

Gray Portland Cement and Clinker from Mexico
Final Results of the Sixth Antidumping Administrative Review
Secretariat File No. USA-98-1904-02 (November 3, 2005)

**FINAL RESULTS OF REDETERMINATION
PURSUANT TO NAFTA PANEL REMAND**

SUMMARY

The Department of Commerce has prepared these final results of redetermination pursuant to the remand order from the Article 1904 Binational Panel in Gray Portland Cement and Clinker from Mexico; Final Results of the Sixth Antidumping Administrative Review, Secretariat File No. USA-98-1904-02 (NAFTA November 3, 2005). In accordance with the Article 1904 Binational Panel's instructions, we have (1) reconsidered whether our determination that CEMEX's home-market sales of Type V cement sold as Types II and V cement produced at the Hermosillo plants are outside the ordinary course of trade is supported by substantial evidence on the sixth-review record, in compliance with the Panel's Opinion and Order regarding the issue, and otherwise in accordance with law; (2) reconsidered whether our selection of the adverse facts-available difference-in-merchandise data is supported by substantial evidence on the record and otherwise in accordance with law. The period of review is August 1, 1995, through July 31, 1996.

BACKGROUND

On March 16, 1998, we published the final results of administrative review in Gray Portland Cement and Clinker from Mexico; Final Results of Antidumping Duty Administrative Review, 63 FR 12764 (March 16, 1998). We amended those results in Gray Portland Cement and Clinker from Mexico; Amended Final Results of Antidumping Duty Administrative Review,

63 FR 24528 (May 4, 1998) (collectively Sixth Review Final Results).

On May 26, 2005, the Panel issued an order in Sixth Review Final Results, Secretariat File No. USA-98-1904-02 (NAFTA May 26, 2005), remanding the determination to the Department of Commerce (the Department) (Remand Order I). On July 5, 2005, we issued our Draft Results of Redetermination Pursuant to NAFTA Panel for Gray Portland Cement and Clinker from Mexico; Final Results of the Sixth Antidumping Administrative Review, Secretariat File No. USA-98-1904-02 (NAFTA May 26, 2005) (Draft Results I), to interested parties for comment. On July 11, 2005, CEMEX, CDC, and the Southern Tier Cement Committee (STCC) submitted comments with regard to the Draft Results I. The Department issued the Final Results of Redetermination (Remand I) for the first remand on July 25, 2005.

On November 3, 2005, the Article 1904 Binational Panel (the Panel) issued an order in Sixth Review Final Results, Secretariat File No. USA-98-1904-02 (NAFTA November 3, 2005) (Remand Order II), remanding the Sixth Review Final Results again to the Department .

In Remand Order II, the Panel instructed the Department to do the following: (1) reconsider whether the Department's determination that CEMEX, S.A. de C.V.'s (CEMEX) home-market sales of Type V cement sold as Types II and V cement produced at the Hermosillo plants are outside the ordinary course of trade is supported by substantial evidence in the 1995/1996 review record, in compliance with the Panel's Opinion and Order regarding the issue, and otherwise in accordance with law; (2) reconsider whether the Department's selection of the adverse facts-available difference-in-merchandise data is supported by substantial evidence in the record and otherwise in accordance with law.

On December 7, 2005, we issued our Draft Results of Redetermination Pursuant to NAFTA Panel for Gray Portland Cement and Clinker from Mexico; Final Results of the Sixth Antidumping Administrative Review, Secretariat File No. USA-98-1904-02 (Draft Results II), to interested parties for comment. On December 21, 2005, CEMEX and CDC submitted comments with regard to the Draft Results II; the STCC presented its rebuttal brief on January 9, 2006.

DISCUSSION

I. Reconsider, in accordance with the Panel's latest opinion, whether CEMEX's sales of Type V cement sold as Type V and Type II cement that were produced at the Hermosillo plants are outside the ordinary course of trade.

The NAFTA Panel remanded the ordinary-course-of-trade determinations for sales of Type V cement sold as Type V and Type II cement to the Department for reconsideration in accordance with the Panel's latest opinion.¹ In the following redetermination, we reconsider the ordinary-course-of-trade determinations, with a particular focus on explaining the impact of the interrelatedness of factors and positions taken in the Seventh Review Remand Determination.² We discuss the economic interaction of factors as they were considered in the Seventh Review Remand Determination, explain how the interaction of factors applies or is distinguishable to the

¹ Remand Order II, at 3, 4-13.

² Gray Portland Cement and Clinker from Mexico: Decision of the Panel concerning the Final Results of Redetermination of the Department of Commerce (Seventh Review Panel Decision and Remand), USA-MEX-99-1904-03 (NAFTA May 30, 2002), at 23-35; Gray Portland Cement and Clinker from Mexico: Decision of the Panel concerning the September 15, 2003 Final Results of Redetermination of the Department of Commerce (Seventh Review Remand Affirmed), USA-MEX-99-1904-03 (NAFTA Apr. 11, 2003), at 10-14 (citing the Final Results of Redetermination Pursuant to NAFTA Panel (Seventh Review Remand Determination) (Sept. 27, 2002), at 3-21) (collectively, Seventh Review Remand Determination). The period of review was August 1, 1996, through July 31, 1997.

facts of the 1995/1996 review, and address each of the specific questions the Panel presented in its recent Opinion.

After thoroughly explaining our reconsideration of the facts in the 1995/1996 review record within the context of the interrelationship of factors presented in the Seventh Review Remand Determination and answering the Panel's relevant questions, we again conclude that CEMEX's sales of Type V cement produced at the Hermosillo plants and sold as Type V and Type II cement were outside the ordinary course of trade during the 1995/1996 review period. In fact, the particular sales in question for this case are unique and very different from the normal sales of CEMEX in the home market during the 1995/1996 review. Substantial evidence supports our conclusion that CEMEX's Type II and Type V sales produced at the Hermosillo plants are outside the ordinary course of trade, in accordance with law and based on the totality of factual circumstances.

A. Legal Standard of the Ordinary-Course-of-Trade Determination

The statute provides that, in order to determine an accurate dumping margin, the Department must identify the universe of home-market sales it will use to calculate normal value. Normal value is defined as the price "at which the foreign like product is first sold for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade...."³ "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

³ 19 U.S.C. § 1677b(a)(1)(B).

trade under consideration with respect to merchandise of the same class or kind.”⁴

When determining whether particular sales are outside the ordinary course of trade, the decision must be based upon “an individual basis taking into account all of the relevant facts of each case.”⁵ 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.”⁶ Courts have affirmed, consistent with this Panel’s findings, that the ordinary-course-of-trade analysis is a broad approach in which the “totality of circumstances” must be considered. It is insufficient to evaluate just “one factor taken in isolation but rather ... all the circumstances particular to the sales in question”⁷ must be considered. The nature of the determination is ad hoc and depends upon the record of the case. Accordingly, great deference has been accorded to the Department regarding this finding.⁸

With this proper statutory mandate in mind, this Panel made three very important

⁴ 19 U.S.C. § 1677(15); Statement of Administrative Action (SAA) accompanying the URAA, H.R. Doc. 103-316, at 830 & 834 (1994) reprinted in 1994 U.S.C.C.A.N. 4171.

⁵ Nachi-Fujikoshi Corp. v. United States, 798 F. Supp. 716, 719 (the Court of International Trade (CIT) 1992)); Mantex, Inc. v. United States, 841 F. Supp. 1290, 1306 (CIT 1993).

⁶ CEMEX S.A. v. United States, 133 F.3d 897, 900 (CAFC 1998) (quoting Monsanto Co. v. United States, 698 F. Supp. 275, 278 (CIT 1988)).

⁷ CEMEX, 133 F.3d at 900 (quoting Murata Mfg. v. United States, 820 F. Supp. 603, 607 (CIT 1993)(consider all factors, not just price and quantity because no factor alone is dispositive)).

⁸ See, e.g., Koenig & Bauer-Albert AG v. United States, 259 F.3d 1341, 1345 (CAFC 2001) (the Department has the discretion to determine which sales are outside the ordinary course of trade).

affirmations of law and fact in its latest opinion regarding the Department’s determinations that are fundamental to a proper ordinary-course-of-trade determination. First and foremost, the Panel “accepts the Department’s statement that the methodology itself – an examination of the totality of facts on the record – has not changed.”⁹ Thus, the legal analysis is precisely the same in both the Remand I and the Seventh Review Remand Determination as they are both based on the “totality of facts.” After upholding the law, the Panel turned to the facts of the case.

Second, the Panel affirmed that the Department’s approach correctly considered all the facts involved and not only the factors considered in the Seventh Review Remand Determination.¹⁰ Throughout the redetermination, therefore, we continue to consider all the factual circumstances of the 1995/1996 review record, including those that were not considered in the Seventh Review Remand Determination. Third, the Panel recognized “that there are differences between the Type V/V and Type V/II product considered in this review and Type V/I product analyzed in the Seventh Review.”¹¹ We discuss the unique characteristics of CEMEX’s sales of Type V cement sold as Type II and Type V in the 1995/1996 review relative to the common characteristics of CEMEX’s sales of Type I cement (and Type V sold as Type I in the 1996/1997 review) again in this remand determination but in the context of the Panel’s specific questions.

We refer to these three findings, which affirm our legal and the general factual approach,

⁹ Remand Order II, at 9.

¹⁰ Remand Order II, at 8.

¹¹ Remand Order II, at 11.

throughout this remand determination to demonstrate that our ordinary-course-of-trade determinations are not only in accordance with law but are also supported with substantial evidence on the record of the 1995/1996 review. The totality of facts and circumstances of these certain sales arrive at the same result, whether examined and explained as we did in the final results of review and our first remand determination or whether the facts are explained adequately in accordance with the positions in the Seventh Review Remand Determination. We find that substantial record evidence in the 1995/1996 review supports our determination that CEMEX's sales of Type V cement sold as Type V and Type II cement are outside the ordinary course of trade in accordance with law.

B. The “Further Development” in the Seventh Review Remand Determination

The Panel remanded the ordinary-course-of-trade determinations with the explicit instructions to “discuss, apply, or differentiate {the further} development.”¹² The Panel explained that the “further development” to which it referred is “the understanding of the relationship of the factors involved” or the economic interrelationship of factors in the Seventh Review Remand Determination.¹³

We have a much different understanding of what the “further development” was in the Seventh Review Remand Determination. We agreed in our first remand decision that a “further development” had occurred in the 1996/1997 review; it was the first opportunity we had to

¹² Remand Order II, at 9.

¹³ Id.

examine CEMEX's sales of Type V cement sold as Type I.¹⁴ As we see it, the "further development" of the Seventh Review Remand Determination was that, for the first time, we explained the facts and factors in support of a finding that CEMEX's Type V cement sold as Type I were **within** the ordinary course of trade. The analysis supporting a finding that these sales were within the ordinary course of trade emphasized the **similarities** of the facts and circumstances of the sales.

Consistent with the Panel's findings, we maintain that the legal methodology of examining the "totality of facts" in the Seventh Review Remand Determination was the same as we had conducted previously when determining whether sales were within the ordinary course of trade. In particular, we began our analysis by reconsidering and discussing the particular facts underlying each factor. After we found that several facts supporting the traditional factors were similar to CEMEX's normal home-market Type I sales, we then considered those similar facts in a broader examination of the economic effects or interrelationship of factors. Regardless of the analytical framework of facts, the substantial evidence on the record for the Seventh Review Remand Determination indicated that CEMEX's sales of Type V as Type I cement were similar with the normal sales practices in the home market.

Notwithstanding the disparity between the Panel's and our understanding and definition of the "further development," in this redetermination we focus our discussion on and reconsideration of the economic interrelatedness of the factors consistent with the Panel's Opinion while applying the proper legal standard in the 1995/1996 review just as the Panel

¹⁴ Remand I, at 22.

affirmed.

C. The Impact of the “Further Development” or Interaction of Factors on the 1995/1996 Review Ordinary-Course-of-Trade Determinations

The Panel instructed the Department to adequately explain the “impact of the positions taken in the Seventh Review Remand Determination on the interaction of the factors considered in the Sixth Review.”¹⁵ We find that there are two general effects of the positions we took in the Seventh Review Remand Determination on the interaction of the factors we considered in the 1995/1996 review. One impact is that the positions highlight that the facts have a fundamental importance on the ordinary-course-of-trade determination. Another impact is that the positions provide a novel way of explaining or organizing the facts that either support or disprove that the sales in question are within the ordinary course of trade. Both impacts are discussed below, but we address the effect of each position specifically in the next section of the redetermination.¹⁶

First, the Seventh Review Remand Determination positions highlight the importance of the facts of each review. Just as the Panel recognized in its latest opinion, we maintain that “there are differences between the Type V/V and Type V/II product considered in this review and Type V/I product analyzed in the Seventh Review.”¹⁷

In the Seventh Review Remand Determination, when CEMEX’s ordinary sales of Type I cement were compared with its sales of Type V cement sold as Type I cement, it is not surprising

¹⁵ Remand Order II, at 8-9.

