

I. PROCEDURAL HISTORY

On May 30, 2002, this Panel issued its decision concerning challenges to the March 17, 1999, Final Results of the United States Department of Commerce ("Commerce") in its seventh administrative review of the antidumping duty order on gray portland cement and cement clinker from Mexico. Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review ("Final Results"), 64 Fed. Reg. 13148 (March 17, 1999). This Panel's Determination affirmed Commerce with respect to the following four findings:

(1) That CEMEX's home market sales of cement that is physically Type V cement as Type II and Type V cement were outside the ordinary course of trade;

(2) That an adjustment to CDC's U.S. indirect selling expenses for interest allegedly incurred in financing cash deposits for antidumping duties was not warranted;

(3) That resort to partial adverse facts available for CEMEX's data from the Hidalgo plant (rather than total adverse facts available for CEMEX's entire response) was warranted; and

(4) That refusal to revoke the antidumping order based upon alleged defects in the initiation of the original LTFV investigation was warranted.

In addition, this Panel remanded the following eight findings to Commerce:

(1) That CEMEX's home market sales of Type V cement sold as Type I cement were outside the ordinary course of trade;

(2) That duties should be assessed on a nationwide basis in this regional industry case;

(3) That CEMEX's bagged and bulk cement should be classified as the same like product, and that sales of CEMEX's bagged and bulk cement were at the same level of trade;

(4) That CEMEX's and CDC's U.S. warehousing expenses should be treated as indirect selling expenses;

(5) That CEMEX's home market pre-sale warehousing expenses should not be deducted from normal value;

(6) That certain CDC sales to unaffiliated US customers by CDC's US affiliate should be classified as indirect export price sales, rather than constructed export price sales;

(7) That a DIFMER adjustment to CEMEX's sales for the physical differences between Type I and Type V cement was warranted; and

(8) That an adjustment for CEMEX's freight expenses was warranted.

On August 8, 2003, Commerce issued, for comment by the parties, its Draft Results of Redetermination Pursuant to NAFTA Panel ("Draft Remand Results"). Parties filed comments on these Draft Remand Results on August 15, 2002, and filed rebuttal comments on these Draft Remand Results on September 3, 2002. On September 27, 2002, Commerce issued its Final Results of Redetermination Pursuant to NAFTA Panel ("Remand Redetermination"). On October 21, 2002, pursuant to NAFTA Rule 73(2)(b), the Southern Tier Cement Committee ("STCC"),

CEMEX, S.A. de C.V. ("CEMEX") and Cementos de Chihuahua, S.A. de C.V. ("CDC") all challenged Commerce's Remand Redetermination. Specifically, STCC challenges Commerce's decision that CEMEX's home market sales of Type V cement sold as Type I cement are within the ordinary course of trade. CEMEX challenges Commerce's decision to include sales from CEMEX's Hidalgo plant in the dumping calculation. Meanwhile, both STCC and CEMEX challenge Commerce's decision to resort to partial adverse facts available. CDC challenges Commerce's decisions to (a) assess duties on a nationwide basis, (b) treat bulk and bagged cement as the same foreign like product, and (c) match CDC's U.S. sales with CDC's home market sales. On November 12, 2002, Commerce responded to these Rule 73(2)(b) challenges.

In conducting this review of STCC's, CEMEX's, and CDC's Rule 73(2)(b) challenges, this Panel has followed the standard of review set forth in Part IV of its decision of May 30, 2002. This Panel's authority derives from NAFTA Article 1904(1), which mandates that binational panel review replace judicial review of final antidumping determinations. In conducting this review, this Panel has applied the law of the United States as required by NAFTA Article 1904(2).

II. SUMMARY AND CONCLUSIONS

For the reasons discussed below, this Panel affirms Commerce's Remand Redetermination with respect to the following findings:

(1) That CEMEX's home market sales of Type V cement sold as Type I cement are within the ordinary course of trade;

(2) That sales from CEMEX's Hidalgo plant should be included in the dumping calculation, and that partial facts available should be used to account for such sales¹;

(3) That duties should be assessed on a nationwide basis²;

(4) That bulk and bagged cement should be treated as the same foreign like product³.

This Panel, however, remands to Commerce's its decision to match CDC's U.S. sales with CDC's home market sales so that Commerce can make a determination whether, under the statute, CDC's U.S. sales should be compared to CEMEX's home market sales of Type V cement sold as Type I cement.⁴ This issue is remanded for resolution within 45 days from the date of this Panel opinion.

¹ Panelist Patino dissents on this issue.

² Panelist Patino dissents on this issue.

³ Panelist Patino dissents on this issue.

⁴ Panelists Mastriani and Kennedy dissent on this issue.

III. MAJORITY OPINION CONCERNING THE CHALLENGES TO THE REMAND REDETERMINATION

A. STCC's Challenge To Commerce's Decision That CEMEX's Home Market Sales of Type V Cement Sold As Type I Cement Are Within The Ordinary Course of Trade

1. Background⁵

In its Final Results of the seventh administrative review, Commerce determined that CEMEX's home market sales of Type V cement sold as Type I cement were made outside the ordinary course of trade. See Final Results, 64 Fed. Reg. 13148 (March 17, 1999). In our decision of May 30, 2002, this Panel was unable to conclude that Commerce properly determined that CEMEX's home market sales of Type V cement sold as Type I cement were outside the ordinary course of trade. This Panel was of the view that Commerce had failed to adequately explain why four factors the agency relied upon in making its ordinary course of trade ("OCT") determination⁶ – differences in freight costs, relative profit levels, the number and type of customers, and disparities in handling charges – supported the conclusion that CEMEX's sales of Type V cement sold as Type I cement were made outside the ordinary course of trade. Accordingly, the Panel remanded this OCT determination to Commerce with instructions to explain why the findings it made supported the agency's determination that sales of Type V cement sold as Type I

⁵ See page 23 of the May 30, 2002, NAFTA Panel decision for additional background concerning this issue.

⁶ The term "ordinary course of trade" is statutorily 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." 19 U.S.C. § 1677(15).

cement were outside the ordinary course of trade. See Remand Redetermination at 38.

In its Remand Redetermination, Commerce reconsidered its decision with regard to CEMEX's sales of Type V cement sold as Type I cement. Commerce determined that only one factor, i.e., disparity in sales volume, would support its conclusion that such sales were outside the ordinary course of trade. Therefore, Commerce determined that such sales were made in the ordinary course of trade. See Remand Redetermination at 4.

2. Contentions Of The Parties

STCC challenges Commerce's Remand Redetermination that CEMEX's sales of Type V cement sold as Type I cement were made in the ordinary course of trade. STCC cites four grounds in support of its position that the subject sales were made outside the ordinary course of trade.

First, STCC contends that Commerce ignored evidence that CEMEX shipped cement from its Hermosillo plants over great distances, contrary to the normal practice of shipping cement over relatively short distances because of its low-value-to-weight ratio. See STCC's October 21, 2002, Comments on the Remand Redetermination at 4-9.

Second, STCC argues that Commerce erred in determining freight costs because the agency used average freight expenses as reported by CEMEX, rather than transaction-specific freight expenses for sales of Type V cement sold as Type I

cement.⁷ In view of the absence of actual freight expense data for sales of Type V cement sold as Type I cement, STCC insists that Commerce should have resorted to partial facts available. See STCC's October 21, 2002, Comments on the Remand Redetermination at 16-18.

Third, STCC maintains that Commerce ignored certain freight adjustment rebates that support STCC's position that the subject sales were made outside the ordinary course of trade. See STCC's October 21, 2002, Comments on the Remand Redetermination at 18-20.

Fourth and finally, STCC argues that Type V cement sold as Type I cement was in fact overrun merchandise destined for export markets and that the local market was supplied with pozzolanic cement, a product different from Type V and Type I cement. See STCC's October 21, 2002, Comments on the Remand Redetermination at 21-23. As such, STCC concludes that sales of Type V cement sold as Type I cement were made outside the ordinary course of trade.

In their response to STCC, CEMEX and Commerce first note that the agency's decision not to treat freight expenses and freight rebates as independent factors in the OCT remand determination was not error and was within the agency's sound discretion. See CEMEX's November 12, 2002, Response To Comments On The Remand Redetermination at 2; Commerce's November 12, 2002,

⁷ In its October 21, 2002, Comments on the Remand Redetermination and at oral argument, STCC identified a single invoice that reflected actual freight expenses. See STCC's October 21, 2002, Comments On The Remand Redetermination at 16; January 24, 2003, Remand Hearing Transcript at 57-62.

Response To Comments On The Remand Redetermination at 4.⁸ Commerce points out that the agency did not ignore the distances over which Type V cement sold as Type I cement was shipped, but rather took these distances into consideration when it compared the profitability of sales of Type V cement sold as Type I cement relative to sales of Type I cement sold as Type I cement. See CEMEX's November 12, 2002, Response To Comments On The Remand Redetermination at 2; Commerce's November 12, 2002, Response To Comments On The Remand Redetermination at 5.⁹ Moreover, Commerce adds, the agency verified that CEMEX reported freight expenses on as specific a basis as was feasible given CEMEX's accounting system. Thus, Commerce concludes, under these circumstances it would have been inappropriate to resort to partial facts available on the issue of freight expenses, as STCC urges. See Commerce's November 12, 2002, Response To Comments On The Remand Redetermination at 10.

Similarly, with regard to the treatment of freight rebates, Commerce notes that it did not ignore such rebates, but rather concluded that the differences were not so significant as to affect price comparability between, on the one hand, sales of Type V cement sold as Type I cement and, on the other hand, sales of Type I cement

⁸ CDC makes no independent arguments on this issue. Instead, CDC adopts the arguments and contentions of CEMEX. See CDC's November 12, 2002, Response To Comments On The Remand Redetermination at 4.

⁹ CEMEX adds that STCC is barred from challenging Commerce's freight methodology because it "already raised this issue before this Panel, has abandoned the argument, and the use of CEMEX's methodology for freight is the law of the case." CEMEX's November 12, 2002, Response To Comments On The Remand Redetermination at 3-5.

sold as Type I cement. More importantly, Commerce observes, profits are comparable for these two types of sales. See Commerce's November 12, 2002, Response To Comments On The Remand Redetermination at 11.

Finally, in response to STCC's contention that Type V cement sold as Type I cement is export overrun merchandise and, thus, sold outside the ordinary course of trade, CEMEX and Commerce counter that STCC's contention is based on pure speculation, not on record evidence. See CEMEX's November 12, 2002, Response To Comments On The Remand Redetermination at 8-9; Commerce's November 12, 2002, Response To Comments On The Remand Redetermination at 12. CEMEX adds that even if the local market near the Hermosillo plants is supplied with pozzolanic cement, it does not necessarily follow that there is no market elsewhere within Mexico for Type V cement sold as Type I cement produced at the Hermosillo plants. See CEMEX's November 12, 2002, Response To Comments on the Remand Redetermination at 8-9.

3. Analysis

As instructed by the Panel in its decision of May 30, 2002, Commerce, on remand, reconsidered the findings it made in support of its OCT determination of Type V cement sold as Type I cement. Specifically, Commerce reconsidered the following OCT factors: (1) the number and type of customers, (2) relative profit levels, (3) differences in freight costs, and (4) disparity in handling charges. The Panel addresses each of these findings in turn.

First, with respect to the number and type of customers, Commerce found on remand that although Type V cement sold as Type I cement was sold to fewer customers than was the case with Type I cement sold as Type I cement, an analysis of CEMEX's home-market sales database showed that both types of cement were sold to the same types of customers, i.e., end-users, distributors, and ready-mixers. See Remand Redetermination at 4. Because the types of customers are essentially the same, Commerce found that this factor did not indicate sales outside the ordinary course of trade.

Second, with regard to profitability, Commerce found that the levels of profitability between the two types of cement, i.e., Type V cement sold as Type I cement, on the one hand, and Type I cement sold as Type I cement, on the other, were "comparable." See Remand Redetermination at 5. Although the levels of profitability between the two types of cement are not identical, the Panel cannot seriously quarrel with Commerce's characterization of their relative levels of profitability as being "comparable."

Regarding the third and fourth factors – differences in freight costs and disparity in handling charges – Commerce acknowledges that these expenses differed for the two types of cement in question. Nevertheless, Commerce points out that the net effect of the differences is reflected in the profitability of the two types of cement. See Remand Redetermination at 5. In other words, whatever differences there may be with regard to freight costs and handling charges between the two types of cement, those differences are ultimately reflected in their relative profit

levels. Because Commerce found the profit levels for the two types of cement to be comparable, Commerce concluded that whatever differences exist between the two types of cement in connection with freight expenses or handling charges do not point to sales outside the ordinary course of trade.¹⁰

Finally, according to Commerce, the only remaining factor that points to OCT sales is that the volume of sales of Type V cement sold as Type I cement is less than the volume of sales of Type I cement sold as Type I. However, because an OCT determination is multi-faceted, with no single factor being dispositive, Commerce concluded that a disparity in sales volume was an insufficient basis, standing alone, upon which to make a finding that sales of Type V cement sold as Type I cement were made outside the ordinary course of trade. See Remand Redetermination at 6.

It is a vital and time-honored principle of U.S. administrative law that an agency's ruling in an adjudicative proceeding be supported by reasoned decision-making, with the various connections among the agency's fact findings, its reasoning process, and its conclusion being sufficiently clear. As the U.S. Supreme Court observed in SEC v. Chenery Corp.:

If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be

¹⁰ STCC complains that Commerce erred because the agency used average freight expenses as reported by CEMEX, rather than transaction-specific freight expenses for sales of Type V cement sold as Type I cement. See STCC's October 21, 2002, Comments on the Remand Redetermination at 9-16. The Panel notes that it is within the agency's discretion to use average freight expenses. See 19 U.S.C. § 1677f-1. Moreover, Commerce verified that CEMEX reported freight expenses on as specific a basis as was feasible, given CEMEX's accounting system.

expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

332 U.S. 194, 196-97 (1947) (quoting United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499, 511 (1935)). In short, an agency's reasoning process must be transparent before a reviewing body can be asked to review an agency decision.

