly. CEMEX argues that the petitioner's citation to *U.S. Steel Group* is misplaced because the decision is not final and it does not give deference to the Department's statutory interpretation of the law that it is charged to administer.

CDC asserts that it was appropriate for the Department to include in total U.S. expenses for CEP profit only expenses related to U.S. operations. CDC cites section 772(f) of the Act, stating that it directs the Department to exclude HM indirect selling expenses associated with U.S. sales and corresponding inventory carrying costs from its definition of total U.S. expenses.

Department's Position: Pursuant to section 772(f) of the Act, CEP profit includes the total revenue and total actual expenses incurred in making the sale to the unaffiliated purchaser in the U.S. market. However, since the statute directs that profit be allocated only to expenses deducted under sections 772(d) (1) and (2) of the Act, we must exclude indirect selling expenses incurred in Mexico for U.S. sales from ''total U.S. expenses,'' the numerator of the expense ratio. Thus, we did not include indirect selling expenses incurred in Mexico for U.S. sales in ''total U.S. expenses'' in calculating CEP profit. This interpretation is consistent with the intent of the statute. With respect to the petitioner's reference to *U.S. Steel,* see our response to Comment 3, below. In preparing for these final results, however, we discovered a clerical error in the CEP calculation in our preliminary results. We inadvertently did not include indirect expenses for advertising in the calculation of profit to be allocated to expenses deducted pursuant to section 772(d) of the Act. We have corrected this clerical error for the final results.

Comment 3: The petitioner argues that the CIT's recent decision in *U.S. Steel* directs the Department to calculate CEP profit by excluding movement expenses from the denominator of the profit-allocation ratio. The petitioner notes that, in that case, the CIT rejected the Department's argument that the statute required the inclusion of ''all expenses,'' including movement expenses, in the ratio.

CEMEX and CDC respond that the Department's inclusion of movement expenses in its calculation of total expenses used to calculate CEP profit is a reasonable interpretation of section 772(f) of the Act and is consistent with the Department's past practice. CEMEX and CDC argue that the CIT's decision in *U.S. Steel* is not final and that the Department has not indicated its intention to abandon its prior policy and adopt the decision.

Department's Position: We agree with the respondents that our inclusion of movement expenses in the calculation of total expenses used to calculate CEP profit is proper. The CIT's decision in *U.S. Steel* is neither final nor binding. Accordingly, we have continued to include movement expenses in ''total expenses'' for calculating CEP profit for these final results. This is consistent with the Department's practice in accordance with section 772(d)(3) of the Act.

Comment 4: The petitioner argues that the Department should revise its calculation of CDC's U.S. indirect expenses because the Department inadvertently allowed a deduction from U.S. indirect selling expenses for the imputed costs of financing antidumping cash deposits. The petitioner notes that the Department denied such an adjustment in the sixth review and that this decision was consistent with past practice.

CDC responds that the Department's allowance of an offset for the cost of financing cash deposits is in accordance with past practice and CIT precedent. CDC argues that in the past the Department has not been consistent in its treatment of imputed interest payments on cash deposits. CDC contends that the Department has recognized that a company incurs a real expense whether it actually obtained loans or diverted funds from another investment activity to finance the antidumping cash deposits, citing *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan,* 62 FR 11825, 11831 (March 13, 1997).

Department's Position: We agree that we have allowed CDC a deduction for the imputed costs of financing cash deposits inadvertently. For the final results, we have denied an adjustment to CDC for imputed expenses which CDC claims are related to financing cash deposits. This is consistent with the Department's treatment of such expenses in the sixth review and its practice as described in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et al.,* 62 FR 54043, 54079 (October 17, 1997). As our position is unchanged from the prior review, we adopt the discussion with respect to this issue in our *Sixth Review Final Results* (63 FR at 1278).

10. Regional Assessment

CEMEX and CDC argue that the United States has not honored its obligations under Article 4.2 of the WTO Antidumping Agreement and its predecessor, Article 4.2 of the 1979 Tokyo Round Antidumping Code. CEMEX and CDC claim that the Department has not implemented the special antidumping duty assessment requirements for regional-industry cases set forth in Article 4.2 because it has imposed antidumping duties on all imports of subject merchandise, including those consigned for consumption outside the Southern Tier region as defined by the ITC in the original investigation. CDC argues that the Department did not give exporters an opportunity to cease exporting at dumped prices into the region prior to the assessment of duties and requests that the Department terminate this review and revoke the antidumping order or, alternatively, assess antidumping duties only on CDC's entries of merchandise consumed within the Southern Tier region. CEMEX requests only that the Department assess duties on its future entries consumed within the Southern Tier region.