¹⁶ See section C (“Understanding of the Relationship of Factors” as “Further Development” is discussed, differentiated, and applied to the Remand I), *infra* at 12-38 or 53.

¹⁷ Remand Order II, at 11.

that these sales had many similar characteristics. Normally, CEMEX sells Type I cement in Mexico. CEMEX ordinarily sells Type I cement to Type I customers. The vast majority of CEMEX's sales of cement in the home market is of Type I cement, both in terms of number of customers and volume of cement sold.¹⁸ CEMEX sells Type I cement commonly to all types of customers that range from large to small customers.¹⁹ Typically CEMEX transports Type I cement to its customers no more than 150 miles away or less due to the extraordinary cost of transporting the heavy cement product.

Similarly, in the Seventh Review Remand Determination, we found that the facts surrounding Type V cement sold as Type I demonstrated many of the same characteristics as the ordinary Type I sales.²⁰ We re-examined all the facts on the record within the traditional factors that the Panel remanded for reconsideration for the Type V sales sold as Type I cement and found many facts comparable to CEMEX's normal Type I sales.²¹ After finding similarities regarding certain traditional factors, we considered the factors in a broader economic context or in terms of the interrelation of factors.²² The totality of the facts, even in a broader economic context,

¹⁸ Seventh Review Remand Determination, at 4-6.

¹⁹ Id.

²⁰ Seventh Review Remand Determination, at 3-17.

²¹ Seventh Review Remand Determination, at 3-6 (reconsidering the facts supporting (1) sales volume, (2) number and type of customer, (3) profitability, (4) freight costs, and (5) handling charges).

²² Id., at 3-6 & 10-17.

indicated numerous similarities between both kinds of sales.²³ Therefore, we concluded that CEMEX's sales of Type V as Type I cement in the 1996/1997 period of review were within the ordinary course of trade in the Seventh Review Remand Determination.

Therefore, the impact of this "further development" is primarily relevant to the products with greater similarities, such as sales of Type V sold as Type I cement and sales of Type I cement. Nevertheless, the "further development" does highlight the fundamental importance of recognizing the numerous factual differences between Type V/I and Type V/V and V/II.²⁴

Second, the impact of the positions we took in the Seventh Review Remand Determination, termed the "interrelatedness of factors," presents a new way of explaining the facts on the record. The positions offer a different organization of facts using basic economic rationale to explain the interrelationship between the factors that describe the conditions and circumstances of certain sales. This basic economic rationale does not change the subsequent ordinary-course-of-trade determinations but provides another way of looking at the facts and understanding how the facts relate. The interrelatedness of factors does not erase the facts on the record that demonstrate the distinguishing characteristics of certain sales from that which is normal in the home market.

The interaction of factors is a particular way of presenting the facts on the record in a broader context. The "further understanding of factors" or "economic interaction" of these factors is simply the organization or grouping of certain facts that exist on the record. Of course,

²³ Id.

²⁴ Remand I, at 24-29.

economics plays an important role when examining the sale of goods in a market. Indeed, a relationship is expected between facts, and consequently factors, that explain the conditions of certain sales. Perhaps in some way all the facts on the record are interrelated through economic rationale. Such a relationship does not mean, however, that certain facts may be ignored or deleted from consideration of the record. Nor do such interrelations between factors cause facts to vanish from the record.

As the Panel affirmed, all the facts on the record must be examined independently and then in terms of the totality of the circumstances.²⁵ Only with this consideration of all the facts on the record can the conditions and practices of home-market sales truly be examined and understood to determine whether they are within the ordinary course of trade, in accordance with law and otherwise supported by substantial evidence.

C. “Understanding of the Relationship of Factors” as “Further Development” is discussed, differentiated, and applied to the 1995/1996 Review Record Facts

1. Factual Circumstances of the 1995/1996 Review

In the 1995/1996 review, CEMEX reported home-market sales of Type I, Type II, Type V, and pozzolanic cement and originally reported producing Type I, Type II, and Type V cement.²⁶ We learned during this review, however, that CEMEX only produced Type V cement

²⁵ Remand Order II, at 9.

²⁶ See CEMEX’s section A questionnaire response, dated October 24, 1996, at 31-32. At the Department’s request, CEMEX submitted a chart identifying the types of cement produced at each plant during the period of review. The chart indicated that CEMEX produced Type I cement at [XX] plants and Type II cement at [X] plants. Specifically, the chart indicated that [XXXXXXXXXXXXXXXX] and made no mention of producing Type V, which was inconsistent with its original response. See CEMEX supplemental section A response, dated Jan. 29, 1997, at

at its Hermosillo plants.²⁷ For the first time at verification, which we use to spot-check the accuracy of submitted information, we discovered that two of CEMEX's factories were in a class all to themselves when it came to their selling practices for Type V cement.²⁸

Normally, CEMEX sold cement on the same basis as it produced it. Normally, when CEMEX sold low-grade cement, it did not ship high-grade cement. But at two of its factories, the normal rules did not apply during the 1995/1996 review period. The two Hermosillo plants (Yaqui and Campana) were the only facilities where CEMEX regularly produced high-grade cement (Type V) and sold it as lower grades (Type II and Type I). Indeed, in the 1995/1996 review period, CEMEX only produced Type V cement at the Hermosillo plants and sold it as Type I, II, and V cements.²⁹ We find that several conditions and practices surrounding these certain CEMEX home-market cement sales are very unusual and many facts set the normal home-market cement sales apart from the Hermosillo plants' cement sales of CEMEX's Type V

SA-7. Sixth Review Final Results, 63 FR at 12767.

²⁷ Report of Home-Market Sales and Ordinary Course of Trade Verification of CEMEX, dated July 21, 1997, at 16-17 & Ex. 33-34 (Verification Report); Sixth Review Preliminary Results, 62 FR at 47628.

²⁸ At verification in June 1997, the Department discovered that, contrary to its submitted information on the record, CEMEX produced only Type V cement at the Yaqui and Campana plants. See Verification Report, at 16-17. CEMEX indicated that Type V is sold as Type I, II, and V. CEMEX also indicated that the reported weighted-average variable cost information is not based on cost differences attributable to physical differences but based upon allocation of sales invoiced as Type I, II, and V cement from the two plants. CEMEX explained that it did not provide the information requested because "it was changing its interpretation of information on the record." Id. at 15-17.

²⁹ Id.; Sixth Review Preliminary Results, 62 FR at 47628; Sixth Review Final Results, 63 FR at 12770-72.

cement to Type II and Type V cement customers.³⁰

In two administrative reviews of earlier periods, we learned that CEMEX made significant changes with respect to distribution, production, and sale of cement in the home market after the imposition of the antidumping duty order.³¹ For example, CEMEX ceased exporting Type I cement but continued exporting Type II and Type V cement to the United States after issuance of the order.³² CEMEX did continue to sell Type I cement, however, to home-market customers from numerous plants that were geographically dispersed throughout Mexico. CEMEX also consolidated its production of Type II and Type V cement at the Hermosillo plants, far from the major centers of Mexican cement demand in Mexico City and Guadalajara, and it discontinued production of these types of cement at other plants after issuance of the order.³³

This consolidation of Type II and Type V production was contrary to CEMEX's normal practice

³⁰ In the 1995/1996 review, the ordinary-course-of-trade issue began by focusing on Type II cement (due to the findings in the 1994/1995 review), but we discovered at verification that CEMEX only produced Type V cement at the Hermosillo plants for these sales. See supplemental questionnaire, dated December 24, 1996, at 7; supplemental questionnaire, dated March 10, 1997, at 3; Verification Report, at 16-17.

³¹ Second Review Final Results, 58 FR 47254-55 (1993) (Type II and Type V cement sales were excluded from the calculation of foreign market value (now "normal value") after being found to be outside the ordinary course of trade); Fifth Review Final Results, 62 FR 24414-24416 (May 5, 1997) (Type II cement sales were excluded from the normal value because they were found to be outside the ordinary course of trade).

³² Verification Report, Exhibit 32 at 23; Second Review Final Results, 58 FR 47254-55; Second Review Verification Report, dated July 20, 1993, at 16-17.

³³ See CEMEX's case brief in the 1994/1995 review, dated November 4, 1996, at 26-27, reprinted in CEMEX's response to March 10, 1997, supplemental questionnaire, dated April 7, 1997, at Exhibit 3.

with respect to sales of cement. Cement is generally sold within an area relatively close to the production plant because transportation costs greatly limit the distance cement can be shipped profitably.

In addition, CEMEX sold substantial quantities of Type II cement as general-purpose cement in Mexico as it did Type I cement before the order. After the order went into effect, however, CEMEX's volume of sales of Type II cement and number of customers for that product decreased significantly as CEMEX restricted sales of Type II to customers which demonstrated a need for the specific properties of Type II.³⁴ In the 1995/1996 review, CEMEX provided a higher-quality cement (e.g., Type V cement) to certain customers who typically used Type I or Type II but CEMEX did not pass along the higher prices or costs to such customers.³⁵ These sales established a "promotion quality" by offering certain customers a special, higher-quality product above their need or demand and also fostered a better and more marketable reputation for CEMEX's cement. In other words, there were reasons other than short-term profit for these unusual sales.³⁶ These changes created a highly restrictive "niche market" for sales of speciality, promotional-quality cements produced at the Hermosillo plants.

All of these conditions and practices together, along with the economic interrelations of factors discussed below that are supported by substantial record evidence, indicate that the

³⁴ Id.; Verification Report, at 17; see also Second Review Final Results, 58 FR 47254-55.

³⁵ CEMEX's sections A, B, C, & E supplemental questionnaire response, dated January 30, 1997, at Exhibit SA-3.

³⁶ Id.

totality of facts prove that the sales of Type V cement sold as Type V and Type II were very unusual in comparison with CEMEX's other home-market sales in the 1995/1996 review.

**2. “Understanding of the Relationship of the Factors Involved”,
Economic Principles, and Interaction of the Factors**

a. Profits Incorporate Freight Costs

The Panel stated correctly that in the Seventh Review Remand Determination the Department found that “the comparable profits of Type I/I and Type V/I incorporated any differences in freight and handling costs.”³⁷ We considered the allegedly “merged” factors, however, only after first considering the facts that supported each of the factors separately. Because we found that both the profit factor and the freight and handling expenses for Type V/I sales were similar to Type I sales with little distinguishing differences, we considered the broader interrelatedness of factors based on basic economic principles.³⁸

For example, in the Seventh Review Remand Determination, we first found that the profits were “comparable” for the Type V cement sold as Type I and the ordinary Type I sales.³⁹ In contrast, we find that substantial record evidence in the 1995/1996 review indicates that CEMEX's profits on Type V/II and Type V/V sales are lower relative to the profits on all other cement sales.⁴⁰

³⁷ Remand Order II, at 9; Seventh Review Remand Determination, at 5.

³⁸ Seventh Review Remand Determination, at 5 & 15-16.

³⁹ Seventh Review Remand Determination, at 5.

⁴⁰ See CEMEX's section B questionnaire response, dated November 22, 1996, with accompanying section B computer data information; CEMEX's January 29, 1997, supplemental

The evidence in the 1995/1996 review indicates that the weighted-average profit for Type V/II cement home-market sales was [* * *] percent while the weighted-average profit on sales of Type I during the period of review was [* * *] percent or [* * *] percentage points higher. Type V/V cement profits are also lower than Type I cement sales, though the disparity is not as great.⁴¹ Specifically, CEMEX's profit rate on sales of Type V cement is [* * *] percent or [* * *] percent lower.⁴² **Therefore, we again find that profits for the Type V/II and Type V/V sales are lower than the normal Type I sales.** Consistent with the record evidence, we conclude again that the profit differential between sales of Type I cement and Type II cement was significant and thus indicates that sales of Type II cement were outside the ordinary course of trade.

Second, in the Seventh Review Remand Determination, we found that the freight expenses, handling charges, and rebates incurred were "not so great" or different from Type I cement sales, which rendered this factor insufficient as a basis for finding such sales outside the ordinary course of trade.⁴³ In contrast, however, the 1995/1996 review record contains

questionnaire response, with accompanying revised section B computer data information; CEMEX's January 30, 1997, supplemental questionnaire response; CEMEX's April 8, 1997, supplemental questionnaire response, with accompanying revised computer data information; CEMEX's May 2, 1997, supplemental questionnaire response; CEMEX's June 30, 1997, revised section B computer data information; CEMEX's section D questionnaire response dated February 13, 1997, with accompanying section D computer data information; Sixth Review Ordinary Course of Trade Memorandum, dated March 9, 1998, at 5 & 7.

