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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Administrative Review of the Antidumping Duty Order on Gray Portland Cement and Clinker From Mexico – August 31, 2003, through July 31, 2004

Summary

We have analyzed the comments and rebuttals of interested parties in the 2003-04 administrative review of the antidumping duty order on gray portland cement and clinker from Mexico. As a result of our analysis, we have made changes to the margin calculations. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttals by interested parties.

Background

On September 13, 2005, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on gray portland cement and clinker from Mexico (Preliminary Results of Antidumping Duty Administrative Review: Gray Portland Cement and Clinker From Mexico, 70 FR 54013 (September 13, 2005) (Preliminary Results)). The period of review (POR) is August 1, 2003, through July 31, 2004.

We invited parties to comment on our Preliminary Results. We received case briefs dated October 13, 2005, from respondent GCC Cemento, S.A. de C.V. (GCCC), respondent CEMEX, S.A. de C.V. (CEMEX), and petitioner Southern Tier Cement Committee (the petitioner). We received rebuttal briefs dated October 21, 2005, from GCCC, CEMEX, Holcim Inc., (a domestic interested party) (Holcim), and the petitioner. The parties raised the following issues:

1. Revocation
2. Regional Assessment
3. Sales-Below-Cost Test
4. Bag vs. Bulk
5. Swap Sales

6. Cash-Deposit Methodology
7. Ordinary Course of Trade
8. Indirect Selling Expenses
9. Interest Revenue

Discussion of the Issues

Comment 1: Revocation

GCCC argues that the Department should terminate this review and revoke the underlying antidumping duty order because the regional producers did not demonstrate support for the petition in this case. According to GCCC, the Department lacks the authority to impose antidumping duties on the basis of petitions that are not filed "on behalf of" the relevant industry. GCCC contends that, due to the statutory linkage of the statements "on behalf of" with "industry," the Department recognizes that the definition of industry is integral to resolving issues of standing. GCCC argues that a petitioner's standing to request antidumping relief and the Department's authority to give the relief depend in large part on how "industry" is defined.

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

GCCC argues that the language in the statute is consistent with the statutory provision setting out the requirements for finding material injury in a regional-industry case. According to GCCC, the plain language of section 771(4)(C) of the Tariff Act of 1930, as amended (the Act), requires petitions in regional-industry cases to be filed on behalf of the producers that account for "all, or almost all, of the production in the region." Because the antidumping duty order covering cement from Mexico was based on a petition that was unsupported by producers accounting for all or almost all of the region's production, GCCC contends, the Department issued the order in violation of U.S. law. GCCC disputes the Department's assertion in the 2002/2003 review that it lacked authority to rescind the antidumping duty order on the basis that the petitioner's standing had not been challenged in connection with the original investigation such that the issue could not be reviewed in the context of an administrative review. GCCC asserts that this view conflicts with both case law and the Department's own precedent. GCCC argues that the lack of standing to file an antidumping duty petition is a "jurisdictional" defect which parties may raise at any time. GCCC contends that the Department has the authority to revoke an order that never had the requisite level of industry support, citing Zenith Electronics Corp. v. United States, 872 F.

Supp. 992 (CIT 1994) (Zenith Electronics), Gilmore Steel Corp. v. United States, 585 F. Supp. 670 (CIT 1984) (Gilmore Steel), and Oregon Steel Mills, Inc. v. United States, 862 F.2d 1541 (Fed. Cir. 1988) (Oregon Steel Mills).

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

Holcim argues that GCCC's claim is untimely and should be rejected by the Department.

The petitioner comments that GCCC has raised this argument in prior reviews. The petitioner asserts that, considering the North America Free Trade Agreement (NAFTA) binational panel decisions pertaining to the 1992/1993, 1994/1995, and 1996/1997 administrative reviews of gray portland cement and clinker from Mexico and the Department's determinations in the 1992/1993 through 2002/2003 reviews that rejected GCCC's claims for revocation, it is long past time for GCCC to stop making this baseless argument.

The petitioner also argues that GCCC's claim is barred by the statute of limitations which, according to the petitioner, required any appeal of the decision to initiate the antidumping investigation to be filed within 30 days of the publication of the antidumping duty order. The petitioner argues further that GCCC's claim is barred by failure to exhaust available administrative remedies because the issue was not raised before the Department in the original investigation. The petitioner contends that GCCC's claim is barred by the doctrine of res judicata because it could have been raised, but was not raised, in an appeal to the Court of International Trade (CIT) from the Department's final determination in the original investigation. The petitioner argues that, to the extent that GCCC's claim is based on the unadopted recommendation of a General Agreement on Trade and Tariffs (GATT) panel, that recommendation does not constitute binding international law and there is no basis for applying the rule of statutory construction in Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (Charming Betsy). The petitioner cites Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review, 63 FR 12764, 2765 (March 16, 1998) (1995-96 Final Results), Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review, 64 FR 13149, 13150 (March 17, 1999) (1996-97 Final Results), and Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review, 66 FR 14889 (March 14, 2001), in which the Department commented that panel reports under the 1947 GATT were not self-executing and had no legal effect under U.S. law and that neither the 1947 GATT nor the 1979 GATT antidumping code obligated the United States to establish industry support in regional-industry cases.

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

Department's Position: This is the fourteenth administrative review of this order in which this issue has been raised and we reiterate our position that the issue of whether a petitioner has the necessary support to file a petition is strictly appropriate to an investigation. The statutory deadline for parties to challenge the industry support for the petition was 30 days after the antidumping duty order was issued in 1990 (see section 516A of the Act). No party did so. As a result, we will not reconsider our industry-support determination. Further, the Uruguay Round Agreements Act (URAA) amended the statute to prohibit the Department from revisiting the issue of industry support once the Department has initiated a less-than-fair-value (LTFV) investigation. See section 732(c)(4)(E) of the Act. The bulk of GCCC's argument is a statutory argument that the Department applied the wrong standard for determining industry support in the investigation.[1] Because the statutory time limit to challenge this issue has passed, the issue cannot be properly raised in this review. Therefore, we have not addressed that argument.

Of the cases cited by GCCC, none of them supports the argument that the Department has the authority, in an administrative review under section 751(a) of the Act, to reach back over 14 years and reexamine the issue of industry support for the original petition. In Gilmore Steel, 585 F. Supp. at 673, the plaintiff contended that the Department lacked the authority to rescind the investigation based upon insufficient industry support for the petition after the 20-day period established in section 732(c) of the Act had elapsed. In Zenith Electronics, 872 F. Supp. at 994, the plaintiff alleged that the petitioner was no longer a domestic "interested party" with standing to request an administrative review. Nothing in Zenith Electronics or Gilmore Steel supports GCCC's argument that a party may challenge industry support for a petition over 14 years after the fact and in the context of an administrative review under section 751(a) of the Act.

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

We also find GCCC's reliance on the administrative decision in OCTG from Argentina to be misplaced. Although GCCC states correctly that the Department terminated these administrative reviews based on the Department's lack of authority to assess countervailing duties on subject merchandise entered after a certain date, this decision was necessitated by a

[1]GCCC cites, in footnote 82 of its administrative case brief, a GATT Panel Report on Mexican Cement to support its argument pertaining to regional-industry provisions of the statute. That report was never adopted, however, by the GATT General Council.

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

In short, the cases GCCC cites are inapposite. None of them supports GCCC's argument that the Department has the authority, in an administrative review under section 751 of the Act, to reach back 14 years and reexamine the issue of industry support for the original petition.