CDC contends that, because the United States did not implement Article 4.2 until it adopted the Uruguay Round Agreement Act (URAA) in 1995, implementation was untimely because the regional assessment rules were absent from U.S. law during the original investigation and during the first several reviews of the antidumping order. CDC also asserts that, in adopting section 218 of the URAA, the United States implemented Article 4.2 inadequately. For instance, CDC asserts, Section 218 does not address producers/exporters who, like CDC, export merchandise both into and outside of the region. CDC proffers other examples of the inadequate U.S. implementation of Article 4.2, which are discussed below. If the Department does not terminate this review and revoke the order, CDC asserts, the Department should levy antidumping duties on a regional basis under Article 4.2.

CEMEX and CDC argue that the United States is obliged to comply with Article 4.2 of the Antidumping Agreement, which states:

> When the industry has been interpreted as referring to the producers in a certain area, *i.e.,* a market as defined in paragraph 1(ii), anti-dumping duties shall be levied only on the product in question consigned for final consumption to that area. When the constitutional law of the importing country does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 of this Agreement, and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

According to CEMEX and CDC, Article 4.2 compels the Department to refrain from assessing duties on its subject

merchandise destined for consumption outside the Southern Tier. CDC contends that the exception to Article 4.2 does not apply because none of the conditions necessary to justify an exception to Article 4.2 are satisfied in this case. First, both CEMEX and CDC assert that there is no U.S. Constitutional prohibition against levying antidumping duties on a regional basis. CEMEX and CDC contend that neither the port-preference clause of the Constitution, which prohibits Congress from regulating commerce or revenue of ports in a discriminatory manner that would confer preferential treatment for the ports of one state over the ports of another state, nor the uniformity clause, which requires the uniform imposition of taxes throughout the United States, render the regional assessment of antidumping duties unconstitutional, citing U.S. Const. Art. I, Sec. 9, cl. 6, and Art. I, Sec. 8, cl. 1. CDC argues further that the United States has never explained its theory that implementing the general assessment rule would result in a constitutional violation.

Next, CDC contends that the condition by which the Department would be exempted from assessing antidumping duties regionally has not been satisfied. CDC argues that the Department did not permit CDC to enter into a suspension agreement at the time of the original investigation because, at the time of the investigation, the Department's policy was one of refusal to enter into suspension agreements. Moreover, CDC maintains, the Department's decision to collapse CEMEX and CDC in the original investigation diminished CDC's opportunity further to enter into a suspension agreement. CDC also argues that the U.S. implementation included no provisions by which the regional-assessment rules could apply to cases predating the URAA. CDC argues the condition that duties cannot be levied only on products of specific producers which supply the area in question has not been met because the language of Section 218 of the URAA and the Department's regulations demonstrate that assessment on less than a national basis is possible. CDC contends that the fact that Congress enacted Section 218 with language calling for the regional assessment of duties attests to the absence of a U.S. constitutional prohibition against regional assessment.

The petitioner responds that the Department has assessed antidumping duties properly on all nationwide entries of the subject merchandise. First, the petitioner suggests that, since the Department has not yet assessed duties for the seventh review period, this issue is not ripe for the Department's consideration. However, assuming it is ripe for decision, the petitioner argues that the Department need only consider whether its assessment of antidumping duties under the order is consistent with the U.S. statute. The petitioner asserts that, because the Department's actions are consistent with the law, the Department need not consider respondents' remaining arguments. The petitioner contends that CEMEX, in referring only to Article 4.2, ignores the U.S. law on this issue.

The petitioner asserts that the Department must act within its authority under sections 736(d)(1)–(2) and 734(m)(1)–(2) of the Act, which were amended by the URAA to conform to the regional-industry provisions of the Antidumping Agreement. The petitioner contends that these provisions are inapplicable to respondents and thus confer no authority upon the Department to refrain from assessing antidumping duties outside the Southern Tier. The petitioner asserts that sections 736(d)(1) and 734(m)(1)–(2) of the Act only apply in investigations and not reviews. Second, the petitioner asserts that both CEMEX and CDC do not qualify for the regional assessment of duties under section 736(d)(2) of the Act because both respondents exported subject merchandise into the Southern Tier during the period of investigation (POI). Third, the petitioners contend, the Department has no obligation under sections 734(m)(1)–(2) of the Act to offer respondents a suspension agreement because the Department may only accept a suspension agreement during the pendency of an investigation or within 60 days after the publication of the antidumping order. For these reasons, the petitioner concludes, the Department complied fully with U.S. law.

In addition, the petitioner argues that the Department cannot ''implement'' its U.S. obligations under Article 4.2 because the Tokyo Round Antidumping Code is without legal force and only assumes binding character through implementing legislation enacted by Congress. Citing the legislative history of the Trade Agreements Act of 1979 and the URAA, the petitioner asserts that Congress intended U.S. law to prevail in the event of a conflict between U.S. law and these Agreements. Citing *inter alia, Suramerica* and *Footwear Distrib. And Retailers of Am.* v. *United States,* 852 F.Supp. 1078 (CIT 1994), *appeal dismissed,* 43 F.3d 1486 (Fed. Cir. 1994), the petitioner notes that courts have rejected the argument that U.S. law must be administered in conformity with the GATT.