⁴¹ Id.

⁴² Id.

⁴³ Seventh Review Remand Determination, at 16.

discernibly different evidence about freight costs for Type II and Type V sales.⁴⁴

The facts in this review indicate that the freight costs for Type V/V and V/II cement sales are significantly greater than the freight costs for Type I cement sales. Specifically, the weighted-average freight cost for Type II cement was [* * *] pesos per metric ton and for Type V cement the freight costs were [* * *] pesos per metric ton whereas the weighted-average freight cost for Type I cement was [* * *] pesos per metric ton.⁴⁵ **Even more unusual, CEMEX was absorbing, at least to some extent, these abnormal and significantly greater freight costs incurred on Type II and Type V sales.**⁴⁶ Accordingly, the distinguishable facts supporting both the profit and the freight costs factors alone are sufficiently different from our findings in the Seventh Review Remand Determination.

Only after finding rather small differences between the Type V/I and Type I/I freight and handling costs in the Seventh Review Remand Determination did we consider these charges in

⁴⁴ See CEMEX's case brief in the 1995/1996 Review, dated November 4, 1996, at 26-27, reprinted in CEMEX's response to March 10, 1997, supplemental questionnaire, dated April 7, 1997, at 18 & Ex. 3.

⁴⁵ See CEMEX's section B questionnaire response, dated November 22, 1996, with accompanying section B computer data information; CEMEX's January 29, 1997, supplemental questionnaire, with accompanying revised section B computer data information; CEMEX's section D questionnaire response dated February 13, 1997, with accompanying section D computer data information; Verification Report, at 9-10.

⁴⁶ Sixth Review Ordinary Course of Trade Memorandum, at 4-5, 7; CEMEX questionnaire responses provided the data indicating the disparity in freight costs between Type I and Type V sales. See CEMEX's section B questionnaire response, dated November 22, 1996, with accompanying section B computer data information; CEMEX's January 29, 1997, supplemental questionnaire at pages 36 through 46, with accompanying revised section B computer data information.

terms of profitability and found that the net differences in the costs are reflected in the profit.⁴⁷ In this review, both Type V and Type II sales have significantly greater freight costs than Type I cement sales. Thus, even though Type V sales have profits somewhat similar to those of Type I sales, the extraordinary difference in freight costs distinguish the factual analysis from the Seventh Review Remand Determination position. Indeed, as we discuss further below, the substantial differences between Type V and Type I sales do not stop at freight-cost differences.

We agree that basic economic principles explain that profits are generally defined as the difference between revenues and costs.⁴⁸ Although basic economics explains that freight and handling costs are included in profit, such interrelatedness of factors does not erase or vanish from the record distinguishing freight costs simply because profits generally incorporate costs. Rather a great difference in freight costs, especially to the extent that CEMEX absorbs the substantial costs, indicates a particularly unusual condition or practice of a sale.

One example of the difficulty of applying economic theory in practice is the sales of Type V as Type V in the 1995/1996 review. CEMEX's Type V sales exhibited the existence of greater shipping distances that influenced greater freight costs but yet result in comparable profits. In fact, the Panel requested the Department to rationalize the existence of greater shipping distances that cause higher freight costs but yet result in comparable profits. In other words, how is this indicative of sales that cannot be representative of "normal" home-market sales?⁴⁹ We find that,

⁴⁷ Seventh Review Remand Determination, at 5, 16.

⁴⁸ Joseph E. Stiglitz, Principles of MicroEconomics (1993), at 311.

⁴⁹ Remand Order II, at 10.

because many different economic variables affect profits, the similarity of profits can be the result of multiple economic factors. In addition, the existence of factors that affect or have correlation with another factor (e.g., freight costs, longer shipping distances incorporated in profits) does not necessarily mean that such factors relate directly to profit levels.⁵⁰

Thus, while profits equal total revenue minus total costs, simple and direct correlations between individual costs and overall profitability may prove elusive. For example, total costs do not include only freight costs. Total costs include both fixed costs and variable costs as well as labor, materials, and capital goods. Any one cost or several costs could change and affect the profits of the particular sales.⁵¹ In this case, CEMEX aggregates all variable and fixed costs on a plant basis per ton of cement produced. Thus, where CEMEX only produced Type V cement at the Hermosillo plants, we are unable to distinguish the costs on a products-sold basis.⁵²

Likewise, total revenue is the total amount of money that flows into a firm. Revenue can be from any source including product sales, government subsidies, venture capital, personal funds, and numerous other variables that can be adjusted by CEMEX in its financial statements and corporate accounting system.⁵³ For example, in this case, if CEMEX was able to charge a

⁵⁰ Stiglitz, “The Science of Economics,” in Principles of MicroEconomics (1993), at 20-21. (What interests economists is the connection or systemic relationships between variables. The relationship is called correlation. The distinction between correlation and causation is an important one. If one variable “causes” the other, then changing one variable necessarily will change the second. If the relationship is just a correlation, this may not be true.) Id. at 21.

⁵¹ Stiglitz, Principles of MicroEconomics, at 311, 315-340.

⁵² Response to questionnaire sections B, C, & D (November 22, 1996), at C-25-27.

⁵³ Stiglitz, Principles of MicroEconomics, at 342-43.

premium price for its highest-quality Type V cement product, revenue would increase to nullify the higher freight costs for these sales. As the much higher costs are offset, then the resulting profits for Type V would appear comparable as they did for the sales of lower-priced, lower-distance/freight-cost Type I sales in the 1995/1996 review. This may, be due to factors, however, other than simply passing on exceptionally high freight costs. Complete and unquestioning reliance on this economic equation to explain the market dynamics of CEMEX's sales of Type V as Type V or Type II cement also presumes that CEMEX competes in a competitive market and strives for profit maximization with its cement sales (see promotional-quality discussion that questions this).

In short, CEMEX's profitability for Type V and Type II alike can vary due to a number of factors including a variety of expenses, prices, and the timing of the sales in the period of review.⁵⁴ Accordingly, whether supported by record evidence or presumed by blind reliance on simple correlations, comparable profits do not equate automatically to economically viable freight expenses in both instances, much less similar selling conditions for cement sales. Indeed, the record evidence in the 1995/1996 review proves this.

⁵⁴ CEMEX's section B questionnaire response, dated November 22, 1996, with accompanying section B computer data information; CEMEX's January 29, 1997, supplemental questionnaire response, with accompanying revised section B computer data information; CEMEX's January 30, 1997, supplemental questionnaire response; CEMEX's April 8, 1997, supplemental questionnaire response with accompanying revised computer data information; CEMEX's May 2, 1997, supplemental questionnaire response; CEMEX's June 30, 1997, revised section B computer data information; CEMEX's section D questionnaire response dated February 13, 1997, with accompanying section D computer data information; Sixth Review Ordinary Course of Trade Memorandum, dated March 9, 1998, at 5 & 7.

b. Economic Effect of the Greater Shipping Distances in the 1995/1996 Review

The Panel instructed the Department to analyze the economic rationale for or the effect of the greater shipping distances found in the 1995/1996 review.⁵⁵ The extraordinary distances CEMEX shipped Type V sold as Type V and Type II cement affect or demonstrate the abnormal shipping arrangements of these sales compared to its normal Type I cement sales.

Shipping distances is a condition of sale that the courts have determined is essential to examine in an ordinary-course-of-trade determination, especially for cement sales.⁵⁶ Shipping distances is a variable in a company's expenses, especially when transporting a heavy product such as cement. Variable costs or direct costs, such as shipping distances, are expenses that change in direct proportion to the activity of a business, such as the number of transactions, locations of the customers, and sales terms. If the distance is greater, however, then the expense for shipment increases exponentially.

In the instant case, the facts on the record indicate that sales of Type II and Type V cement were shipped significantly greater distances than the majority of normal cement sales in Mexico during the 1995/1996 review period.⁵⁷ CEMEX's shipments of Type II and Type V

⁵⁵ Remand Order II, at 10.

⁵⁶ CEMEX, 133 F.3d at 901 (finding that "this departure from the norm could well give rise to Commerce's determination that the sales of Type II and Type V cements were outside {the ordinary course of trade}").

⁵⁷ See Verification Report, Exhibit 32, at 15 & 17; CEMEX's April 7, 1997, response, Exhibit 1, Tab 4, Chart 7 & Tab 7, at 1 and 8 (stating that the home-market base for Type II and Type V is the Mexico City area, yet the Hermosillo plants consolidate the production 1220 miles from Mexico City). CEMEX's Comments, at 8; see Sixth Review Final Results, 63 FR at 12771.

cement produced at the Hermosillo plants were uncharacteristically transported substantially greater distances. Contrary to normal practices of shipping cement short distance and passing the freight costs on to its customers, CEMEX not only shipped Type II and V cement vast distances but also absorbed these exorbitant freight costs.⁵⁸

CEMEX's shipping arrangements in the 1995/1996 period depart significantly from the standard industry practice in Mexico. CEMEX's sales of Type I cement conformed with the normal practice of shipping cement, a heavy material, over relatively short distances. Indeed, over 95 percent of all cement shipped in Mexico covered less than 150 miles. In contrast, CEMEX shipped Type V sold as Type V and Type II cement substantially greater distances (e.g., [* * *]miles).⁵⁹

Although longer shipment distances may not be sufficient unusual circumstances alone, taken together with the company's decision to absorb freight costs for Type II and V cement, it is apparent that a very unusual practice developed. Before the implementation of the order, CEMEX's normal business practice was to pass along the cost of freight to purchasers of its Type II and V cement. This unusual circumstance of absorbing freight costs for select Type II and V

⁵⁸ Before the antidumping duty order went into effect, CEMEX transferred the cost of shipping distances to its customers. After the order was imposed, however, CEMEX began to ship the higher-quality cement a much longer distance and absorb those costs in its profits. See CEMEX's November 4, 1996, case brief in the 1994/1995 review at 26-27, reprinted in CEMEX's April 7, 1997, response to the Department's March 10, 1997, supplemental questionnaire at Exhibit 3.

⁵⁹ See Verification Report Exhibit 32, at 15 & 17; CEMEX's April 7, 1997, response, Exhibit 1, Tab 4, Chart 7 & Tab 7, at 1 and 8 (stating that the home-market customer base for Type II and V is in Mexico City area yet the Hemosillo plants that consolidate the production are 1220 miles from Mexico City).

cement began to occur after the issuance of the order.⁶⁰ Given that freight costs were significantly higher for Types II and V cement relative to Type I, these abnormal shipping arrangements “could well give rise to Commerce’s determination that the sales of Type II and V cements were outside the {ordinary course of trade}.”⁶¹

c. Number of Customers (not Type) is Related to and Thus Merged with Volume of Sales

The Panel stated that another area in which “economic principles” led to the combining of factors is the Department’s discussion of the concept that “smaller volume naturally implied a smaller number of customers.”⁶² Accordingly, the Panel requested an explanation from the Department regarding why this analysis in the 1995/1996 review should differ from the Seventh Review Remand Determination characterization.⁶³

We find that the 1995/1996 review analysis differs from the Seventh Review Remand Determination because of a plethora of significantly different facts that may be organized into three important reasons. First, despite the uncharacteristically small volume and limited number of customers, most importantly there were no “considerable differences” in the customers CEMEX sold its Type V as Type I cement and its normal Type I cement in the Seventh Review

⁶⁰ Id.; see also CEMEX’s November 4, 1996, case brief in the 1994/1995 Review at 26-27, reprinted in CEMEX’s April 7, 1997, response to the Department’s March 10, 1997, supplemental questionnaire at Exhibit 3.

⁶¹ CEMEX, 133 F.3d at 901

⁶² Remand Order II, at 10.

⁶³ Id.

Remand Determination.⁶⁴ This fact is very different in the 1995/1996 review, which in turn changes the analysis substantially because the characteristics of CEMEX's customers buying Type V cement sold as Type II and Type V are very different in the 1995/1996 review than its customers buying Type I. Second, all these facts concerning the customers and characteristics of the sales in question work together to explain the uniquely situated Type V and Type II sales. No one factor is dispositive alone. Third, as mentioned before, in the Seventh Review Remand Determination, the Department found that the sales were *within* the ordinary course of trade. The alleged "collapsing" or merging of factors only occurred when the similarities outweighed the differences, which is clearly not supported by the record evidence in this 1995/1996 review.