In remanding that portion of the Final Results of the seventh administrative review dealing with Type V cement sold as Type I cement, this Panel explained "[the] remand is for the purpose of requesting the agency to make its reasoning processes more transparent." See May 30, 2002, Panel Determination at 34. The agency has now done so to the satisfaction of this Panel.

The purpose of the OCT provision "is 'to prevent dumping margins from being based on sales which are not representative' of the home market.'" CEMEX, S.A. v. United States, 133 F.3d 897, 900 (Fed. Cir. 1998) (quoting Monsanto Co. v. United States, 698 F. Supp. 275, 278 (Ct. Int'l Trade 1988)). Commerce's OCT inquiry is fact-specific. As observed by the Federal Circuit in the second administrative review of the antidumping order that is the subject of this Panel review, Commerce is not to evaluate just "one factor taken in isolation but rather . . . all the circumstances particular to the sales in question." CEMEX, supra, 133 F.3d at 900. No one factor in isolation can be considered determinative. Rather, all the circumstances surrounding the sales in question must be examined. When applying this totality-of-the-circumstances test, reviewing courts have accorded Commerce

great deference regarding its findings. See, e.g., CEMEX, supra; Koenig & Bauer-Albert AG v. United States, 259 F.3d 1341, 1345 (Fed. Cir. 2001); NTN Bearing Corp. v. United States, 155 F. Supp. 2d 715, 732-33 (Ct. Int'l Trade 2001); Timken Co. v. United States, 852 F. Supp. 1122, 1128 (Ct. Int'l Trade 1994). The burden is thus on the party challenging Commerce's determination to demonstrate that it is wrong.

The totality of circumstances as found and weighed by Commerce on remand supports its determination that CEMEX's home market sales of Type V cement sold as Type I cement were made within the ordinary course of trade. Even if this Panel would have reached a different conclusion had it been asked to consider the matter de novo, it is not the role of this Panel, to second-guess the agency in a determination that is committed to the agency's sound discretion.

4. Conclusion

We conclude that Commerce properly determined in its Remand Redetermination that CEMEX's home market sales of Type V cement sold as Type I cement are within the ordinary course of trade.

B. CEMEX's Challenge To Commerce's Decision To Include Sales From CEMEX's Hidalgo Plant in the Dumping Calculation and STCC's and CEMEX's Challenge To Commerce's Decision To Resort To Partial Adverse Facts Available For Such Sales

1. Background

In its Final Results, Commerce resorted to partial adverse facts available for all CEMEX's Hidalgo plant sales, and "substituted the highest calculated NV

[normal value] for all HM [home market] sales of cement produced at Hidalgo." Final Results, 64 Fed. Reg. at 13153. Commerce found that CEMEX provided inaccurate information and sought to submit corrected information after the deadline for the submission of new factual information had passed. Id. at 13152. In addition, Commerce found that the nature and timing of CEMEX's cancellation of the home-market verification the last business day before it was scheduled to begin was "unprecedented." Id. at 13153. Given CEMEX's actions, Commerce determined that CEMEX did not act to the best of its ability to provide accurate and timely information, and thus, resorted to partial adverse facts available to account for the Hidalgo sales. Commerce, however, taking into account CEMEX's overall cooperation in the administrative review, determined that it was inappropriate to resort to total adverse facts available. This Panel, in its May 30, 2002, decision affirmed Commerce's use of partial adverse facts available for CEMEX's Hidalgo sales. See May 30, 2002, NAFTA Panel Opinion at 65.

In its Draft Remand Results, Commerce changed the pool of home-market sales for CEMEX from Type I sales to Type V sales because on remand, Type V sales were determined to be within the ordinary course of trade and thus, usable for matching purposes. However, Commerce did not apply partial adverse facts available to CEMEX's Hidalgo plant sales. In its August 15, 2002, comments on the Draft Remand Results, STCC so noted. Subsequently, in its Remand Redetermination, Commerce admitted it erred in the Draft Remand Results by not applying partial adverse facts available to CEMEX's Hidalgo plant sales, stating:

When we treated all Hidalgo plant sales as Type I cement for the Final Results, we did not do so as a result of hypothesizing about the likely composition of the types of cement produced at the Hidalgo plant. Rather, we did so because we calculated the normal value for CEMEX on the basis of sales of Type I cement. Thus, in order to apply an adverse inference as we intended, we had to treat the Hidalgo plant sales as the same type of cement as the reported, verified sales which we used as the basis for normal value. Thus, on remand, when we changed the basis of normal value to sales of Type V sold as Type I cement but did not do the same for the Hidalgo plant sales in the Draft [Remand] Results, we inadvertently neutralized the adverse facts available we had intended to apply. This was an error on our part and we have corrected it for these final results of redetermination.

Remand Redetermination at 19.

Accordingly, in its Remand Redetermination, Commerce treated all Hidalgo plant sales as Type V sold as Type I cement and applied partial adverse facts available to all home-market sales of cement produced at Hidalgo.

2. Contentions Of The Parties

CEMEX challenges Commerce's decision to include sales from CEMEX's Hidalgo plant in the dumping calculation. Meanwhile, CEMEX, as well as STCC, challenges Commerce's decision to resort to partial adverse facts available for such sales.

CEMEX's challenge to Commerce's decision to include sales from CEMEX's Hidalgo plant in the dumping calculation is premised on CEMEX's belief that normal value should be based only on sales of Type V cement sold as Type I cement from CEMEX's Hermosillo plants. According to CEMEX, the administrative review

is devoid of any data tying Type V cement sold as Type I cement produced at the Hidalgo plant to any particular sales. CEMEX asserts that such sales of Type V cement sold as Type I cement at the Hidalgo plant were sporadic, and since sporadic sales were not taken into account at any other CEMEX plant, they should not be taken into account for the Hidalgo plant.

In addition, CEMEX argues that STCC never previously raised the argument that Hidalgo sales of Type V cement sold as Type I cement should be included in the normal value calculation if, in fact, normal value was based on sales of CEMEX's Type V cement sold as Type I cement. CEMEX points out that STCC never raised this argument before Commerce or this Panel prior to the issuance of Commerce's Draft Remand Results.

Furthermore, CEMEX argues that only the issue of sales of Type V cement sold as Type I cement from CEMEX's Hermosillo plants was remanded to Commerce by this Panel. CEMEX states that no party appealed the issue of Hidalgo sales being treated as Type I cement sold as Type I cement. Accordingly, CEMEX believes that the Hidalgo sales must continue to be treated as Type I cement sold as Type I cement, as this Panel never remanded this matter back to Commerce. CEMEX states that if this Panel did not remand any issue regarding Hidalgo to Commerce, then Commerce has no authority to make any decision with regard to the Hidalgo sales.

Moreover, CEMEX argues that the Hidalgo sales of Type V cement sold as Type I cement were outside the ordinary course of trade, and therefore, cannot be

part of Commerce's normal value calculation. CEMEX points out that Hidalgo Type V cement sold as Type I cement is of a different nature than Hermosillo Type V cement sold as Type I cement. CEMEX says that its production of Type V cement sold as Type I cement "was the result of a failed attempt to make another product," and this production attempt "was unauthorized, making it even more extraordinary." CEMEX's October 21, 2002, Comments on the Remand Redetermination at 20. Thus, according to CEMEX, at Hermosillo, the intention to produce Type V cement sold as Type I cement, was part of CEMEX's corporate strategy; at Hidalgo, the production of Type V cement sold as Type I cement was a result of a strategy concealed from corporate management to produce another type of cement.

CEMEX believes that because the Hidalgo sales of Type V cement sold as Type I cement were outside the ordinary course of trade, the Hidalgo sales of Type V cement sold as Type I cement were irrelevant to the calculation of normal value. Such sales, according to CEMEX, could not have been used for a normal value calculation even if they had been reported initially.

CEMEX also challenges Commerce's decision to resort to adverse facts available for sales from CEMEX's Hidalgo plant. CEMEX believes that use of any adverse facts available – partial adverse facts available and/or total adverse facts available – for the Hidalgo plant sales is inconsistent with U.S. law and U.S. obligations under the GATT antidumping code. CEMEX's October 21, 2002, Comments on the Remand Redetermination at 21.

CEMEX argues that this Panel never considered whether use of partial facts available for Type V cement sold as Type I cement from the Hidalgo plant was warranted because no party argued in the original pre-remand appeal before this Panel that Commerce should use partial facts available with regard to Type V cement sold as Type I cement. CEMEX complains that Commerce was not permitted to use partial facts available in its Remand Redetermination because nothing with regard to Hidalgo was remanded to Commerce. CEMEX states that "since the Hidalgo issue was not remanded to DOC by this Panel DOC had no authority to use either partial or total adverse facts available once Type V LA sales became the basis for normal value." CEMEX's November 12, 2002, Response to Comments on the Remand Redetermination at 9. Also, to the extent that CEMEX did not accurately report Hidalgo information, CEMEX points out that it did not derive any benefit from reporting incomplete information. CEMEX notes that "the record shows that CEMEX attempted to correct the response as soon as it became aware of the inadvertent error and delayed verification in order to ensure that all corrections were made. There was no finding by DOC that the errors were intentional." CEMEX's October 22, 2002, Comments on the Remand Redetermination at 23-24. In addition, CEMEX says that it could not have benefited from its reporting error, since the error concerned sales that were initially found by Commerce to be outside the ordinary course of trade.

CEMEX also argues that the use of partial adverse facts will have an effect that is of much greater magnitude than the original use of partial adverse

inferences. Whereas in the Final Results, the use of partial adverse facts available had little effect on the dumping margin, now if partial adverse facts were applied to Hidalgo's sales of Type V cement sold as Type I cement, the use of partial adverse facts available will dramatically increase the dumping margin. Therefore, CEMEX argues that partial adverse facts would be inappropriate considering that Commerce has decided that the magnitude of the error by CEMEX in the context of the massive amount of information submitted was small.

CEMEX also points out that it believes that total adverse inferences are not warranted. CEMEX notes that Commerce has already determined (and this Panel has affirmed) that total adverse inferences are not warranted. In this regard, CEMEX notes that the overwhelming majority of the information was timely submitted, and that Commerce's earlier decision rejecting total facts available in the Final Results is now final and binding. According to CEMEX, there is no record evidence that would permit a finding of total adverse facts available.

STCC, in its comments before this Panel, challenges Commerce's decision to resort to partial adverse facts available for the Hidalgo sales if CEMEX's sales of Type V cement sold as Type I cement are determined to be in the ordinary course of trade. STCC contends that Commerce should resort to total adverse facts available, rather than to partial adverse facts available to account for the Hidalgo sales. STCC opines that total adverse facts are warranted because CEMEX misled Commerce during the administrative review about its production of Type V cement at the Hidalgo plant, and failed to cooperate with Commerce's requests for sales

data for cement produced at the Hidalgo plant. STCC notes that after repeatedly denying that it produced cement meeting Type V specifications at Hidalgo, CEMEX belatedly admitted that some of the cement it sold from Hidalgo as Type I cement was produced as Type V cement. STCC asserts that CEMEX did so only once it became apparent that Commerce would discover the truth during verification of CEMEX's questionnaire responses. STCC notes that upon learning that Commerce intended to verify its reported data for sales from the Hidalgo plant, CEMEX unilaterally cancelled verification on May 15, 1998, the last business day before it was scheduled to start. STCC asserts that several weeks later, only after a diligent effort by Commerce to learn CEMEX's reasons for canceling verification, did CEMEX's counsel explain that CEMEX canceled verification after discovering "a discrepancy in the product coding of certain cement sales from the Hidalgo plant." STCC's October 21, 2002, Comments on the Remand Redetermination at 26. STCC notes that later – almost three weeks after it canceled verification – CEMEX admitted that, contrary to its prior, certified questionnaire responses, it produced at the Hidalgo plant, Type V cement and sold this cement as Type I cement. STCC asserts that based on these facts, "the only reason it [CEMEX] canceled verification was because it would have failed verification on whether it produced and sold cement meeting Type V specifications at Hidalgo." STCC's October 21, 2002, Comments on the Remand Redetermination at 28. STCC notes that CEMEX then attempted to "correct" its previous statement that it produced no Type V cement at the Hidalgo plant, but Commerce rejected this information since the deadline for

providing new factual information had long past. See Final Results, 64 Fed. Reg. at 13152 ("with respect to the Hidalgo sales, CEMEX provided inaccurate information and sought to submit correct information after the deadline for the submission of factual information had passed").

STCC states that, given Commerce's rejection of CEMEX's belated attempt to provide the Hidalgo sales information that it previously misreported, Commerce found that CEMEX's sales and cost database for cement produced at Hidalgo – regardless of type of cement – was "extremely flawed." See Gray Portland Cement and Clinker from Mexico, 63 Fed. Reg. 48471, 48473 (1998) (preliminary results). STCC also noted that Commerce found that CEMEX's cancellation of verification the last business day before it was scheduled to begin was "unprecedented." Final Results, 64 Fed. Reg. at 13153. STCC opined that these conclusions led Commerce to apply facts available for sales from the Hidalgo plant.

STCC argues that although Commerce applied partial adverse facts available in its Final Results, when Commerce, in its Remand Redetermination, changed the basis of CEMEX's normal value from Type I cement sold as Type I cement to Type V cement sold as Type I cement, the Hidalgo sales constituted a much larger proportion of CEMEX's home market sales of the foreign like product. STCC argues that under this changed circumstance the use of total adverse facts available is most appropriate. However, STCC asserts that Commerce in its Remand Redetermination did not even consider STCC's argument that it should reconsider whether to apply total, rather than partial, adverse facts available. Instead, STCC

notes that Commerce simply tracked the approach it adopted in the Final Results without further explanation: "[I]n keeping with our selection of adverse facts available in the Final Results, we have substituted the highest calculated normal value in this review for all home-market sales of cement produced at Hidalgo." Remand Redetermination at 20. STCC argues that Commerce's predicate for not using total facts available in the Final Results – that only a small proportion of home market sales of the foreign like product were affected by CEMEX's failure to cooperate regarding sales from the Hidalgo plant – was no longer correct once Commerce determined that sales of Type V cement as Type I were within the ordinary course of trade.

Thus, given the "egregious" and "unprecedented" nature of CEMEX's actions during the administrative review and the significant percentage of sales of the foreign like product for which Commerce lacked data, STCC argues that the only appropriate course of action is for Commerce to apply total adverse facts available to the calculation of the dumping margin. STCC's October 21, 2002, Comments on the Remand Redetermination at 30.