The petitioner also argues that the Department lacks the statutory authority to terminate the antidumping order or assess duties regionally based on a claim that the Department did not offer respondents an opportunity to enter into a suspension agreement. Citing the *Sixth Review Final Results,* 63 FR at 12766, the petitioner notes that no respondent appealed the Department's final determination in 1990 based on an alleged lack of an opportunity for a suspension agreement and the Department's determination in the original investigation ''is final and binding on all persons, including the Department.'' The petitioner also asserts that neither the statute nor the Department's regulations authorize the Department to rescind a determination made in the original investigation and revoke the order in the context of an administrative review. The Department's authority in an administrative review is limited to calculating a margin and setting new cash deposit rates, the petitioner asserts, citing the NAFTA binational panel decision for the *Third Review Final Results.*

The petitioner also notes that CDC's claim that the Department neglected to offer an opportunity for a suspension agreement is barred by the statute of limitations, by *res judicata,* and because CDC failed to exhaust administrative remedies in the original investigation. Finally, the petitioner notes that, even if it were necessary to discuss the issue, Article 4.2 of the Antidumping Agreement does not require assessment of duties only on imports of subject merchandise consigned for consumption in the Southern Tier. The petitioner argues that the Constitution bars regional assessment of duties, the respondents had the opportunity to enter into a suspension agreement during the original investigation, and the Act complies with the requirement that antidumping duties be applied nationwide if they cannot be assessed only on the products of exporters in the region.

Department's Position: Before considering respondents' substantive arguments on this issue, we disagree with the petitioner's contention that this issue is not ripe for consideration since we have not yet assessed duties pursuant to the results of this administrative review. The purpose of an administrative review is to ''review and determine * * * the amount of any antidumping duty'' (section 751(a)(1)(B) of the Act) and the results of an administrative review ''shall be the

basis for the assessment of * * * antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties.'' Section 751(a)(2)(C) of the Act. Therefore, the Department's assessment procedures as they pertain to the antidumping duties determined in this review are an appropriate issue for the Department to consider for these final results.

Turning to arguments by CEMEX and CDC, we disagree that we should exempt entries of subject merchandise exported into regions other than the ''Southern Tier'' from antidumping duties and cash deposits. Respondents' argument focuses on the compatibility of the U.S. antidumping law with the United States' obligations under the URAA. Specifically, respondents suggest that the U.S. antidumping law, as amended by the URAA, does not implement the obligations contained in Article 4.2 of the Antidumping Agreement, which governs the assessment of antidumping duties in regional industry cases, properly.

The Department's determinations in an antidumping proceeding are governed by the U.S. antidumping statute—specifically, Title VII of the Tariff Act of 1930, as amended by the URAA in 1995. As numerous courts have recognized, in the event of a conflict between a GATT obligation and a statute, the statute must prevail. *See Federal Mogul Corp.* v. *United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995), *citing Suramerica DeAleaciones Laminadas* v. *United States*, 966 F.2d 660, 668 (Fed. Cir. 1992). Congress codified this principle in the URAA. Section 102 of the URAA states that ''[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.'' *See also* SAA at 659 (''The WTO will have no power to change U.S. law. If there is a conflict between U.S. law and any of the Uruguay Round agreements * * * U.S. law will take precedence.''). Thus, even if respondents were correct in asserting that the statutory provisions relating to regional assessment of duties conflicted with the obligations contained in Article 4.2 of the Antidumping Agreement, the Department must act in conformity with the antidumping statute.

Sections 736(d)(1)–(2) and 734(m) of the Act govern the assessment of antidumping duties in regional-industry cases. To this extent, section 736(d)(1) of the Act provides that, in an investigation in which the ITC makes a regional-industry determination, the Department ''shall, to the maximum extent possible, direct that duties be assessed only on the subject merchandise of the specific exporters or producers that exported the subject merchandise for sale in the region during the period of investigation.'' Because the original Mexican cement antidumping investigation occurred in 1989–90 and the URAA applies only to investigations initiated on the basis of petitions filed after January 1, 1995, this provision does not apply to CEMEX's and CDC's exports. However, even if section 736(d)(1) of the Act did apply to this review, since CEMEX and CDC exported subject merchandise into the region during the POI, the Department directed properly that antidumping duties be assessed on all entries of merchandise produced by CEMEX and CDC. For the same reasons, contrary to CDC's argument, section 351.212(f) of the Department's regulations does not apply to CEMEX's and CDC's entries.

Moreover, section 736(d)(2) of the Act provides that, ''after publication of the antidumping order, if the administering authority finds that a new exporter or producer is exporting the subject merchandise for sale in the region concerned, the administering authority shall direct that duties be assessed on the subject merchandise of the new exporter or producer consistent with the provisions of section 751(a)(2)(B).'' Because neither CEMEX nor CDC is a new exporter or producer as described in this provision, section 751(a)(2)(B) of the Act is inapplicable to the assessment of antidumping duties on subject merchandise exported to the United States by CEMEX or CDC.