In the Seventh Review Remand Determination, we allegedly "merged" these factors only after considering each fact independently for each relevant factor. For instance, first we considered the number of customers in the 1996/1997 period of review and found that there were only a "limited number of customers for sales at issue."⁶⁵ Regarding the number and types of customers, we found that the evidence did not demonstrate "considerable differences" in customers between CEMEX's sales of Type V/I and Type I sales.⁶⁶ Because the types of customers were essentially the same, we found that this factor, *i.e.*, the number and type of customers, did not indicate any meaningful departure from the usual conditions and practices of

⁶⁴ Seventh Review Remand Determination, at 7.

⁶⁵ Seventh Review Remand Determination, at 4-5.

⁶⁶ Seventh Review Remand Determination, at 4.

CEMEX's home-market sales of Type I cement.⁶⁷ Later in the redetermination, we determined that different quantities of sales volume existed.⁶⁸ Indeed, we found that “the only significant difference in the circumstances surrounding the sales of Type V cement sold as Type I cement and sales of Type I cement is that CEMEX sold substantially less Type V cement sold as Type I than it sold Type I as Type I.”⁶⁹ But this difference was not a sufficient basis to conclude that Type V sold as Type I was outside the ordinary course of trade.⁷⁰

We acknowledge that, generally, as we discussed in the Seventh Review Remand Determination, there is a relation or expectation that, when fewer sales exist, it is likely that there are few customers. More importantly, however, our analysis for the Seventh Review Remand Determination turned on the fact that we found CEMEX sold both types of cement (Type V/I and Type I) to the same types of customers.⁷¹ The fact that CEMEX sold Type V cement as Type I cement to fewer customers than Type I is “unremarkable” largely because the evidence did not demonstrate how “the types of customers {were} different” and because CEMEX sold substantially less Type V cement sold as Type I cement than it did Type I cement.⁷² That is, all the facts work together to demonstrate properly the circumstances of the sales in question.

⁶⁷ Seventh Review Remand Determination, at 5.

⁶⁸ Seventh Review Remand Determination, at 6.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Seventh Review Remand Determination, at 14.

We maintained in the Seventh Review Remand Determination the relevance of the number of the buyers and the sales volume in the home market as indicative of whether sales are outside the ordinary course of trade. To the extent that the number of buyers is a relevant factor, the Seventh Review Remand Determination only reinforces that no single factor is dispositive in an ordinary-course-of-trade analysis. Absent other evidence, a limited number of customers does not serve as the sole basis to exclude sales from the calculation of the normal value. Indeed, numerous cases have affirmed the Department's longstanding practice of examining sales volume and number of customers along with many other facts when conducting its ordinary-course-of-trade inquiry.⁷³

We reconsidered the facts in the 1995/1996 review in the same "merged" analysis that we considered in the Seventh Review Remand Determination and found that the number of customers and sales volume again demonstrate that Type V sold as Type V and II cement are easily distinguishable from CEMEX's normal sales of Type I cement. First, CEMEX sold Type V as Type V and Type II cement to a substantially smaller number of select customers in certain areas of Mexico than it sold Type I cement. Specifically, in the 1995/1996 review, CEMEX sold Type V cement to approximately [* * *] customers and sold Type II cement to approximately [* * *] customers. In contrast, CEMEX sold Type I cement to over [* * *] customers.⁷⁴ Second,

⁷³ See, e.g., CEMEX, 133 F.3d at 901 (CAFC 1998); Laclede Steel Co. v. United States, 18 C.I.T. 965 (1994); Mantex, 841 F. Supp. 1290, 1295, 1307-08 (CIT 1993); Thai Pineapple Public, 949 F. Supp. 11, 16 (CIT 1996); Murata, 820 F. Supp. at 607.

⁷⁴ CEMEX's supplemental questionnaire response, dated January 29, 1997, at Exhibit SA-3; Sixth Review Ordinary Course of Trade Memorandum, at 4-5, 7-8; Verification Report, at 16-17.

the volume of Type V sold as Type V and Type II cement in the home market is extremely small compared to sales of other cement types in the 1995/1996 review.⁷⁵ The record supports our determination very clearly that sales volume of Types II and V is minuscule relative to the ordinary course of trade of Type I. In particular, CEMEX sold [* * *] metric tons of Type I cement in the home market but only sold [* * *] metric tons of Type V cement sold as Type II cement, or less than [* * *] percent of all Type I, and [* * *] metric tons of Type V cement sold as Type V cement, or less than [* * *] percent of all Type I.⁷⁶

We recognize that it is not unexpected that, when fewer sales exist, there are also fewer customers. Unlike our findings in the Seventh Review Remand Determination, however, we find substantial record evidence indicating additional differences that amplify and make remarkable the substantially fewer number of customers and extremely small sales volume of Type V and Type II cement in the 1995/1996 review.

In addition to the number of customers, the type of customers that purchase Type V cement sold as Type V and Type II cement from CEMEX is substantially different from the types of customers which purchase other cement types. For example, CEMEX sold Type V as Type II cement to approximately [* * *] customers, and four of these customers bought approximately [* * *] percent of the Type II cement sold in the 1995/1996 review period. Moreover, these

⁷⁵ See Sixth Review Final Results, 63 FR at 12771; Sixth Review Ordinary Course of Trade Memorandum, at 8-9. See also CEMEX April 7, 1997, response, Exhibit 1, at 8, and Tab 5, at 8 (demand for II is small and volume of home-market sales is insignificant).

⁷⁶ CEMEX's supplemental questionnaire response, dated January 29, 1997, at Ex. SA-3; Sixth Review Ordinary Course of Trade Memorandum, at 4-5, 7-8; Verification Report, at 16-17.

customers tended to be large industrial contractors working on a small number of projects. For Type V cement sales, CEMEX sold Type V as Type V cement to approximately [* * *] customers, all of which were large industrial contractors. By comparison, CEMEX sold Type I cement during the 1995/1996 review to a large number of customers which ranged in size from individual customers buying one bag of cement to large contractors buying as much as [* * *] metric tons over the period of review.⁷⁷ Based upon the facts of the record, there is evidence that sales of Type II and V cement were sold to a select number of customers in certain areas of Mexico, whereas the bulk of cement sales, [* * *] percent, were sold to a wide variety of customers in various producing facilities.

Furthermore, we also found that CEMEX's production of Type I was [* * *] metric tons in the 1995/1996 review. In contrast, CEMEX only produced [* * *] metric tons of Type V sold as II and V.⁷⁸ CEMEX sold over [* * *] percent of Type I in the home market but only [* * *] percent of Type V and Type II in the home market.

Here, the 1995/1996 review record demonstrates many significant differences in the circumstances surrounding CEMEX's sales of Type V as Type II and Type V cement and its sales of Type I cement. These significant differences include the substantially smaller number of customers and small volume of customers that are made further remarkable due the substantially

⁷⁷ See Verification Report, at Exhibit 38, at 1896-97, 1898a - b & Exhibit 32, at 15; CEMEX supplemental questionnaire response, dated May 2, 1997, Ex. L; CEMEX supplemental questionnaire response, dated April 7, 1997, at Exhibit 1, at 8 n. 4, Tab 5 at 1 and 9 & Exhibit 2, App. 1, at 3.

⁷⁸ See CEMEX cost verification, dated July 21, 1997, at Exhibit 13 (CEMEX cost verification).

different type of customers, the drastically different production quantities, and the significantly divergent share of production that is sold in the home market.

d. Analysis of a “Niche” Market Requires Consideration of Differences Beyond the Number and Type of Customer

The Panel questioned why the “concept of ‘niche’ market should be considered an additional factor beyond the differences in the merchandise and the number and type of customers.”⁷⁹ The “niche” market concept incorporates much more than simply the differences in the merchandise and the number and type of customers. The niche-market factor represents more than the differences in merchandise and the number and type of customers based on ordinary definitions of the words and the factual circumstances surrounding the sales of Type V as Type V and Type II. Thus, the niche-market factor is also an important factor for the Department to consider in the ordinary-course-of-trade determination.

Definition of the words alone indicates that the niche-market factor also considers the specialty characteristics of both the product that is being supplied to the market, as well as the unique demand for the unique product. A “niche” market is commonly defined in business terms as any homogeneous market in which the members of the group have similar occupational, interests, or those characteristics being ones which would make them an excellent prospect to benefit from an entity’s services or consume an entity’s products. Furthermore, this term consists of two words with distinct meanings: niche and market. A “niche” is defined for commerce as

⁷⁹ Remand Order II, 10.

“a position from which an opening in a market etc. can be exploited.”⁸⁰ A “market” is a location where those willing to pay a price for something meet those willing to sell it and is governed by the theory of supply and demand.⁸¹

In addition, the action conducted in a niche market is niche marketing and is defined as the process of finding small but potentially profitable market segments and designing custom-made products or services for them. Niche marketers are often reliant on the loyalty business model to maintain a profitable volume of sales.⁸² Therefore, based on the ordinary definitions of the “niche” market, the concept represents the specialty good and the demand and supply side of a specialty market.

As we explained previously, CEMEX implemented numerous changes after the implementation of the antidumping duty order to create a highly restrictive “niche market” for sales of speciality, promotional-quality cements it produced at the Hermosillo plants. During the 1995/1996 review, CEMEX produced only Type V cement at the Hermosillo plants and sold the Type V cement as Type I, II, and V cement to certain customers. These sales were of a specialty product of highest quality, often above the customer’s specific need or demand. This uniquely marketed product also fostered a better and more marketable reputation for CEMEX’s cement

⁸⁰ New Shorter Oxford English Dictionary, at 1971 (definition of “niche”).

⁸¹ Stiglitz, Principles of Micro-Economics, at 13-18 (definition of “market”).

⁸² Definition of “Niche marketing” found at <http://www.answers.com/topic/niche-marketing>.

with its customers.⁸³ Accordingly, based on these and the following discussions, the concept of “niche” market should be considered an additional factor beyond the differences in the merchandise and the number and type of customers.

e. Facts Available are Warranted for Promotion-Quality Factor

The application of the facts available is warranted for the promotion-quality factor for many of the same reasons the Panel affirmed the application of adverse facts available for Type I cement sales in the 1995/1996 review.⁸⁴ We did not learn until verification that CEMEX produced only Type V cement at the Hermosillo plants. CEMEX also withheld until verification the fact that it sold Type V cement from the Hermosillo plants as Types I, II, and V. Therefore, the record did not contain specific, timely filed information regarding certain factors considered by the Department for Type V cement sold as various types of cement beyond the information CEMEX had submitted to the Department previously in other reviews. Accordingly, we resorted properly to using the only properly filed information we had available that was submitted by CEMEX in previous reviews. If we did not use the only available information as facts available, CEMEX would gain an unfair advantage or windfall by withholding necessary information for

⁸³ Verification Report, at 16-17; CEMEX case brief in the 1994/1995 review, dated November 4, 1996, at 26-27, reprinted in CEMEX’s response to March 10, 1997, supplemental questionnaire, dated April 7, 1997, at 18 & Exhibit 3.

⁸⁴ Section 19 U.S.C. § 1677e(a)(1) & (2) of the statute authorizes the Department to use facts available in reaching an applicable determination when necessary information is not available on the record, or an interested party (1) withholds information requested by the Department, (2) fails to provide such information in a timely manner, (3) significantly impedes the procedure, and (4) provides information that cannot be verified.

our ordinary-course-of-trade determinations.

As discussed previously, CEMEX provided its highest-quality cement (Type V cement) to certain customers who typically used Type I or Type II, but CEMEX did not pass along the higher prices or costs to such customers. These sales established a “promotion quality” by offering certain customers a special, higher-quality product above their need or demand and also fostered a better and more marketable reputation for CEMEX’s cement. In other words, there were other reasons than profit for these sales.⁸⁵

The 1995/1996 review record only contains timely filed information regarding the promotional quality of the sales in question from past reviews. Specifically, according to our fictitious-market verification report for the second administrative review, a company representative named Mr. Gonzales claimed that CEMEX sought to retain its Types II and V cement customers in the home market because these customers also buy Type I in large quantities and CEMEX did not want to jeopardize these sales of Type I cement. This representative claimed further that CEMEX sells Types II and V cement for reasons of corporate image.⁸⁶

The promotional quality of sales is an important characteristic that differentiates the unusual sales from the normal sales in the ordinary-course-of-trade determination, which courts

⁸⁵ Second Review Final Results, 58 FR at 47255.