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

Comment 2: Regional Assessment

GCCC contends that, during the instant review, it sold cement both inside and outside the Southern Tier region, as defined by the U.S. International Trade Commission (ITC) in the original antidumping investigation. GCCC asserts that, in the Preliminary Results, the Department calculated duties on sales both inside and outside the Southern Tier region. According to GCCC, the Department has no authority to assess duties on imports that do not affect the Southern Tier region and the Department has an international obligation to limit its assessment of antidumping duties in regional cases only to the imports consigned for final consumption in that region. For a complete summary of GCCC's "Regional Assessment" argument, see GCCC's case brief dated October 13, 2005, at page 26.

Holcim argues that GCCC's argument should be rejected because it does not argue that the Department's decision to collect duties for all U.S. sales of subject merchandise regardless of the region is inconsistent with U.S. law.

The petitioner argues that GCCC's claims have no merit. The petitioner asserts that GCCC does not allege that the assessment of duties on a nationwide basis is in any way contrary to U.S. law but relies exclusively upon international trade agreements that date back to 1968. In fact, the petitioner argues, U.S. law requires application of duties on a nationwide basis. The petitioner asserts that, contrary to GCCC's argument, Congress has declared that the collection of antidumping duties on a region-specific basis is unconstitutional. According to the petitioner, Congress has crafted a set of statutory provisions that provide for the assessment of antidumping duties in regional-industry cases in a manner that is in accord with both the constitutional constraints and U.S. international obligations. In addition, the petitioner contends that these provisions and only these provisions form the body of law that governs the Department's antidumping determinations. For a complete summary of the petitioner's rebuttal comment with regard to this argument, see the petitioner's rebuttal case brief dated October 21, 2005, at page 74.

Department's Position: As in prior reviews, we find GCCC's arguments to be without merit. GCCC has not alleged that our regional-assessment methodology is contrary to U.S. law. Moreover, we find that U.S. law, as implemented through the URAA, is fully consistent with our WTO obligations.

Comment 3: Sales-Below-Cost Test

CEMEX argues that, while it agrees with the Department's preliminary finding that it had no sales in the home market below the cost of production, the Department's decision to initiate a cost investigation was unsupported by substantial evidence on the record and not in accordance with the law.

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

CEMEX argues further that, in light of the Department's findings in the nine previous reviews not to disregard any below-cost sales, the first basis to initiate a sales-below-cost investigation set forth above has not been met and that the Department should have been skeptical of the information submitted by the petitioner to fulfill the second basis. CEMEX also claims that the volume of alleged sales below cost was insubstantial and de minimis. CEMEX cites several decisions by the CIT and the U.S. Supreme Court recognizing the de minimis principle and the general principle that the law does not concern itself with small, insignificant, or trifling errors. CEMEX argues further that, by not setting a threshold quantity on which to initiate a sales-below-cost investigation, the statute permits the Department to use its discretion in determining what constitutes a reasonable basis to believe or suspect a respondent is selling merchandise in the home market below the cost of production. Finally, CEMEX argues that, in conducting this investigation, it incurs substantial expenses and the Department bears a substantial burden in analyzing and verifying the information. CEMEX argues therefore that the Department should establish a threshold quantity in determining what constitutes a reasonable basis on which to conduct a sales-below-cost investigation.

GCCC argues that the petitioner did not provide a sufficient basis for requesting that the Department initiate a cost investigation and that, as a result of the Department's initiation, as in the past nine administrative reviews, the respondents and the Department have expended resources needlessly on an unwarranted investigation of sales below cost. According to GCCC, given the consistent pattern in the past six reviews and this review of an allegation of de minimis below-cost sales, multiple submissions of cost data by respondents, and a decision by the Department not to disregard any sales below cost, the grounds for the Department to decline to initiate a sales-below-cost investigation have grown more compelling.

Holcim argues that the Department applied the statute properly because there was evidence of the existence of below-cost sales and the statute does not require a specified quantity of below-cost sales to undertake the inquiry.

The petitioner contends that the Department should reject the respondent's arguments on the ground that they do not relate to any issue relevant to the final results of this review. The petitioner argues that, as it is too late for the Department to reverse its decision to initiate a cost investigation in this review, this issue is no longer relevant to these final results and, thus, the Department should reject the respondent's arguments on that ground alone. The petitioner argues further that, as long as there is sufficient information that home-market sales were made below cost in this current review, it is irrelevant whether the Department excluded below-cost sales in prior reviews. According to the petitioner, the antidumping law indicates explicitly that, in deciding whether to initiate a cost investigation, the Department may not disregard an allegation of sales below cost on grounds that such transactions are purportedly de minimis and the statute does not establish any minimum quantity of sales that must be demonstrated to be below cost. Citing Huffy Corp. v. United States, 632 F. Supp. 50, 57-58 (CIT 1986), the petitioner argues that the statute requires only a showing that sales have been made at below-cost prices in order to initiate a sales-below-cost investigation and that there is no requirement to show such sales were in substantial quantities. Rather, the petitioner asserts, the Department must only decide whether substantial below-cost sales were made in determining whether to disregard those sales.

Department's Position: CEMEX and GCCC have raised this issue in previous administrative reviews and have not offered any new arguments. Our position regarding this issue has not changed. As we explained in previous reviews, section 773(b)(1) of the Act requires that the Department have "reasonable grounds" to believe or suspect that below-cost sales occurred before initiating a below-cost investigation. See Statement of Administrative Action of the Uruguay Round Agreements Act, H.R. Doc.103-316, vol I, at 833 (1994) (SAA). Reasonable grounds exist when an interested party provides information indicating that sales have been made in the foreign market in question at below-cost prices. See section 773(b)(2)(A)(I) of the Act. Based on our analysis of the information the petitioner provided to support its allegation of sales below cost, we found reasonable grounds to believe or suspect that below-cost sales occurred. The petitioner made use of the respondent's data on the record, employed a reasonable methodology, and provided evidence of below-cost sales. Upon examining the allegation, we found that the petitioner's analysis was consistent with our practice of examining sales below cost and determined that the petitioner had provided a reasonable basis to believe or suspect that the respondent was selling subject merchandise in Mexico at prices below the COP. See the memorandum from Mark Ross to Laurie Parkhill entitled "Gray Portland Cement and Clinker from Mexico: Request to Initiate Cost Investigation in the 2003/2004 Review," dated February 18, 2005.

In Connors Steel Company v. United States, 527 F. Supp. 350 (CIT 1981) (Connors Steel), the CIT determined that, when a petitioner provides reasonable evidence that home-market sales are being made below cost, the Department has a statutory duty to inquire further to determine the validity of such an allegation. Further, in that decision, the CIT stated that the statutory "duty could not be avoided except for the most compelling reasons." See Connors Steel, 527 F. Supp. at 356. In this case, based on the petitioner's submissions, we found reasonable grounds to believe or suspect that below-cost sales occurred. Therefore, pursuant to section 773(b)(1) of the Act, we initiated a cost-of-production investigation to determine whether the respondent made home-market sales during the POR at below-cost prices. We reject the respondent's assertions that the petitioner's allegation is insufficient based on the number of below-cost sales it identified. Section 773(b)(2) of the Act does not establish a threshold quantity of sales below cost in order for the Department to initiate a cost investigation. There is no threshold quantity of below-cost sales in order to initiate a sales-below-cost investigation because, as a general matter, the petitioner does not have access to a respondent's cost data in order to be able to demonstrate minimum percentages. If the petitioner can provide the Department with a reasonable basis to believe or suspect that any sales are being made below cost based on available data, the only way to determine whether the sales are being made at below-cost prices is to collect the data from the respondent and perform the calculations.