STCC believes that Commerce in its Remand Redetermination failed to explain why the application of total facts available was not required to account for the Hidalgo sales, and thus, requests that this Panel remand for Commerce to address whether total adverse facts available should be applied in this case.

In STCC's November 12, 2002, Response to Comments on the Remand Redetermination, STCC addresses CEMEX's challenge to Commerce's decision to

include sales from CEMEX's Hidalgo plant in the dumping calculation, as well as CEMEX's challenge to Commerce's decision to resort to partial adverse facts available for such sales. Also, in this response, STCC argues that if the Panel does not remand for Commerce to address whether total adverse facts available should be applied in this case, then the Panel "should affirm Commerce's use . . . [of] . . . adverse partial facts available. STCC's November 12, 2002, Response to Comments on the Remand Redetermination at 11.

Specifically, in its response to comments on the Remand Redetermination, STCC notes that CEMEX did not contest Commerce's use of partial adverse facts available. STCC's November 12, 2002, Response to Comments on the Remand Redetermination at 5. Rather, STCC asserts that CEMEX actually argued that Commerce's reliance on partial adverse facts available was appropriate. Id. at 5 (citing CEMEX's November 16, 2001 Responsive Brief, at 9 (section heading stating, "The Use Of Partial Adverse Facts Available In The Final Results, Rather Than Total Adverse Facts Available, Was In Accordance With Law") & 10 ("The Department's resort to partial facts available and its continued use of CEMEX's information which was verified by the Department to be accurate was in accordance with the statute")). STCC, accordingly, asserts that it is too late for CEMEX to now contest Commerce's use of partial adverse facts available, stating:

Even assuming that Commerce is allowed to make an adverse inference only where a party intended to benefit or would have benefited from its failure to cooperate, as argued by CEMEX, it was incumbent upon CEMEX to make that case in the administrative review, not after the conclusion of the review, appeal to the Panel, the Panel's

affirmance of Commerce's use of partial adverse facts available, and completion of Commerce's remand proceeding. It is far too late to do so now.

STCC's November 12, 2002, Response to Comments on the Remand Redetermination at 28.

STCC notes that this Panel, in its May 30, 2002, decision upheld Commerce's determination that CEMEX's actions justified Commerce to resort to facts available and to apply an adverse inference as to CEMEX. Given this Panel's affirmance of Commerce's determination that CEMEX's lack of cooperation required it to resort to adverse facts available, CEMEX contends that the issue was final and Commerce was required in its Remand Redetermination to continue to apply adverse facts available. STCC asserts that -- as pointed out by Commerce -- CEMEX's argument that its sales of Type V cement sold as Type I cement from Hidalgo were outside the ordinary course of trade and should simply have been excluded when determining normal value is "irrelevant." STCC's November 12, 2002, Response to Comments on the Remand Redetermination at 25. In light of the fact that Commerce applied adverse facts available to account for the Hidalgo sales in the Final Results, that CEMEX did not challenge Commerce's decision to do so, and that this Panel affirmed Commerce's use of facts available, STCC argues that Commerce must continue to apply adverse facts available to account for the Hidalgo sales, stating, "the use of partial adverse facts available for the missing data on the Hidalgo sales is now the law of the case," id. at 26, and "the fact that Commerce appropriately

resorted to partial adverse facts available is the law of the case and cannot be contested by CEMEX." Id. at 28.

In addition, STCC, in its response to comments on the Remand Redetermination, terms "frivolous" and "insubstantial," CEMEX's argument that Commerce erred in applying adverse facts available on remand because STCC failed to timely argue that the Hidalgo sales should be treated as sales of Type V cement sold as Type I cement for the purposes of facts available. STCC's November 12, 2002, Response to Comments on the Remand Redetermination at 12. STCC states that CEMEX's focus on STCC's failure to timely raise this issue prior to remand "fails" because it ignores Commerce's responsibility under the antidumping law to apply adverse facts available on remand, and Commerce's intent and legal obligation to make a choice of facts available on remand that was consistent with the choice it made in the Final Results. Id. Thus, STCC states that the timeliness of STCC's raising this issue is simply "immaterial," and asserts, "given that Commerce was under a legal obligation to apply adverse facts available on remand, once it complied with the Panel's instructions to reconsider whether sales of Type V cement as Type I were outside the ordinary course of trade and reversed its position on that issue, Commerce would have erred if it had not proceeded to decide the issue of how to deal with the Hidalgo sales." Id. at 23.

STCC also asserts that even if the timeliness of STCC raising this issue was material, it raised this argument at the appropriate time. STCC argues that it would have been premature to raise this issue any earlier, as it was not until

CEMEX's sales of Type V cement sold as Type I cement became the basis of CEMEX's normal value did this issue become ripe for debate. STCC states that "[t]he question of whether Commerce should treat the Hidalgo sales as sales of Type I cement or as sales of Type V as Type I was wholly contingent upon whether Commerce first found sales of Type V cement as Type I to be outside the ordinary course of trade." Id. at 23. Once Commerce changed its position and treated the Hidalgo sales as sales of Type V cement sold as Type I cement, STCC asserts that it timely raised the issue.

CDC, in its comments before this Panel, does not, itself, challenge Commerce's decision to include sales from CEMEX's Hidalgo plant in the dumping calculation and Commerce's decision to resort to partial adverse facts available for such sales. Rather, CDC states that it "supports the arguments set forth in CEMEX's draft redetermination rebuttal comments and comments before this Panel, and refers the Panel to those comments for a discussion of why the Department should reject Petitioner's comments regarding CEMEX's sales of cement produced at the Hidalgo Plant." CDC's October 21, 2002, Comments on the Remand Redetermination at 20.

In CDC's November 12, 2002, Response to Comments on the Remand Redetermination, however, CDC addresses STCC's challenge to Commerce's decision to resort to partial adverse facts available for the Hidalgo sales. Specifically, CDC notes that STCC did not raise the issue of the Hidalgo plant sales before Commerce, or in its initial complaint filed with this Panel, or in its original

pre-remand briefs. Rather, CDC points out that STCC never made any arguments regarding Hidalgo plant sales until after Commerce issued its Draft Remand Results. Also, according to CDC, this Panel did not include the Hidalgo plant sales in the remand instructions. Since STCC failed to raise the issue of Hidalgo plant sales before Commerce during the administrative review and during the pre-remand proceeding before this Panel, and because this Panel did not include the Hidalgo plant sales in the remand instructions, CDC argues that the Hidalgo plant sales were not properly before Commerce on remand. CDC's November 12, 2002, Response to Comments on the Remand Redetermination at 7. Accordingly, CDC argues that this Panel should reject STCC's request to remand to Commerce to consider the application of total facts available. Id.

Commerce argues that this Panel, in its May 30, 2002, decision, affirmed Commerce's determination to resort to partial adverse facts available for the Hidalgo sales. Commerce notes that "CEMEX argues that the Department may not include the partial adverse facts available normal values in the new matching pool because the partial adverse facts available determination was not remanded to the Department, and that the Department's 'new' partial adverse facts-available determination is not supported by the proper findings and is therefore contrary to law." Commerce's November 12, 2002, Response to Comments on the Remand Redetermination at 15. According to Commerce, CEMEX's argument is "fundamentally flawed." Id.

Commerce points out that it has not changed its partial adverse facts-available determination in the Remand Redetermination. Commerce notes that in the Remand Redetermination, as in the seventh administrative review results, Commerce used as partial adverse facts available, the highest calculated normal value for CEMEX in the review for all of Hidalgo's sales. To give effect to this partial adverse facts available determination, Commerce, again, in the Remand Redetermination, included the partial adverse facts available normal values in the home-market sales matching pool. Commerce notes that "[t]he only difference is that the matching pool was now Type V sales and not Type I sales." Commerce's November 12, 2002, Response to Comments on the Remand Redetermination at 15. According to Commerce, because Commerce has not changed its partial adverse facts available determination, the Panel's determination that Commerce's determination was supported by substantial evidence and is otherwise in accordance with law still stands. Id. at 15-16. Commerce states that, contrary to CEMEX's argument, "no additional findings are required to make the determination in accordance with law." Id. at 16. Commerce believes that CEMEX's argument "simply amounts to an attempt to escape the adverse facts-available consequences of Hidalgo misreporting its sales, and that "[t]here is simply no basis on remand for excluding the partial adverse facts-available normal value sales from the home-market matching pool." Id.

Commerce asserts that STCC "is simply rehashing the arguments it made to the Panel before the Panel's May 30, 2002 Opinion was issued," in arguing that

Commerce should resort to total adverse facts available. Id. Commerce notes that this Panel did not find STCC's arguments on the use of total adverse facts available persuasive then, and that it should not do so now.

Commerce concludes its argument on the Hidalgo sales issue by asserting that "[b]ecause STCC's and CEMEX's arguments concerning the Department's application of partial adverse facts available for the Hidalgo sales are meritless and the Department's determination is supported by substantial evidence and in accordance with law, this Panel must affirm the Department's partial adverse facts-available determination." Id.

3. Analysis

We affirm Commerce's decision to include sales from CEMEX's Hidalgo plant in the dumping calculation, as well as its decision to resort to partial adverse facts available for such sales.

In our view, the fundamental issue with respect to this aspect of the Remand Redetermination by Commerce is how to account for sales from CEMEX's Hidalgo plant. Sales from CEMEX's Hidalgo plant -- whether viewed as Type I cement sold as Type I cement, or Type V cement sold as Type I cement -- must be accounted for in some fashion, or else CEMEX would be rewarded for not providing complete, accurate, and timely information for Hidalgo sales. In light of the fact that CEMEX originally certified to Commerce that the Hidalgo plant did not produce Type V cement, then took the "unprecedented" action of canceling verification on the last business day before it was scheduled to start, and then later admitted that it did

produce and sell Type V cement, we believe that, as set forth below, Commerce's decision to resort to partial adverse facts available for such sales is in accordance with law and supported by substantial evidence on the record. We also note that in our May 30, 2002, NAFTA Panel decision, we affirmed Commerce's decision in the Final Results to resort to partial adverse facts available to account for the Hidalgo sales. See page 65 of the May 30, 2002, of the Panel decision.

In affirming Commerce's decision to resort to partial adverse facts available, we reject CEMEX's argument that use of any adverse inference – even partial facts available – for the Hidalgo plant sales is inconsistent with U.S. law and U.S. obligations under the GATT antidumping code. We especially note that in the original pre-remand appeal to this Panel, CEMEX did not contest Commerce's use of partial adverse facts available, and that, instead, CEMEX argued that Commerce's reliance on partial adverse facts available was appropriate. See CEMEX's November 16, 2001, Rule 57(2) Brief, at 9 (section heading stating, "The Use Of Partial Adverse Facts Available In The Final Results, Rather Than Total Adverse Facts Available, Was In Accordance With Law") & 10 ("The Department's resort to partial facts available and its continued use of CEMEX's information which was verified by the Department to be accurate was in accordance with the statute."). We agree with STCC that "it was incumbent upon CEMEX to make that case in the administrative review, not after the conclusion of the review, appeal to the Panel, the Panel's affirmance of Commerce's use of partial adverse facts available, and completion of Commerce's remand proceeding."

Although CEMEX argues that the playing field changed when Commerce changed CEMEX's basis of normal value from Type I cement sold as Type I cement to Type V cement sold as Type I cement, we find that this argument has no impact on the overarching issue of whether or not to apply partial adverse facts available. The type of cement that was sold at CEMEX's Hidalgo plant had no bearing whatsoever on Commerce's decision to apply partial adverse facts available for the Hidalgo sales. During the seventh administrative review, Commerce rejected CEMEX's belated effort to submit revised data for its Hidalgo sales on the basis that such data represented unsolicited new factual information that was presented long after Commerce's administrative deadline for the submission of new factual information. As a result, CEMEX's sales and cost database for the Hidalgo sales was incomplete and could not be verified by Commerce. Accordingly, based on the information on the record, Commerce lacked information allowing it to determine which of the Hidalgo sales were sales of Type V cement sold as Type I cement, and which were sales of Type I cement sold as Type I cement. Accordingly, in its Final Results, Commerce treated all Hidalgo sales as Type I cement sold as Type I cement because Commerce calculated the normal value for CEMEX on the basis of Type I cement sold as Type I cement, and not because it actually had information indicating that the Hidalgo sales were actually Type I cement sold as Type I cement. Commerce so stated in its Remand Redetermination:

When we treated all Hidalgo plant sales as Type I cement for the Final Results, we did not do so as a result of hypothesizing about the likely composition of the types of cement produced at the Hidalgo plant. Rather, we did so

because we calculated the normal value for CEMEX on the basis of sales of Type I cement. Thus, in order to apply an adverse inference as we intended, we had to treat the Hidalgo plant sales as the same type of cement as the reported, verified sales which we used as the basis for normal value.

Remand Redetermination at 19 (Emphasis added).

Thus, by the same token, now that Commerce is calculating the normal value for CEMEX on the basis of Type V cement sold as Type I cement, we find it reasonable that Commerce is concomitantly treating all Hidalgo sales as Type V cement sold as Type I cement. To this end, we are mindful of our restricted standard of review and of the "considerable deference . . . [this Panel must afford] . . . to Commerce's expertise in administering the antidumping law." SKW Stickstoffwerke Piesteritz GmbH v. United States, 989 F. Supp. 253, 256 (Ct. Int'l Trade 1997). This Panel "may not substitute its judgment for that of . . . [Commerce] . . . when the choice is between two fairly conflicting views, even though . . . [this Panel] . . . would justifiably have made a different choice had the matter been before it *de novo*." See, e.g., PPG Indus., Inc. v. United States, 708 F. Supp. 1327, 1329 (Ct. Int'l Trade 1989) (citations omitted).

