

**ARTICLE 1904 BINATIONAL PANEL REVIEW  
PURSUANT TO  
NORTH AMERICAN FREE TRADE AGREEMENT**

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<b>IN THE MATTER OF:</b>	)	
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	)	
Gray Portland Cement and Clinker	)	
from Mexico; Final Results of the	)	Secretariat File No.
Third Antidumping Administrative	)	USA-95-1904-02.
Review (August 1, 1992-July 31, 1993).	)	
	)	

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**PANEL:**

John M. Peterson, Chairman.

William P. Alford.

Víctor Blanco Fornieles.

Eduardo Magallón.

Morton Pomeranz.

**COUNSEL:**

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For the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement and the National Cement Company of California: King & Spalding (Joseph W. Dorn, Esq., Michael P. Mabile, Esq., Stephen A. Jones, Esq.)

For the Investigating Authority: U.S. Department of Commerce, Office of the Chief Counsel for Import Administration (Stephen J. Powell, Esq. and Duane W. Layton, Esq.)

For Intervenor Cementos de Chihuahua, S.A. de C.V.: White & Case (Walter J. Spak, Esq. and Christopher M. Curran, Esq.)

For Amicus Curiae the Government of Mexico: Keller and Heckman (Stephan E. Becker, Esq. and Elliot Belilos, Esq.)

## I. INTRODUCTION

Pursuant to Article 1904 of the North American Free Trade Agreement (the "Agreement"), this binational panel was convened at the request of the parties to review the final determination of the United States Commerce Department ("DOC", "Commerce", "agency" or "Department"), International Trade Administration ("ITA") in its third annual administrative review of an antidumping duty order on gray portland cement and cement clinker from Mexico.<sup>1</sup> Final Results of Third Review, 60 Fed. Reg. 26,865 (May 19, 1995) (Final) ("third administrative review"). The parties include CEMEX, S.A. de C.V. ("CEMEX"), the DOC, and the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement and the National Cement Company of California (the "Ad Hoc Committee").<sup>2</sup> Leave to intervene in this matter was previously granted to Cementos de Chihuahua, S.A. de C.V. ("CdC"), a Mexican manufacturer of cement.<sup>3</sup> The Government of Mexico has sought leave of this panel to file a brief in the capacity of amicus curiae. The Government of Mexico's motion is discussed at the end of this opinion with other outstanding motions.

In conformity with Article 1904.8 of the Agreement, and Part VII of the Rules of Procedure for Article 1904 Binational Panel Reviews, this panel hereby renders its written decision.

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<sup>1</sup> The third administrative review covers the period of August 1, 1992, through July 31, 1993.

<sup>2</sup> Three Mexican cement companies were respondents in the original antidumping investigation: CEMEX; Apasco, S.A. de C.V.; and Cementos Hidalgo, S.C.L. CEMEX was the only Mexican respondent that participated in the third annual review.

<sup>3</sup> Gray Portland Cement and Cement Clinker from Mexico, USA-95-1904-02 (Issued January 18, 1996).

## II. BACKGROUND

On September 26, 1989, a petition was filed with the DOC by the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement<sup>4</sup>, requesting that the DOC initiate an antidumping duty investigation on gray portland cement and cement clinker from Mexico. The petitioner claimed to have filed the petition "on behalf of" a regional industry in accordance with 19 U.S.C. § 1673a(b)<sup>5</sup>.

In response to the petition, on October 23, 1989, the DOC initiated an antidumping investigation. 54 Fed. Reg. 43,190 (Oct. 23, 1989). Thereafter, as required by statute, the U.S. International Trade Commission ("ITC") initiated an investigation to determine if a U.S. industry had been injured or was likely to be injured as a result of less than fair value imports of gray portland

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<sup>4</sup> The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement represents producers of gray portland cement in the Arizona-New Mexico-Texas and Florida regions. The National Cement Company of California was not named as a petitioner.

<sup>5</sup> Section 1673a(b) provides:

**(b) Initiation by petition.** (1) Petition requirement. An antidumping proceeding shall be commenced whenever an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 771(9) [19 U.S.C. § 1677(9)(C), (D), (E), (F), or (G)] files a petition with the administering authority [the DOC] on behalf of an industry which alleges the elements necessary for the imposition of the duty imposed by section 731 [19 U.S.C. § 1673], and which is accompanied by information reasonably available to the petitioner supporting those allegations. The petition may be amended at such time, and upon such conditions, as the administering authority and the [U.S. International Trade] Commission may permit.

(2) Simultaneous filing with the Commission. The petitioner shall file a copy of the petition with the Commission on the same day as it is filed with the administering authority.

cement and cement clinker.<sup>6</sup>

As provided by law, interested parties were given time to file comments in response to the antidumping petition. No comments were filed opposing the petition. On November 8, 1989, the ITC made its preliminary affirmative determination of injury. Gray Portland Cement and Cement Clinker from Mexico, Inv. No. 731-TA-451 (Preliminary). Thereafter, on April 12, 1990, the DOC issued its preliminary results finding that the portland gray cement and cement clinker from Mexico was being sold in the United States at less than fair value ("LTFV"). 55 Fed. Reg. 13,817; see 19 U.S.C. § 1673b(b).

On July 18, 1990, in accordance with 19 U.S.C. § 1673d(a), Commerce issued its final LTFV determination. 55 Fed. Reg. 29,244 (July 18, 1990). On August 13, 1990, the ITC issued its final affirmative injury determination. Gray Portland Cement and Clinker From Mexico, Inv. No. 731-TA-451 (Final), USITC Pub. 2305 (Aug. 13, 1990); see 19 U.S.C. §1673d(b). Thereafter, on August 30, 1990, the DOC imposed an antidumping duty order. Gray Portland Cement and Clinker

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<sup>6</sup> Under United States law, the imposition of antidumping duties is predicated upon two independent administrative findings made by Commerce and the ITC, respectively. Specifically, 19 U.S.C. § 1673 provides that antidumping duties may be imposed if

- (1) the administering authority [the DOC] determines that a class or kind of foreign merchandise is being, or likely to be sold in the United States at less than fair value, and
- (2) the [U.S. International Trade] Commission determines that --
  - (A) an industry in the United States --
    - (i) is materially injured, or
    - (ii) is threatened with material injury, or
  - (B) the establishment of an industry in the United States is materially retarded,

by reason of imports of merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation.

from Mexico, 55 Fed. Reg. 35,433 (Aug. 30, 1990); see 19 U.S.C. § 1673e(a).