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

Comment 4: Bag vs. Bulk

GCCC states that the Department performed the price comparisons for its preliminary results in this review for its Type II bagged and bulk cement sold in the United States by calculating monthly average normal values for CEMEX's CPO 40 bulk cement sales in Mexico. GCCC also states that the Department compared U.S. transactions of GCCC's Type V, which included only bulk cement, to monthly average normal values of CEMEX's CPO 40 sales, which also included only bulk cement. GCCC asserts that, because the Department's dumping comparisons in this review compared primarily bulk cement to bulk cement, the Department largely avoids the problem seen in previous reviews and NAFTA challenges of comparing bagged sales to bulk sales. GCCC argues that, if the Department changes its approach to making product comparisons and, for example, compares GCCC's U.S. sales to its own home-market sales instead of to CEMEX's CPO 40 bulk cement sales, the Department should not compare sales of bulk cement in one market with sales of bagged cement in the other market and provides various arguments for its view.

The petitioner argues that the issue of matching bulk and bagged cement is irrelevant as long as the Department continues to select of CEMEX's sales of CPO 40 cement, all of which were in bulk, as the foreign like product for matches with sales of all cement types sold in the United States by CEMEX and GCCC. In any event, the petitioner argues, the Department's practice of matching cement types sold in the United States and the home market without regard for packaging is consistent with the statute and the Department's longstanding, consistent practice in other cases.

Department's Position: As we have not altered our matching methodology from the Preliminary Results, we find this issue to be moot. Therefore, we find no reason to consider this issue for purposes of the final dumping calculation.

Comment 5: Swap Sales

The petitioner argues that CEMEX has overstated the U.S. price for certain transactions involving exchanges of cement with one of its unaffiliated U.S. customers during the POR. According to the petitioner, CEMEX reported an arbitrary price that bears no relationship to any real-world value to certain swap transactions in this review. The petitioner asserts that, by CEMEX's own admission, the values it assigned to the transactions in question are entirely arbitrary and do not even purport to represent a price that CEMEX received from its unaffiliated U.S. customer.

The petitioner argues further that, in the absence of any information about the actual consideration CEMEX received for the transactions in question, the Department cannot simply accept any fanciful value that CEMEX chooses to enter into its records. Citing Freshwater Crawfish Tail Meat from the People's Republic of China: Preliminary Notice of Intent to Rescind New Shipper Administrative Review, 68 FR 52745, 52746 (September 5, 2003) (Crawfish), the petitioner argues that in that case the Department found U.S. sales not to be bona fide because, among other things, their prices were atypical of normal business practices. In addition, the petitioner asserts, CEMEX has provided no information on the record to justify the change in value for the transactions in question from the values CEMEX claimed in the previous review. The petitioner argues that the Department should assign the same value it assigned in the 2001/2002 administrative review for these types of transactions. The petitioner contends that, because the Department verified this value in the prior review and it is a value that CEMEX has reported in this POR for most of its swap transactions, it is a reasonable surrogate for the actual consideration CEMEX received for such transactions.

The petitioner asserts that, if the Department allows CEMEX to use the prices that it reported for the swap transactions in question, the Department will encourage CEMEX in future reviews to engage in creative bookkeeping by concocting self-serving high values for the swap transactions in question that bear no resemblance to any actual value received by CEMEX.

The petitioner states that, if the Department decides not to rely upon the standard price for the swap transactions in question, it instead should rely on record information regarding cement prices CEMEX obtained in another geographic market where CEMEX conducts business. Specifically, the petitioner suggests that the Department should value these swap transactions at prices for U.S.-produced cement sold by CEMEX in a different geographic market.

CEMEX disputes the petitioner's assertion that the prices CEMEX reported for the transactions in question are arbitrary values that have no real-world validity. CEMEX contends that, just as for the other swap transactions, the reported prices for these transactions were taken directly from its books and records which were kept in the normal course of business. Thus, according to CEMEX, the reported prices for the challenged transactions are just as valid as the prices it reported for all other swap transactions.

CEMEX argues that the petitioner's reliance on Crawfish is inapposite because the prices in that case were found to be atypical of normal business practices whereas the prices reflected for the transactions at issue were based upon the prices CEMEX recorded in its records in the normal course of business.

CEMEX argues further that the petitioner's alternative argument that the Department should value the challenged transactions at prices CEMEX obtained in another geographic market where CEMEX conducts business is equally without merit. According to CEMEX, the petitioner is asking the Department to value Mexican cement transferred in Arizona not on the basis of prices for Mexican-produced cement but rather on the basis of prices for U.S.-produced cement sold in a totally different geographical market. CEMEX argues that such an approach would be contrary to the statutory requirement in the U.S. antidumping law that export price and constructed export price be based on the price of the subject merchandise (i.e., cement produced in Mexico). CEMEX argues that the petitioner has not provided, and cannot provide, any statutory support or administrative precedent for its argument that the price of these transactions should be based on the price of U.S.-produced cement.

CEMEX requests that the Department follow the precedent established in the prior administrative review and value the transactions in question at the prices reflected in its books and records.

Department's Position: The difference between U.S. non-swap sales and the swap sales in question in terms of average net prices is insignificant. The information on the record does not support the petitioner's assertion that the prices CEMEX reported for the swap transactions in question bear no relationship to "real world value." For a detailed discussion of our analysis of prices regarding swap sales and non-swap sales, see Final Results Analysis Memo for CEMEX, S.A. de C.V. and Its Affiliate, GCC Cemento, S.A. de C.V., for the Fourteenth Administrative Review (03-04) of the Antidumping Duty Order on Gray Portland Cement and Clinker from Mexico, dated January 11, 2006 (Final Analysis Memo), covering the 2003/2004 period.

Further, we have no reason to believe and there is no evidence to support a determination that CEMEX reported the prices for the swap transactions in question inappropriately. During the 2003/2004 administrative review, the Department requested further clarification in its March 25, 2005, supplemental questionnaire regarding the prices reported by CEMEX for the swap transactions in question. In its supplemental response dated April 27, 2005, at pages 60 and 61, CEMEX provided a further explanation of why it reported different prices for these swap transactions. We have no information on the record of this administrative review to indicate that the prices for the swap transactions in question were reflected inappropriately in the company's books and internal records. Thus, for the final results of this administrative review, we have used the price CEMEX reported for its swap transactions.

We see no merit to the petitioner's recommendation that we rely on record information regarding cement prices CEMEX obtained in another geographic market. The petitioner's recommendation is not supported by the statute and, therefore, it would be inappropriate to value subject merchandise on the basis of prices for U.S.-produced cement. See section 773 of the Act, which states that a fair comparison shall be made between the export price or constructed export price to normal value.

Comment 6: Cash-Deposit Methodology

CEMEX argues that the Department's reasons for departing from its standard cash-deposit methodology are erroneous and do not justify the change in methodology in this case. Specifically, CEMEX asserts that the cash deposit is not intended to be an accurate measure of the assessed duty. According to CEMEX, the statute requires only cash-deposit estimates, not absolute accuracy. CEMEX argues further that these estimates need only be reasonably correct pending the submission of complete information for an actual and accurate assessment. Citing Koyo Seiko Co., Ltd. v. United States, 110 F. Supp. 2nd 934, 942 (CIT 2000), affirmed 258 F.3rd 1340 (Fed. Cir. 2001) (Koyo), CEMEX argues that the CIT has consistently rejected efforts to require more precision in the cash-deposit rate.