In affirming Commerce's decision to resort to partial adverse facts available, we also hold that, contrary to CEMEX's argument, the point in time in this litigation when STCC first raised the argument that Hidalgo sales should be treated as sales as Type V cement sold as Type I cement for purposes of facts available – and, thus, included in the normal value calculation -- is wholly irrelevant. So, too, is CEMEX's argument that such sales were outside the ordinary

course of trade and should have been excluded when determining normal value. Regardless of when STCC raised this issue, and regardless if such sales were outside the ordinary course of trade, and since, as explained above, the type of cement that was sold at CEMEX's Hidalgo plant had no bearing on Commerce's decision to apply partial adverse facts available for the Hidalgo sales, Commerce was under a legal obligation pursuant to U.S. dumping law -- as well as pursuant to our May 30, 2002, NAFTA Panel decision -- to apply partial adverse facts available to the Hidalgo sales. In order to give meaningful effect to the partial facts available inference, the Hidalgo sales had to be treated as within the ordinary course of trade, whatever their actual nature may have been. Had Commerce not applied partial adverse facts available for such sales, CEMEX would have been unjustly rewarded for its lack of cooperation regarding the reporting, and verification of, Hidalgo sales data.

In affirming Commerce's decision to resort to partial adverse facts available, we also reject STCC's argument in its comments on the Remand Redetermination that Commerce should resort to total adverse facts available, rather than to partial adverse facts available to account for the Hidalgo sales. As set forth above, we find that Commerce's decision to resort to partial adverse facts available for such sales -- rather than total adverse facts available for such sales -- is in accordance with law and supported by substantial evidence on the record. Aside and apart from the Hidalgo plant sales, taking into account CEMEX's overall cooperation in the seventh administrative review, the overwhelming majority of CEMEX's information

was timely submitted. Under such circumstances, we cannot say that Commerce erred in resorting to partial facts available.

In addition, we note that STCC on two occasions in its response to comments on the Remand Redetermination, explicitly endorsed the applicability of partial adverse facts available to the Hidalgo sales, asserting that it was now the law of the case. On page 26 of this response, STCC stated, "the use of partial adverse facts available for the missing data on the Hidalgo sales is now the law of the case." And on page 28 of this response, STCC stated, "the fact that Commerce appropriately resorted to partial adverse facts available is the law of the case and cannot be contested by CEMEX." Accordingly, we reject STCC's challenge to Commerce's decision to resort to partial adverse facts available for the Hidalgo sales.

4. Conclusion

Based on the foregoing, Commerce properly included sales from CEMEX's Hidalgo plant in the dumping calculation and properly resorted to partial adverse facts available to account for such sales. In so doing, this Panel rejects STCC's request to remand to Commerce to consider the application of total facts available, and rejects CEMEX's argument that use of any adverse inference for the Hidalgo plant sales is inconsistent with U.S. law and U.S. obligations under the GATT antidumping code.¹¹

¹¹ Panelist Patino dissents on this issue. See pages 65 to 72, infra.

C. CDC's Challenge To Commerce's Decision To Assess Duties On A Nationwide Basis

1. Background¹²

In its Final Results of the seventh administrative review, Commerce determined that it was bound to assess the duties on a nationwide basis, as it lacked authority to assess duties on a regional basis. See Final Results, 64 Fed. Reg. at 13165. Commerce stated that, pursuant to both judicial precedents and Section 102 of the Uruguay Round Agreements Act ("URAA"), "even if respondents were correct in asserting that the [U.S.] statutory provisions relating to regional assessment of duties conflicted with the obligations contained in Article 4.2 of the Antidumping Agreement, Commerce must act in conformity with the antidumping statute." Id. During the first hearing held by this panel, counsel representing Commerce stated that Commerce's position that it lacks authority to assess duties on a regional basis is based not simply on a reading of the applicable statute, but is also predicated upon two provisions of the U.S. Constitution. See May 30, 2002, NAFTA Panel Decision at 45. Commerce's position was, further, that this NAFTA Panel lacked the authority to (A) review Commerce's conclusion that the U.S. statutory scheme for assessment of antidumping duties in regional industry cases is consistent with the obligations of the United States under the WTO Antidumping Agreement, (B) review the questions raised by CDC concerning the interpretation of the U.S. Constitution as bearing on the regional assessment issue, and (C) order

¹² See pages 35-38 of the May 30, 2002, NAFTA Panel decision for additional background concerning this issue.

Commerce to revoke the order based on an allegedly improper assessment methodology.

In its May 30, 2002, decision, this Panel ruled that, without regard to whether the Panel was authorized to review matters of constitutional interpretation or was empowered to order Commerce to revoke the antidumping duty order here, Commerce had the administrative responsibility to more fully explain the legal grounds on which its decision on the regional assessment issue was based. The issue was, therefore, remanded to Commerce for it to more adequately explicate the basis of its decision on this issue, with particular reference to the requirements of the U.S. Constitution.

In its Remand Redetermination, Commerce reiterated its statutory position that "in enacting the Uruguay Round Agreements Act, Congress added some specific provisions with regard to assessment of duties for regional antidumping duty orders which direct the Department to assess duties on the entries of certain exporters or producers and do not allow for a distinction to be made based on location of imports." Thus, stated Commerce, 19 U.S.C. § 1673e (d)(1) [Section 736 (d) (1) of the Act], entitled Special Rule for Regional Industries, is "clear and unambiguous" in providing for antidumping duties to be assessed on the entries of the exporters or producers who exported to the region during the period of investigation, without regard to the location of the imports. Remand Redetermination at 22-23. Moreover, 19 U.S.C. § 1673e (d) (2) [Section 736 (d) (2) of the Act] deals with the subject of new exporters and producers. Id. Therefore,

according to Commerce, the statute supports its determination to assess antidumping duties on all entries of CDC merchandise. Commerce concluded by stating that, under U.S. law, "the Panel does not have the authority to rule on the consistency of U.S. law with the WTO agreements or on Constitutional issues" and therefore "it would be inappropriate to address these issues in the remand and we respectfully decline to do so." Id. at 25.

2. Contentions Of The Parties

CDC challenges Commerce's Remand Redetermination to assess duties on a nationwide basis. CDC argues that Commerce has improperly failed to address the pertinent requirements of the U.S. Constitution, contrary to the Panel's express instructions. CDC's October 21, 2002, Comments on the Remand Redetermination at 22-27. CDC also argues that Commerce should have addressed the apparent resulting inconsistency between its Constitutional interpretation barring regional assessment, on the one hand, and the statute and regulations, on the other, that permit the assessment of duties on a regional basis under certain circumstances. Id. at 23-24. CDC further argues that the statute is ambiguous with respect to the treatment of exporters such as CDC, which export the subject merchandise to the United States for sale both in and out of the region, and that this statutory ambiguity must be resolved consistently with WTO Article 4.2's general assessment rule providing that antidumping duties shall be levied only on the product in question consigned for final consumption in the relevant region. Id. at 25-26.

STCC supports Commerce's reading of the U.S. antidumping law, whereby antidumping duties had to be assessed on all of the subject merchandise exported into the United States by CEMEX and CDC. STCC's November 12, 2002, Response to Comments on the Remand Redetermination at 65-77. STCC argues that, since the Panel has no authority to rule on the consistency of U.S. law with the WTO agreements or upon constitutional issues, it was unnecessary and inappropriate for Commerce to address these issues on remand. STCC also argues that Commerce has no constitutional authority to impose duties on a regional basis and that, in any event, Commerce's nationwide assessment of duties here does not contravene the WTO Antidumping Agreement.

Commerce's comments in response to CDC's challenge reiterates Commerce's position that its regional assessment approach is consistent with U.S. law, that CDC lacks standing to raise issues about the United States' compliance with the WTO Antidumping Agreement, and that this NAFTA Panel is not authorized to consider U.S. Constitutional issues. Commerce's November 12, 2002, Response To Comments on the Remand Redetermination at 16-17. At the hearing before this Panel concerning Commerce's Remand Redetermination, this Panel pressed counsel for Commerce on the question of whether Commerce's decision on the regional assessment issue was premised solely on its reading of the statute or whether the decision was also based on its reading of the U.S. Constitution. Counsel responded that, "[o]ur position is based entirely on the statute as it is written out in the Final Results of review and the remand determination." January 24, 2003, Remand

Hearing Transcript at 104; see also January 24, 2003, Remand Hearing Transcript at 146-147.

3. Analysis

The Panel accepts Commerce's representation, after remand, that its determination on the regional assessment issue has been based solely on the agency's reading and interpretation of the applicable statutory provisions. Therefore, our review here is limited to the statutory questions presented. Commerce's representation makes it unnecessary for the Panel to consider whether Commerce complied with the Panel's remand instructions on this issue or to consider whether NAFTA Panels have the authority to review constitutional questions.

CDC's central argument is that (1) the U.S. antidumping statute is ambiguous with respect to the duty treatment of exporters who export the subject merchandise to the United States for sale both in and out of the defined region and that (2) this ambiguity must be resolved consistently with the requirements of Article 4.2 of the WTO Antidumping Agreement by interpreting the statute as precluding the assessment of duties consigned for consumption outside the region. Commerce's central premise is that the statute requires it to assess duties on all subject merchandise exported into the United States by CEMEX and CDC.

Before reviewing the issues of statutory interpretation, it bears to make brief note again of our standard of review in this regard. The first question for this Panel, as for a court, is whether "Congress has directly spoken to the precise

question at issue." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). If Congress has not directly addressed the precise question at issue, deference must be given to the administrative interpretation so long as it is based on a reasonable construction of the statute. Id. at 843-44. "To survive judicial scrutiny, an agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation." Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (emphasis in original). Provided that Commerce has acted rationally, a court, or here a NAFTA Panel, may not substitute its judgment for the agency's. Windmill Int'l Pte., Ltd. v. United States, 193 F. Supp. 2d 1303, 1306 (Ct. Int'l Trade 2002).

We consider, therefore, the provisions of the URAA which were added by the Congress to the U.S. antidumping law to deal specifically with the assessment of duties in the case of regional antidumping orders. 19 U.S.C. § 1673e(d)(1) and (2) [Section 736 (d) (1) and (2) of the Act] headed "Special Rule for Regional Industries", reads as follows:

(1) *In general.* In an investigation in which the Commission make a regional industry determination under section 1677 (4) (C) of this title, the administering authority shall, to the maximum extent possible, direct that duties be assessed only on the subject merchandise of the specific exporters or producers that exported the subject merchandise for sale in the region concerned during the period of investigation.

(2) *Exception for new exporters and producers.* After publication of the antidumping duty order, if the administering authority finds that a new exporter or producer is exporting the subject merchandise for sale in the region concerned, the administering authority shall

direct that duties be assessed on the subject merchandise of the new exporter or producer consistent with the provisions of section 1675 (a) (2) (B) of this title.

Commerce reads subsection (d) (1) as requiring it to direct that antidumping duties be assessed on all entries of subject merchandise produced by CEMEX and CDC, not only those exported by them for sale in the region concerned. (Emphasis added). Final Results, 64 Fed. Reg. at 13165; Remand Redetermination at 23. Subsection (d) (2) by its terms deals solely with new exporters and producers of the subject merchandise. As Commerce concluded, since neither CEMEX nor CDC is a new exporter or producer as described in the provision, the latter is inapplicable.

CDC maintains that the statutory language as a whole is ambiguous with respect to exporters who exported the merchandise for sale both in and out of the region and that this ambiguity must be resolved in the light of Article 4.2 of the WTO Antidumping Agreement which provides that antidumping duties shall be levied only on the product consigned for final consumption in the relevant region. CDC's October 21, 2002, Comments on the Remand Redetermination at 25-26. While CDC may well be correct in its contention that the statute does not address directly the situation of exporters and producers who ship for sale both in and out of the region concerned, this does not advance CDC's position sufficiently. None of the provisions cited differentiate between a particular exporter's or producer's sales in the region and those outside. Accordingly, it would be a considerable stretch to find such a differentiation embedded in the statutory language, regardless of whether or not the statutory interpretation is informed by the terms of the WTO Antidumping

Agreement. In sum, Commerce's construction of the statute as permitting no distinction between CDC's sales in the region and those outside it for purposes of assessing antidumping duties is a reasonable one and is, consequently, in accordance with law for purposes of this review.¹³

CDC evidently realizes the difficulty of its argument, given the language of the antidumping statute, because the thrust of its argument is largely that the statutory changes enacted by the U.S. Congress in the URAA "fall short" of meeting the United States' WTO obligations and may "conflict" with those obligations. Final Results, 64 Fed. Reg. at 13165. However, as we observed in our previous decision, this Panel is bound to conduct this review on the basis of U.S. law and cannot consider challenges regarding the United States' compliance with WTO obligations.

4. Conclusion

Based on the foregoing, we find that Commerce's determination on the regional assessment issue is in accordance with law. Therefore it is affirmed.¹⁴

¹³ We note also that 19 U.S.C. § 1673c(m) provides a special rule directing Commerce to offer exporters the opportunity to enter into suspension agreements where a regional industry determination has been made. Commerce determined that this provision was inapplicable in this review proceeding because, under the statute, it may accept a suspension agreement only during the pendency of the investigation. See Final Results, 64 Fed. Reg. at 13165. We uphold Commerce's reading of the statute in this regard as well.

¹⁴ Panelist Patino dissents on this issue. See pages 72 to 78, infra.

D. CDC's Challenge To Commerce's Decision To Treat Bulk And Bagged Cement As The Same Foreign Like Product

1. Background¹⁵

Commerce requested a remand for further consideration and an explanation of the classification of bulk and bagged cement as the same foreign like product. In its May 30, 2002, decision, this Panel, in granting request for a remand, declined to engage in a lengthy analysis of this issue.

In its Remand Redetermination, Commerce found that both bagged and bulk cement have "the same commercial value," and found "there is no justification for treating foreign like product sold in both bulk and bags as separate like products based on physical characteristics." Remand Redetermination at 34, 42. Accordingly, Commerce treated bagged and bulk cement as the same foreign like product. Id.

2. Contentions Of The Parties

CDC challenges Commerce's Remand Redetermination "to treat bulk and bagged cement as the same foreign like product meeting the definition under section 771(16)(B) of the Act [19 U.S.C. § 1677(16)(B)]." CDC's October 21, 2002, Comments on the Remand Redetermination at 28 (quoting Remand Redetermination at 39). CDC argues that, for the following five reasons, comparing bagged and bulk sales is contrary to U.S. law and the record evidence:

¹⁵ See pages 71 through 72 of the May 30, 2002, NAFTA Panel decision for additional background concerning this issue.