⁸⁶ See Verification Report, at Exhibit 32 at 11, 23 & 24. See also the petitioner’s case brief, App. 1, at 6, and CEMEX Case Brief in the 1994/1995 review, dated November 4, 1996, at 26-27, reprinted in CEMEX’s response to March 10, 1997, supplemental questionnaire, dated April 7, 1997, at 18 & Exhibit 3.

have upheld.⁸⁷ In fact, the U.S. Court of International Trade even stated that CEMEX's Type II cement sales were either designed to maintain low foreign market values or intended legitimately to promote other sales.⁸⁸ In the 1994/1995 administrative review, we found that CEMEX's sales of Type II cement had promotional quality not found in sales of other types of cement, based on facts available because CEMEX did not provide the information in a timely manner.⁸⁹

Just as in prior reviews, we inquired in the 1995/1996 review about whether sales of Type II cement exhibited a promotional quality that is not apparent in CEMEX's normal sales of cement. With respect to Type II cement sales, CEMEX failed to provide new information concerning the promotional quality of these sales in response to the Department's March 10, 1997, questionnaire. Indeed, CEMEX gave the same response that it submitted in the 1994/1995 administrative review. That is, CEMEX responded to all items in the questionnaire except historical sales trends and promotional quality of sales.⁹⁰

Consequently, just as we did in the 1994/1995 review, we were compelled to use the facts available given the lack of sufficient information on the 1995/1996 review record. We relied upon the only facts known about the promotional quality of the sales learned during the second

⁸⁷ The Federal Circuit affirmed the Department's finding that the promotional quality of sales of Type II cement differentiated them from CEMEX's other products in the second administrative review of this cement order. CEMEX, 133 F.3d at 901.

⁸⁸ CEMEX, 19 CIT at 592.

⁸⁹ Notice of Final Results of Antidumping Duty Administrative Review, 62 FR at 17148-03 (Fifth Review Final Results).

⁹⁰ CEMEX's response to March 10, 1997, supplemental questionnaire, dated April 7, 1997, at 18 & Exhibit 3.

review. By applying facts available, we applied the status quo and assumed that the facts regarding this issue remained the same since the second review because CEMEX provided no new information since then. Therefore, we concluded that the sales of Type II cement continued to exhibit promotional quality.

With respect to Type V sales sold as Type V, we find also that facts otherwise available are warranted because the new information provided by CEMEX during verification disputing that the sales of Type V continue to exhibit promotional qualities was untimely filed. We must rely upon the only available information on the record that was fairly and timely submitted from previous reviews which holds that CEMEX sells Type V cement sales for promotional purposes, a characteristic of the sales that is not apparent in the normal cement sales of CEMEX in the home market. Indeed, CEMEX's failure to disclose until verification that all home-market sales from the Hermosillo plants were physically Type V cement compelled the Department to extend its analysis of promotional quality of Type II to sales of Type V cement.

Based upon CEMEX's allegations, the Panel instructed the Department to demonstrate that the promotional material is not part of the record or, if it is, address how it would affect the analysis.⁹¹

During the 1995/1996 review, CEMEX submitted particular information after the preliminary results that contained new factual information after the regulatory deadline; we did

⁹¹ Remand Order II, at 9, 11 & 12.

not consider the untimely filed information on the record.⁹² We did not consider this new information introduced to us during verification, in accordance with 19 CFR 351.31(a)(1)(ii), expressly because it was filed untimely. The deadline for new information in the 1995/1996 review was March 17, 1997, but CEMEX's verification was from May 14, 1997, through June 2, 1997, when the new information was filed.⁹³ CEMEX resubmitted the filing without certain new information, but the relevant information about promotional quality was **not** among the information struck from the record. Therefore, although CEMEX's submission is on the current record, only the Department's memorandum to the file documents that CEMEX's new information was not considered for the original ordinary-course-of-trade determination.

For the sake of argument, even if the information was submitted in a timely manner as part of the record, the new information would need to be considered fairly and properly. We would weigh the new information against the current information demonstrating the promotional quality of the sales. Additionally, all parties must have the equal opportunity to review and rebut the information properly, which is the rationale behind the justifications for the regulatory deadlines to submit new information.

Notwithstanding these fairness concerns, if the new promotional-quality information was on the record and it demonstrated clearly that sales were not made for promotional purposes, the

⁹² Memorandum from Kristen Smith, Case Analyst, to Roland MacDonald regarding Striking Certain Documents Provided during Verification, dated September 2, 1997.

⁹³ Id.; see also Letter to the Department from the petitioner objecting to CEMEX's new factual information submitted at verification, dated June 13, 1997.

promotional quality would be the only fact not supporting our original ordinary-course-of-trade determination. This promotional-quality factor alone would not, by itself, reverse the challenged ordinary-course-of-trade decision. Consistent with the Panel's findings that profits alone cannot change the determination, the hypothetical cannot prove that the promotional quality is not a factor supported by the record.

Indeed, we also found and maintain that CEMEX did not sell Type II and Type V cement in the home market until it began production for export in the mid-1980s even though a small domestic demand for such cement existed prior to that time ("historical sales trends") and the "niche" market characteristics.⁹⁴ We made this finding in the second administrative review based on statements made by CEMEX officials during verification but, when we asked CEMEX to address this factor in the 1995/1996 review, CEMEX did not respond.⁹⁵ Consequently, we continue to conclude reasonably that the facts did not change with respect to these factors since the second review for the sales of Type V as Type V and Type II cement.⁹⁶

As our application of facts available in the ordinary-course-of-trade analysis concerning this factor remains, so too does our conclusion based on the "totality of facts" that sales of Type V sold as Type II and Type V are outside the ordinary course of trade. In fact, we also find that,

⁹⁴ Verification Report, 16-17 & Exhibit 32 at 11, 23-24.

⁹⁵ *Id.*; Verification Report, Exhibit 32 at 23; CEMEX April 7, 1997, questionnaire response, Exhibit 1, at 8.

⁹⁶ See Sixth Review Final Results, 63 FR at 12771; Sixth Review Ordinary Course of Trade Memorandum, at 5-6, 8.

even after reconsideration of the facts consistent with the “further development” or interrelation of the factors positions we took in the Seventh Review Remand Determination, we continue to find that substantial record evidence supports our determinations that CEMEX’s sales of Type V as Type II and Type V cement are outside the ordinary course of trade based on the totality of the facts in the 1995/1996 review record.⁹⁷

Comment 1: CEMEX and CDC argue that the Department’s Draft Results II do not comply with the Panel’s explicit instructions and are not supported by the evidence on the record. Specifically, CEMEX and CDC argue that the Department’s analysis with regard to the impact of further development on the ordinary-course-of-trade determination in the 1995/1996 review does not explain why the type of analysis applied in the Seventh Review Remand Determination can or cannot be used in the context of the 1995/1996 review.

CEMEX and CDC argue further that the Department’s assessment as to what it considered to be “normal” for CEMEX with regard to its business practice in the home market is neither explained nor supported by the record. Specifically, CEMEX and CDC argue that the fact that CEMEX sells more of one type of cement than another type does not automatically render the more popular cement sales to be normal and all other sales to be abnormal. CEMEX argues that the fact it produces Type V cement sold as Type II and V at the Hermosillo plants is a fact, which, according to CEMEX, in itself is not indicative of abnormal or unusual sales

⁹⁷ In accordance with the Panel’s instructions, the Department did not consider or address the conditional issue raised by CDC regarding the selection of sales for comparison in conformity with the position taken by the majority in the Seventh Review Panel because it did not change its ordinary-course-of-trade determinations in this redetermination. Remand Order II, 12-13.

practices. CEMEX and CDC argue that the Department points to no evidence on the record of the 1995/1996 review that indicates that CEMEX's sales of Type V cement was not a part of its normal sales practice during the period of review.

CEMEX argues that its sales practice with respect to Type II cement more than four years ago has nothing to do with its sales of Type V cement during the 1995/1996 review. According to CEMEX, there is no evidence on the record that indicates that CEMEX restricted sales of Type V cement in any way during the 1995/1996 period of review. CEMEX and CDC argue further that, because the type of clay is naturally present at the Hermosillo plants, the production of Type V cement does not entail higher production costs. CEMEX and CDC argue further that the record shows in fact that the Hermosillo plants producing Type V cement during the 1995/1996 review had some of the [* * *] costs of production. Thus, according to CEMEX and CDC, there is no higher cost to be passed along to customers and, therefore, these types of sales would not achieve any promotional effect.

CEMEX and CDC argue that the Department's conclusion that the profit differentials of [* * *] and [* * *] percent are significant is irrational. CEMEX argues that, contrary to the Department's conclusion, these profit differences are not higher than the relative difference in profit between the types of cement the Department compared in the Seventh Review Remand Determination. CEMEX argues further that, even if the Department sets aside the differential of [* * *] percent as significant, the differential of [* * *] percent cannot be considered significant by any measure. CEMEX and CDC assert that the profit rates of Type V cement sales and Type I cement sales are comparable and not indicative of sales outside the ordinary course of trade.

CEMEX and CDC argue that, contrary to its analysis in the Seventh Review Remand Determination, in its argument to the Panel the Department analyzed the differences in freight costs apart from the profitability analysis. CEMEX and CDC argue that the Department's argument stands in contrast with its finding in the Seventh Review Remand Determination in which the Department dismissed differences in freight and handling charges as a factor separate from profit. CEMEX and CDC argue that the Department has not explained the inconsistency between these two positions. CEMEX and CDC argue further that the Department has not explained why a difference in cost or selling conditions that has no effect on a company's bottom line has any significance that would render such sales to be outside the ordinary course of trade.

CEMEX and CDC also argue that the Department has not explained the significance of shipping distances beyond the impact on freight costs and, in turn, on profit. According to CEMEX and CDC, differences in freight costs, regardless of whether such costs are absorbed by CEMEX, are subsumed in the profitability comparisons.

With regard to the number of customers and volume of sales, CEMEX and CDC argue that the Department mischaracterizes the type of customers characterized in the Seventh Review Remand Determination with the size and location of customers in the 1995/1996 review without explanation.

CEMEX and CDC argue that the Department does not explain why the concept of "niche" market is relevant in an ordinary-course-of-trade analysis. In addition, CEMEX and CDC claim that the factors cited by the Department as indicative of a "niche" market are not based on the facts on the record.

CEMEX and CDC argue that the Department's findings regarding the promotional quality did not consider the relevant portions of verification Exhibit 32 of the Verification Report and, therefore, the Department did not have any rational reason to resort to facts available.

CEMEX and CDC argue that for these reasons, the Department's Draft Results II are erroneous and should be corrected by finding that CEMEX's sales of Type V cement are within the ordinary course of trade.

The petitioner asserts that the Department complied properly with the Panel's instructions and focused its discussion on the economic interrelationship of factors as the Panel required. The petitioner argues that CEMEX's and CDC's suggestion that the Department is resisting the Panel's interpretation has no basis and simply presumes that the Panel knows better than the Department what the Department did in the 1996/1997 review. The petitioner contends that the fact that certain factors may be related to each other does not diminish the strength of the evidence which demonstrates that certain sales are so different from sales ordinarily made in the home market that they are outside the ordinary course of trade. According to the petitioner, consistent with the Panel's instructions, the Department examined the facts of the record independently and then in terms of the totality of the circumstances. The petitioner argues that, in this case, the Department reviewed the evidence of record in light of the Panel's instructions and found correctly that the conditions and practices related to sales of physical Type V cement invoiced as Type II and Type V were very unusual relative to other home-market sales. The petitioner argues that the Department found that CEMEX normally does not sell cement that meets a higher specification (Type V cement) as a lower-specification cement (Type I and Type

II cements), but that it did so at the two Hermosillo plants (Yaqui and Campana).

The petitioner argues also that CEMEX offers insubstantial arguments in response to the Department's findings. For example, with regard to CEMEX's assertion that the evidence upon which the Department relies to find the sales to be unusual relates solely to sales practices prior to the second administrative review, the petitioner claims that the record contradicts CEMEX's argument. Specifically, the petitioner argues, contrary to CEMEX's assertion, such practices as shipping cement long distances at high freight costs and selling for promotional reasons rather than profit continued to be contrary to CEMEX's usual practice during the 1995/1996 review.

The petitioner argues also that, with respect to the Panel's instruction to consider the interrelationship of factors, the Department reviewed the relevant evidence and factors carefully and exhaustively in making its analysis.

With respect to profit, the petitioner argues that record evidence of other factors supports the Department's ordinary-course-of-trade determination with respect to the sales in question. Specifically, the petitioner argues that, with respect to sales of Type V cement invoiced as Type II cement, there was a significant difference in profitability compared with sales of Type I cement. The petitioner argues that the profit on Type V cement sold as Type II cement was [* * *] percent while the profit on Type I cement was [* * *] percent. Thus, according to the petitioner, the profit margin on Type I was [* * *] percent higher than on Type V sold as Type II cement. The petitioner asserts that these are hardly comparable figures.