CEMEX argues that the pattern of differences between the weighted-average margins and the assessment rates that the Department observed arise naturally in most cases involving an affiliated importer and constructed export price due to the normal differences between the entered value and sales value. CEMEX asserts that, in such cases, because the sale of the subject merchandise to the first unaffiliated customer occurs after importation, the entered value represents the transfer price set between the exporter and the affiliated importer. CEMEX asserts further that the price at which the merchandise is later sold to an unaffiliated customer generally reflects a mark-up added by the affiliated importer. CEMEX contends that the facts of this case are no different from the countless administrative reviews and investigations involving constructed export price in which the Department applied its normal ad valorem cash-deposit practice. CEMEX argues that this case does not present any exceptional facts to warrant any deviation of its normal practice.

CEMEX asserts that, there is no under-collection of duties because section 737 of the Act provides that any difference between deposited and assessed duties will be collected or refunded with interest. According to CEMEX, this provision ensures that the U.S. government does not suffer a loss from an underestimate of antidumping duties. CEMEX contends that, on the other hand, the over-collection of duties imposes a significant financial burden upon the importer because its funds must remain tied up for a lengthy period of time.

CEMEX contends that by changing the deposit requirement for future entries, the Department essentially assumes that the difference between the entered value and the U.S. price will remain constant in future review periods. CEMEX argues that no evidence on the record supports such a finding and the courts have repeatedly rejected such a assumption. Citing Federal-Mogul Corp. v. United States, 813 F. Supp. 856, 868 (CIT 1993), CEMEX argues that the CIT specifically rejected the argument that calculating cash-deposit rates as a percentage of entered value, rather than as a percentage of sales value, would result in a more accurate estimate of the assessed duty. According to CEMEX, the court held that it is by no means true that the adjusted U.S. price of the future entries would indeed be increased in the same proportion as in the final results of this review. CEMEX contends that the court upheld the Department's standard cash-deposit practice without any conversions to account for the differences between the entered value of the merchandise and the adjusted U.S. price to be determined in the future.

CEMEX asserts that the Department's departure from its normal cash-deposit practice is arbitrary because there is no reasonable basis for such a departure. CEMEX contends that well-established principles of administrative law require that the Department must adhere to its prior policies and practices or provide a reasonable explanation for such change. CEMEX argues that, in previous administrative reviews of this order, the Department consistently applied its normal ad valorem methodology and rejected the petitioner's request to apply a per-unit deposit amount. According to CEMEX, the only instance of deviating from its practice has occurred in cases where the entered value was inaccurate or incomplete. CEMEX asserts that in reviews prior to the 2001/2002 administrative review the Department specifically declined to use a per-unit cash-deposit amount because it found no problems with the entered value in those reviews. CEMEX contends that in this review, there was no change in the facts from those of the earlier review periods and there is no evidence showing that this case differs in any way from other cases. Thus, according to CEMEX, the Department's change in practice is inappropriate because it is not supported by a reasonable explanation as to why this case should be treated differently from other cases.

GCCC argues that the Department should follow its normal approach for calculating cash-deposit rates. GCCC asserts that the reasoning used by the Department in the 1999/2000 and 2000/2001 reviews applies equally to this review. GCCC contends that the Department has no reason to believe that the entered values that GCCC reported do not correspond to the values on the documentation presented to U.S. Customs and Border Protection (CBP). GCCC claims further that, if the final assessment rate differs from the cash-deposit rate, the U.S. government collects the difference with interest. Therefore, GCCC argues, there is no reason for the

Department to use any other method than its normal method for calculating the cash-deposit rate.

Holcim argues that the Department's requirement of cash-deposit rates on a per-ton basis is an appropriate remedy to correct the under-collection of cash deposits. Holcim claims that the respondents' suggestion that the collection of interest is the appropriate solution is flawed because, by that rationale, there would be no need for cash deposits at all, given that the ultimate amount of duties to be collected could always be collected with interest. Holcim claims that Congress clearly made a judgment that the actual collection of cash deposits at the time of entry was necessary to further the remedial purpose of the law. Holcim argues, therefore, that the Department should continue to collection cash deposits on a per-ton basis.

The petitioner argues that the Department used a cash-deposit rate based on dollars per metric ton cash for future entries of the respondent correctly, rather than an ad valorem rate. The petitioner asserts that the Department's finding of a pattern of difference between the weighted-average margins and the assessment rates in recent reviews is supported fully by evidence on the record. The petitioner asserts that, in fact, from the 1998/1999 review to the 2002/2003 review the assessment rate has been different than the ad valorem cash-deposit rate. The petitioner contends that, as a result, the application of an ad valorem cash-deposit rate to future entries of cement from Mexico would plainly result in the under-collection of cash deposits relative to the antidumping duties that ultimately will be assessed upon liquidation of the entries.

The petitioner contends that the gross discrepancy between the assessment rate and the ad valorem cash-deposit rate is not a coincidence but the result of the respondent's aggressive understatement of entered values for the purpose of decreasing its liability for cash deposits of estimated antidumping duties. According to the petitioner, the respondent has admitted that its entered values reflect an arbitrary transfer price, not the arm's-length price between unaffiliated buyers and sellers preferred by the customs law. The petitioner asserts that the respondent and its affiliated U.S. importers have distorted the transfer price in a way that yields an under-collection of cash deposits. The petitioner argues that the resulting shortfall in the collection of cash deposits provides the respondent and its affiliated U.S. importers a substantial and improper economic benefit.

The petitioner asserts that the use of an ad valorem cash-deposit rate that grossly under collects the estimated antidumping duties does not serve the fundamental purpose of the statutory cash-deposit requirement of providing security for final assessment and immediate relief from dumped imports. The petitioner contends that the requirement that importers pay cash deposits was meant to provide an additional deterrent to dumping by increasing the immediate financial burden on exporters and importers upon entry of merchandise subject to an antidumping duty order. Thus, according to the petitioner, cash deposits serve as security for monies that may be owed once entries of subject merchandise are liquidated.

The petitioner argues that the Department's choice of methodologies for calculating cash-deposit rates and antidumping duty assessment rates is not restricted by the statute, regulation, or case law.

Citing Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Preliminary Results of Antidumping Administrative Review, 68 FR 7976, 7980 (February 19, 2003) (Freshwater Crawfish), the petitioner argues that the use of the dollars-per-metric-ton methodology is supported by the Department's precedent in other cases. The petitioner argues further that the Department has used quantity-based methodologies for determining the assessment rate. According to the petitioner, in the 1997/1998 administrative review, the Department discovered that the respondent had reported gross entered values erroneously rather than net entered values. Thus, the petitioner asserts, the Department could not follow its normal practice of calculating an assessment rate using total entered value in the denominator.

The petitioner states that the respondent provides no reason why the Department should not rely on the dollars-per-ton methodology, rather than an ad valorem methodology, to determine the cash-deposit rate in light of the great discrepancy in this review and prior reviews between the ad valorem weighted-average margin and the assessment rate and between the entered value and the U.S. sales price. The petitioner argues that the respondent's argument that the cash-deposit rate is not intended to be an accurate measure of the assessed duty is simply erroneous. The petitioner asserts that, to achieve their remedial purposes, cash deposits must provide a reasonably correct estimate of the duties that will be assessed ultimately.

The petitioner argues that the evidence on record compels the Department to reach the conclusion that a decision to use a different methodology for the cash-deposit rate would result in the under-collection of estimated antidumping duties. The petitioner asserts that, for the final results, the Department should continue to calculate the cash-deposit rate for future entries of subject merchandise using the dollars-per-metric-ton methodology.