As a result of the antidumping duty order, Commerce directed the U.S. Customs Service to assess antidumping duties on certain imports of gray portland cement and cement clinker from Mexico. 19 U.S.C. § 1673e. The statute allows parties to seek judicial review of Commerce's decision to initiate the dumping investigation in the United States Court of International Trade ("CIT") [28 U.S.C. § 1581(c)], but no party exercised this right.

On October 24, 1990, the Government of Mexico requested consultations with the United States under Article 15:2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (known as the GATT Antidumping Code, hereinafter "GATT-AD Code")<sup>7</sup> to address Mexico's concern that the DOC in 1989 had improperly initiated the antidumping investigation on gray portland cement and cement clinker by failing to determine, affirmatively and prior to initiation of the investigation, that the petition was filed by a party with proper standing. According to Mexico, the Ad Hoc Committee's petition was not filed on "behalf of the industry affected" within the meaning of Articles 4:1(ii) and 5:1 of the GATT AD-Code. Thereafter, a GATT panel was established under Article 15:5 of the GATT to examine the matter.

On July 9, 1992, the GATT panel issued a report supporting Mexico's position on petitioner standing, finding that the term "industry" in the phrase "on behalf of the industry affected" in the case of a regional market means "the producers of . . . almost all of the production within such market". The Report of the Panel, under the Agreement on Implementation of Article VI, on United States Antidumping Duties on Gray Portland Cement and Cement Clinker from Mexico, GATT Doc.

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<sup>7</sup> GATT-AD Code, Done at Geneva, April 12, 1979; entered into force January 1, 1980. 31 U.S.T. 4919; T.I.A.S. 9650; 1186 U.N.T.S. 2.

No. ADP/82 (unadopted) ("GATT panel report") at 76. However, the GATT panel report was never adopted by the GATT Antidumping Code Committee because the U.S. blocked its adoption in accordance with the GATT procedures in effect at that time.

During the GATT deliberations, the DOC conducted two administrative reviews of the dumping order, covering the periods August 1990 to July 1991 (56 Fed. Reg. 47,185), and August 1991 to July 1992 (57 Fed. Reg. 44,551).<sup>8</sup> Commerce's results in the second annual review were challenged by CEMEX in the CIT.<sup>9</sup> However, at no time during the first two annual review periods did any party question the legality of the original dumping investigation either at the administrative level or in court.

On September 30, 1993, the DOC initiated its third administrative review, covering the period August 1, 1992 through July 31, 1993. 58 Fed. Reg. 51,053 (Sept. 30, 1993). The third administrative review covered one manufacturer/exporter, CEMEX. Among other things, CEMEX challenged Commerce's decision to initiate the original 1989 antidumping investigation. CEMEX alleged, for the first time, that the intervening GATT panel report created an international obligation on the United States, and hence Commerce, to void the original antidumping order as violative of the United States' international obligations under the GATT AD-Code.

The final results of the third administrative review were issued by the DOC on May 19, 1995. 60 Fed. Reg. 26,865 (May 19, 1995). Therein, Commerce determined that CEMEX had

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<sup>8</sup> Each year, if requested by an interested party, Commerce is required to conduct annual reviews of dumping orders. 19 U.S.C. § 1675(a)(1)(B). The results of the first two annual reviews of the subject dumping order are not before this panel.

<sup>9</sup> See CEMEX, S.A. v. United States and Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement and Cement and National Cement Co., CIT Slip Op. 95-72 (April 24, 1995).

failed during the third administrative review to provide the Department with information needed to complete the review. Accordingly, the DOC assigned CEMEX a dumping margin based upon the "best information available" ("BIA")<sup>10</sup> in accordance with 19 U.S.C. § 1677e(b). Using its "BIA" formula Commerce assigned a dumping margin equal to the highest rate found for any firm in the LTFV investigation, which in this case was CEMEX's margin of 61.85 percent. Commerce rejected CEMEX's request that the antidumping duty order be revoked on the ground of faulty initiation, per the GATT panel report.

### **III. SCOPE AND STANDARD OF REVIEW**

In accordance with NAFTA Article 1904(1), this binational panel is empowered to conduct reviews, in place of judicial review, of final administrative antidumping determinations issued by the "administering authority", in this case the DOC. The determination in question is DOC's final determination in its third administrative review of the 1989 antidumping order. 60 Fed. Reg. 26,865 (May 19, 1995).

The scope of the panel's review is limited to the administrative record compiled by the DOC during its third administrative review. NAFTA Article 1904(2).<sup>11</sup> Furthermore, the decisions

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<sup>10</sup> The issues concerning Commerce's use of BIA are discussed in a later section of this opinion.

<sup>11</sup> The reviewable "administrative record" in this case means:

- (1) all documentary evidence or other information presented to or obtained by [Commerce] in the course of the administrative proceeding, including any governmental memoranda pertaining to the case, and including any record of ex parte meetings as may be required to be kept;

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of this panel may only apply prospectively to final determinations which were made by Commerce after the date of entry into force of NAFTA, which was January 1, 1994. See NAFTA Article 1906(a).

The standard of review to be applied by this panel is defined in Annex 1911 of the Agreement. See NAFTA Article 1904.3. Annex 1911 requires that we apply the same United States statutory standard of review as would be applied by the CIT in reviewing a final determination of the DOC under section 516A(b)(I)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B).

Accordingly, in reviewing final determinations in antidumping investigations, this panel "shall hold unlawful any [antidumping] determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." The United States Court of Appeals for the Federal Circuit ("CAFC"), the decisions of which are binding on this panel, has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept to support a conclusion." Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

In this case, the ultimate question is whether the DOC's findings, made in the third

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<sup>11</sup>(...continuación)

- (2) a copy of the final determination of [Commerce], including reasons for the determination;
- (3) all transcripts or records of conferences or hearings before [Commerce]; and
- (4) all notices published in the [Federal Register] in connection with the administrative proceeding.

administrative review of the dumping order, were based upon substantial evidence on the record and otherwise in accordance with law.

Although the scope of this panel's review is limited to the administrative record compiled in the third administrative review, and to Commerce decisions made after January 1, 1994, CEMEX, CdC, and the Government of Mexico argue that this panel should include in the record the 1992 GATT panel report, and that consideration of that report dictates revocation of the underlying antidumping duty order dated August 30, 1990.

#### **IV. DISCUSSION**

Before this panel, CEMEX and CdC assert that the 1989 decision of the DOC to initiate an antidumping investigation of gray portland cement and cement clinker from Mexico was not in accordance with law. Specifically, CEMEX asserts that because the petition filed by the Ad Hoc Committee seeking the initial investigation defined industry as a "regional industry", the DOC, as the investigating authority, was obliged to "poll" the domestic industry prior to initiation, and affirmatively determine that the petition was supported by producers accounting for "all or almost all" of the production in the region. Because, in CEMEX's view, the DOC failed to do this, and improperly presumed that the petition had the requisite level of support from the regional industry, the antidumping duty order was void ab initio.