With regard to unusual shipping distances and high freight costs, the petitioner argues

that the Department fully explained how these unusual shipping distances and high freight costs make the circumstances surrounding these sales different from those with respect to the sales of Type V cement invoiced as Type I cement that were at issue in the Seventh Review Remand Determination.

With regard to the Department's "niche" market analysis, the petitioner argues that the Department reasonably explained that these sales involved specialty cements that had a promotional quality and were sold for reasons other than profit. According to the petitioner, CEMEX does not actually dispute this finding but instead argues over the details.

The petitioner argues that, for the reasons stated above, the Department should reject CEMEX's and CDC's objections and issue final results of remand determination confirming the Draft Results II.

Department's Position: We disagree with CEMEX's and CDC's argument that we have refused to comply with the remand instructions and have drawn conclusions unsupported by the record.⁹⁸ On the contrary, we followed the Panel's instructions to conduct an examination of the ordinary-course-of-trade issue in a manner "which fully recognizes the implications of the economic relationship of issues developed in the Seventh Review Remand Determination."⁹⁹ We reconsidered the general effects and the specific impact of the analysis of the Seventh Review Remand Determination and meticulously explained the implications of the interaction of factors

⁹⁸ CEMEX's comments, at 3-5.

⁹⁹ Remand Order II, at 11; the petitioner's comments, at 2-10.

we considered in the 1995/1996 review.¹⁰⁰ Furthermore, we addressed each question or concern raised by the Panel and explained how our position is supported by substantial record evidence in the 1995/1996 review and is in accordance with law. As a result, based upon the totality of the facts, we found that substantial record evidence on the 1995/1996 review record supports our findings that sales of CEMEX's Type V cement sold as Type II and Type V cement are outside the ordinary course of trade. Therefore, we complied with the Panel's instructions and exhaustively discussed the details of the economic analysis and of the interaction of facts as applied and differentiated in the 1995/1996 review.

The outcome of this remand redetermination is based upon the "totality of facts" on the record in the 1995/1996 review, which the Panel upheld as the proper methodology.¹⁰¹ CEMEX's and CDC's comments appear to be based on a misunderstanding or refusal to accept the distinct facts in the 1995/1996 review.¹⁰² For instance, CEMEX and CDC refuse to accept that the 1995/1996 review record contains different facts than the 1996/1997 review, despite the Panel's recognition that "there are differences between the Type V/V and Type V/II product considered in this review and Type V/I product analyzed in the Seventh Review."¹⁰³ Additionally, CEMEX and CDC advocate examining only Type V cement sales "as produced" but not cement as was sold, even though the ordinary-course-of-trade determination is an

¹⁰⁰ Draft Results II, at 3-37.

¹⁰¹ Remand Order II, at 9.

¹⁰² CEMEX's comments 5-8.

¹⁰³ Remand Order II, at 11.

examination of the conditions and practices of home-market sales. CEMEX's and CDC's incorrect assertion that all sales of Type V cement should be considered as one is also contrary to the Panel's explicit findings and instructions.¹⁰⁴ The Panel affirmed our application of adverse facts available to CEMEX's sales of Type V cement sold as Type I cement from the Hermosillo plants because CEMEX did not submit complete information.¹⁰⁵ The Panel also instructed us to reexamine the issue of whether the "Type V/V and Type V/II sales by CEMEX" are representative of normal conditions and practices of sales in the home market.¹⁰⁶ Interestingly, the 1995/1996 review record indicates that only CEMEX's cement sales from its Hermosillo plants were produced as one type but yet sold to customers as another type of cement.¹⁰⁷ Although CEMEX's response suggested it produced different types of cement, it was not until verification that we discovered that CEMEX only produced Type V cement at Hermosillo, which it sold as different types of cement.¹⁰⁸ CEMEX does not dispute that Type V cement was sold as different types of cement. This suggests a very unusual sales practice.¹⁰⁹

¹⁰⁴ CEMEX's comments, at 9 n.15.

¹⁰⁵ Remand Order I, at 32.

¹⁰⁶ Remand Order II, at 13.

¹⁰⁷ See Verification Report, at 16-17 & Exhibit 32 at 23; CEMEX questionnaire response, dated April 7, 1997, at Exhibit 1 at 8.-33; CEMEX cost verification report, at 14-15.

¹⁰⁸ See CEMEX's supplemental questionnaire response, April 7, 1997, at 64-65; Notice of Preliminary Results of Antidumping Duty Administrative Review, 62 FR 47626, 47629, (September 10, 1997) ; CEMEX cost verification report, at 14-15. See also supra 12 nn. 26-28.

¹⁰⁹ CEMEX's comments, at 6.

We also disagree that neither the 1995/1996 review record nor our explanations support our conclusions of what is “normal” in the Mexican cement market.¹¹⁰ Although CEMEX disputes the explanations, the numerous citations to the facts on the 1995/1996 review record more than adequately support our conclusion.¹¹¹ First, we find that CEMEX’s practices in earlier review periods are relevant to the current ordinary-course-of-trade analysis because they establish the proper historical context of the issue.¹¹² They are also indicative of CEMEX’s cement selling “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 in the same class or kind.”¹¹³ Furthermore, CEMEX submitted the previous record findings and underlying evidence to the 1995/1996 review record for consideration in this review.¹¹⁴

Accordingly, our consideration of sales practices and conditions before exportation that is

¹¹⁰ Id.

¹¹¹ See supplemental questionnaire, dated December 24, 1996, at 7; supplemental questionnaire, dated March 10, 1997, at 3; the petitioner’s rebuttal brief, dated December 19, 1997, at 13-70; the petitioner’s fictitious-market allegations, dated January 29, 1997.

¹¹² See supra nn.28 & 30.

¹¹³ 19 U.S.C. § 1677(15).

¹¹⁴ See, e.g., CEMEX’s response to March 10, 1997, supplemental questionnaire, dated April 7, 1997, at Exhibit 3 (resubmitting CEMEX Case Brief in the 1994/1995 Review, dated November 4, 1996, at 26-27). See also the petitioner’s fictitious-market allegations, dated January 29, 1997, at 9-16, & Appendices 1-5, 7 at 126-27, 8 at 9, 9 (Exhibit 4, chart 7 to CEMEX’s July 17, 1996, submission in the 1994/1995 review), 10 (Exhibit 4, chart 20 to CEMEX’s July 17, 1996, submission in the 1994/1995 review), 11 (Exhibit 5 at 8-9 to CEMEX’s July 17, 1996, submission in the 1994/1995 review), 15, 16 (affidavit of Phillip Lockbrunner, Jr.).

discussed in previous review findings is not only statutorily required but also factually relevant for the proper ordinary-course-of-trade analysis in this remand redetermination.¹¹⁵

Second, we agree with the petitioner and find that CEMEX's reference to the 1995/1996 review costs of production are inappropriate and misplaced. The cost-of-production data upon which CEMEX relied is the same data that did not pass verification in the 1995/1996 review.¹¹⁶ Just as we rejected using this data for the difference-in-merchandise adjustment, it is equally inappropriate to consider it for this ordinary-course-of-trade analysis.

In contrast, however, the record evidence does indicate that CEMEX offered Type II and Type V cement to customers as specialty cement in relatively small quantities to promote its corporate image and entire sales line of products rather than for obtaining a profit on sales of Type II and Type V cement sales.¹¹⁷ Accordingly, these sales were marketed in a highly unusual way when compared to CEMEX's other home-market sales, which is why the niche-market and promotional-quality characteristics are relevant to this ordinary-course-of-trade analysis.

Third, with respect to profit, CEMEX continues to confuse our two factual findings in the

¹¹⁵ See, e.g., Second Review Final Results, 58 FR 47254-55 (1993) (Type II and Type V cement sales were excluded from the normal value after being found to be outside the ordinary course of trade); Fifth Review Final Results, 62 FR 24414-24416 (May 5, 1997) (Type II cement sales were excluded from normal value because they were found to be outside the ordinary course of trade).

¹¹⁶ CEMEX's comments, at 8 & Attachment A; Sixth Review Final Results, 63 FR at 12768 & 12772.

¹¹⁷ CEMEX's response to March 10, 1997, supplemental questionnaire, dated April 7, 1997, at 18 & Exhibit 3. See also the petitioner's case brief, dated October 24, 1997, App. 1 at 6, and the petitioner's rebuttal brief, dated December 19, 1997, at 65-70.

1995/1996 review.¹¹⁸ For Type V/II cement sales, we find that the profit data for Type V cement sold as Type II is significantly higher than CEMEX's profits on Type I home-market sales.¹¹⁹ For Type V/V cement sales, we find that the profit on Type V cement sold as Type V cement is higher than CEMEX's profits on Type I home-market sales but not by a significant amount.¹²⁰ As we acknowledged throughout this segment of the proceeding and litigation, the Type V profit rate could be considered "similar to its profits on Type I sales."¹²¹ Nevertheless, because this factor is not alone determinative, the totality of the facts on the record indicated that sales of Type V cement sold as Type V cement were unusual based upon the other factors including the extraordinarily longer shipping distances, significantly higher freight costs, abnormally small sales volume, unusual number and type of customers, the unique niche-market characteristics, promotional quality, and historical trends. In addition, CEMEX also does not acknowledge that the profit discussion in the Seventh Review Remand Determination explained the facts and factors in support of a finding that CEMEX's Type V cement sold as Type I were **within** the ordinary course of trade, which employed an analysis emphasizing the **similarities** of the facts and circumstances of the sales.

With regard to the interrelationship of profits and freight costs, CEMEX alleges that we

¹¹⁸ CEMEX's comments, at 9-11.

¹¹⁹ Draft Results II, at 16-18. We agree with the petitioner that our comparison with the Seventh Review Remand Determination proprietary information is inappropriate and have removed the reference from these final remand results.

¹²⁰ Draft Results II, at 16-17.

¹²¹ Ordinary Course of Trade Memorandum, at 7; Remand I, at 9-10.

neglected to explain the alleged inconsistency in Seventh Review Remand Determination when profits incorporate freight. In fact, it appears that CEMEX has overlooked our lengthy discussion of the distinguishable facts that justify such a different finding.¹²² Similarly, CEMEX asserts incorrectly that we did not explain the significance of shipping distances beyond the impact on freight costs and, in turn, profit.¹²³ But this comment also demonstrates that CEMEX neglected to acknowledge our remand discussion and did not substantively challenge the findings based upon substantial record evidence in the 1995/1996 review.¹²⁴ This persistent error or refusal to recognize the different facts on the record of the 1995/1996 review record also undermines the legitimacy of CEMEX's comments about a surmised "mischaracterization" by the Department for its findings about the type of customers. Indeed, our findings rely upon the weight of substantial evidence regarding the type of customers for the ordinary-course-of-trade analysis.¹²⁵ We do not find that the other record information submitted for different purpose (e.g., channels of distribution) alter those findings.¹²⁶ In short, we explained exhaustively the impact of the economic interrelationship of issues developed in the Seventh Review Remand Determination on

¹²² Draft Results II, at 15-21. See also supra at 16-22 & n. 124 supra at 22-24.

¹²³ CEMEX's comments, at 11-12.

¹²⁴ Draft Results II, at 22-24.

¹²⁵ See CEMEX's verification Exhibit 38, at 1896-97, 1898a-b & Exhibit 32 at 15; CEMEX supplemental questionnaire response, dated May 2, 1997, at Exhibit L; CEMEX questionnaire response, dated April 7, 1997, Exhibit 1 at 8 n.4, Tab 5 at 1 and 9 & Exhibit 2, App.1 at 3.

¹²⁶ CEMEX's comments, at 13.

the interaction of the factors we considered in the 1995/1996 remand as supported by substantial record evidence in this review. CEMEX's comments do not prove otherwise.

Finally, but not least importantly, as a result of the comments and re-examination of the facts regarding the promotional quality of the sales, we have corrected part of the draft remand results. We agree with CEMEX, as the Panel pointed out, that the record information in the Verification Report Exhibit 32 about the promotional quality of the sales remains on the record of the 1995/1996 review.¹²⁷ The record does indicate, in fact, that the relevant promotional-quality evidence was not struck from the record but, rather, we did not consider the information and resorted to facts available because CEMEX's new promotional-quality information was untimely filed.¹²⁸ The Department's regulations provide procedural guidelines concerning when parties may submit new information properly. The new promotional-quality information was submitted during verification, however, which was over two months after the deadline for new information in the 1995/1996 review.¹²⁹

Given that the promotional-quality information is part of the record, albeit improperly submitted to the Department, and in light of the Panel's explicit instructions to consider the

¹²⁷ See revisions to remand results supra Subsection e. Facts Available are Warranted for Promotion-Quality Factor, at 32-36.