Department's Position: For the reasons stated in the Preliminary Results, we affirm our decision to apply a per-unit cash-deposit amount to entries of subject merchandise from CEMEX/GCCC following the publication of these final results of review. See Final Analysis Memo. The record evidence indicates that a pattern of significant differences exists between the weighted-average margin and the assessment rate. See the attachment of the Preliminary Results Analysis Memorandum dated August 30, 2005. Contrary to CEMEX's assertion, this pattern of differences indicates that the collection of estimated antidumping duties using an ad valorem rate based on net U.S. price results in the under-collection of estimated antidumping duties at the time of entry. Consequently, the under-collection of estimated antidumping duties does not serve the fundamental purpose of the statutory cash-deposit requirement of providing security for final assessment and immediate relief from dumped imports. Therefore, we continue to find that the per-unit assessment figure we have calculated represents a more accurate reflection of the estimated antidumping duties.

While we agree with CEMEX that cash deposits and assessment rates need not be identical, we find that deposit rates should be as accurate as reasonably possible (as also indicated by the court in Koyo). In this case, because there is a significant disparity between the weighted-average margin and the assessment rate, it is appropriate to apply a per-unit cash-deposit figure in order to calculate a more accurate estimate of the duty amount that will ultimately be assessed.

We disagree with CEMEX's assertion that, by changing the deposit requirement for future entries, we assume that the differences between the entered value and the U.S. price will remain constant in future review periods. Our decision to apply a per-unit cash-deposit amount is in accordance with the statute and based directly upon evidence on the record that indicates a significant disparity between the weighted-average margin and the duty-assessment rate. Thus, our decision to adopt this methodology is not based on the belief that we can forecast the amount of dumping on future entries.

In addition, the statute does not bind the Department to any specific calculation methodology and the Department has discretion in establishing the cash-deposit methodology. Therefore, the application of a different methodology as a result of the particular facts of this review does not render our methodology inconsistent with the statute. See Federal Mogul Corp. v. United States, 918 F. Supp. 386, 404 (CIT 1996).

While we agree with the respondent that our normal practice is to establish the cash-deposit rate on an ad valorem basis using the weighted-average margin and that oftentimes there is a difference between the weighted-average margin and the assessment rate, we find that the pattern of significant differences between the weighted-average margin and the assessment rate here is distinct and, therefore, warrants a continued deviation from our standard practice. Upon completion of this review, we will direct CBP to apply the resulting quantity-based amount against the quantity of subject merchandise entered by the importer to satisfy the cash-deposit requirement.

Comment 7: Ordinary Course of Trade

GCCC argues that the Department's determination that its sales of CPO30R BRA cement were not in the ordinary course of trade was based on erroneous conclusions with regard to sales volume, number of sales, price and profitability, sales history, customers, and shipping arrangements. GCCC argues that these sales were within the ordinary course of trade as defined by the statute and interpreted in the Department's prior decisions and, consequently, that the Department should match GCCC's Type II sales in the United States with GCCC's CPO30R BRA cement sales in the home market as identical sales.

Citing section 771(15) of the Act, GCCC asserts that ordinary course of trade is defined as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." GCCC cites the SAA at 834 which states that an ordinary-course-of-trade determination is based on whether "such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market." Citing 19 CFR 351.102, GCCC argues that sales deemed to be outside the ordinary course of trade must have characteristics that are extraordinary for the market in question. GCCC also argues that the Department must examine all the circumstances surrounding a sale to make a determination that its sales of CPO30R BRA cement were made under extraordinary conditions.

With respect to the Department's comparison of sales volumes, GCCC argues that comparing its sales volumes to CEMEX's sales volumes is distortive and unfair because of the small size of GCCC's total home-market sales compared to those of CEMEX. GCCC also contends that, because CPC 30R cement is a general, all-purpose cement and CPO30R BRA cement is normally only used for particular types of projects in the home market, it would follow that sales of CPC 30R cement would be much greater than sales of CPO30R BRA cement and that the smaller sales of CPO30R BRA cement relative to CPC 30R cement would not make sales of CPO30R BRA cement outside the ordinary course of trade.

GCCC cites NTN Corp. v. United States, 306 F. Supp. 2d 1319 (CIT 2004) (NTN Corp.), and asserts that the Department's past precedent has recognized that sales volume is not a persuasive indicator of whether sales are extraordinary. GCCC argues that the Department has recognized that at times it is more appropriate to compare the sales in question to quantities other than total quantities of all subject merchandise during the POR. GCCC asserts that, in this case, the more appropriate analysis would be on the basis of average-per-sale quantities sold to the same customers. GCCC asserts that, based on its analysis of average-per-sale quantities, its sales of CPO30R BRA are not unusual or extraordinary.

With respect to the Department's price comparisons, GCCC argues that the Department excluded crucial evidence that supports a finding that the average net price of CPO30R BRA cement is not extraordinary. GCCC explains that the high level of competition and the greater purchasing power of the customer surrounding sales of CPO30R BRA show that those sales were not extraordinary when compared to sales of other cement types.

With respect to the Department's profit comparisons, GCCC argues that the Department should calculate profit as GCCC normally calculates profit in its ordinary course of business (i.e., based on the variable costs of manufacturing (not the fixed costs)) as the Department has done in Structural Steel Beams From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 69 FR 7200 (February 13, 2004). GCCC claims that, by using this methodology and the information it provided in its home-market-sales database, the profit margins for CPO30R BRA cement and CPC 30R cement are not extraordinarily different.

With respect to the Department's analysis of GCCC's customers, GCCC asserts that the Department's determination that strong competition produces aberrational sales is illogical and that, in fact, strong competition should be a hallmark of what constitutes the ordinary course of trade. GCCC claims that producers often bid for projects with strong competition and that its customers of CPO30R BRA cement have a very competitive bidding process. GCCC argues further that this type of situation occurs often and is not an extraordinary condition, especially in the cement industry. GCCC also argues that the implications of the Department's determination are highly problematic and will create uncertainty for foreign producers in the future because most conduct their business in free markets. Moreover, GCCC objects to the Department's conclusion that there is nothing on the record that shows the customers' request for CPO30R BRA cement.

With respect to the Department's analysis of shipping distances and costs, GCCC states that, by relying on the shipping distance and a comparison of the average freight costs per metric ton of CPO30R BRA cement and CPC 30R cement, the Department concluded that GCCC altered its normal distribution practices and, consequently, that its sales of CPO30R BRA cement did not represent sales made in normal market conditions. GCCC argues that production and shipping decisions for sales of CPO30R BRA cement were based on its customers' requests and the most cost-effective and profitable practices possible and, therefore, that these sales were wholly consistent with its sales of CPC 30R.

The petitioner argues that the Department determined correctly that GCCC's unusual and unrepresentative sales of CPO30R BRA cement should be excluded from the calculation of normal value because they were outside the normal course of trade. The petitioner claims that the evidence indicates that GCCC carried out a scheme to deflate normal value artificially and thereby decrease the dumping margin.

The petitioner argues that the Department observed correctly that, in order to determine whether sales were made outside the ordinary course of trade, it must consider whether certain home-market sales of cement were ordinary in comparison with other home-market sales of cement, not whether the sales were based on sound business principles. The petitioner argues that, even if GCCC made its sales of CPO30R BRA cement during the POR under conditions that are normal for sales of CPO30R BRA cement and had sound business reasons for its decisions on production and shipping arrangements, its sales of CPO30R BRA cement during the POR would not necessarily be within the ordinary course of trade.