(1) There is virtually no overlap in the customers, and no overlap in uses for bagged and bulk cement.

(2) The NAFTA Panel in the 5th administrative review determined that the purposes for which bagged and bulk cement are used differ.

(3) Commerce has not always relied on the cost of production for a product to measure its commercial value, as it did in this case (instead, in certain cases, Commerce has considered the price in the marketplace).

(4) The adjustments that Commerce made to the reported price in attempting to measure commercial value are improper and that an appropriate analysis reveals significant differences in prices between bagged and bulk cement.

(5) Commerce compared bagged to bagged cement and bulk to bulk cement in the original investigation of this case.

These five arguments CDC makes are now considered:¹⁶

(1) There is virtually no overlap in the customers, and no overlap in uses for bagged and bulk cement

CDC contends that the majority of CDC's bagged cement was sold to typical bag customers that resell the cement to individual users, and nearly all of the remainder was sold to private contractor end users for small jobs. Therefore, nearly

¹⁶ STCC points out that all of CDC's arguments are "fundamentally irrelevant," because they rely upon comparisons of two products (bagged and bulk cement) sold in the home market (i.e., whether bagged and bulk cement) that are sold at different prices or to different customers in Mexico. The criteria in 19 U.S.C. § 1677(16)(B), however, address whether Mexican and U.S. products are appropriate matches, not whether Mexican products are appropriate matches, and Commerce properly focused its analysis in the Remand Redetermination on whether to match bulk cement sold in the United States with bagged cement sold in Mexico. STCC argues that this Panel should reject CDC's arguments on this ground alone.

all bagged cement was sold to bag cement customers. On the other hand, CDC asserts that most bulk cement is sold to typical bulk customers for large ready mix jobs or concrete jobs, and these customers do not buy bagged cement or resell cement.

Commerce found during its review that there is, in fact, an overlap between all types of customers to which CDC sold bagged and bulk cement, even if the overlap is not large. See Remand Redetermination at 40. Specifically, in applying 19 U.S.C. § 1677(16)(B), Commerce explained that CDC sold both bagged and bulk cement

to each of resellers, ready-mixers, industrial end-users, government agency end-users, private contractor end-users, and employees end-users. The fact that every type of customer to which CDC sold cement in the home market bought both bagged and bulk cement indicates that Type I cement, whether sold in bulk or in bags, is like the subject merchandise in the purposes for which it is used.

Remand Determination at 27.

Further, Commerce states, that "the only difference between bagged and bulk cement is in its packaging," and Commerce does not "normally consider packaging as part of the component material of either the subject merchandise or foreign like product." Remand Redetermination at 27; Commerce's November 12, 2002, Response To Comments on the Remand Redetermination at 20. As Commerce stated in the Remand Determination, "[t]he only difference between bagged and bulk cement is the bag. . . . Furthermore, the bag itself is not used in the making of concrete, the purposes [sic] for which cement is used. Thus, we find that bags are

not 'an integral part of the product' but, rather, incidental to shipment." Remand Redetermination at 27-28 (quoting Fresh Salmon from Chile, 63 Fed. Reg. 31411, 31415 (1998)).¹⁷ In addition, Commerce notes that Congress has granted it broad discretion in developing a model-match methodology.

STCC agrees with Commerce that the uses are the same. STCC quotes Commerce's statement in the Remand Redetermination, stating that, "[w]hether sold in bags or in bulk, cement is used to make concrete." Remand Redetermination at 27. STCC also argues that gray portland cement has no use other than to make concrete, and CDC has not argued otherwise. STCC notes that Commerce pointed out, "the respondents did not take issue with our finding that . . . cement is used to make concrete." Id. at 39. STCC make the point that rather than contest Commerce's finding that bulk and bagged forms of Type I cement are both used for the same purpose as the subject merchandise, CDC instead argues that bulk and bagged Type I are sold to different types of home market customers. (Specifically, CDC argues that bagged cement is sold primarily to distributors for resale to individuals and small contractors for use in small projects and bulk cement is sold primarily to end users for larger projects). STCC agrees with Commerce's following assessment of the situation as set forth in the Remand Determination:

[T]he respondents focus improperly on the downstream uses of concrete in their arguments rather on the use of

¹⁷ Commerce points out that it does "not normally consider packaging as part of the component material of either the subject merchandise or foreign like product." Remand Determination at 27. (STCC notes that this is Commerce's practice under the Mexican cement antidumping order and its practice in other cases).

cement itself. Ultimately, whether a customer uses the cement for private residential use or for a large construction project, the cement is used to make concrete, a fact which respondents nowhere dispute. In fact, the difference in uses that the respondents claim exist is actually merely a difference in scale, not a genuine difference in use. What the respondents are proposing would be analogous to our finding two otherwise identical bearings to be different products because one is used in manufacturing an automobile while the other is used in manufacturing a skateboard.

Remand Determination at 40.

STCC also points out that Commerce properly rejected CDC's argument focusing on alleged differences in uses for the downstream product – concrete – rather than the uses for cement. STCC asserts that this methodology is consistent with the statute and with Commerce's practice.

Further, STCC notes that CDC does not contest the existence of substantial evidence supporting Commerce's finding that bulk and bagged forms of Type I cement were sold to the same home market customer types. Instead, STCC points out that "there is virtually no overlap in the customers and . . . thus no overlap in uses, for bag and bulk cement." STCC notes that Commerce fully disposed of this argument on remand:

. . . CDC argued that because there was little overlap between the types of customers to which CDC sold bulk and bagged cement, bulk and bagged cement are not alike in the purposes for which they are used To the extent that cement sold to different customer types indicates different uses, such a factor could be significant if there were no overlap in the types of customers to which CDC sold bagged and bulk cement. In this case, however, there is overlap between all types of customers to which CDC sold cement, even if not large. The fact that large

industrial users do buy bagged cement, even if less frequently than do resellers, and the fact that resellers buy bulk cement, even if less frequently than do large industrial users, suggest that cement in bags and bulk is used for the same purpose, namely, to make concrete.

Commerce Redetermination at 39-40.

STCC also points out that the bag, in this case, does not change the physical characteristics of the merchandise, stating, "the use of a bag does not change the physical characteristics of the cement contained inside."

- (2) The NAFTA Panel in the 5th administrative review determined that the purposes for which bagged and bulk cement are used differ.

CDC states that the 5th review NAFTA panel aptly explained that bagged and bulk cement are different merchandise, even though they are both used to make concrete, and quotes the 5th review NAFTA panel:

Although it is obvious that cement Type I, as either bulk or bag, is the same "thing" or the same product, it is not the same "merchandise." According to the evidence in the record, Type I bag is not the same "merchandise" because of the purposes for which it is used, the clients and the prices of bag cement are different from those of Type I bulk cement. Simply stated, one might argue that if a purchaser of Type I bulk cement received from the vendor Type I bag cement, he/she could refuse that merchandise as non-conforming merchandise.

CDC's October 21, 2002, Comments on the Remand Redetermination at 29-30.

The 5th review NAFTA panel determined that the purposes for which bagged and bulk cement are used differ; bag customers resell bagged cement to customers for small projects, and bulk customers use bulk cement in large construction projects.

Commerce points out that this NAFTA Panel stated in its May 30, 2002, decision that the 5th review NAFTA panel determination is not binding. Specifically, this NAFTA panel stated (in considering the bag vs. bulk issue):

[T]he panel decision in the fifth review is not binding on this Panel; it is not precedent; and it is currently the subject of an extraordinary challenge proceeding.

May 30, 2002, NAFTA Panel Decision at 78.

STCC attacks the 5th review NAFTA panel determination as being "discredited" and "results-oriented." STCC's November 12, 2002, Rebuttal Comments on the Remand Redetermination at 57. STCC states that the 5th review panel "disregarded Commerce's broad discretion in matching U.S. and home market products, grossly overstepped the bounds of its authority under NAFTA and U.S. law, and blatantly violated the appropriate standard of review by making its own, de novo decisions with respect to the interpretation of the statute and the evidence of record." Id. at 57-58 n.32. STCC asserts that the 5th review NAFTA panel's reasoning and conclusions are "obviously flawed, and the Panel in this case should avoid falling into the same error." Id.

- (3) Commerce has not always relied on the cost of production for a product to measure its commercial value, as it did in this case (instead, in certain cases, Commerce has considered the price in the marketplace)

Pursuant to 19 U.S.C. § 1677(16)(B)(iii), commercial value must be approximately equal in order to compare products. Commerce concluded that under its "normal methodology" – basing commercial value on variable cost of production

(i.e., whether the variable cost of production of the home market product varies from that of the export product by more than 20 percent) – the commercial value of bagged and bulk cement is the same because the variable cost of manufacturing bagged and bulk cement is identical.

CDC notes that Commerce has not always relied on the cost of production for a product to measure its commercial value. Instead, Commerce has considered the price in the marketplace.

Commerce states that while CDC is correct in arguing that Commerce has, on some occasions, considered the price in the marketplace as a measure of commercial value, "this practice is extremely rare, and, in any event, does not refute the Department's point that its normal practice is to measure commercial value on the basis of differences in variable cost of production. Commerce's November 12, 2002, Response to Comments on the Remand Redetermination at 20. Commerce notes that it determined that CDC's home-market sales of Type I were approximately equal in commercial value to its U.S. sales of Type II cement because the difference in commercial value between Type I and Type II cement measured in terms of cost of production was small. The difference in commercial value between bagged and bulk cement, which Commerce measured by means of prices, was smaller still. Thus, Commerce asserts that it properly found bagged and bulk cement to be approximately equal in commercial value.

STCC agrees with Commerce that Commerce normally assesses whether products are approximately equal in commercial value by looking at variable cost of

production (i.e., whether the variable cost of production of the home market product varies from that of the export product by more than 20 percent). In addition, STCC notes that CDC on remand did not even address Commerce's normal practice of using differences in variable cost of production to determine whether two products are approximately equal in commercial value. In addition, STCC notes that CDC's Comments to this Panel are similarly silent with respect to Commerce's reliance on its standard practice. According to STCC, CDC's failure to challenge Commerce's reliance on this practice or to demonstrate any reason why such reliance was inappropriate in this case is conclusive of this issue. STCC notes that before this Panel, CDC merely contends that Commerce "has not always relied on the cost of production for a product to measure its commercial value," as Commerce has "considered the price in the marketplace." STCC asserts that even if Commerce in rare circumstances may have relied upon price rather than variable cost to measure differences in commercial value, it is incumbent upon CDC to demonstrate why Commerce was required under the circumstances of this case to depart from its longstanding practice and use price in the marketplace to measure commercial value. STCC notes that CDC has not done so.

- (4) The adjustments that Commerce made to the reported price in attempting to measure commercial value are improper and that an appropriate analysis reveals significant differences in prices between bagged and bulk cement.

CDC notes that in its draft Remand Redetermination, Commerce attempted to measure the commercial value by comparing CDC's bagged and bulk prices in the home market in order to assess whether, based on prices, bagged and bulk cement

are approximately equal in commercial value. Commerce concluded in its Draft Remand Results that they are approximately equal in commercial value. The CDC, however, asserts that Commerce's methodology was faulty, as Commerce incorrectly (a) adjusted the bagged and bulk prices to CDC's customers reported on the home market database to reflect net prices, and (b) eliminated all employee sales and affiliated party sales that did not pass Commerce's arm length test. CDC asserts that it performed a review of the home market bagged and bulk prices (without eliminating affiliated party and employee sales) on a net basis, and this review demonstrated that bagged and bulk cement are not equal in commercial value.

Commerce responds that employee sales and affiliated party sales that did not pass Commerce's arm's length test should have been eliminated because these sales prices were artificially low, and not representative of the home-market sales prices. Commerce asserts that including such sales would "improperly skew" its analysis and exaggerate whatever real difference in commercial value may exist.

Commerce also responds that it was appropriate to use net prices. Commerce asserts that if it had used the prices observed by consumers in the marketplace (i.e., the gross unit price), it would capture differences in prices due to causes totally unrelated to whether the cement is in bags or in bulk, such as the distance between the plant and the customer.

STCC claims that CDC's attack on Commerce's price analysis is wholly irrelevant and may be disregarded by this Panel because it does not relate to the actual basis on which Commerce made its finding. STCC points out that Commerce

relied upon the variable cost of producing bulk and bagged cement – not price to determine that there was no difference in commercial value, and quotes the Remand Determination, stating:

[W]e should clarify that we only performed that price analysis to test CEMEX's claim that there is a [] percent markup for bagged cement as compared to bulk cement This analysis was only performed to ascertain whether the claim that there is a significant markup is accurate, not to suggest that this was the basis of our determination that bagged and bulk cement are approximately equal in commercial value. Rather, in keeping with our normal practice, we determined that bagged and bulk cement have the same commercial value because they have the same variable cost of manufacturing. However, as our above analysis demonstrates, bagged and bulk cement are approximately equal in commercial value even if we measure it by means of the observed prices in the home market.

Remand Determination at 41.

STCC also points out that, even assuming that CDC's objections to Commerce's price analysis is relevant, CDC's objections are without merit. STCC argues that Commerce correctly eliminated all employee sales and affiliated party sales that did not pass Commerce's arm length test, as such sales are outside the ordinary course of trade. STCC notes that the very reason Commerce treats non-arm's length home market sales to affiliates as outside the ordinary course of trade is that they are sold at aberrant prices that do not reflect the normal market price to non-affiliated customers. Thus, STCC concludes, even under CDC's definition of "commercial value" as representing the price paid by the customer in the

marketplace, non-arm's length sales to affiliates would skew the analysis and must be excluded.

STCC also argues that Commerce correctly adjusted the bagged and bulk prices to CDC's customers reported on the home market database to reflect net prices. STCC agrees with Commerce when Commerce states:

CDC's proposal that we should look at prices observed by consumers in the marketplace instead of net prices would cause improper results. This is because the prices observed by consumers in the marketplace, in addition to reflecting a theoretical markup for bagged cement, reflect a number of factors for which we normally adjust, such as differences in the circumstance[s of] sale and movement expenses.

Remand Determination at 41. STCC points out that CDC has not bothered to suggest any genuine flaw in Commerce's methodology or reasoning, other than the fact that it did not yield the result sought by CDC.