It is noteworthy that neither CEMEX nor any other participant in the original investigation appealed to the CIT after issuance of the antidumping order in this case, in order to

challenge the DOC's initiation of the investigation.<sup>12</sup> Rather, CEMEX and CdC waited until the DOC conducted its third administrative review of the antidumping order, covering entries made during the period August 1, 1992 through July 31, 1993. 60 Fed. Reg. 26,865. At that time, CEMEX argued, for the first time, that the DOC should find that the agency's initiation of the antidumping investigation was unlawful, and that the order was void ab initio. CEMEX's principal support for this argument was the July 9, 1992 determination by the GATT panel, which concluded that the DOC's failure to affirmatively ascertain the level of regional industry support before initiating the antidumping investigation was inconsistent with Article 5:1 of the GATT AD-Code, and which therefore recommended that the antidumping order be revoked and that all antidumping duties paid or deposited under the order be reimbursed.

In its brief before this panel, CEMEX frames the issue as follows:

Whether the DOC improperly initiated the antidumping investigation by failing to determine affirmatively, prior to initiation, whether the petition was filed on behalf of "all or almost all" of the regional cement industry consisting of the "Southern Tier" of the United States.

CEMEX Main Brief at 16 (Jan. 16, 1996) (emphasis added). In sum, although both CEMEX and CdC challenge DOC's final results in the third annual review, it is clear that the error of which they complain was the DOC's 1989 decision to initiate the underlying investigation.<sup>13</sup>

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<sup>12</sup> Commerce's results in the second annual review were challenged by CEMEX in the CIT, as noted earlier in this opinion. We repeat, however, that at no time during the first two annual review periods did any party challenge the legality of the initiation of the original dumping investigation either at the administrative level or in court. Significantly, the GATT panel report was issued two months prior to the commencement of the second administrative review.

<sup>13</sup> CdC frames the issue as "whether the [DOC's] determination in the underlying administrative review not to revoke the antidumping duty order was contrary to U.S. law in light of the fact that the  
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For the reasons set forth herein, the panel determines that (a) CEMEX's and CdC's claims relating to the initiation of the antidumping investigation are barred by the applicable statute of limitations; (b) those claims are also barred by the doctrine of res judicata; (c) the panel lacks authority under the Agreement to review or alter the DOC's 1989 decision to initiate the antidumping investigation, or the 1990 antidumping duty order into which DOC's 1989 decision is subsumed; (d) the unadopted GATT panel decision does not bind this binational panel or compel the result suggested by CEMEX, CdC, and the Government of Mexico; and (e) the DOC acted within its authority in choosing BIA, and the particular BIA methodology it used, in assigning a dumping margin to imports from CEMEX.

**A. CEMEX AND CdC'S CLAIM THAT THE ANTIDUMPING INVESTIGATION WAS IMPROPERLY INITIATED IS BARRED BY THE STATUTE OF LIMITATIONS**

Section 516a of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(2)(A) provides a short statute of limitations for interested parties to challenge final administrative determinations in antidumping investigations. It provides as follows:

- (2) Review of determinations on record. (A) In general. Within thirty days after the date of publication in the Federal Register of -
- (i) notice of any determination described in clause (ii), (iii), (iv) or (v) of subparagraph (B), or
  - (ii) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B),

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<sup>13</sup>(...continuación)  
antidumping duty petition was not filed on behalf of producers accounting for all or almost all of the production in the regional industry." CdC Main Brief at 7 (Jan. 16, 1996) (emphasis added).

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter, a complaint, each with the content and in the form, manner and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

Section 516(a)(2)(A) constitutes a waiver of the United States' sovereign immunity, and is strictly construed. Lehman v. Nakshian, 453 U.S. 156, 161 (1981); Soriano v. United States, 352 U.S. 270, 276 (1957). As the CAFC noted in NEC Corp. v. United States, 806 F.2d 247, 249 (Fed. Cir. 1986):

The United States is immune from suit except in accordance with the terms and conditions under which it consents to be sued. Under 19 U.S.C. Section 1516a, an interested party may commence an action contesting an antidumping determination by properly filing a summons and complaint within 30 days after a notice of the determination is published in the Federal Register.

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The terms of the government's consent to be sued in any particular court define that court's jurisdiction to entertain the suit. United States v. Testan, 424 U.S. 392, 399 (1976), quoting United States v. Sherwood, 312 U.S. 584, 586 (1941). Conditions upon which the government consents to be sued must be strictly observed and are not subject to implied exceptions.<sup>14</sup>

It is equally well-settled that challenges to the DOC's decision to initiate an antidumping investigation, including a challenge claiming that the requisite level of domestic industry support did not exist, must be brought within 30 days following the agency's final determination, or within 30 days from

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<sup>14</sup> Indeed, the CAFC has held that, even where an interested party timely files a summons challenging a final determination in an antidumping case, but fails thereafter to file a complaint within the time prescribed by statute, the action is time-barred. See Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).

publication of an antidumping duty order. See, e.g., Minebea Co., Ltd. v. United States, 782 F. Supp. 117 (Ct. Int'l Tr. 1992); NTN Bearing Corp. of America v. United States, 757 F. Supp. 1425 (Ct. Int'l Tr. 1991).

CEMEX or any other party with standing could have filed an action in the CIT within 30 days after either (1) the DOC's final affirmative determination of LTFV sales; or (2) the DOC's publication of the antidumping duty order in this case. In such an action CEMEX could have presented to that court any and all arguments concerning the definition of the "industry" in a regional industry case, and could have challenged the DOC's failure to poll the regional industry prior to initiation to determine whether the necessary level of domestic support existed. However, neither CEMEX nor any other party filed such an action, and the statute of limitations for doing so has long expired. Moreover, CEMEX has offered no explanation of why the arguments that it seeks to raise now (or those that the Government of Mexico presented to the GATT panel) could not have been presented to the United States courts in the context of a timely-filed challenge to the final result of the DOC's investigation, or to the publication of the antidumping order. As explained below, issues which the parties could have raised in a prior challenge, but failed to raise, are barred by the doctrine of res judicata.

Although CEMEX's and CdC's challenge is nominally directed to the final results of the DOC's third administrative review of the antidumping order, neither party has identified any specific error that the DOC committed in that review that is distinct from the original 1989 initiation decision. To the contrary, CEMEX's and CdC's basic claim is that the DOC should, in the context of the third administrative review, have found that the 1989 initiation was unlawful.