The petitioner argues that GCCC's sales of CPO30R BRA cement are not representative of its sales of cement in the home market for various reasons. The petitioner contends that there is no genuine demand for CPO30R BRA cement because GCCC did not begin selling it until the end of the 2002/2003 review. The petitioner asserts that, based on how GCCC and its customers normally refer to the product in documentation on the record, it is clear that they do not consider it to be a product that is sold in the home market normally.

The petitioner asserts that GCCC's sales of CPO30R BRA cement were restricted to a small and unrepresentative group of customers. Citing Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea (62 FR 18404, 18437 (1997)), the petitioner argues that the Department has relied on the number of customers as a factor in determining whether sales are outside the ordinary course of trade. The petitioner also argues that the record indicates that both the number and the nature of its customers of CPO30R BRA cement are not representative of sales of cement generally made in the home market.

The petitioner contends that the sales process for CPO30R BRA cement was very different than for other sales of cement in the home market. In particular, the petitioner mentions that there were no rebates, discounts, or tariffs for sales of CPO30R BRA cement to a particular customer category and that the sales were the result of a public bidding process for two customers in particular.

Citing Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 62 FR 18404 (April 15, 1997), the petitioner claims that the Department and the courts frequently have relied upon low relative sales volumes as a factor in determining whether sales are outside the ordinary course of trade. The petitioner argues, therefore, that the Department was correct in comparing the sales volumes of CPO30R BRA cement and CPC 30R cement for purposes of determining whether such sales are outside the ordinary course of trade.

The petitioner rebuts GCCC's claim that the Department should not compare GCCC's sales of CPO30R BRA cement to CEMEX's total home-market sales because, according to the petitioner, there is no more appropriate comparison of sales volumes than that of collapsed affiliates. Furthermore, the petitioner argues that, even without considering CEMEX's home-market sales, the result would be the same when comparing GCCC's sales of CPO30R BRA cement to its overall home-market sales.

The petitioner argues that GCCC provides no justification as to why the Department should compare the sales volumes on the basis of average-per-sale quantities sold to the same customer instead of comparing total sales quantities as the Department does normally.

Citing Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit

From Thailand, 60 FR 29553 (June 5, 1995) (Pineapple), the petitioner claims that the Department has relied upon differences in pricing to determine whether sales were outside the ordinary course of trade in other proceedings and has recognized that this factor has greater importance when the production costs of the products being compared are very similar. The petitioner, therefore, argues that the Department considered the price comparison correctly in determining whether sales were outside the ordinary course of trade.

Citing Mantex Inc. v. United States, 841 F. Supp 1290, 1308 (CIT 1993), the petitioner asserts that the Department and the courts have found relative profitability to be a relevant factor in determining whether sales are outside the ordinary course of trade. The petitioner also asserts that GCCC does not contest that there is a significant difference in profit between its sales of CPO30R BRA cement and its sales of CPC 30R cement using the Department's traditional profit-calculation methodology but proposes an alternative method for calculating profit which is favorable to GCCC. The petitioner argues that GCCC's method is inappropriate because it excludes certain pertinent components. The petitioner argues that the Department is correct in relying on its standard comparison of profitability.

The petitioner claims that GCCC's shipping arrangements for sales of CPO30R BRA cement are highly unusual and that the Department was correct in concluding that, because GCCC altered its normal distribution practices for CPO30R BRA cement, those sales did not represent sales made in normal market conditions. Citing CEMEX, S.A. v. United States, 19 CIT 587 (1995), the petitioner asserts that the Department and the courts have long recognized that differences in shipping arrangements are an important factor in determining whether home-market sales are within the ordinary course of trade, particularly with respect to cement.

The petitioner asserts that GCCC implemented a new practice during the 2002/2003 period with respect to its shipping arrangements and that this change was implemented in a disparate manner that resulted in shipping arrangements for sales of CPO30R BRA cement that were highly unusual when compared with arrangements for all sales prior to the POR as well as with arrangements of sales of CPC 30R cement during the instant POR.

The petitioner states that GCCC's shipments of CPO30R BRA cement were shipped over unusual distances and involved average freight costs that were significantly higher than its other sales of cement in the home market. The petitioner highlights the importance of shipping distances and costs to the cement industry and argues that the industry practice is to limit the shipping distance to 150 miles. Thus, the petitioner claims, GCCC's shipping practices are very suspect when judged by the normal practice in Mexico. The petitioner states that, even if GCCC had a rational, market-driven explanation for the shipping distances for sales of CPO30R BRA cement, it does not alter the fact that its shipping arrangements for sales of CPO30R BRA cement are unusual when compared with its shipping arrangements of other sales and, therefore, outside the ordinary course of trade.

Department's Position: Section 773(a)(1)(B)(I) of the Act states, in part, that normal value is "the price at which the foreign like product is first sold (or, in absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." The term "ordinary course of trade" is defined as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." The SAA clarifies this portion of the statute further when it states: "Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market." See SAA at 834. Thus, the statute and the SAA are clear that a determination of whether sales (other than those specifically addressed in section 771(15) of the Act) are within the ordinary course of trade must be based on an analysis comparing the sales in question with sales of merchandise of the same class or kind generally made in the home market. In this case, the sales in question are CPO30R BRA cement and, as discussed in the Ordinary Course of Trade Memorandum for the Preliminary Results of the 2003/2004 Administrative Review of the Antidumping Duty Order on Gray Portland Cement and Clinker from Mexico, dated August 30, 2005 (OCT Memo), we compared these sales to sales of all other types of cement (i.e., CPC 30R, CPO 30, CPO 40, and CPC 40) sold in the home market during the POR.

As discussed further on page 2 of the OCT Memo, the Department has discretion to choose how best to analyze the many factors involved in a determination of whether sales are made within the ordinary course of trade. In making our ordinary-course-of-trade determinations for various segments of this proceeding, we have considered, inter alia, shipping distances and costs, sales volume, profit levels, sales history, home-market demand, and the promotional aspect of sales. For purposes of determining whether the respondent's sales of CPO30R BRA cement during the instant POR were made within the ordinary course of trade, we evaluated the totality of circumstances surrounding these sales.

With respect to sales volume, we found that, based on a comparison of the total sales quantity of CPO30R BRA cement and the home-market sales of CEMEX and GCCC, the sales of CPO30R BRA cement were not representative of the respondents' normal course of sales of cement. For a discussion of the proprietary arguments presented and the proprietary information used in this determination, see the OCT Memo, page 3, and the Final Analysis Memo at page 3. We disagree with GCCC's argument that sales volumes have limited utility in making an ordinary-course-of-trade determination. The case cited by GCCC (NTN Corp.) does not state or imply that sales volumes have limited utility. Rather, the Department concluded (and the CIT agreed) that merely labeling sales as samples that are in small quantities does not require them to be treated as sample sales absent a demonstration that the sales were not representative of home-market sales. See NTN Corp., 306 F. Supp. 2d at 1345. While we agree that low sales volume alone would not make sales outside the ordinary course of trade, in this case we relied on sales volume as one of many important factors in making our ordinary-course-of-trade determination. See CEMEX, S.A. v. United States, 133 F.3d 897, 901 (Fed. Cir. 1998), Thai Pineapple Public Co. v. United States, 946 F. Supp. 11, 16 (CIT 1996), and Bergerac v. United States, 102 F. Supp. 2d 497, 509 (CIT 2000).