Finally, pursuant to section 734(m) of the Act, in an investigation in which the ITC makes a regional-industry determination, the Department ''shall offer exporters of the subject merchandise who account for substantially all exports of that merchandise for sale in the region concerned the opportunity to enter into (a suspension) agreement.'' Any such agreement is ''subject to all the requirements imposed under this section for other (suspension) agreements, except that if the Commission makes a regional industry determination * * * in its final determination * * * but not in the preliminary affirmative determination * * * any agreement * * * may be accepted within 60 days after the antidumping order is published under section 736.''

Under section 734(b) of the Act, we may only accept a suspension agreement during the pendency of an investigation. Because the Department cannot enter into a suspension agreement once the 60-day post-order period has passed (and, indeed, seven administrative reviews have passed), the Department's decision not to offer respondents an opportunity to enter into a suspension agreement in this review does not violate section 734(m) of the Act.

Moreover, although CEMEX argues that the posting of cash deposits should not be required of CEMEX's entries outside the Southern Tier, the Act contains no provision and describes no circumstances under which we may waive an importer's requirement to post cash deposits except when conducting new-shipper reviews under section 751(b) of the Act. Accordingly, for these final results, we will require the posting of cash deposits and assess antidumping duties on entries of CEMEX's and CDC's subject merchandise that have entered or will enter for consumption both inside and outside the Southern Tier.

As demonstrated above, the Department's decision to assess duties on all subject merchandise exported into the United States by CEMEX and CDC is consistent with the antidumping statute. Indeed, neither CEMEX nor CDC argue that the Department's actions fail to conform to these statutory provisions. For purposes of this administrative review, therefore, the Department need not consider respondents' arguments further concerning the United States' implementation of its obligations under the Antidumping Agreement.

Nonetheless, we disagree with respondents' contention that the antidumping statute does not fully implement the United States' obligations under the Antidumping Agreement. As the Federal Circuit in *Federal Mogul* explained: ''GATT agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.'' *Federal Mogul*, 63 F.3d at 1581. Indeed, the U.S. Supreme Court elaborated on this canon of construction. ''It has also been observed that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains * * *.'' *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804). *See also Fundicao Tupy S.A.* v. *United States*, 652 F. Supp. 1538, 1543 (CIT 1987)(''An interpretation and application of the statute which would conflict with the GATT Codes would clearly violate the intent of Congress.''); *Footwear Dist. and Retailers of America* v. *United States*, 852 F. Supp. 1078, 1092–93 (CIT 1994), *quoting* Restatement (Third) of the

Foreign Relations Law of the United States, at 115, comment a, p. 64 (1987) (''Congress does not intend to repudiate an international obligation of the United States * * * Therefore, when an act of Congress and an international agreement * * * relate to the same subject, the courts, regulatory agencies, and the Executive Branch will endeavor to construe them so as to give effect to both.''). Because qualifying exporters are given an opportunity for exemption from the assessment of antidumping duties, the statutory scheme described above is consistent with Article 4.2 of the Antidumping Agreement. Thus, the United States has fully implemented its obligations with respect to the assessment of antidumping duties in regional industry cases.

We also disagree with CDC's contention that we must terminate the review and revoke the underlying antidumping duty order because U.S. implementation of its international obligations is allegedly untimely and inadequate. First, as we stated in the third, fourth, fifth and sixth administrative reviews and have reaffirmed in the ''Revocation of Underlying Order'' section, above, we have no authority to revoke the order. *Third Review Final Results. See also Fourth Review Final Results; Fifth Review Final Results*; and *Sixth Review Final Results.* Specifically, neither CEMEX nor CDC appealed the Department's final determination based upon the Department's alleged refusal to offer a suspension agreement. Thus, the antidumping duty order, based upon the Department's LTFV determination, is final and binding.

11. Bulk vs. Bag Sales

CEMEX argues that the Department should calculate NV based only on bulk sales rather than combining both bulk and bagged sales. CEMEX argues that the Department justified its use of bagged cement sales in its calculation incorrectly on the premise that, by excluding the cost of packing from NV, it made the price of cement in bags equal to the price of bulk cement. CEMEX argues that consumers are willing to pay a premium for the convenience of buying a bag of cement and that this fact is supported by record evidence. Additionally, CEMEX argues that, based on commercial realty, sales of cement in bags are at a different LOT than sales in bulk. CEMEX maintains that section 773(a)(7)(A) of the Act requires the Department to adjust the sale price in the comparison market to ''make due allowances'' for any difference in the comparison market shown to be ''wholly or partly'' due to differences in the LOT and that ''the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which NV is determined.'' Therefore, CEMEX argues, if the Department uses bagged cement sales in its calculation of NV for the final results, it must deduct the difference in average prices for bag and bulk cement from the net price of bagged cement.