- (5) Commerce compared bagged to bagged cement and bulk to bulk cement in the original investigation of this case.

CDC points out that Commerce recognized in the final Remand Redetermination that "the Department compared bagged to bagged cement and bulk to bulk cement" in the original investigation in this case. CDC also notes, however, that Commerce dismissed its approach to comparisons in the investigation by stating that "it was not an issue that was developed or briefed by the parties in that investigation and, therefore, was not developed fully by the Department," and that "[w]e have since considered the issue in greater detail and have concluded that it was more appropriate to compare cement without regard to packaging type based

on the evidence and argument developed in subsequent reviews of the order." CDC argues that although Commerce now claims that its earlier precedent was not briefed by the parties and fully considered by Commerce, the approach in the original investigation was appropriate under the statute, and recognized the realities of pricing for bagged and bulk cement in the market.

Neither Commerce nor STCC address this issue.

3. Analysis

The statutory provision at issue – 19 U.S.C. § 1677(16)(B) – is silent with regard to the methodology Commerce should use for purposes of matching the subject merchandise to the foreign like product. In light of the considerable deference we must accord to Commerce's expertise in administering the antidumping law, the issue for this Panel is whether Commerce's interpretation of 19 U.S.C. § 1677(16)(B) is a permissible construction of the statute. Steel Auth. of India, Ltd. v. United States, 146 F. Supp. 2d 900, 905 (Ct. Int'l Trade 2001). We hold that it is, and that Commerce reasonably interpreted the statutory provision at issue.

We note that this Panel decision is in accord with Commerce's decisions in every administrative review of this case since the seventh administrative review. See Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 68 Fed. Reg. 1816 (January 14, 2003) (stating in the 11th administrative review that "[w]e continue to find our practice of matching the U.S. merchandise to the foreign like product by cement type to be appropriate and

maintain that there is no basis for the use of form of presentation as a matching criterion"); Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 67 Fed. Reg. 12518 (March 19, 2002) (stating in the 10th administrative review, "[i]n the past five reviews we have maintained a practice of including both bulk and bagged cement sales in the calculation of normal value. In the instant review, we find no reason to deviate from this practice Congress and the courts have granted us broad discretion in developing our model-match methodology"); Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 66 Fed. Reg. 14889 (March 14, 2001) (finding in the 9th administrative review that bagged and bulk are the same foreign like product, and matching the U.S. merchandise which is sold only in bulk to the foreign like product sold in both bulk and bags); Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 65 Fed. Reg. 13943 (March 15, 2000) (finding in the 8th administrative review that bagged and bulk cement are the same foreign like product, and matching the U.S. merchandise which is sold only in bulk to the foreign like product sold in both bulk and bags).

"To survive judicial scrutiny, an agency's construction [of a statute] need not be the only reasonable interpretation or even the most reasonable interpretation." Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (emphasis in original). In view of Commerce's reasonable interpretation of the statute with respect to this issue, this Panel may not substitute its judgment for that of the

agency. Windmill Int'l Pte. Ltd. v. United States, 193 F. Supp. 2d 1303, 1306 (Court Int'l Trade 2002).

4. Conclusion

Based on the foregoing, Commerce properly treated bulk and bagged cement as the same foreign like product. Accordingly, Commerce's Remand Redetermination on this issue is affirmed.¹⁸

E. CDC's Challenge To Commerce's Decision To Match CDC's U.S. Sales With CDC's Home Market Sales

1. Background

During the seventh administrative review, CDC argued that Commerce should not "collapse" CDC and CEMEX. In its Final Results, Commerce rejected this contention, deciding to collapse these two entities. Final Results, 64 Fed. Reg. 13148, 13152. Despite this collapsing, Commerce matched CDC's U.S. sales of Type II cement with CDC's home market sales of Type I cement and matched CEMEX's U.S. sales with CEMEX's home market sales of Type I cement. CDC did not ask Commerce to match CDC's U.S. sales with any of CEMEX's home market sales and did not raise the matching issue on its appeal to this Panel. On review of CEMEX's appeal, the Panel, in its May 30, 2002, decision, remanded to Commerce for further consideration of the agency's finding that CEMEX's home market sales of Type V cement sold as Type I cement were outside the ordinary course of trade.

¹⁸ Panelist Patino dissents on this issue. See pages 79 to 82, infra.

Subsequently, in its Draft Remand Results, Commerce determined that CEMEX's home market sales of Type V cement sold as Type I cement were, in fact, within the ordinary course of trade, and hence should be included in the normal value calculations. Draft Remand Results at 4-6.

2. Contentions Of The Parties

After the Draft Remand Results were issued, CDC urged Commerce for the first time in this proceeding, that Commerce should compare CDC's U.S. sales with CEMEX's home market sales of Type V cement sold as Type I cement. In response to CDC's argument, STCC contended that CDC had failed to exhaust its administrative remedies by failing to raise this argument either during the course of the seventh administrative review or in its appeal to this NAFTA Panel.

In its Remand Redetermination, Commerce found that CDC exhausted its entitlement to legal remedy by not raising the matching issue previously. Remand Redetermination at 21. CDC now argues to this Panel that the doctrine of exhaustion of remedies should not be applied here and that the Panel should remand to Commerce for consideration of the CDC matching issue.

3. Analysis

By failing to raise its matching argument either before Commerce during the seventh administrative review or in the original appeal to this Panel, CDC might well be deemed to have waived its contention regarding the matching argument. We do not accept CDC's contentions that it would have necessarily been premature or futile to raise the matching argument at these stages of this proceeding, or that CDC

could not raise the matching issue without jeopardizing its primary position that CDC should not be collapsed with CEMEX. Parties in litigation can, and often do, offer, on an alternative basis, arguments that are not mutually consistent. CDC could have raised its alternative matching argument when it made its argument to Commerce against collapsing. "Ordinarily, when a party fails to make an argument in proceedings [before the lower court or agency], the argument is waived...", and that is the end of the matter. CEMEX, S.A. v. United States, 133 F.3d 897, 902 (Fed. Cir. 1998); see also Aimcor v. United States, 141 F.3d 1098, 1111-12 (Fed. Cir. 1998); Budd Co., Wheel & Brake Division v. United States, 773 F. Supp. 1549, 1554-56 (Ct. Int'l Trade 1991) ("Plaintiff did not attempt to raise its present line of argument before Commerce on the assumption that Commerce would not be amenable to its proposals This is no excuse for Plaintiff's not exhausting its administrative remedies.").

We believe, however, that the manner in which the proceedings have developed in this case justifies a departure from the routine application of the rules of waiver and exhaustion. The statute dealing with exhaustion of administrative remedies, 28 U.S.C. § 2637(d), provides that the CIT (and here this NAFTA Panel) shall require such exhaustion of remedies "where appropriate." It is well settled that this language authorizes the court or Panel to excuse departure from the exhaustion rule where such a ruling is warranted in the exercise of sound judicial discretion. Over time, a number of grounds for departing from the exhaustion requirement have been carved out, particularly where doing so would not defeat the purposes of the

doctrine. See, e.g., McCarthy v. Madigan, 503 U.S. 140, 146 (1992); FAG Kugelfischer Georg Schafer AG v. United States, 131 F. Supp. 2d 104, 113-14 (Ct. Int'l Trade 2001); Geneva Steel v. United States, 914 F. Supp. 563, 606 (Ct. Int'l Trade 1996); Gerald Metals, Inc. v. United States, 937 F. Supp. 930, 935 (Ct. Int'l Trade 1996), vacated, 132 F.3d 716 (Fed. Cir. 1997), rehearing denied, in banc suggestion declined, on remand, 8 F. Supp.2d 861 (Ct. Int'l Trade 1998).

However, before we can address the exhaustion issue, we must determine whether, at the remand stage of the proceeding, Commerce is *empowered to consider* the matching issue raised by CDC. This depends on the scope of Commerce's powers of review after remand. In this regard, the precedents indicate that, although an administrative agency may not reconsider issues which the appellate review has laid to rest, the agency may consider and decide any matters left open by the mandate of the reviewing court. Indeed, upon remand, the agency is again charged with carrying out its statutory responsibilities. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 145 (1940) (" . . . an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge"); 73A C.J.S. Public Administrative Law and Procedures §258 (2002) at 393 (" . . . although on remand after correction of errors of law by the court, the administrative body is bound to act on the corrections, this does not foreclose the administrative body from enforcing the legislative policy committed to its charge"); cf. Sprague v. Ticonic Bank, 307

U.S. 161, 168 (1938); In Re Sanford Fork & Tool Co., 160 U.S. 247, 256 (1895). Accordingly, since this Panel did not make any decision concerning the appropriate matching of CDC's U.S. sales, it was an issue that Commerce was not precluded from considering on remand, after CDC raised it in connection with Commerce's Draft Remand Results.

Among the significant responsibilities that Congress has given Commerce in the administration of the U.S. antidumping laws is the determination of the appropriate "foreign like product", pursuant to 19 U.S.C. §1677(16). See SKF USA, Inc. v. United States, 263 F.3d 1369, 1374 (Fed. Cir. 2001). This function is an important component of "the legislative policy committed to [Commerce's] charge," to borrow the language of FCC v. Pottsville Broadcasting Co., *supra*. When this Panel remanded to Commerce for reconsideration of CEMEX's contention that its home market sales of Type V cement sold as Type I cement were within the ordinary course of trade, Commerce was required to take a fresh look at the foreign like product issue, at least as applied to CEMEX. Commerce did reconsider its position on this issue and reversed its earlier view, signaling in the Draft Remand Results that it intended to find that the CEMEX sales in question were within the ordinary course of trade and thus should be included in the normal value calculations. CDC then commented with regard to the Draft Remand Results that, under the Commerce's practice, the correct product match for CDC was the same as CEMEX's, given that Commerce had decided to treat CDC and CEMEX as a single entity. See CDC's August 15, 2002, Comments on the Draft Remand Results. As

previously noted, Commerce declined to consider this comment on the merits, ruling that CDC exhausted its entitlement to legal remedy by not raising the matching issue previously.

Certainly, it would have made for a more efficient process had CDC raised its matching issue earlier as an alternative theory, as it might have. But it must also be acknowledged that Commerce's reversal of its previous position on the ordinary course of trade issue placed the matching issue in a new and non-hypothetical context for CDC. In effect, when Commerce changed its matching as to CEMEX, CDC, which Commerce has determined to be part of the same collapsed entity, asked to have the same match. There is, evidently, precedent for this approach. While here Commerce matched CDC's U.S. sales with its own home market sales, in some other cases, after "collapsing" two entities into one, Commerce has "cross-matched" one company's sales with the other's. See January 24, 2003, Remand Hearing Transcript at 103-04. In sum, we believe that CDC's request for a cross-match raises a valid question about the application in this case of Commerce's policy and practice on the matching issue which deserves a reasoned answer from the agency. The primary purpose of the exhaustion doctrine is to assure that the administrative body, and not the reviewing court or Panel, should have the primary responsibility for making determinations under the program which Congress has entrusted to the agency to administer. McCarthy v. Madigan, 503 U.S. 140, 145 (1992). The exhaustion doctrine will not be undermined by remanding this issue to Commerce for its updated determination on the CDC matching issue.

Finally, CDC requests that, if the Panel remands to Commerce for the agency to consider CDC's argument that its Type II U.S. sales should be compared to CEMEX's home market sales, the Panel should instruct Commerce that it should not apply facts available to CDC. See CDC's October 21, 2002, Comments on the Remand Redetermination at 20-22. This is a matter on which Commerce has apparently not made a determination, and we decline to formulate any instructions with respect to it.

4. Conclusion

Based on the foregoing, we remand this issue to Commerce, with no instructions on the facts available question, so that Commerce can make a determination whether, under the statute, CDC's U.S. sales should be compared to CEMEX's home market sales of Type V cement sold as Type I cement. The issue is remanded for resolution within 45 days from the date of this Panel opinion.¹⁹

F. Majority Opinion Conclusions

For the reasons discussed above, this Panel affirms Commerce's Remand Redetermination with respect to the following findings:

- (1) That CEMEX's home market sales of Type V cement sold as Type I cement are within the ordinary course of trade;
- (2) That sales from CEMEX's Hidalgo plant should be included in the dumping calculation, and that partial facts available should be used to account for such sales;

¹⁹ Panelists Mastriani and Kennedy dissent on this issue. See pages 82 to 88, infra.

- (3) That duties should be assessed on a nationwide basis;
- (4) That bulk and bagged cement should be treated as the same foreign

like product.

This Panel, however, remands to Commerce its decision to match CDC's U.S. sales with CDC's home market sales so that Commerce can make a determination whether, under the statute, CDC's U.S. sales should be compared to CEMEX's home market sales of Type V cement sold as Type I cement. This issue is remanded for resolution within 45 days from the date of this Panel opinion.

IV. DISSENTING VIEWS

A. Dissenting View of Panelist Patino Concerning The Panel Majority Opinion To Affirm Commerce's Decision To Include Sales From CEMEX's Hidalgo Plant In The Dumping Calculation And To Resort To Partial Adverse Facts Available To Account For Such Sales

I dissent from the majority opinion of this Panel to affirm Commerce's decision to include sales from CEMEX's Hidalgo plant in the dumping calculation. I do not believe that such sales should be included in the dumping calculation. As such, I believe that the issue of whether this Panel should affirm Commerce in resorting to partial adverse facts available to account for such sales is moot.

In our May 30, 2002, decision, the Panel determined the following in regard to CEMEX's sales:

. . . CEMEX produces cement that meets the ASTM physical requirements for Type V cement at only two of its cement plants (Campana and Yaqui), which are

located in the Hermosillo region of Mexico. Because Type V cement meets or exceeds the ASTM standards for Type I and Type II cement, CEMEX can and does sell this Type V cement as Type I, Type II, or Type V cement. The Hermosillo plants are the only two CEMEX plants that on a consistent basis produce cement meeting the ASTM standard for Type V cement that is sold as a different ASTM type. All of CEMEX's remaining facilities produce cement that meet the ASTM physical requirements for Type I cement which these plants in turn sell as Type I cement.

See May 30, 2002, Panel Determination at 24.