We disagree with GCCC that we should compare sales volumes on the basis of average-per-sale quantities sold to the same customer rather than comparing the total sales volumes during the POR. We find that the best way to compare the sales of CPO30R BRA cement to the sales or transactions generally made in the same market is to look at the total sales quantity of the product in question during the period under examination. We have followed this methodology in several cases and find that GCCC has provided no justification to change it in this review. See Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 66 FR 14889 (March 14, 2001), and Pineapple, 60 FR 29553.

We also disagree with GCCC's argument that we should exclude CEMEX's total home-market sales from comparison to the sales of CPO30R BRA cement because we consider GCCC and CEMEX to be one entity. Nonetheless, even without CEMEX's home-market sales, we found that GCCC's sales of CPO30R BRA cement are not made within the ordinary course of trade based on GCCC's home-market sales. See OCT Memo at page 3.

With respect to the price comparisons, we compared the price of CPO30R BRA cement to the price of other types of cement (CPC 30R, CPO 30, CPC 40, and CPO 40) sold in the home market and found that the prices for sales of CPO30R BRA cement were not comparable to the prices of other cement types. For more details on the proprietary information we used to make this determination, see the OCT Memo at page 4. We have followed this methodology in several other cases, and this methodology has been upheld by the CIT. See Pineapple, Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 62 FR 18404 (April 15, 1997), and Murata v. United States, 820 F. Supp. 603, 606 (CIT 1993). We also find that our methodology is reasonable because we are comparing sales of CPO30R BRA cement to sales of other similar merchandise sold in the home market during the POR.

With respect to profit, we examined the profitability of CPO 40, for which we have profit information on the record, in comparison to the profitability of CPO30R BRA cement and found that sales of CPO30R BRA cement were not ordinary. For a discussion of the proprietary information we used in this analysis, see OCT Memo at pages 4-5. We disagree with GCCC's assertion that we should use the methodology that GCCC uses in its normal course of business to calculate profit. We find that the traditional profit-calculation methodology we used in our analysis is reasonable and more appropriate because it considers the prices and expenses as reported by GCCC and certain other components GCCC neglected to use in its recommended methodology. For further information, see Final Analysis Memo, at pages 3-10.

With respect to GCCC's customers, sales history, and demand, we find that we determined correctly that, because almost all of GCCC's sales were sold to fulfill government contracts or programs, the pricing practices associated with the "saco per saco" program were unusual, and there was questionable demand for CPO30R BRA in the home market, GCCC's sales of CPO30R BRA cement did not represent sales based on normal market conditions. For further information, see the OCT Memo at pages 5-6.

We agree with the petitioner that the group of customers that bought CPO30R BRA cement from GCCC was small and unrepresentative in comparison to all of GCCC's home-market customers and that the sales process for sales of CPO30R BRA cement was different than the sales process for most of GCCC's sales in the home market. These differences are discussed in the OCT Memo at pages 5-6.

With respect to GCCC's argument concerning strong competition, we find that GCCC's argument is misplaced. We did not determine that strong competition alone would result in finding sales to be outside the ordinary course of trade. Rather, we determined that the circumstances surrounding these sales are unusual when compared to the sales process for most other GCCC sales. See OCT Memo, pages 5-6, and the Final Analysis Memo, pages 3-10.

With respect to shipping, as discussed in the OCT Memo, we continue to find that GCCC's sales of CPO30R BRA cement did not represent sales made under normal market conditions because it altered its normal distribution practices and because the average freight cost of CPO30R BRA is significantly higher than the average freight costs of the other cement types it sold in the home market. See OCT Memo, pages 6-7. Therefore, we continue to find that GCCC's shipping arrangements for sales of CPO30R BRA cement are unusual.

Therefore, based on our examination of all the relevant factors specific to the sales in question, we continue to find that GCCC's sales of CPO30R BRA cement are outside the ordinary course of trade and we have not included them in our determination of normal value for this review.

Comment 8: Indirect Selling Expenses

The petitioner contends that GCCC excluded certain expenses of its U.S. affiliate, GCC Rio Grande (GCCRG) improperly, from its indirect-expense calculations and that the Department should recalculate the amount for indirect selling expenses to recapture those expenses. The petitioner asserts that, despite the Department's request that GCCC "be sure to explain how and why expenses from the financial statements were excluded," GCCC only provided an unsubstantiated explanation that these expenses "were unrelated to the sales of GCCC cement in the United States." The petitioner argues that GCCC has the burden of responding to the Department's questions and developing the record which it did not do. The petitioner claims that GCCC's section A response states that GCCRG provides several support services to U.S. customers and GCCRG is essential to GCCC's U.S. selling operations.

GCCC responded that it has not changed it methodology since the 1994/1995 review and that it was verified in the 2001/2002 review. GCCC argues that the petitioner made the identical argument in the 2001/2002 review and the Department rejected it. GCCC also asserts that the petitioner's argument to include all of the expenses in question is not appropriate because GCCRG engages in many other activities unrelated to the sale of GCCC's cement, such as the production of non-subject merchandise. GCCC also claims that it has responded fully to all of the Department's questionnaires. Therefore, GCCC argues, the Department should not recapture those expenses in any recalculation of indirect selling expenses incurred in the United States.

Department's Position: We agree with the petitioner and have recalculated GCCC's indirect selling expenses for the final results by recapturing certain expenses it excluded from its calculation. Despite our request for GCCC to "be sure to explain how and why expenses from the financial statements were excluded," GCCC did not explain why it excluded certain expenses from its calculation of indirect selling expenses. Further, these expenses appear to be general expenses of GCCRG which would apply to all of its activities equally. As the petitioner mentions, GCCRG's activities related to its sales of GCCC-produced cement were substantial as indicated in GCCC's response dated November 30, 2004, at page A-17. Therefore, we find it appropriate to recapture the proportion of those expenses allocated to GCCRG's sales of subject merchandise based on the weight of GCCRG's shipments.

GCCC states that the petitioner made the identical argument in the 2001/2002 review and the Department rejected it. In the 2001/2002 review, the petitioner argued that the Department should recalculate the indirect selling expenses in order to account for the discrepancy between the indirect selling expenses GCCC reported to the Department and those reported in GCCRG's audited financial statement. In that review, we found that there was no indication that GCCC omitted any indirect selling expenses incurred on sales of subject merchandise in the United States and concluded that it would be inappropriate to recalculate the ratio for indirect selling expenses directly from the audited financial statements. See Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review, 68 FR 54203 (September 16, 2003), and accompanying Issues Decision Memorandum at comment 9. Unlike the 2001/2002 review, however, we do not have to recalculate the indirect selling expenses ratio directly from the audited financial statements because we have the expense totals for the expenses in question with which to recalculate the ratio for indirect selling expense. Instead, the certain expenses that GCCC excluded from its calculation of indirect selling expenses in this review were general and presumably applicable to all the activities of GCCRG; accordingly, they are not the same type of expenses we addressed in the 2001/2002 review. Despite our request, GCCC did not explain why it excluded expenses from the financial statements from its response to our questionnaire. Thus, in this review, we have evidence that GCCC omitted indirect selling expenses incurred on sales of subject merchandise in the United States. Further, the extent to which the record is not clear as to whether the expenses applied only to non-subject merchandise is the fault of GCCC, which has the burden of providing the appropriate evidence.