¹²⁸ Memorandum from Kristen Smith, Case Analyst to Roland McDonald Regarding Striking Certain Untimely Filed Documents Provided during Verification, dated September 2, 1997.

¹²⁹ Id.; see also Letter to the Department from the petitioner objecting to CEMEX's new factual information submitted at verification, dated June 13, 1997.

evidence on the record, we examined the late-filed information relevant to promotional quality along with the timely filed promotional-quality information submitted from previous reviews.¹³⁰ We weighed CEMEX's untimely filed new information that suggests that Type II and Type V cement sales are not sold as part of a special promotion specifically against the timely filed information demonstrating the promotional quality of those sales. We find that the weight of the evidence indicates a promotional quality of the sales of the highest quality, Type V cement, to customers wanting other cements, like Type II cement.¹³¹ We disagree with CEMEX's contention that there is no promotional effect of these sales simply because customers are not told about receiving the highest-quality Type V cement.¹³² Rather, we find that provision of a higher-quality product, even if not requested by or told to customers, does promote CEMEX's home-market cement business in a positive manner. This is consistent with a vast majority of other information on the record about the promotional qualities of these sales.¹³³ For example,

¹³⁰ See Verification Report, at Exhibit 32 at 11, 23 & 24. See also the petitioner's case brief, App. 1, at 6; CEMEX's case brief in 1994/1995 review, dated November 4, 1996, at 26-27, reprinted in CEMEX's response to March 10, 1997, supplemental questionnaire, dated April 7, 1997, at 18 & Exhibit 3; the petitioner's rebuttal brief, at 65-67; the petitioner's allegation of fictitious market, dated January 29, 1997, at 13 & App. 13. See also Second Review Final Results, 58 FR at 47255; Fifth Review Preliminary Results, 62 FR at 17153-54. The Federal Circuit affirmed the Department's finding that the promotion quality of sales of Type II cement differentiated them from CEMEX's other products in the second administrative review of this cement order. CEMEX, 133 F.3d at 901.

¹³¹ Id.

¹³² CEMEX's comments, at 8 & 14 (citing verification Exhibit 27 & P.R.No. 40).

¹³³ See, e.g., CEMEX case brief in 1994/1995 review, dated November 4, 1996, at 26-27, reprinted in CEMEX's response to March 10, 1997, supplemental questionnaire, dated April 7, 1997, at 18 & Ex. 3; the petitioner's case brief, App. 1, at 6; the petitioner's rebuttal brief, at 65-

we find that the affidavits on the record support our conclusion that CEMEX sells Type V/V and Type V/II cement for reasons of corporate image, not just to obtain certain profit levels.¹³⁴

Accordingly, we find that the weight of the record evidence indicates that there was a promotional quality to CEMEX's sales of Type V sold as Type II and V cement, even when we consider the untimely filed CEMEX information.

In conclusion, our ordinary-course-of-trade determination in this remand redetermination is fact-specific. For the remand redetermination, we examined all the conditions and practices surrounding CEMEX's home-market sales carefully. As required, we evaluated not just "one factor taken in isolation but rather. . . all the circumstances particular to the sales in question."¹³⁵ We examined the "totality of the facts" on the 1995/1996 review record to determine whether CEMEX's sales of Type V sold as Type II and Type V cement produced at the Hermosillo plants were being made for "unusual reasons" or under "unusual circumstances."¹³⁶ Therefore, pursuant to the Panel's order, in this second final remand redetermination, we have reconsidered whether CEMEX's home-market sales of Type V cement sold as Type II and Type V cement produced at the Hermosillo plants were outside the ordinary course of trade with an exhaustive

67; the petitioner's allegation of fictitious market, dated January 29, 1997, at 13 & App. 13.

¹³⁴ The petitioner's case brief, App. 1 at 6; the petitioner's rebuttal brief, at 65-67; the petitioner's allegation of fictitious market, dated January. 29, 1997, at 13 & App. 13.

¹³⁵ CEMEX v. United States, 133 F.3d at 900, quoting Murata Mfr. Co. v. United States, 820 F. Supp. 603, 607 (CIT 1993)(quoting Certain Welded Carbon Steel Standard Pipes and Tubes from India, 56 FR 64753, 64755 (1991)).

¹³⁶ Electrolytic Manganese Dioxide from Japan, 58 FR 28551, 28552 (1993).

explanation supported by substantial record evidence of (a) the impact of the economic interrelationship of issues developed and positions taken in the Seventh Review Remand Determination on the interaction of the factors considered in the 1995/1996 review remand and (b) the facts that are actually on the record in the 1995/1996 review regarding promotion quality, and we have determined that these sales are outside the ordinary course of trade based upon the totality of the facts of the 1995/1996 review.

II. Selection of Adverse Facts-Available Difference-In-Merchandise Data

In Remand I, we clarified our explanation of why we selected, as part of the adverse facts-available calculation for the difference-in-merchandise (DIFMER) adjustment between Type I and Type V cement, the data from the Type I plant with the lowest variable cost of manufacturing. See Remand I, at 29-42. On November 3, 2005, the Panel once again remanded this issue to us, finding that the actual amount of the DIFMER is known based on subsequent reviews and that any DIFMER amount over zero would be adverse and that we must select a DIFMER which is a reasonably accurate estimate of the actual known rate. See Remand Order II. As explained below, the Panel's determination is not in accordance with U.S. law. Moreover, the Panel's factual findings concerning the knowledge of "actual amount" of the DIFMER are not supported by the record of the review before it or the record of any other review. Therefore, the Panel should affirm our DIFMER determination in Remand I.

Contrary to U.S. law, the Panel has expanded the administrative record of the Sixth Review Final Results, at issue here, to include information from the subsequent review records which is not before this Panel. As we explain below, (1) the information upon which the Panel

relies does not support the factual finding the Panel made with regard to the Sixth Review Final Results, (2) the information upon which the Panel relies does not fall within the statutory definition of the record for the Sixth Review Final Results, (3) the case cited by this Panel does not support expansion of the administrative record to include data from subsequent reviews, and (4) inclusion of this information in the 1995/1996 review record undermines the administrative process.

1) The Panel’s Factual Determination That Any DIFMER Adjustment Would Be Adverse Is Not Supported by Any Record Evidence.

The Panel’s entire ruling concerning the reasonableness of our selection of what to use as adverse facts available for CEMEX’s DIFMER adjustment hinges on the Panel’s finding that any amount of DIFMER would be adverse because, based on events in subsequent reviews, we “could well have found” that there were no physical differences between products. See Remand Order II, at 22. This speculative finding is not supported by any evidence in the record of this segment of the proceeding, i.e., Sixth Review Final Results, and could not be supported by the record of the subsequent reviews cited by the Panel in footnote 47 of Remand Order II.

From the Panel’s decision and discussion of the 1996/1997 and 1998/1999 administrative reviews, CEMEX has confused the Panel enough such that it is viewing the DIFMER adjustment beyond the context of 1995/1996 administrative review. During the 1995/1996 administrative review, the Department and the domestic interested parties were under the impression from the history of the case and the questionnaire responses in the 1995/1996 administrative review record that the comparisons being made were between Type V cement produced as Type V cement with

Type I cement produced as Type I cement. There is no dispute that Type I cement produced as Type I cement and Type V cement produced as Type V cement are physically different.

The statute requires us to make adjustments for difference in physical characteristics before making dumping comparisons. In fact, we had granted CEMEX its requested DIFMER adjustment in the 1994/1995 administrative review. In the 1995/1996 administrative review, we discovered at verification that, for a few of a number of CEMEX cement plants, CEMEX misrepresented its production and DIFMER data. We calculated substitute DIFMER data to correct for what history and the record demonstrates were undisputed physical differences between the two cement types. The Panel's decision to look at subsequent reviews and make assumptions that there would be no DIFMER adjustments in the 1995/1996 administrative review takes the determination improperly out of the context in which it actually occurred.

The Panel's determination that, if CEMEX had reported its data properly, there would have been no DIFMER is pure speculation and is directly contrary to the record evidence submitted by CEMEX. The Panel assumes that, “{i}f CEMEX had actually reported” its data, the Department “could well have found” that there were no physical differences upon which to base a DIFMER. Remand Order II, at 22-23. As the Panel itself recognized, however, CEMEX did not report its actual data. This discrepancy is the basis upon which the Panel upheld our determination to resort to adverse facts available. In the absence of such data, what we might have found will never be known. Consequently, the Panel has drawn conclusions from nothing more than assumptions. We are statutorily precluded, however, from basing our decisions on assumptions or speculation not supported by the record.

With regard to the specific contents of the record of the 1995/1996 administrative review, in support of its speculative finding the Panel cites to a submission by CEMEX that the El Yaqui and CBN cement plants produce only a natural Type V cement. Remand Order II, fn. 47. As we explained in our initial response brief, when we asked CEMEX to clarify its contradictory factual statements, which included this one, as to what types of cement were produced at the El Yaqui and CBM plants, CEMEX disavowed the factual statement upon which the Panel now relies. See our response brief dated May 3, 1999, at 57-60. At verification, however, we found that CEMEX had no support for its claims that Type I and Type II cement were produced at these plants and it appeared to produce only Type V cement. This data was not previously submitted data that was verified but rather data discovered at verification. Because CEMEX misrepresented its production and cost data at these plants, the Department and interested parties did not have the opportunity to develop the record concerning this data properly. The Department and the Panel cannot treat this information, the sole production of Type V cement at these plants, the same as data which was submitted and vetted by the administrative process including verification. Thus, there is absolutely no uncontradicted verified evidence in the record of the 1995/1996 administrative review to support the Panel's speculations about what the actual DIFMER might have been.

The Panel cites to the Seventh Review Remand Determination and the final results of the 1998/1999 administrative review of the antidumping duty order as support for the general proposition that there may have been no physical difference between Type I and Type V cement produced at the Hermosillo plants in an attempt to bolster its unwarranted factual finding with

regard to the 1995/1996 administrative review. Remand Order II, at fn. 47. As an initial matter, at the time we conducted the 1995/1996 administrative review, the complete data sets for the 1996/1997 and 1998/1999 administrative reviews upon which the Panel now relies did not exist. Moreover, as a consequence of the manner in which we collect data, data from the 1996/1997 and 1998/1999 reviews would only demonstrate the facts with regard to the materials that came out of the ground during those two (1996/1997 and 1998/1999) administrative reviews. Those determinations are silent with regard to the materials used to produce cement in the 1995/1996 administrative review. The Panel's decision assumes that the material that came out of the ground during the 1995/1996 administrative review period was the same as the material that came out the ground during the 1996/1997 and 1998/1999 administrative review periods. There is no evidence in the 1995/1996 review supporting this assumption and there is no statement in the 1996/1997 and 1998/1999 administrative review determinations which support it. Therefore, no inferences or assumptions can be made with regard to facts in the 1995/1996 administrative review based on the 1996/1997 and 1998/1999 administrative review determinations.

2) The Information upon Which the Panel Relies Does Not Fall Within the Statutory Definition of the Record for the Sixth Review.

In Remand Order II, fn 47, the Panel relies on statements from the 1996/1997 and 1998/1999 administrative review determinations as support for the proposition that any DIFMER would be adverse in the 1995/1996 administrative review. As discussed above, any administrative review facts found in the 1996/1997 and 1998/1999 administrative reviews could not support our 1995/1996 administrative review determination and, as discussed below, could

not properly be part of the 1995/1996 administrative review record.

The Panel may not consider information that is not on the administrative record. Article 1911 of the North American Free Trade Agreement (NAFTA) defines the administrative record, in part, as follows:

a) All documentary or other information presented to or obtained by the competent investigating authority in the course of the administrative proceeding, including any governmental memoranda pertaining to the case, and including any record of ex parte meetings as may be required to be kept;

....

d) all notices published in the official journal of the importing Party in connection with the administrative proceeding.

Emphases added. In this regard, under Article 1904(2) of the NAFTA, a panel must base its definition of the administrative record on the law of the importing country (i.e., the United States):

For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

NAFTA, Article 1904(2).

The Panel in this case is limited to determining whether our Sixth Review Final Results is supported by substantial evidence on the record or otherwise in accordance with law. 19 U.S.C. § 1516a(b). For purposes of this review, the record consists of:

(i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and

(ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

19 U.S.C. § 1516a(b)(2)(A).

In Kerr-McGee Chem. Corp. v. United States, 955 F.Supp. 1466, 1472 (CIT 1997)

(Kerr-McGee), the CIT recognized that 19 U.S.C. § 1516a(b)(2)(A)(i):

has been interpreted by this Court to mean that, barring exceptional circumstances, "[* * *]he scope of the record for purposes of judicial review is based upon information which was 'before the relevant decision maker' and was presented and considered 'at the time the decision was rendered.'"