The scope of an annual antidumping administrative review, conducted pursuant to

Section 751(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a), is far more limited than that of the underlying antidumping investigation. As this panel has noted in a Preliminary Order issued in this proceeding:

antidumping investigations, and Section 751(a) annual reviews, are different types of proceedings having different goals. Antidumping investigations are designed to establish whether sales of a class or kind of foreign merchandise have been sold at "less than fair value", and have caused or threatened material injury to an industry in the United States.

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By contrast, Section 751(a) annual review proceedings accept as a given the existence of the antidumping or countervailing duty order, and instead seek to calculate the amount of special duty to be assessed on particular import shipments.

Gray Portland Cement and Cement Clinker from Mexico, Secretariat File No. USA-95-1904-02 (Order issued Jan. 18, 1996) at 12 n.5. Nothing in the Tariff Act suggests that, in the context of a Section 751(a) annual review -- the purpose of which is to calculate antidumping duty liabilities for goods imported during a defined period -- the DOC may revisit or correct errors made during the original investigation. Indeed, Section 751(a) itself indicates that, in an annual review the DOC shall "review and determine . . . the amount of any antidumping duty" [19 U.S.C. § 1675(a)(1)(B)], and in particular, shall determine --

(A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and

(B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of such entry.

19 U.S.C. § 1675(a)(2). The DOC's authority and responsibility in a Section 751(a) investigation is to calculate the amount of duties to be assessed pursuant to an antidumping duty order, not to reconsider and change decisions made during the original antidumping investigation.

In its final decision in the third administrative review, the DOC correctly held that it lacked authority to provide CEMEX the relief it sought -- rescission of the agency's 1989 decision to initiate an antidumping investigation.<sup>15</sup> Accordingly, even assuming arguendo that CEMEX and CdC had stated a claim for which the DOC could grant relief, it is clear that the requested relief could not be afforded in the context of the Section 751(a) annual review of the antidumping order.<sup>16</sup>

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<sup>15</sup> The DOC noted that:

[T]he Department has no authority to rescind its initiation of the LTFV investigation. Under Sections 514(b) and 516A(c)(1) of the [Tariff] Act, a LTFV determination regarding initiation becomes final and binding unless a court challenge to that determination is timely initiated under Section 516A. Even if judicial review of a determination is timely sought, the Department's determination continues to control until there is a resulting court decision "not in harmony with that decision." See 19 U.S.C. § 1516(a)(c)(1). In this case, no one challenged the Department's determination on standing before the CIT. Therefore, that determination is final and binding on all persons, including the Department.

60 Fed. Reg. at 26,866 (May 19, 1995).

<sup>16</sup> The panel notes that Section 751(b) of the Tariff Act [19 U.S.C. § 1675b)] provides a separate mechanism whereby an interested party may ask the DOC or ITC to conduct a special review of an antidumping order based upon "changed circumstances sufficient to warrant review of such determination."

In Oregon Steel Mills, Inc. v. United States, 862 F.2d 1541 (Fed. Cir. 1988), the CAFC held that the evaporation of domestic industry support for an antidumping order might constitute "changed circumstances" sufficient to warrant revocation of an existing antidumping duty order. However, the Oregon Steel Mills court took pains to refrain from holding that "loss of industry support for an existing order creates a jurisdictional defect" or otherwise precludes the DOC from enforcing the  
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Indeed, in Oregon Steel Mills, Inc. v. United States, 862 F.2d 1541, 1543-44 (Fed. Cir. 1988), the CAFC held that the DOC could not, in a Section 751(a) annual review, revoke an antidumping duty order based upon a reconsideration of the underlying LTFV determination:

A straightforward reading of the above-quoted statutory provisions indicates that [19 U.S.C.] Section 1675(a) allows the [DOC] to adjust the amount of antidumping duties; section 1675(b) allows the [DOC] to review its affirmative determination; and section 1675(c) gives the [DOC] authority to review an outstanding antidumping order "after review under this section". Logically, revocation must be predicated upon section 1675(b) review, not merely on review under section 1675(a).

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. . . a section 1675(a) review is insufficient in itself to provide a ground for revocation of the antidumping duty order. Section 1675(b), by its terms, is the section providing for review of [DOC]'s section 1673a affirmative [LTFV] determination.

CEMEX and CdC assert that a challenge to the original investigative determination is not barred by the statute of limitations, but the cases upon which they rely are inapposite. Oregon Steel Mills, *supra*, involved a revocation of an antidumping duty order under Section 751(b) based upon changed facts, not a new legal interpretation of the facts as they existed during the original antidumping investigation. In Gilmore Steel Corp. v. United States, 585 F. Supp. 671 (Ct. Int'l Tr. 1984), the court ruled that DOC could rescind a decision to initiate an antidumping investigation, after expiration of the 20-day period provided in 19 U.S.C. § 1673a(c), but during the original investigation.<sup>17</sup> Gilmore Steel did not involve an attempt to overturn a final antidumping order in the

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<sup>16</sup>(...continuación)  
order. *Id.* at 1545 n.4.

<sup>17</sup> The panel notes that a DOC decision not to initiate an antidumping investigation is considered (continúa...)

context of an annual review of the order under Section 751(a). Finally, in Zenith Electronics Corp. v. United States, 872 F. Supp. 992 (Ct. Int'l Tr. 1994), the court ruled that an interested party could challenge the DOC's determination that a domestic manufacturer had standing to request a Section 751(a) annual review of an antidumping order. However, this challenge was raised in connection with a court challenge to the initiation of an annual review of an earlier antidumping investigation.

CEMEX urges that this panel revisit the issue of whether the original investigation should have been initiated, based upon the "well-established" rule that "the courts may revisit a decision from below in situations where there have been judicial interpretations of existing law after decision below and pending appeal -- interpretations which if applied might have materially altered the result." CEMEX Main Brief (Jan. 16, 1996) at 23 (citing Hormel v. Helvering, 312 U.S. 552, 558 (1941)). However, the cases upon which CEMEX relies do not stand for the proposition that a change in legal interpretation (in this case a non-binding one) authorizes a reviewing body to reopen prior agency decisions which are otherwise final. Rather, the cases cited<sup>18</sup> stand for the far narrower proposition that a party may raise on appeal a new issue, not argued before the lower court or agency, if applicable law has changed due to an intervening judicial decision.