CDC argues that the Department should compare bag sales in the United States to bag sales in the home market and bulk sales in the United States to bulk sales in the home market in order to make a fair comparison without distortions. CDC states that, in past segments of this and other cement proceedings, the Department made comparisons on a bag-to-bag and bulk-to-bulk basis, citing Original LTFV Investigation, 55 FR at 29245, and Concurrence Memorandum, *Preliminary Determination: Gray Portland Cement and Clinker from Venezuela* (October 28, 1991). CDC acknowledges that, in the fifth and sixth reviews of this order, when CDC made sales of bag and bulk cement in the home market and only bulk cement in the United States, the Department compared both bag and bulk sales made in the home market to bulk sales made in the United States. However, in this review, CDC argues, the Department should make comparisons on a bag-to-bag and bulk-to-bulk basis as it did in the original investigation under similar circumstances. CDC asserts that comparing bulk and bag separately in both markets ensures that no addition to HM price is necessary for the bulk HM sales and the Department need only subtract the HM packing from and add U.S. packing to NV for the HM bagged sale.

The petitioner responds that the Department compared both bulk and bagged sales to the United States with bulk and bagged sales in the home market in the preliminary results correctly. The petitioner maintains that, except for packaging, the cement sold in both bulk and bagged form is identical. The petitioner also argues that CDC has not established that the Department has a rule of comparing bulk sales only to bulk sales and bagged sales only to bagged sales which, the petitioner asserts, would be contrary to the statute. The petitioner states that sections 773(a)(1)(A)–(B) and section 771(16) of the Act require the Department to compare U.S. sales with sales of the ''foreign like product,'' which is defined as the identical merchandise sold in the home market or, if there is no identical HM merchandise, the most similar merchandise. The petitioner maintains that, in the fifth and sixth reviews, the Department found that bulk and bagged sales ''constitute identical merchandise,'' citing *Fifth Review Final Results* at 17165, and *Sixth Review Final Results* at 12777. The petitioner argues that CEMEX misinterpreted the Department's findings by stating that the Department was attempting to ''equalize'' the net prices of bagged and bulk cement by excluding the cost of packing from NV. In fact, the Department was making adjustments for packaging differences which, the petitioner asserts, accounted for the ''only difference between these products.''

The petitioner contends that the Department rejected CEMEX's argument that sales of bagged cement were at a different LOT than the HM sales of bulk cement in the fifth and sixth reviews and that CEMEX has not demonstrated that the facts in this review warrant a different result.

Finally, the petitioner claims that CEMEX has not satisfied the Department's two-step LOT analysis. First, the petitioner argues that CEMEX has not demonstrated that bagged and bulk cement are sold at different points in the chain of distribution. Second, the petitioner argues, CEMEX has not established differences in selling functions with respect to different customer classifications. In conclusion, the petitioner urges the Department to use bagged and bulk in its calculation of NV.

Department's Position: We agree with the petitioner and have included all Type I sales, bulk and bagged, in the calculation of NV. The only difference between these products is the packaging; therefore, we have made an adjustment downward to NV to account for packaging differences. In addition, as stated in the LOT section of this notice, we have determined that CEMEX sold at one LOT in the home market; therefore, distinguishing discrete channels of distribution is not warranted as there is only one LOT. Therefore, we have not calculated NV for each channel of distribution as CEMEX requested and have used our standard methodology for comparing NV to U.S. sales for purposes of the final results.

12. Rebates

The petitioner argues that the Department should deny CEMEX's claimed adjustment to NV for rebates. First, it claims that, prior to sale, CEMEX did not communicate the conditions to be fulfilled to qualify for the rebate and the amount of the rebate, which are requirements the Department

has established for granting rebate claims (citing *Certain Corrosion-Resistant Carbon Steel Flat Products And Certain Cut-To-Length Carbon Steel Plate From Canada*, 61 FR 13815, 13822–23 (1996), and *Certain Corrosion-Resistant Carbon Steel Flat Products And Certain Cut-To-Length Carbon Steel Plate From Canada*, 63 FR 12725, 12741 (1998)). The petitioner also asserts that CEMEX must establish that it granted the rebate pursuant to its standard business practice or under a pre-established program and cites *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From The Federal Republic Of Germany*, 54 FR 18992, 19056 (1989), and *Portable Electric Typewriters From Japan*, 56 FR 14072, 14078 (1991).

Second, the petitioner argues that the allocation methodology CEMEX used for reporting certain rebates is distortive because the allocated rebates may include rebates on sales of non-subject merchandise. In this review, the petitioner contends, CEMEX used two different methods for reporting rebates on HM sales. The petitioner acknowledges that, in most instances, CEMEX reported rebates on a transaction-specific basis. However, the petitioner argues that CEMEX reported rebates in the REBALH field that it based on an allocation methodology, but it has not provided any information to demonstrate that this allocation is the most specific calculation feasible. Additionally, the petitioner claims that CEMEX has provided no information confirming that it paid allocated rebates on sales of subject merchandise.