The rest of the discussion and analysis on this issue concerns sales of Type V cement sold as Type I cement from the Hermosillo plants. In our remand instruction on this issue we stated:

This Panel remands to Commerce and instructs the agency to explain why the findings it made regarding the difference in freight costs, the relative profit levels, the number and type of customers, and the disparity in handling charges support the agency's determination that sales of physically Type V cement sold as Type I cement were outside the ordinary course of trade.

See May 30, 2002, NAFTA Panel Opinion at 35.

Even though we frame the remand without mentioning Hermosillo, the obvious implication is that we are discussing and analyzing the sales from these plants. Not once was the issue of including the Hidalgo sales into this mix mentioned, and the issue of the Hidalgo sales was never brought up by any of the parties during the seventh administrative review or in the original pre-remand appeal before this Panel because Hidalgo sales were already considered inside the ordinary course of trade as Type I cement.

Even in the Draft Remand Results, Commerce never considered Hidalgo sales in its decision to treat Type V cement sold as Type I cement as sold in the ordinary course of trade. It was only after the Draft Remand Results had been issued did STCC raise the issue of Hidalgo sales. STCC raised this issue in briefs and during a private meeting at Commerce. Only after STCC made these arguments did Commerce change its mind and include the Hidalgo sales in its normal value calculation.

During the entire seventh administrative review, sales from Hidalgo have been treated as type I cement sales. Because of a misrepresentation by CEMEX regarding the sales at Hidalgo, Commerce calculated CEMEX's dumping margin based on facts available, and Hidalgo cement was included in the ordinary course of trade calculation as Type I cement.

This summary of events raises two important questions. First, does Commerce have the authority to go outside the scope of our remand and consider other questions that have not been raised on remand, and have, in fact, already been considered and accepted by the panel? Second, can STCC raise this issue after all discussion in the case is closed?

1. Does Commerce Have The Authority To Go Outside The Scope Of Our Remand And Consider Other Questions That Have Not Been Raised On Remand And Have, In Fact, Already Been Considered And Accepted By The Panel?

It has long been recognized that a court cannot consider issues on remand that were not sent back to them for consideration, In re Sanford Fork and Tool Co.,

160 U.S. 247, 255 (1895), and cannot deviate from the mandate issued by the appellate court. See Briggs v. Pennsylvania R.R. Co., 334 U.S. 304, 305 (1948). It is a slightly different situation when a remand is sent back to an administrative agency, as in this case. Both of the parties in this case have cited FCC v. Pottsville Broadcasting Corp., 309 U.S. 134, 141 (1940), as authority for their position. Although Pottsville did broaden an agency's responsibility on remand -- and recognized that once questions on remand were resolved, the agency was still left with the basic question of regulating their area of responsibility -- the decision did not change the basic relationship regarding remands to lower courts. In fact, the court in Pottsville said that "[t]he Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest. See In re Sanford Fork and Tool Co., 160 U.S. at 255. That proposition is indisputable, but it does not tell us what issues were "laid at rest." See Pottsville, 309 U.S. at 141.²⁰ In Pottsville, the issue that was remanded for error was corrected but was not dispositive of the case. There remained the larger issue of

²⁰ The Pottsville case involved a dispute over the refusal of the FCC to issue a radio station license to the petitioner, Pottsville. There were several criteria for qualifying for the license and the agency disqualified the petitioner on the first criteria and did not move on to the other criteria because they had already found cause for rejecting the application. On appeal, the appellate court reversed on the first criteria and sent it back on remand for further determination. Once back in the hands of the FCC, the FCC corrected the error but didn't automatically consider their petition, but placed their application in a group with three other applicants for consideration. Eventually, the application was rejected. The court said that the agency had broad powers because they had to consider all aspects of the petition and finally decide to issue a license out of 'public convenience, interest, or necessity' which was the agency's charge. Although one of the factors for approval of the license was corrected the agency was still left with the other factors for determining 'public convenience, interest, or necessity'.

granting a radio license based on other factors as well, which were presumably included in the original petition.

In the present case, Pottsville does not apply because once Commerce determined that Hermosillo Type V cement sold as Type I cement was inside the ordinary course of trade, there were no lingering factors to be considered. Commerce considered all of the factors regarding Hermosillo cement and decided to use this type of cement for the calculation of normal value. Since the Hidalgo sales were already in the ordinary course of trade as Type I cement, Commerce cannot change its character unless it goes through a similar analysis for Hidalgo as it did for Hermosillo.

In other words, Commerce cannot have it both ways. Commerce cannot use facts available treating Hidalgo sales as Type I, and then sneak in facts available again by treating Hidalgo sales as Type V sold as Type I. If Commerce had considered all Type V cement sold as Type I cement as being outside the ordinary course of trade originally, then when Commerce changed course and placed the Hermosillo sales into the ordinary course of trade, Commerce would have had a better argument for including the Hidalgo sales in the same category as the Hermosillo cement. However, once Commerce concluded that Hidalgo sales were inside the ordinary course of trade as Type I and applied facts available, Commerce cannot now turn around and change its denomination without going through an analysis similar to its analysis regarding the Hermosillo sales. Apart from that, Commerce cannot change the character of the Hidalgo sales because that issue is

closed. Those sales remain as Type I. That issue has been decided by Commerce and affirmed by this Panel.

There is also confusion in the Hidalgo sales as to what type of cement was sold as type I so that it would be impossible for Commerce to analyze the issue as it did for the Hermosillo sales. Even STCC discusses this problem by saying:

In the final results, the department treated all of the Hidalgo sales as sales of physical Type I sold as Type I in applying adverse facts available, because the record does not indicate which sales are physical Type V and which are physical Type I.

STCC's August 15, 2002, Comments on the Draft Remand Results at 37.

With that type of ambiguity over the nature of the sales, it is not possible to include these sales with the Hermosillo sales as a basis for normal value. To try to get these sales in under facts available again using a different basis for normal value is manipulative and indicates a determination by Commerce and STCC to raise the dumping margin to where it was before.

2. Can STCC Raise This Issue After All Discussion In The Case Is Closed?

STCC argues that the issue concerning the Hidalgo sales was not ripe until Commerce concluded that Hermosillo Type V cement sold as Type I was inside the ordinary course of trade. In a footnote to its brief, STCC argues:

There was no reason or opportunity to raise this issue prior to the Department's final results. It was not until the Department reversed position on remand with respect to whether sales of Type V cement sold as Type I were outside the ordinary course of trade that this issue became ripe for consideration. It is not necessary or even appropriate for a party to predict that an agency or court

will reach a particular outcome on an issue and argue any ancillary or subsidiary question that might arise as a result.

STCC's August 15, 2002, Comments on Draft Remand Results at 32.

Several cases are listed to support this position by STCC but CEMEX distinguishes these cases very effectively in its responsive brief. See CEMEX's October 21, 2002, Comments on the Remand Redetermination at 16-17.

One cannot be convinced that the issue of the Hidalgo sales was not previously ripe for consideration. Once CEMEX argued the point that Type V cement sold as Type I cement from Hermosillo should be within the ordinary course of trade, the obvious alternative argument would have been that even if Commerce were to decide that Type V cement sold as Type I cement from Hermosillo was within the ordinary course of trade, then Commerce must take all Type V sold as Type I cement into consideration -- including the sales from the Hidalgo plant using partial or total facts available.

Even more convincing is the fact that CEMEX from the initiation of this case up until the present revision has always argued that Commerce should use Type V cement as the identical merchandise to calculate normal value. Accordingly, STCC cannot now argue that the selection of Hermosillo Type V cement sold as Type I cement was not foreseeable or ripe for discussion, and that the inclusion of Hidalgo cement was not an obvious counter issue to present before Commerce or this Panel.

Therefore, STCC should be barred from introducing this argument before Commerce after all opportunities for discussion of these issues has been closed. As

such, the Hidalgo sales should not be included in the dumping calculation. Since such sales should not be included in the dumping calculation, I conclude that the issue of whether this Panel should affirm Commerce in resorting to partial adverse facts available to account for such sales is moot.

B. Dissenting View of Panelist Patino Concerning The Panel Majority Opinion To Affirm Commerce's Decision To Assess Duties On A Nationwide Basis

I vigorously dissent from the majority opinion of this Panel to affirm Commerce's decision to assess duties on a nationwide basis.

Since Commerce has refused to acknowledge or invoke the Constitution on this issue, my analysis is relatively simple. First, is the general assessment statute - 19 U.S.C. § 1673e(d)(1) -- clear and unambiguous so as to be unreviewable under the Chevron test?²¹ Based on the wording of the statute and within the letter and spirit of the participation of the United States in the World Trade Organization ("WTO") and its obligations under the NAFTA, the meaning is clear and unambiguous, but not in the way that Commerce interprets the statute. There can be no other interpretation of the general assessment statute in regional cases other

²¹ Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). This test is explained as follows: "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, [467 U.S. 837, 843] as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

than the plain meaning that it presents, which is that duties can only be collected on merchandise shipped to the region:

In an investigation in which the Commission makes a regional industry determination under section [1677\(4\)\(C\)](#) of this title, the administering authority shall, to the maximum extent possible, direct that duties be assessed only on the subject merchandise of the specific exporters or producers that exported the subject merchandise for sale in the region concerned during the period of investigation.

19 U.S.C. § 1673e(d)(1).

Any other interpretation would not make any sense. If the statute is interpreted to mean that dumping duties could be collected on a national basis, then the whole purpose of a regional assessment would be frustrated and any national industry could accomplish the same objective in a regional case (which is much easier to make) as it could in a national case. Also, this interpretation would raise much stronger questions of due process²² since there has been neither a determination of dumping, nor a calculation of duties, nor injury from dumping concerning products imported outside of the region in which the assessment is made.

The statute is at least ambiguous if we accept Commerce's interpretation of the statute as a possible -- if not permissible -- interpretation. In that case, where

²² Even if one were to agree with the conclusion that panels are not authorized to handle constitutional questions, panels are allowed to make due process arguments by virtue of Article 1904.3. "The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority." General legal principles are defined in Article 1911 as: "**general legal principles** includes principles such as standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies."

the statute is ambiguous, we would go to the second test of Chevron and determine if Commerce's interpretation of the statute is a permissible (i.e., reasonable) one. If we conclude that the general assessment statute is ambiguous and Congress has not spoken to the issue, then we can use other sources in order to clarify the meaning of the statute. The obvious source for that purpose would be article 4.2 of the Antidumping Code formulated in the Uruguay Round of the GATT negotiations which also established the World WTO.²³

The general assessment statute conforms to Article 4.2 of the Antidumping Code which further makes clear the intent of that statute. Thus, only when the constitutional law of the importing member would not permit the levying of antidumping duties on a regional basis are the WTO members permitted to levy on a national basis.

The use of Article 4.2 to clarify the meaning of the general assessment statute is also bolstered by Article 1902 of the NAFTA which states:

2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party's antidumping or countervailing duty statute:

²³ AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 Article 4.2. When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii) [regional industry], anti-dumping duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

(d) such amendment, as applicable to that other Party, is not inconsistent with

(i) the *General Agreement on Tariffs and Trade* (GATT), the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the Antidumping Code) or the *Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade* (the Subsidies Code), or any successor agreement to which all the original signatories to this Agreement are party.

See NAFTA Chapter 19, Article 1902(2).

Since the general assessment statute was modified by the implementation of Article VI of GATT 1994 after the effective date of the NAFTA, then Article 1902(2) of the NAFTA is applicable,²⁴ and the general assessment statute must be interpreted within the limits of Article VI of GATT 1994.

The only way that Commerce's interpretation could be reasonable is if one were to analyze the statute in light of possible Constitutional restrictions to assessing duties on a regional basis based on the "uniformity clause" or the "port clause" of the Constitution.²⁵ Since Commerce has taken great pains to avoid that

²⁴ 19 U.S.C. § 1673 was modified by "Amendment by Pub. L. 103-465 effective, except as otherwise provided, on the date on which the WTO Agreement enters into force with respect to the United States (Jan. 1, 1995), and applicable with respect to investigations, reviews, and inquiries initiated and petitions filed under specified provisions of this chapter after such date, see section 291 of Pub. L. 103-465, set out as a note under section 1671 of this title." The North American Free Trade Agreement Implementation Act is Pub. L. 103-182, Dec. 8, 1993, 107 Stat. 2057. The NAFTA went into effect on January 1, 1994.

²⁵ The Uniformity Clause is contained in Article I, section 8, clause 1 of the U.S. Constitution, and the Port Clause in Article 1, section 9, clause 6 of this document.

argument, then we must demand that the statute be enforced as written and as intended.

We are charged with applying the law in making our decisions. Every law is assumed to be constitutional unless and until it is determined by a competent court to be unconstitutional. Since no constitutional issue has been raised, we are within our authority to interpret that provision of the law as it is written.

Even if a constitutional issue were to be raised before this Panel, there is no prohibition in the United States law, or in the NAFTA, which limits a panel in that respect. What Commerce and even other panels have interpreted to be a prohibition to entertain constitutional issues is not a limitation at all. 19 U.S.C. § 1516a(g)(4) provides an exception to the exclusivity of panel review.²⁶ This provision implies that a constitutional interpretation is permitted by supplying a remedy for review by the CIT or the United States Court of Appeals for the Federal Circuit, whichever is applicable. This is an exception to the normal procedure in which panel decisions can only be challenged through the procedure of the Extraordinary Challenge Committee as defined in annex 1904.13 of the NAFTA. In

²⁶ This exception to exclusivity allows a challenge to the constitutionality of the binational panel review system itself to the Court of Appeals for the District of Columbia Circuit, which would have jurisdiction of such action, and in two other instances which are: "Review is available under subsection (a) of this section with respect to a determination solely concerning a constitutional issue (other than an issue to which subparagraph (A) applies) arising under any law of the United States as enacted or applied. An action for review under this subparagraph shall be assigned to a 3-judge panel of the United States Court of International Trade." 19 U.S.C. § 1516a(g)(4)(B). "Notwithstanding the time limits in subsection (a) of this section, within 30 days after the date of publication in the Federal Register of notice that binational panel review has been completed, an interested party who is a party to the proceeding in connection with which the matter arises may commence an action under subparagraph (A) or (B) by filing an action in accordance with the rules of the court." 19 U.S.C.1516a(g)(C).

order to have a constitutional issue to review, one must have a final judgment made by a lower court or, in this case, the panel which operates in the manner of an Article III court (The International Court of Trade). There must be an appealable issue or final judgment or order before one can appeal that issue.²⁷ If that is so, then the issue must be raised before the panel and decided by them before the issue can be appealed.