In sum, the panel concludes that to the extent CEMEX and CdC seek to overturn the DOC's 1989 decision to initiate an antidumping investigation of Gray Portland Cement and Cement Clinker from Mexico, its action is barred by the applicable statute of limitations.

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<sup>17</sup>(...continuación)  
a separate final determination, subject to judicial review under 19 U.S.C. § 1516a(1)(i).

<sup>18</sup> Hormel, 312 U.S. at 558; Ceramica Regiomontana, S.A. v. United States, 16 CIT 358, 359 (1992); Timken Co. v. United States, 779 F. Supp. 1402 (Ct. Int'l Tr. 1991); Rhone-Poulenc, S.A. v. United States, 583 F. Supp. 607 (Ct. Int'l Tr. 1984).

**B. CEMEX's AND CdC's CLAIM THAT THE ANTIDUMPING INVESTIGATION WAS IMPROPERLY INITIATED IS BARRED BY THE DOCTRINE OF RES JUDICATA**

CEMEX's and CdC's claim that the DOC improperly initiated the antidumping investigation is also barred by the doctrine of res judicata. "Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1577 (Fed. Cir. 1991), quoting Brown v. Felson, 422 U.S. 127, 131 (1979).<sup>19</sup>

In this regard, the panel notes that neither CEMEX nor any other Mexican producer sought judicial review of the DOC's final LTFV determination rendered during the antidumping investigation.<sup>20</sup> That decision has now become final. CEMEX offered no explanation for why it failed to raise the standing issue in a challenge to the investigation decision. Presumably, CEMEX could have presented to the CIT substantially the same arguments regarding initiation which the Government of Mexico presented to the GATT panel shortly thereafter. For whatever reasons, however, CEMEX elected not to pursue this issue before the United States courts. "Res judicata precludes not only the relitigation of issues that were actually decided, but also issues which could have been presented for determination." Watkins v. M&M Tank Lines, Inc., 694 F.2d 309, 311 (4th

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<sup>19</sup> NAFTA Article 1904(3) provides that "[t]he panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party would otherwise apply to review a determination of the competent legal authority." Res judicata is a legal principle which the courts of the United States may apply to review agency determinations.

<sup>20</sup> The Ad Hoc Committee did seek judicial review of certain aspects of the DOC's final LTFV sales investigation. CEMEX participated as a defendant-intervenor in support of the DOC in that action, which was finally adjudicated by the CAFC. Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, 68 F.3d 487 (Fed. Cir. 1995). The legality of the DOC's decision to initiate the investigation was not raised in that action.

Cir. 1982).

Clearly, the question of whether a petitioner has standing to seek initiation of an antidumping investigation is potentially an issue in every antidumping investigation. CEMEX has furnished the panel with no reasons why its failure to raise this issue before the CIT in a timely fashion should be excused. Because CEMEX could have raised the issue in a timely challenge to the original determination, but failed to do so, the panel concludes that its challenge to initiation is barred by res judicata.

**C. THIS PANEL LACKS AUTHORITY TO REVIEW OR ALTER DOC'S FINAL LESS THAN FAIR VALUE DETERMINATION, OR TO AFFORD THE PARTIES RETROSPECTIVE RELIEF**

Even if CEMEX's and CdC's claims were not barred by the statute of limitations or the doctrine of res judicata, this panel would be without power to provide the relief sought by those parties. Specifically, Article 1906(a) of the NAFTA provides:

Article 1906. Prospective Application

This Chapter shall apply only prospectively to:

- (a) final determinations of a competent investigating authority made after the date of entry into force of this Agreement . . .

This panel is without power to review final determinations of the DOC rendered prior to January 1, 1994, the date NAFTA entered into force. To the extent that CEMEX and CdC ask the panel to rule that the DOC erred by initiating the antidumping investigation in 1989 without polling the members of the domestic regional industry to determine their level of support for the investigation, or that the DOC erred by publishing an affirmative final LTFV determination in 1990, the panel is without power to furnish the relief sought.

Furthermore, this panel is limited by NAFTA Article 1906(a) to furnishing review on a prospective basis only. In this regard, we disagree with CEMEX's claim that the panel "has full authority to order the DOC to revoke the antidumping duty order ab initio" [CEMEX Main Brief at 23] or to "give retrospective effect to the GATT Panel's interpretation of the Antidumping Code and cause the antidumping duty order in this case to be revoked as of the date DOC issued the order" [Id. at 23-24]. Clearly, the panel has no authority to review or alter the DOC's original investigation decision, or to give retrospective" effect to the GATT panel report.

**D. UNADOPTED GATT PANEL DECISIONS ARE NOT BINDING INTERNATIONAL LAW**

Even assuming, arguendo, that this panel has the authority to consider CEMEX's arguments concerning the applicability of the 1992 GATT panel report to the third administrative review, we are unpersuaded that the GATT panel's report should be afforded any probative weight. While we respect the GATT panel's opinion on the standing issue, we are not bound by that opinion.

While CEMEX, CdC, and the Government of Mexico acknowledge that the unadopted 1992 GATT panel recommendation is not "binding" on this binational panel, they suggest that this panel should nevertheless respect and apply the GATT panel recommendation, as "the best available interpretation of what GATT requires". See, e.g., CEMEX Reply Brief at 1 (Apr. 15, 1996). Those parties also argue that U.S. law must be interpreted to conform with U.S. "international obligations", and that Commerce's failure to revoke the antidumping order is inconsistent with those obligations.

Our analysis of the law leads us to conclude that (1) no binding international obligation

was created by the 1992 GATT panel report, and therefore Commerce's actions cannot be deemed illegal on that ground; and (2) nothing in U.S. law, GATT law, or international law required Commerce retroactively (or prospectively) to revoke the original 1990 antidumping order irrespective of whether there are any conflicts between the petitioner standing criteria applied by Commerce and that recommended by the GATT panel report in 1992.

It is a general principle of U.S. constitutional law that international agreements to which the U.S. specifically agrees to be bound, including the GATT, constitute the "supreme law of the land." See Footwear Distributors and Retailers v. United States, 852 F. Supp. 1078, 1093 (Ct. Int'l Tr. 1994); Federal Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995). For instance, Article VI(2) of the U.S. Constitution provides that all treaties made under the authority of the U.S. are the supreme law of the land, and hence supersede prior acts of Congress. See Chew Heong v. United States, 112 U.S. 536, 540 (1884).

Normally, in the case of non-self-executing treaties, such as the GATT, the U.S. agrees to be bound only when it enacts legislation implementing those treaties. See Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987). We note, however, that there have been instances, as in The Paquete Habana and the Lola, 175 U.S. 667 (1900), where U.S. courts have adopted or "incorporated" customary international laws into domestic law even in the absence of implementing legislation. This has typically occurred, however, in cases where there is no particular treaty, legislation, or court decisions to the contrary.