CEMEX argues that the Department's preliminary results adjusted NV correctly for CEMEX's verified rebates. CEMEX argues that the Department has a long-standing practice of allowing a claimed rebate without documentary evidence if the rebates are consistent with a respondent's normal business practices and its past dealings with its customers. CEMEX notes that it provided detailed descriptive data of its rebate program in its response and adequate sample documentation. CEMEX rejects the petitioner's claim that CEMEX's customers were not aware of its rebate policies at the time they were purchasing cement from CEMEX. According to CEMEX, as all rebates were negotiated on a customer-specific basis, customers were aware of the discounts for which they were eligible.

Next, CEMEX rebuts the petitioner's claim that the Department has a long-standing policy to reject claims for a rebate adjustment unless they are reported on a transaction-specific basis. CEMEX argues that the Department recognizes that it is not unusual for price adjustments to be granted to customers on a specific basis.

Additionally, CEMEX claims that the petitioner mischaracterizes the record evidence by stating that CEMEX did not provide additional information regarding the rebates reported in the REBALH field. Contrary to the petitioner's argument, CEMEX asserts that, for the non-transaction-specific rebates, CEMEX identified where the allocated rebates were reported, the reasons why it allocated them, how it allocated them, and why the allocation methodology it used was not distortive. Therefore, CEMEX concludes, the Department's acceptance of the rebate claims was appropriate.

Department's Position: We allow adjustments to NV for rebates if we are satisfied that such rebates reflect the respondent's normal business practice and not an attempt by the respondent to eliminate dumping margins once we initiate an antidumping investigation or review. *See Certain Corrosion-Resistant Carbon Steel Flat Products From Japan*, 63 FR 47465, 47468 (1998). In this respect, based on CEMEX's response and our verification of the response, we are satisfied that rebates are a long-established business practice of CEMEX and that CEMEX's customers had a reasonable expectation of receiving such rebates based on their long-standing business relationships with CEMEX.

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

13. Freight

Comment 1: The petitioner argues that the Department should deny CEMEX's reported HM freight adjustment. The petitioner argues that CEMEX did not demonstrate adequately that it is entitled to the adjustment on HM sales. The petitioner contends that movement expenses are allowable under the statute and under the Department's practice only if they are reported based on the actual, transaction-specific expense or on an allocation methodology that is not distortive. The petitioner argues that CEMEX did not report its HM freight expenses on a transaction-, customer-, point-of-sale- or even a plant-specific basis and has not demonstrated that it was not feasible to report these expenses on a such a basis. The petitioner notes specifically that CEMEX's record-keeping system compiles freight-cost data on a transaction-specific basis and thus CEMEX has failed to demonstrate why it cannot provide the Department with freight expense information on the same basis. The petitioner argues further that CEMEX's response demonstrates CEMEX either did not report freight on a type- and presentation (bulk vs. bag)-specific basis or failed to report a significant volume of Type II cement sold in the home market. The petitioner maintains that CEMEX provided an insufficient explanation for this discrepancy. The petitioner also argues that CEMEX has not demonstrated that its allocation methodology is not distortive of the actual, transaction-specific freight cost. The petitioner notes that, because cement costs vary widely depending upon transportation mode and shipment distances, CEMEX's company-average reporting methodology does not account for potentially significant variances in freight costs among sales. The petitioner also asserts that CEMEX has not demonstrated that freight provided by affiliated freight companies was at arm's length.

CEMEX argues that the Department deducted its reported HM freight expense from NV properly. CEMEX argues that it reported HM freight in the most specific manner permitted by its record-keeping system and that its methodology is not distortive. CEMEX observes that the Department rejected identical arguments made by the petitioner concerning HM freight expenses in the final results of the fifth and sixth administrative reviews. CEMEX also contends that it did present evidence that the expenses for freight

provided by affiliated parties were made at arm's length.

Department's Position: We disagree with the petitioner. Based on our findings at verification, we determine that CEMEX's reported freight costs for Type I cement are reported on as specific a basis as is feasible given CEMEX's accounting system, and that they provide a reasonable estimate of actual transaction-specific freight expenses. Thus, it would be inappropriate to apply adverse facts available to CEMEX's freight expense by rejecting the claimed adjustment. Furthermore, with regard to the petitioner's assertion that CEMEX did not demonstrate that the expense for freight provided by affiliated parties was at arm's length, we find that, based on data CEMEX submitted, the expense for freight provided by unaffiliated parties is generally higher than the expense for freight provided by affiliated parties. *See* Exhibit B–8–C of CEMEX's December 8, 1997, response. Based on this fact, we determine that the expense for freight provided by affiliated parties was at arm's length. Therefore, we have deducted CEMEX's claimed HM freight expense for Type I cement from NV for the final results.