Id. (quoting Beker Indus. Corp. v. United States, 7 C.I.T. 313, 315 (1984)).¹³⁷

The logic for the limitation of review to the administrative record is compelling:

absent information on the record, the parties will not have an opportunity to comment on it and the agency will not have an opportunity to consider the information in light of those comments.

See Kerr-McGee, 955 F. Supp. at 1474-75. This comports with fundamental notions of

¹³⁷ See also Budd Co. v. United States, 507 F. Supp. 997, 1000 (1980) rehearing denied 1981 WL 2450 (CIT 1981)(scope of judicial review "encompasses only the information before {Commerce} at the time the determination was made, including any information that has been compiled as part of a formal record"); Atcor, Inc. v. United States, 658 F. Supp. 295, 300 (CIT 1987)("In reviewing agency action, the Court must base its decision upon the administrative record. New evidence may not be received."); PPG Industries, Inc. v. United States, 5 CIT 282, 284 (1983)("Thus, any data or memoranda not presented to, obtained by, considered or relied upon by {the agency} . . . are not part of the record."); see also U.S.C. IT R. 71(a) (defining the administrative record in accord with the statutory definition).

transparency and due process.

In actions in which the scope of judicial review is confined to the administrative record, matters outside the record may only be considered when there has been a "strong showing of bad faith or improper behavior on the part of the officials who made the determination" or when a party demonstrates that "there is a reasonable basis to believe that the administrative record is incomplete." Saha Thai Steel Pipe Co., Ltd. v. United States, 661 F. Supp. 1198, 1202-03 (CIT 1987) (Saha Thai Steel Pipe).¹³⁸ New information or evidence outside the record will not be considered as a supplement to the record absent the aforementioned exceptions.¹³⁹

Our regulations detail the requirements necessary for the submission of factual information on the administrative record. "Factual information" is defined by the regulations as "(1) Initial and supplemental questionnaire responses; (2) Data or statements of fact in support of allegations; (3) Other data or statements of fact; and (4) Documentary evidence." 19 CFR 353.2(g) (1996). Section 353.31 establishes time limits for the submission of factual information and states that for a final results of a review in antidumping duty order "a submission of factual information is due no later than. . . seven days before the date on which the verification of any

¹³⁸ See F.lli DeCecco Di Fillippo Fara San Martino S.p.A. v. United States, 980 F. Supp. 485, 487 (CIT 1997)(DeCecco)(Court permitted addition of a summary of ex parte contacts to be included in the record in light of the Department's statutory obligation to maintain a record of such contacts).

¹³⁹ The CIT has also accepted such information "only to the narrow extent that it may offer support for a legal argument advanced by the Plaintiffs." Hynix Semiconductor, Inc., et al. v. United States, slip op. 2002-117 (CIT Sept. 30, 2002) (Hynix) at 2; see also Koyo Seiko Co., Ltd. V. United States, C.I.T. 146, 955 F.Supp 1532, 1544 (CIT 1993).

person is scheduled to commence." Id.

Section 353.31 specifies the procedural rules regarding the filing, format, service, translation and certification of all persons submitting documents to the Department for consideration in a antidumping duty proceeding. Id. at § 353.31(a). In addition, all submissions to the record must be filed with the Secretary of Commerce, at the Central Records Unit, and must be served simultaneously on all other persons on the service list. Id. at § 353.31. Finally, pursuant to section 353.31(g), each document filed with the Department must include a certificate of service listing each person served, the type of document served, and the date and method of service on each person.

The DIFMER data from the 1996/1997 and 1998/1999 administrative reviews upon which the Panel relies is not “information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the {6th review} administrative proceeding.” Id. Just as this Panel found in its December 10, 2004, order that inclusion of certain 1996/1997 administrative review data was not properly part of the 1995/1996 administrative review record, the Panel should not rely on facts from subsequent administrative reviews in reviewing the Department’s adverse facts-available selection for the DIFMER adjustment. There is no substantive difference that would compel the Panel to treat such extra-record information in this disparate fashion. Indeed, to be consistent with its earlier decision and U.S. law, the only conclusion is that the 1996/1997 review information is not properly part of the 1995/1996 review record and should therefore not be included and relied on by the Panel.

3) The Case Cited by this Panel Does Not Support Expansion of the Administrative Record to Include Data from Subsequent Reviews Contrary to the Statutory Limitations on What Constitutes the Administrative Record of this Review.

In its Remand Order II, the Panel cites to a Federal Circuit decision in support of its DIFMER decision that the adverse facts-available determination must be a “reasonably accurate estimate of {each company’s} actual rate. . .” Remand Order II, at 21, quoting F. LLI De Cecco Di Filippo Fara S. Martino S.p.A v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2002)(F.LLI De Cecco). While the Panel quotes the case correctly, there is nothing in this case which indicates that the Federal Circuit would approve of overriding the statutory limits of the administrative record to use subsequently developed extra-record evidence concerning what the “actual DIFMER” would be to evaluate appropriate adverse facts-available selections.

In F.LLI De Cecco, the Federal Circuit was reviewing a case involving the selection of a total adverse facts-available rate based on a review of past rates and found the adverse facts-available rate selected for the administrative review at issue to be inappropriate. Nowhere in the F.LLI De Cecco decision does the Federal Circuit rely on or intimate that it is appropriate to rely on evidence developed in subsequent administrative reviews, evidence which did not exist at the time the Department made its decision and thus was not before it, to evaluate the reasonableness of partial adverse facts-available selections.

4) Inclusion of this Information in the 1995/1996 Review Record Undermines the Administrative Process.

The Panel has undermined the U.S. administrative-law process by considering evidence

from subsequent administrative reviews. The administrative process established by U.S. law provides, in general, that, once a proceeding is started, interested parties may make submissions of arguments and facts and rebuttals at particular times in the proceeding. See, generally, subtitle IV of the Tariff Act of 1930, as amended; see also 19 CFR §351.301-312. We will review these arguments and facts and may also investigate and collect facts. *Id.* We then issue a preliminary determination upon which the parties are permitted to comment and provide rebuttal comments. 19 U.S.C. §1675(a)(3). A hearing may be conducted to allow the parties to present their positions and respond to our questions or questions raised by other parties. 19 U.S.C. §1675(e). Then we review the administrative record with all of the arguments and information collected or submitted and issue a final determination or results of a review in which we explain the basis of our decision. 19 U.S.C. §1675(a)(1). This administrative process allows for issues raised by the parties to be fully developed and investigated by us fully so that we can make an informed decision on those issues.

If any of the parties are dissatisfied with the final determination or results of a review, those parties may challenge our determination in the United States court system or, if a member of NAFTA, before a NAFTA panel on the basis that our decision is not supported by substantial record evidence or otherwise in accordance with law. 19 U.S.C. §1516a(b). The court or panel will review our determination or results on this basis. If either finds that the decision or results are supported by substantial record evidence and in accordance with the law, the process ends at this point. If the courts or panel find that the decision or results are not supported by substantial record evidence and are not supported by law, the court or panel may remand the issues back to

us. We must then further explain or conduct additional analysis and investigation limited to information which would have been available at the time of the original final determination and make another decision which we send back to the courts or panel to be reviewed once again based on the substantial record evidence and in-accordance-with-law standard.

The Panel has made a finding that the “actual data” for CEMEX would have shown that any amount of DIFMER would be adverse to CEMEX based, in part, on extra-record evidence. This finding undermines the administrative process. As discussed above, not only is this factual finding not supported by any record evidence, it is contrary to U.S. law. Based on record evidence, we do not know what the actual data would have been. CEMEX took full advantage of the administrative process and made a decision to falsify its data concerning its production and DIFMER data at the Hermosillo plants. We and the other interested parties were deprived, by this falsification of data, of the opportunity to review, comment on, and test the actual data. To attempt to use information from subsequent reviews to justify its decision, the Panel has ignored the administrative process as well as its function under NAFTA. Therefore, the Panel should disregard the DIFMER factual findings in the 1996/1997 and 1998/1999 administrative reviews and examine our Sixth Review Final Results administrative review DIFMER determination based solely on the facts of that administrative review as required by U.S. law. If the Panel does this, it will find that our determination in the Remand I is supported by record evidence and is otherwise in accordance with law.

- 5) To use the weighted-average cost data for producing Type I cement instead of the cost data for the most efficient plant using Type I cement would not be adverse to CEMEX because it would result in a DIFMER that is less than the DIFMER CEMEX requested based on its falsified data.**

Finally, using the weighted-average figure of the variable cost for producing Type I cement as adverse facts available instead of the variable costs for the most efficient Type I plant as the Panel suggests would not be adverse because it would result in a DIFMER adjustment that is almost identical to the DIFMER adjustment requested by CEMEX based on its misrepresented data.

Based on the above, the Panel's factual finding that any DIFMER would be adverse to CEMEX is not supported by record evidence and is not in accordance with U.S. law. Therefore, the Panel should affirm our DIFMER adverse facts-available selection in the Remand I.

Comment 2: CEMEX and CDC argue that the Department has not complied with the Panel's instructions. According to CEMEX and CDC, the Panel instructed the Department explicitly to use an adverse DIFMER adjustment that is adverse to CEMEX yet isolated to physical characteristics (free from plant-efficiency effects) and data that is non-punitive and more probative of the current conditions instead of the costs of cement facility with the lowest variable costs. CEMEX and CDC argue that, contrary to the Department's contentions, the Panel's conclusion that had the Department not resorted to adverse facts available a zero DIFMER finding was feasible was not based solely on citations to subsequent reviews but also on undisputed information on the record of the 1995/1996 review. According to CEMEX and CDC, the Panel's decision was supported by more than one reference to the record of the 1995/1996

review which indicates that any cost differences are not attributable to physical differences. Therefore, according to CEMEX and CDC, the Panel concluded reasonably that a zero DIFMER finding was conceivable, absent the application of facts available, and, thus, any DIFMER finding above zero could be adverse to CEMEX. CEMEX and CDC contend that, given this information, the Department's refusal to comply with the Panel's instruction is not justified.

CEMEX and CDC argue that, for these reasons, the Department should determine a DIFMER adjustment that fully takes into account the effect of plant efficiencies, such as an adjustment based on the weighted-average variable costs of all CEMEX's Type I plants.

The petitioner argues that, as explained by the Department, the Panel may not rely on the contrary information the Department discovered at verification as record support for a zero DIFMER because that would allow CEMEX to benefit from its deception in falsifying the information it provided to the Department previously.

The petitioner argues that the Department's conclusions with respect to the DIFMER issue are correct and should be included in its final remand results.

Department's Position: The petitioner's comments are consistent with our understanding of the facts and the law. The arguments raised by CEMEX and CDC in their comments on Draft Results II concerning our selection of adverse facts available for the DIFMER adjustment have already been addressed fully in the above text of this final results remand determination. We would like to point out, however, that CEMEX and CDC have not addressed the fact that the adverse facts-available DIFMER selection which they are advocating and believe the Panel has

instructed the Department to use is the same calculation and figure, with an insignificant modification, which CEMEX requested initially for a DIFMER adjustment in the 1995/1996 administrative review. The record indicates that CEMEX's original request for DIFMER was based on falsified production and cost data which is the basis upon which the Panel upheld the Department's decision to resort to adverse facts available for the DIFMER adjustment. Based on the record of the 1995/1996 administrative review, it cannot be adverse to give CEMEX the same DIFMER adjustment it requested that is based on false information as the adverse facts available DIFMER adjustment.

During the administrative review and prior to the Department's discovery at verification that CEMEX had falsified its cost and production data, CEMEX used that falsified data to request a DIFMER adjustment for comparisons between Type II and Type I cement. CEMEX requested a DIFMER adjustment based on the Type II cost data from the Yaqui and Campana plants and the weighted-average of the costs of all of the CEMEX plants reported to produce Type I cement. We discovered at verification that CEMEX had no documentation to support the production cost of Types I or II cement at the Yaqui and Campana plants. The reported Type II cost data was discovered to be Type V cement cost data in reality. As partial adverse facts available, the Department used the Type II cement cost data (now known as Type V cement cost data) and compared it with the cost data from CEMEX's most efficient Type I plant to calculate the adverse facts-available DIFMER adjustment. To use the Type II (V) cost data and the weighted-average cost data of CEMEX's Type I plants as adverse facts available as CEMEX and CDC suggest would be giving CEMEX the same DIFMER adjustment based on false data it

requested during the 1995/1996 review. To make an adverse facts-available DIFMER adjustment which is the same as the DIFMER adjustment requested by CEMEX during the review is not adverse.

FINAL RESULTS OF REDETERMINATION

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

David M. Spooner
Assistant Secretary
for Import Administration

(Date)