A GATT panel report is neither an "international agreement" nor a "treaty" which

Congress or the President has approved.<sup>21</sup> Nor are we faced with a situation where there is no domestic legislation or case law governing Commerce's actions. Therefore, the only question presented here is whether, despite the general rules just mentioned, the unadopted 1992 GATT panel report should be considered to constitute a form of customary international law or other international obligation which Commerce was bound to apply. We approach this issue keeping in mind the CIT's observation in Footwear Distributors, *supra* (citing The Paquete Habana and the Charming Betsy, *infra*) that, when faced with issues involving the application of U.S. law and U.S. compliance with international agreements such as the GATT, courts should make a "good faith" effort to construe the relevant law so as to give effect to both U.S. law and to such agreements. See Restatement (Third) of the Foreign Relations Law of the United States § 321 ("Every international agreement in force is binding upon the parties to it and must be performed by them in good faith.").

The principle that the law of nations forms part of a nation's municipal laws, sometimes referred to as the doctrine of "incorporation", has its common law jurisprudential roots in the eighteenth century British case styled Triquet v. Bath, Great Britain, Court of King's Bench, 1764. 3 Burrow 1478. Forty years after the Triquet case, in Murray v. The Schooner Charming Betsy, 6 U.S. 64, 2 Cranch 64 (1804), the U.S. Supreme Court confirmed and emphasized the importance of construing Congressional acts in conformity with international law and international agreements of the United States. This principle was reaffirmed by the Supreme Court at the start of this century in The Paquete Habana, 175 U.S. 667. Writing for the court, Justice Gray noted that

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<sup>21</sup> On the other hand, the original GATT itself "became part of U.S. law via executive orders in accordance with congressional delegation of power to the President." Footwear Distributors, 852 F. Supp. at 1093 and n. 30 (citing Proclamation No. 2761A, 12 Fed. Reg. 8,863 (Dec. 30, 1947)). Also, unlike unadopted GATT panel decisions, NAFTA panel determinations which review antidumping and countervailing duty determinations are binding on the parties.

"International law is part of our law and must be ascertained and admitted by the courts of justice and appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." 175 U.S. at 700 (emphasis added); see United States v. Smith, 19 U.S. (5 Wheat.) 152, 160-61 (1820) (courts must "ascertain" the law of nations); International Court of Justice: Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), 25 I.L.M. 1023, 1028-29 (1986).

The highlighted portions of the quoted passage from The Paquete Habana establish certain criteria that courts should apply to determine what, if any, relevant international law or obligation exists and whether it should be applied in a given case. The judiciary's role in "ascertaining and admitting" relevant international law was succinctly explained by the International Court of Justice in Nicaragua v. United States:

The Court . . . , as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required . . . to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.

25 I.L.M. at 1028-29 (quoting the Fisheries Jurisdiction cases, I.C.J. Reports 1974, p.9, para. 17; p. 181, para. 18)<sup>22</sup>

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<sup>22</sup> See also West Rand Central Gold Mining Co. v. The King, Great Britain, King's Bench Division, 1905. [1905] 2 K.B. 391 (emphasis added):

It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general

(continúa...)

Applying the above principles, the resolution of this issue is straightforward. For the following reasons, we conclude that the 1992 GATT panel report does not constitute relevant international law, and does not otherwise constitute an international obligation that the U.S. agreed to undertake.

First, the 1992 unadopted GATT panel report was a recommendation, hardly attaining the status of "international law" which has the "comment consent" of nations.<sup>23</sup> The CIT in Footwear Distributors addressed the legal relevancy of a GATT panel report in some detail. It noted "that GATT contracting parties do not automatically accept [GATT] panel decisions as binding." In Footwear Distributors, Judge Aquilino observed that the legal status of GATT panel decisions has not been established within the international community. 852 F. Supp. at 1093

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<sup>22</sup>(...continuación)

may properly be called International Law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.

<sup>23</sup> Section 102 of the Restatement (Third) of the Foreign Relations Law of the United States defines a "rule" of international law as "one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (3) by derivation from general principles common to the major legal systems of the world." (emphasis added). See Article 38(d) of the Statute of the International Court of Justice (listing recognized sources of international law). Section 102(2) of the Restatement defines "customary" international law as that which "results from a general and consistent practice of states followed by them from a sense of legal obligation." (emphasis added).

The 1992 GATT panel report contains certain findings on a particular factual situation, and merely recommends, rather than mandates, that certain actions be taken. There is no "consistent practice of states" to be followed here. Additionally, since the adoption of the GATT panel report was blocked by the U.S. in accordance with GATT procedures, the U.S. cannot be said to have undertaken an international obligation or agreement.

(emphasis added).<sup>24</sup> The court therefore concluded that the GATT panel decision did not create a legally binding international obligation on the U.S. The complaining party in Footwear Distributors, as here, was subject to the U.S. antidumping laws, and was ultimately required to demonstrate that the administering authority's decision was not based upon substantial evidence, or was contrary to U.S. law.

Moreover, as pointed out by Commerce in its brief, the non-binding status of unadopted GATT panel reports may be inferred in the Tokyo Round agreements. Article 15.7 of the GATT-AD Code provides that disputes arising thereunder must be governed by the 1979 Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance, and its annex, the "Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement." GATT, Basic Instruments and Selected Documents 26th Supp. 210, 215 (1980) ("Understanding"). Paragraph 21 of the Understanding provides that when disputes are referred to a GATT panel, a report must be issued and that report shall be adopted by consensus within a reasonable time. Paragraph 17 provides that the GATT panel's report "should normally set out the rationale behind any findings and recommendations that it makes." However, nothing in the Understanding leads us to believe that an unadopted panel report -- that is, a report lacking consensus -- is to be construed as other than merely a recommendation.

Second, rather than having assented to the GATT panel report and its interpretation of the GATT-AD Code, the U.S. objected to that report, blocking its adoption as consensus of all contracting parties was required for adoption at that time. Nothing in the then operative GATT rules

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<sup>24</sup> By way of contrast, Judge Aquilino noted that Chapter 19 of the NAFTA specifically provides that NAFTA panel decisions which review antidumping and countervailing duty determinations are binding upon the parties to that proceeding as concerns the dispute in question.

provide that antidumping disputes resolved by GATT panels, but not adopted by the GATT Antidumping Code Committee, were binding on the parties. This reflects the views of many in the international legal community, including tribunals in Europe, Japan, and the United States. See, e.g., Bello & Homer, GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?, 26 Int'l Law. 795, 796 (1992); Jackson, Restructuring The GATT System 68 (1990); Young, Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats, 29 Int'l Law. 389, 395 (1995); Davey, Dispute Settlement in GATT, 11 Fordham Int'l L. J. 51, 94 (1987); Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, 86 Am. J. Int'l L. 310, 33-34 (1992) (describing instances where the European Court of Justice and the Japanese Supreme Court have deemed GATT panel decisions non-binding).