Comment 2: The petitioner maintains that CDC has failed to demonstrate entitlement to a freight expense adjustment for sales by its affiliate Construcentro. Because CDC's responses demonstrate that CDC's freight-expense methodology for Construcentro results in commingled expenses for subject and non-subject merchandise, the petitioner argues, and because CDC has not demonstrated, in accordance with the preamble to the Department's regulations that its methodology is not distortive, the Department should deny CDC a freight-expense adjustment for sales by Construcentro.

CDC argues that the Department deducted its reported HM inland freight incurred by Construcentro from NV properly. CDC argues that its allocation is the most specific possible given its accounting system. CDC claims further that, because the majority of its total shipments were of subject cement, the freight expenses associated with its shipments is not inherently distortive. Finally, CDC observes that the Department made an adjustment for this expense in the fifth and sixth administrative reviews where CDC used the same methodology.

Department's Position: As in prior reviews, we find that CDC reported its freight expenses to the best of its ability given its accounting system. Furthermore, the record indicates that at least 70 percent of this particular affiliate's shipments are of subject merchandise and that at least another 10 percent of this affiliate's shipments are of nonsubject ''powder materials.'' *See* CDC's supplemental response dated May 8, 1998, at page B–6. Because the vast majority of the freight is for subject merchandise or for products sufficiently similar to subject merchandise, we can conclude the relative freight costs would be virtually identical so we find that CDC's methodology is not unreasonably distortive. Therefore, we have deducted the reported HM expense incurred by the affiliate from NV for the final results.

14. Other Adjustments

The petitioner argues that CDC is not entitled to a specific deduction included under certain other price adjustments in the OTHADJH field in its HM sales database. The petitioner claims that CDC did not provide documentation demonstrating a standard policy or any agreements communicated to its customers prior to sale and that the price adjustment benefits consumers of an out-of-scope product rather than subject merchandise.

CDC disagrees and asserts that the Department deducted CDC's OTHADJH from NV correctly. CDC states that in other cases the Department has allowed similar post-sale price adjustments where it was satisfied that the adjustments were not attributable to a company's attempt to lower or eliminate antidumping margins. CDC states that, in its case, there is no evidence on the record to suggest that these adjustments were an attempt to manipulate prices to lower its margin. On the contrary, it notes that the Department has accepted these types of adjustments in the fifth and sixth reviews. CDC also states that it provided sample credit memoranda to support its claim that customers were aware of the discount prior to sales. CDC also notes that the Department rejected in past administrative reviews the petitioner's argument that the discount is not awarded to cement customers.

Department's Position: Based on information CDC submitted and our verification of similar information in prior reviews, we are satisfied that the price adjustments in question are consistent with CDC's past business practices and that CDC's customers would be knowledgeable of these practices based on long-term business relationships with CDC. Also, no record evidence for this review indicates that we should not conclude, as we have in prior reivews, that the price adjustments covered by this item were paid to cement customers and not attributable to sales of non-subject merchandise. Since CDC was able to allocate the adjustment on a product-specific and customer-specific basis in the month in which the sale occurred, we conclude that such an allocation did not have a distortive effect. Thus, we have allowed CDC's claimed adjustment.

15. Pre-Sale Warehousing

CEMEX argues that the Department should have deducted pre-sale warehousing expenses in Mexico from NV. CEMEX cites section 773(a)(6)(B)(ii) of the Act which requires the Department to reduce NV if included in the price, by the amount of transportation and other expenses, including warehousing expenses, incurred in bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser. As further support, CEMEX also cites the SAA at 827. CEMEX argues further that § 351.401(e)(2) of the Department's regulations provides that the warehousing expenses incurred after the subject merchandise leaves the original place of shipment are to be included in the adjustments for movement expenses. In addition, CEMEX cites section 773a(6)(B)(ii) of the Act, which recognizes that warehousing expenses incurred at facilities other than the production site are considered part of the movement expenses and should therefore be deducted from the sales price.

CEMEX disagrees with the Department's statement in its Calculation Memorandum of August 31, 1998, that it had reviewed the record of the instant review and found that there had been no change in the reporting methodology of this item from previous reviews. CEMEX claims that it provided the Department with new information such as the per-ton cost of pre-sale warehousing incurred in Mexico and that cost was calculated by company, by month, and reflects only the costs associated with the remote terminals.

The petitioner agrees with the Department's decision not to include CEMEX's HM pre-sale warehousing expenses as movement expenses. It asserts that, since the Department was not able to verify CEMEX's reported pre-sale warehousing expenses and no new information has been provided, the Department has no reason to change its treatment of these expenses. The petitioner contends that the expense figures CEMEX reported reflect warehouses at locations remote from CEMEX's production plants. In conclusion, the petitioner cites the Department's regulations, the statute, and legislative history to define

movement expenses as only those expenses incurred after the subject merchandise leaves the original place of shipment and that in CEMEX's case these expenses represent only factory warehousing.