Comment 9: Interest Revenue

GCCC argues that, for the preliminary results, the Department treated interest revenue received for late payment of U.S. sales improperly as revenue rather than as a direct expense item. GCCC argues further that the Department's treatment was inappropriate based on U.S. law, the record of this administrative review, and the Department's treatment of interest revenue in past cases with similar facts. According to GCCC, section 772 a(d)(1)(B) of the Act contemplates an adjustment to U.S. price for direct selling expenses. Quoting from the Department's questionnaire, GCCC argues that direct selling expenses are expenses, "such as...credit expenses..., that result from, and bear a direct relationship to, the particular sale in question." GCCC argues further that the Department's questionnaire defines "credit expenses" as the interest expense incurred (or interest revenue foregone) between shipment of merchandise to a customer and receipt of payment from the customer. According to GCCC, the amount it reported for interest revenue satisfies this definition of direct selling expenses because these expenses are tied directly to U.S. sales and related to the credit expense for such sales.

Citing Certain Steel Concrete Reinforcing Bars from Turkey, Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Notice of Intent to Revoke in Part, 70 FR 23990-23995 (May 6, 2005), and Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands: Preliminary Results of Antidumping Duty Administrative Review, 69 FR 70226, 70232 (December 3, 2004), GCCC argues that in certain recent cases involving interest revenue the Department has regarded such revenue as an offset to credit expense. GCCC states that it recognizes that the Department has not always followed one consistent methodology in its treatment of interest revenue. According to GCCC, in August 2005, the Department applied two different approaches in two different cases. GCCC argues that the courts have disapproved of the use of inconsistent methodologies simultaneously by the Department. Specifically, according to GCCC, the CAFC has stated that if the analysis shows that the Department acted differently in this case than it has consistently acted in similar circumstances without reasonable explanation, then the Department's action will have been arbitrary. GCCC argues further that the CIT has indicated that an agency is prohibited from adopting significantly inconsistent policies that result in the creation of conflicting lines of precedent governing the identical situation and that, if an administrative agency decides to depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable. GCCC asserts that, contrary to this precedent, the Department has maintained inconsistent positions with regard to the treatment of interest revenue and has not explained why its decision to treat interest revenue as a revenue item is reasonable.

The petitioner argues that the Department treated interest revenue incurred for late payment of U.S. sales as a revenue item, not an offset to GCCC's credit expense, properly. Citing Notice of Final Determination of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat From Canada, 68 FR 52741 (September 5, 2003), and accompanying Issues Decision Memorandum at comment 32, and Notice of Final Results of Antidumping Duty Administrative Review: Silicon Metal from Brazil, 65 FR 7497 (February 15, 2000) (Silicon Metal), the petitioner argues that the Department's treatment of interest revenue incurred for late payment in this case is consistent with its prior practice in other cases.

The petitioner asserts that GCCC's claim that the Department's treatment is inappropriate is without merit. Specifically, the petitioner argues that evidence on the record and the Department's regulations establish that the revenue earned by GCCC on late-payment charges is not related to GCCC's credit expenses and it is not appropriate to treat it as an offset to such expenses. The petitioner argues further that, rather than being tied to GCCC's imputed credit expense, as argued by GCCC, the interest revenue is related closely to GCCC's early-payment discount. The petitioner asserts that early-payment discounts and the interest charges for late payments are two sides of the same coin: one is a deduction from the invoice price granted when the customer pays early and the other is an addition to the invoice price charged when the customer pays late. According to the petitioner, in both cases, the change is reflected in the amount actually paid by the customer. The petitioner argues further that, because both the early-payment discount and the late-payment charge represent changes to the invoice price paid by the customer, it is appropriate to treat both as post-sale adjustments to the price which, according to the petitioner, is what the Department did in this case.

The petitioner contends that GCCC misinterprets the issue with regard to its argument that the Department's treatment of interest revenue as a revenue item in this review results impermissibly in the existence of inconsistent positions. Citing Silicon Metal, 65 FR 7497, the petitioner argues that the Department's treatment of GCCC's interest revenue represents an exercise of discretion by the Department rather than an arbitrary departure from an established practice. According to the petitioner, the statute does not address the treatment of late payments and, therefore, the determination of the appropriate methodology is a matter within the Department's discretion. The petitioner asserts that the cases GCCC cites in support of its claim that the Department has applied inconsistent positions impermissibly are inapposite. The petitioner argues that GCCC has not met its burden of demonstrating that treating such revenue as a post-sale price adjustment is an unreasonable exercise of the Department's discretion to select appropriate methodologies, particularly in light of the fact that such treatment is consistent with the Department's regulations.

Department's Position: We agree with the petitioner that the interest income related to late payment of invoices should not be used as an offset in the calculation of U.S. interest expense. The statute does not speak to the treatment of late payments. In such circumstances, we have the discretion to determine the most appropriate methodology to use. See U.S. Steel Group v. United States, 225 F.3d 1284, 1290 (Fed. Cir. 2000) (quoting Koyo Seiko Co. v. United States, 36 F.3d 1565, 1573 (Fed. Cir. 1994)). Accordingly, the courts have long deferred to the Department's technical expertise in identifying, selecting, and applying methodologies to implement the statute. See Smith-Corona Group v. United States, 713 F.2d 1568, 1582 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984).

Citing a few preliminary decisions relating to the calculation of normal value, GCCC argues mistakenly that it is the Department's practice to treat interest income from late payments as an offset to direct selling expenses. When valuing U.S. price, we have regarded interest income related to late payments as a revenue item, not a direct selling expense. As we explained in the Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From South Korea, 65 FR. 41437 (July 5, 2000), interest income related to late payment of invoices should not be used as an offset in the interest-expense calculation. In addition, we have also stated that we treat interest income earned on accounts receivable as an adjustment to the selling price. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate Products from Indonesia, 64 FR 73164, 73173 (December 29, 1999). Furthermore, our standard questionnaire directs a respondent to report such interest income in a separate field on the sales database in order to allow for the adjustment to the selling price. See sections B and C of the Department's Questionnaire dated October 6, 2004, concerning "Interest Revenue," which instructs the respondent to report the per-unit interest charges collected on each sale for late payment of the invoice.

Just as an early-payment discount is a reduction in price when the customer pays in advance of the payment due date, a late payment charge is an addition to the price to the customer when the customer delays its payment. Our longstanding practice of treating early-payment discounts as an adjustment to price leads us to the same determination concerning late-payment increases to the price. In either instance, the amount of the discount or the additional charge effectively amounts to a post-sale price adjustment and may or may not be equivalent to any reduction or increase in the company's actual or imputed interest expenses. Therefore, we determine that is more appropriate to treat a late payment charge as a post-sale adjustment to price, not as an offset to the broader allocation of interest expense or revenue.

Moreover, even if GCCC's proposed treatment is reasonable, "{w}hen {the Department is} faced with the decision between two reasonable alternatives and one alternative is favored over the other in their eyes, then they have the discretion to choose accordingly." See Technoimportexport, UCF Am. v. United States, 783 F. Supp. 1401, 1406 (CIT 1992). The courts have recognized that antidumping determinations involve complex economic and accounting decisions of a technical nature. See Fujitsu General Ltd. v. United States, 88 F.3d 1034 (Fed. Cir. 1996).

Based on reasons outlined above, we find that our treatment of the interest GCCC earned due to late payments it received as a price adjustment is reasonable and consistent with our practice. Accordingly, for the final results, we have disallowed this interest income related directly to sales as an offset to interest expense but have allowed it as a price adjustment.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review and the final dumping margin for the reviewed firm in the Federal Register.

Agree _________ Disagree _________

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David M. Spooner
Assistant Secretary
for Import Administration

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Date