The unadopted 1992 GATT panel report, therefore, constitutes neither the "law of nations" nor an obligation of the United States. Since there is no international law or international agreement to apply here, there is no occasion to invoke the principle of statutory construction found in The Charming Betsy.

Additionally, whatever non-binding relevancy the 1992 GATT Panel report might have is severely undercut, if not nullified, by the binding international agreement under which this NAFTA panel operates. As discussed above, Article 1906(a) states, in no uncertain terms, that this binational panel may only review final determinations of Commerce rendered after January 1, 1994. Commerce's initiation of the original antidumping investigation, which is challenged here, took place in 1989, and the dumping order was issued in 1990. Therefore, the GATT panel report lacks legal relevancy within the meaning of The Paquete Habana, since there is no "legitimate occasion" for its

application.<sup>25</sup>

CEMEX argues that the rule of statutory construction in The Charming Betsy compels this panel to adopt of the reasoning of the GATT panel because it provides the only available neutral and authoritative guidance. CEMEX suggests that The Charming Betsy should be applied to resolve the interpretive "conflict" concerning the GATT-AD Code between Commerce and the GATT panel. This position must be rejected. The Charming Betsy does not apply where there are no binding international obligations to observe.

CEMEX also argues that the reasoning of the GATT panel report should be adopted by this binational panel because it was the intent of Congress to conform U.S. antidumping law (found in the 1979 Trade Agreements Act) with the GATT-AD Code. Since all parties agree that the pertinent language of the U.S. antidumping law is identical to the GATT, CEMEX is in effect arguing that Commerce's interpretation of U.S. antidumping law must give way to the GATT panel's interpretation of that law. This issue was addressed by the CAFC in Suramerica De Aleaciones Laminadas v. United States, 966 F.2d 660 (Fed. Cir. 1992). In that case, the appellee argued that an unadopted GATT panel report had rejected the DOC's interpretation of the statutory provisions on standing and industry support for a petition. The court opined that even if Commerce's interpretation of U.S. law in that case were found to be in conflict with the GATT (which the court did not), "the GATT is not controlling." 966 F.2d at 667. The court concluded that the GATT, and by implication an unadopted GATT panel report, "does not trump domestic legislation . . .", or Commerce's interpretation of that legislation. Id. at 668. The court reasoned that it was the role of

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<sup>25</sup> Therefore, even if the 1992 GATT panel report were deemed to embody a persuasive "international" statement on Commerce's initiation procedures in 1989, the third annual review of an antidumping order is certainly not a "legitimate occasion" for revisiting that original determination.

Congress, and not the court, to resolve such conflicts.

Irrespective of the holding in Suramerica, neither the DOC nor this binational panel, in the context of an annual review under Section 751(a), are empowered to retroactively nullify the original antidumping order. This is true whether or not there is a conflict between the GATT-AD Code (as interpreted by the 1992 GATT panel) and the DOC's interpretation of U.S. antidumping law. Also, to give effect to the unadopted GATT panel report would violate statutorily-imposed U.S. procedural laws concerning the statute of limitations, and would undermine established principles of res judicata. Both legal doctrines are of enormous importance in common law jurisprudence, and should not be cast aside in favor of a recommendation of questionable legal status.<sup>26</sup>

In sum, we conclude that Commerce was acting upon substantial evidence in the record and in accordance with law when it refused to revoke its original antidumping order notwithstanding the 1992 GATT panel report.

#### **E. COMMERCE'S APPLICATION OF BIA**

The next set of issues we address concerns the Department's application of the BIA standard to arrive at a dumping margin for Types II and V cement in the third annual administrative review. The threshold issue we must decide is whether the DOC acted within its authority when it chose to use BIA in assigning a dumping margin to imports from CEMEX. The second issue is whether, in its choice of BIA to apply to CEMEX, Commerce acted within its authority.

##### **1. Commerce Properly Used BIA for CEMEX's Imports**

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<sup>26</sup> We note that nothing prevents a court (or this panel) from voluntarily adopting the reasoning of another tribunal, including an unadopted GATT panel report in other circumstances, assuming that its reasoning is sound and does not conflict with the law that the court is bound to apply, including applicable standards of review and statutorily-imposed procedural rules.

The antidumping statute of the United States provides that the DOC "shall [use BIA] whenever a party . . . refuses or is unable to produce information requested in a timely manner and in the form required." 19 U.S.C. § 1677e(b) (1992). This provision applies to requests for information made during administrative reviews pursuant to Section 751 of the antidumping statute, as well as during LTFV determinations. See Allied-Signal Aerospace Co. v. U.S. 996 F.2d 1185 (Fed. Cir. 1993).

In premising resort to BIA on the provision of requested information in a manner and time satisfactory to the Department, the statute vests Commerce with broad authority as to whether to use BIA in any particular case. While not binding upon this panel, we find the reasoning of a recent binational panel under the U.S.-Canada Free Trade Agreement (USCFTA) persuasive on this issue: the DOC's

discretion to resort to BIA stems not only from the variety of statutory grounds for the use of BIA -- refusal to produce information, inability to produce information in the required form, significantly impeding an investigation -- but also from the need for [Commerce] to control the fact-gathering process. The courts have viewed [Commerce]'s authority to resort to BIA as essential to the fulfillment of [Commerce]'s responsibility to determine in a timely manner an accurate dumping margin, both in antidumping investigations and in administrative reviews.

Certain Cut-to-Length Carbon Steel Plate from Canada, USA-93-1904-04, 1994 FTAPD, LEXIS 14, October 31, 1994, at 68, quoting Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA-90-1904-01, 1992 FTAPD, LEXIS 2, May 15, 1992, at 74 (footnote omitted).