Department's Position: We agree with the petitioner and have not deducted pre-sale warehousing expenses from NV. CEMEX did not, as in prior reviews, submit its data in accordance with the Department's instructions. Because there were no changes in CEMEX's reporting methodology from previous reviews, we again denied the adjustment (*see* Calculation Memorandum, dated August 31, 1998, located in Room B–009 of the Department's main building).

16. Advertising Expenses

CDC argues that the Department treated CDC's HM advertising expenses incorrectly as indirect rather than direct selling expenses. CDC maintains that it demonstrated, through sample documents, that it incurs these expenses directly in conjunction with sales of the product under review and the advertising is directed towards the customer's customer.

The petitioner disagrees and asserts that the Department treated these expenses as indirect selling expenses correctly. The petitioner maintains that the record evidence demonstrates that, as in the previous review, CDC's advertising is corporate-image advertising and is not related directly to sales of gray portland cement.

Department Position: As we have noted in prior reviews, we normally consider direct expenses as expenses that result from, and bear a direct relationship to, sales of products under review. With respect to advertising, the expense must be assumed on behalf of a customer and must be specifically associated with sales of subject merchandise for the Department to treat this expense as a direct selling expense. Although CDC argues that it submitted evidence to support its claim that the expenses were direct, we disagree. The advertising at issue is associated with sales of subject and non-subject cement and promotes the overall corporate image of CDC rather than promoting sales of gray portland cement. Therefore, consistent with our prior practice, we have treated these expenses as indirect selling expenses in the home market.

17. Ministerial Errors

Comment 1: CEMEX claims that the Department did not deduct certain rebates from NV inadvertently. The petitioner argues that, because the rebates in question were reported using a distortive methodology, an adjustment for these rebates should not be granted.

Department's Position: We agree with CEMEX. We have corrected this clerical error for the final results. With regard to the petitioner's argument that the methodology CEMEX used to report these rebates was distortive, *see* our position for comment 11, above.

Comment 2: CEMEX claims that the Department used the wrong month variable in recalculating credit for the arm's-length test. The petitioner agrees with CEMEX.

Department's Position: We agree and have corrected this clerical error for the final results.

Comment 3: CEMEX claims that, when the Department recalculated its home-market imputed expenses using its revised interest rates, the Department inadvertently used the cumulative average interest rate instead of the monthly interest rate although CEMEX used the monthly interest rates in its original submission. The petitioner argues that the Department apparently used a monthly average interest rate.

Department's Position: We agree with CEMEX and have corrected this clerical error for the final results.

Comment 4: CDC claims that the Department mismatched interest rates in recalculating its home-market credit expenses by using the rates that were off by one month. The petitioner agrees with CDC.

Department's Position: We agree and have corrected this clerical error for the final results.

Comment 5: CDC argues that the Department should use 360 days in recalculating HM credit expenses because that is the figure respondent used in its original credit calculation.

Department's Position: We agree with CDC. Because CDC used the same number of days in its U.S. credit expense calculation, we have changed our calculation of CDC's HM credit expenses to reflect a 360 day-credit calculation.

Comment 6: CDC argues that the Department should convert packing expenses from pesos to U.S. dollars before making the packing adjustment to NV. The petitioner agrees with CDC.

Department's Position: We agree with CDC and the petitioner and have corrected this ministerial error for the final results.

Comment 7: CDC argues that the Department should also add U.S. packing to NV rather than deduct it from U.S. price. The petitioner agrees with CDC.

Department's Position: We agree with CDC and the petitioner and have corrected this ministerial error for the final results.

Comment 8: CDC argues that the Department neglected to include U.S. packing expenses in its calculation of the CEP ratio. The petitioner agrees with CDC.

Department's Position: We agree with CDC and the petitioner and have corrected this ministerial error for the final results.

Comment 9: CEMEX claims that, in calculating the assessment rates, the Department should have included the entered value of cement used in CEMEX's further-manufactured sales. The petitioner agrees with CEMEX.

Department's Position: We agree with CEMEX and the petitioner and have corrected this error for the final results.

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–825]

Oil Country Tubular Goods from Korea: Final Results of Antidumping Duty Administrative Review

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

ACTION: Notice of Final Results of the Antidumping Duty Administrative Review of Oil Country Tubular Goods From Korea.

SUMMARY: In response to a request from SeAH Steel Corporation (''SeAH''), the Department of Commerce (''the Department'') is conducting an administrative review of the antidumping duty order on oil country tubular goods from Korea. This review covers one manufacturer/exporter of the subject merchandise to the United States, SeAH, and the period August 1, 1996 through July 31, 1997, which is the second period of review (''POR'').

We have made a final determination that SeAH made sales below normal value (''NV''). We will instruct the U.S. Customs Service to assess antidumping duties based on the difference between the constructed export price (''CEP'') and the NV.

EFFECTIVE DATE: March 17, 1999.

FOR FURTHER INFORMATION CONTACT: Doug Campau, Steve Bezirganian, or Steven Presing, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202)