There is nothing extraordinary about judicial review of legislative and executive decisions in the United States. Ever since Marbury v. Madison, 5 U.S. 137 (1803) and Martin v. Hunters Lessee, 1 Wheat 304, 14 U.S. 304 (1816), which extended the federal courts' authority to declare state statutes unconstitutional, and its progeny, it has been the province of both state and federal courts at every level to interpret and, in some cases, declare unconstitutional, state and federal statutes. The United States -- along with Canada and Australia -- is one of the common law countries in the world that practices this form of judicial supremacy over the constitution. British constitutional law is based on the principal of Legislative or Parliamentary Supremacy, in which every act of Parliament becomes constitutional authority and cannot be overturned by the courts, only interpreted by them. In other legal systems there exists instituted hybrid versions of judicial supremacy either through special procedures for judicial review, such as in Mexico, or special courts to handle constitutional questions, such as in Germany.

²⁷ 28 U.S.C. §1291, Federal Rules of Appellate Procedure, Rule 4

Since the binational panel is established under Chapter 19 of the NAFTA, and acts as the court of last resort in the commercial affairs defining its authority, it is only rational and reasonable that it should have the authority to interpret and entertain constitutional questions. Any limitations to this power must come from higher authority.

At any rate, the constitutional question is not before us although it lurks in the background. If we follow the statute on regional assessment as it is written, then we must order Commerce to only collect duties on a regional basis, or at least remand the issue back to Commerce for further explanation of their position based on the arguments that I have raised here. I, therefore, vigorously dissent from the panel majority on this issue.

C. Dissenting View of Panelist Patino Concerning The Panel Majority Opinion To Affirm Commerce's Decision To Treat Bulk And Bagged Cement As The Same Foreign Like Product

I dissent from the majority opinion of this Panel to affirm Commerce's decision to treat bulk and bagged cement as the same foreign like product.

In the 5th revision of this case, the NAFTA panel decided that bagged and bulk cement were different merchandise for purposes of the relevant statute -- 19 U.S.C. § 1677(16)(B) -- and that product matching should be bag to bag and bulk to bulk. In that case, the panel distinguished between product and merchandise basically saying that packaging is one among several factors that determine the type of merchandise as distinguished from the product that the packaging contains. Their logic and reasoning is convincing.

As a Panel, we are not obliged to follow their decision. That brings up the point of how we are to treat past panel decisions in general, and panel decisions generated from the same case, in particular.

The law governing binational review is the law of the importing country and includes, "...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." See NAFTA, Article 1904.2. In the U.S., the "court of the importing Party" referred to is the CIT which is mandated as the authority for judicial review of Department of Commerce administrative decisions regarding unfair trade practices. See 19 U.S.C. § 1516a(a)(1)(D). CIT decisions are not expressly binding on panels. However, they should be given the respect that one judge of a particular court gives to another judge of the same court. In the context of the CIT, one court described this comity as "...valuable, though non-binding, precedent unless and until it is reversed". Rhone Poulenc v. United States, 583 F. Supp. 607, 612 (Ct. Int'l Trade 1984) (cited in Gray Portland Cement and Clinker from Mexico, USA-97-1904-01 (NAFTA June 18, 1999) at 12). Therefore, a panel decision, being treated in a similar manner as CIT decisions, should be accorded the same respect and be acknowledged as valuable -- though non-binding -- precedent by a subsequent panel. See In the Matter of Certain Corrosion-Resistant Carbon Steel Products from Canada, USA-93-1904-03 (NAFTA October 31, 1994) at 78, fn.

254 (cited in Gray Portland Cement and Clinker from Mexico, USA-97-1904-01 (NAFTA June 18, 1999) at 12.

The question is whether that relationship between panels becomes even stronger when the panels are involved in the same ongoing case where the facts vary slightly from review to review and where many of the important issues are based on Commerce's original determination.

I do not think that we can completely dismiss the decision of the 5th annual revision by simply saying that their decision is not precedent and is not binding on a subsequent panel -- even though this decision is presently being determined by an Extraordinary Challenge Committee. I think that we have an obligation to discuss their reasoning and either distinguish the factual situation that is posed in the present case, or otherwise point out any legal error that they might have made in the interpretation of the existing statute or statutes involved. As the court in Rhone Poulenc concluded, the CIT (read panel) decision is precedent, although non-binding, unless and until it is reversed and we have not reversed that decision. We have merely given it passing mention.

Article 1904(9) of the NAFTA states: "The decision of a panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel." This article has been widely interpreted to preclude a panel's decision from being binding precedent for use in other panels. When we are dealing with the same parties and the same or similar set of facts in the same case (albeit an annual review), then we have to question

whether or not we have res judicata²⁸ or collateral estoppel at play.²⁹ Since none of the parties have raised this question, and since the panel in the 5th revision is being challenged in an extraordinary challenge proceeding, I will not deal with it further, but it does indicate that a distinction should be made between panel decisions in different cases involving different parties and panel decisions within the same case with the same parties and similar if not identical issues.

Therefore, I dissent from the majority opinion in this matter. I believe that there should be more discussion of the panel decision in the 5th revision and any variations in the present case that would alter our ability to follow their judgment.

D. Dissenting View of Panelists Mastriani And Kennedy Concerning The Panel Majority Opinion To Remand To Commerce Its Decision To Match CDC's U.S. Sales With CDC's Home Market Sales

We dissent from the majority opinion of this Panel to remand to Commerce its decision to match CDC's U.S. sales with CDC's home market sales. We agree with Commerce that this issue has not been properly raised before this Panel, and believe that CDC's exhaustion argument misses the mark. The issue is not merely whether CDC exhausted its administrative remedies. Rather, the overarching issue is whether CDC raised this matching issue in the original appeal to this Panel. In

²⁸ Black's Law Dictionary (6th ed. 1990) (citing Matchett v. Rose, 344 N.E.2^d 770, 779 (Ill. 1976), and stating, "A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.").

²⁹ Id. (citing E.I. Dupont de Nemours & Co. v. Union Carbide Corp., 250 F. Supp. 816, 819 (D.C. Ill. 1966), and stating, "Prior judgment between the same parties on a different cause of action is an estoppel as to those matters in issue or points controverted, on determination of which finding or verdict was rendered.")

the original appeal to this Panel, the following issues were ripe for consideration: (1) whether CDC and CEMEX were properly collapsed in Commerce's Final Results, and, if so, (2) whether CDC's U.S. sales were properly matched with CDC's home market sales in Commerce's Final Results. That being the case, CDC clearly had the opportunity to raise this issue in its original appeal to this Panel. However, CDC elected not to do so.

By not raising this issue in the original appeal to this appeal, we hold that CDC is precluded from raising this issue now, as "a party cannot raise anew on remand an issue that it failed to pursue in the appeal." Washington Post Co. v. U.S. Department of Health and Human Services, 865 F.2d 320 (D.C. Cir. 1989). For example, in Usinor Sacilor v. United States, 907 F. Supp. 426 (Ct. Int'l Trade 1995), plaintiff Usinor argued in its comments to the Remand Determination that the highest non-aberrant margins, as calculated in the original investigation, should not be applied to its unreported U.S. sales and to its sales involving systematic coding errors. The defendant and the defendant-intervenors argued that Usinor never raised this issue on its initial appeal to the Court of International Trade ("CIT"), and was, thus, barred from raising it in on remand. Id. at 429. In its remand determination, the CIT agreed with the defendant and the defendant-intervenors and held that Usinor was precluded from raising this new argument on remand. Id. at 430. See also In re Geothermal Resources International, Inc., 1999 WL 273161, at *1 (9th Cir. April 21, 1999) ("Having failed to raise the issue of NEML's liability in their original appeal, appellants waived the right to raise the

issue on remand and in this appeal."). Likewise, in the instant case CDC had the opportunity to raise this issue in the original appeal to this NAFTA Panel. It did not do so, and like Usinor, should not be permitted to raise a new argument on remand.

The panel majority has cast the issue as being one of exhaustion of administrative remedies, a duty which the majority is prepared to excuse. However, even if the matching issue is analyzed as one of exhaustion of administrative remedies, it still does not appear to us that this case presents a proper one for excusing CDC of its duty to exhaust, at least based on the cases cited and relied upon by the majority.

For example, in McCarthy v. Madigan, 503 U.S. 140 (1992) -- a prisoner's rights case relied upon by the panel majority -- the Supreme Court stated that "[e]xhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency. . . . [E]xhaustion promotes judicial efficiency in at least two ways. When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." McCarthy, 503 U.S. at 145 (citations omitted). Thus, according to the Supreme Court, the chief purposes for the exhaustion requirement are twofold: (1) to protect agency authority (a purpose that the panel majority does explicitly acknowledge) *and* (2) to avoid piecemeal appeals (a purpose that the panel majority does not explicitly acknowledge). In this case, had CDC raised the matching issue in its original pre-remand appeal of the Final

Results, which it had every opportunity to do, the remand that the majority has now ordered in this case -- in effect, the allowance of a piecemeal appeal -- would have been avoided.

Next, the majority places reliance upon FAG Kugelfischer Georg Schafer AG v. United States, 131 F. Supp. 2d 104 (Ct. Int'l Trade 2001). In FAG Kugelfischer, the CIT observed that, pursuant to 28 U.S.C. § 2637(d), Congress has given the CIT the discretion to waive the exhaustion requirement. However, the exercise of that discretion is not unbridled. The CIT went on to identify four situations when the duty to exhaust is properly excused: (1) when requiring it would be futile, or would be inequitable and an insistence of a useless formality as in the case where there is no relief which plaintiff may be granted at the administrative level; (2) when a subsequent court decision has interpreted existing law after the administrative determination at issue was published, and the new decision might have materially affected the agency's actions; (3) when the question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency; and (4) when the plaintiff had no reason to suspect that the agency would refuse to adhere to clearly applicable precedent. See FAG Kugelfischer, 131 F. Supp. 2d at 114.

None of these four circumstances identified by the CIT in FAG Kugelfischer appear to be applicable to the CDC matching issue. First, there has been no showing that it would have been futile for CDC to raise the matching issue before Commerce during the seventh administrative review. Compare McCarthy, 503 U.S.

at 147-148 (noting that the interests of the individual weigh heavily against requiring administrative exhaustion where an agency lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute). Second, there has been no intervening court decision that has a bearing on this issue. Third, the matching issue is not one that is purely legal in nature. Fourth, we are not presented with a situation where Commerce has failed to adhere to clearly applicable precedent. Moreover, in the FAG Kugelfischer case itself, Commerce actually considered the very issue that was being challenged for the first time on appeal, unlike the case here where CDC never argued in the alternative, either during the seventh administrative review or on appeal to this panel, that its U.S. sales should be matched with CEMEX's home market sales.

The Supreme Court has stated that the exhaustion requirement applies with particular force when, as here, the action under review involves the exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise. See McKart v. United States, 395 U.S. 185, 194-95 (1969).

The majority also cites Geneva Steel v. United States, 914 F. Supp. 563 (Ct. Int'l Trade 1996). In Geneva Steel, the CIT excused the duty to exhaust when an interested party in a countervailing duty proceeding was unaware of Commerce's position on a certain issue, to wit: whether to aggregate certain government grants. In this case, however, CDC knew during the course of the seventh administrative review Commerce's position on matching CDC's U.S. sales. That is, CDC knew that

Commerce had decided to match CDC's home market sales with CDC's U.S. sales. See Final Results, 64 Fed. Reg. 13154 ("Finally, we agree with CDC that we should apply our matching methodology consistently to its margin calculations and have adjusted our analysis accordingly."). Unlike the interested party in Geneva Steel, CDC knew Commerce's position on the relevant issue and cannot claim surprise or lack of knowledge. CDC was fully aware of Commerce's matching decision, but never complained about it in a timely manner.

Finally, the majority relies upon Gerald Metals, Inc. v. United States, 937 F. Supp. 930, 935 (Ct. Int'l Trade 1996), vacated, 132 F.3d 716 (Fed. Cir. 1997), where the CIT excused the duty to exhaust because the precise issue that was presented on appeal had actually been raised and discussed by the administrative agency below. Here, however, the question of whether CDC's U.S. sales should be matched with CEMEX's home market sales was neither raised during the course of the seventh administrative review nor discussed by Commerce in its Final Results.

In closing, we note the following observations by the Court of Appeals for the Federal Circuit in Thomson Consumer Electronics, Inc. v. United States, 247 F.3d 1210 (2001):

Exhaustion requirements ensure that an agency and the interested parties fully develop the facts to aid judicial review. 'Judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise.' Other justifications for requiring exhaustion have to do with practical notions of judicial efficiency and notions of administrative autonomy. The courts may never have to intervene if the complaining party is successful in vindicating his rights in the pursuit of his administrative

remedies. In addition, the agency must be given a chance to discover and correct its own errors. Finally, it is possible that by allowing frequent and deliberate evasion of administrative processes the effectiveness of an agency could be weakened by encouraging people to ignore its procedures.

Thomson Consumer Electronics, 247 F.3d at 1214 (quoting McKart, 395 U.S. at 194-95). By allowing CDC to argue the matching issue for the first time at this late stage of the Chapter 19 panel process, the decision of the panel majority may have the unintended, yet unfortunate, effect of undercutting the sound policies for the exhaustion requirement identified by the Court of Appeals for the Federal Circuit in Thomson Consumer Electronics.

In light of the above, and in light of the considerable deference that we must afford to Commerce's expertise in administering the antidumping law -- see SKW Stickstoffwerke Piesteritz GmbH v. United States, 989 F. Supp. 253, 256 (Ct. Int'l Trade 1997) -- we would affirm Commerce's finding in the Remand Redetermination that "CDC exhausted its entitlement to legal remedy by not raising this issue previously." Remand Redetermination at 21. Accordingly, we dissent from this Panel's majority opinion to remand to Commerce its decision to match CDC's U.S. sales with CDC's home market sales.

April 11, 2003, Date Issued.

Louis S. Mastriani, Chairman
Louis S. Mastriani, Chairman

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