Commerce's discretion to use BIA is, of course, not unbounded. A reviewing court -- and hence, this panel -- is not obligated to sustain a decision by Commerce to use BIA should said

decision be unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). Applying this standard, the Department's use of BIA has been upheld, save for the unusual situation in which its requests for information from respondents have been unreasonable under the circumstances -- as where, for example, the information did not exist or the Department failed adequately to notify respondent of what it was seeking. See, e.g., Olympic Adhesives, Inc. v. United States, 899 F.2d 1565 (Fed. Cir. 1990); Mitsui & Co., Ltd. v. United States, 1994 Ct. Int'l. Tr. LEXIS 59, Slip Op. 94-44; NTN Bearing Corp. v. United States, 13 CIT 713, 826 F. Supp. 1435 (1993); Daewoo Electronics Co., Ltd. v. United States, 13 CIT 253, 712 F. Supp. 931 (1989), aff'd in part and rev'd in part, remanded, 6 F.3d 1151 (Fed. Cir. 1993). Stated differently, where the Department's requests for information have been reasonable in view of the circumstances, both courts and USCFTA panels have upheld the use of BIA when such information has not been provided in a form and at a time acceptable to the DOC. See, e.g., Allied-Signal, 996 F.2d 1185; Koyo Seiko Co., Ltd. v. United States, 898 F. Supp. 915 (Ct. Int'l Tr. 1995); Certain Cut-to-Length Carbon Steel Plate from Canada, U.S.A.-93-1904-04, 1994 FTAPD, LEXIS 14 (Oct. 31, 1994).

In the instant case, the DOC made a series of requests for information concerning CEMEX's home market sales of Type I cement.<sup>27</sup> These requests had two principal bases. One concerned Commerce's need to determine whether sales of Types II and V cement occurred "within the ordinary course of trade," as was claimed by CEMEX. Given that the ordinary course of trade

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<sup>27</sup> See Antidumping Questionnaire of October 14, 1993; Letter of November 29, 1993 from Laurie A. Lucksinger, Division Director, Office of Antidumping Compliance, ITA, to CEMEX; Supplementary Questionnaire of February 4, 1994 and covering letter from Laurie A. Lucksinger, Division Director, Office of Antidumping Compliance, ITA, to CEMEX.

is defined at least in part through comparison with the terms and conditions for sales of similar products, the DOC was of the view that it could not evaluate this claim absent the data it sought from CEMEX regarding sales of Type I cement. Final Results of Third Review, 60 Fed. Reg. at 26,869. The record is quite clear that CEMEX did not provide such data to the Department, thereby impairing the DOC's ability to complete a comparative investigation. Id.

A second, independently sufficient basis for Commerce's request for sales information concerning Type I cement lay in the possibility that sales of Types II and V cement might, indeed, be found to be outside the ordinary course of trade, thereby necessitating the DOC's reliance on sales of Type I cement, as similar merchandise, in order to determine Fair Market Value ("FMV"). In this regard, it should be noted that in the second administrative review, Commerce determined that CEMEX's home market sales of Types II and V cement were outside the ordinary course of trade, and that the CIT affirmed that finding, in so doing instructing the DOC to collect Type I sales information rather than resort to a constructed value methodology. CEMEX, S.A. v. United States, CIT Slip Op. 95-72 (April 24, 1995). In the words of the CIT,

There is a statutory preference for the use of similar merchandise in determining FMV . . . . Constructed value should only be used where Commerce has made a determination that the exporter's home market prices are inadequate or unavailable for the purpose of calculating FMV.

Id. at 31-32 (citation omitted). To be sure, Commerce's finding in the second administrative review is not binding on subsequent reviews and the above-cited CIT decision was not handed down until well after the third administrative review began. Nonetheless, Commerce's finding in the second administrative review of the need for Type I sales data, and its affirmation by the CIT, lends support to the DOC's position in the instant case that its requests for Type I sales data in the third

administrative review were not unreasonable.

CEMEX argues that the Department did not need information on sales of Type I cement because CEMEX had submitted information demonstrating that sales of Types II and V were in the ordinary course of trade for the period of review of the third administrative review. Based on this, CEMEX argues that the DOC's requests for information on Type I sales were unreasonable, and that, therefore, its resort to BIA should be overturned by this panel. We do not find that argument persuasive. As has been stressed previously, Commerce's discretion here is broad, with requests for information being subject to the general reasonableness standard described above. Believing that the DOC gave adequate consideration to the evidence of changed circumstances submitted by CEMEX, we find no basis for CEMEX's assertion that the Department acted unreasonably during the third administrative review in requesting information on Type I sales for FMV purposes.

Although we are sensitive to the risks involved in allowing the DOC too free a hand in requesting information, lest it lead to a *de facto* barrier to imports, that was not the case here. Commerce's requests for Type I sales information clearly came within the range of discretion implied by the reasonableness standard, and we, therefore, hold that the DOC was justified in applying BIA when those requests for information were not answered. This decision is made easier by the fact that CEMEX had provided information on Type I sales during the LTFV investigation and during the first and second administrative reviews. In addition, over the course of its requests to CEMEX, the Department (i) warned CEMEX that BIA might be applied if the requested information were not forthcoming (Letter of 2/4/94, supra note 24); (ii) narrowed the scope of its requests to reduce the burden which supplying the requested information would place on CEMEX (Letter of 11/29/93,

supra note 24); and (iii) granted a time extension requested by CEMEX (Letter of 11/29/93, supra note 24). For this panel to hold otherwise would be to sanction CEMEX's tactic of answering routine requests for information with substantive objections to the appropriateness of those requests, a practice that would render it impossible for Commerce to administer the antidumping statute in the manner intended by Congress. See Ansaldo Componenti, A.p.A. v. United States, 628 F. Supp. 198 (Ct. Int'l Tr. 1986); Mitsubishi Heavy Industries, Ltd. v. United States, 833 F. Supp. 919 (Ct. Int'l Tr. 1993).

2. Commerce's Methodology in Applying BIA Was Within the Scope of its Authority

The second issue we must address is whether the Department acted within its discretion when implementing the BIA provision; specifically, whether its decision to apply its two-tier BIA methodology was supported by substantial evidence and was otherwise in accordance with law.

The DOC's two-tier methodology is set forth in Antifriction Bearings and Parts Thereof from France, et al., 57 Fed. Reg. 28360 (June 24, 1992). Under the two-tier methodology, respondents that refuse to cooperate with the Department, or otherwise significantly impede proceedings, are assigned dumping margins from the first-tier, while respondents that substantially cooperate with the DOC's requests for information, but fail to supply it in the form or within the time requested, are subject to second-tier BIA. See Preliminary Results of Third Review, 59 Fed. Reg. 28,844, 28,845. In selecting first-tier BIA the DOC will use the highest dumping rate assigned in the LTFV investigation or any subsequent administrative review to any company from the same country of origin selling the same class or kind of merchandise. Id. Second-tier BIA potentially is less

adverse to the respondent, being the higher of the highest rate assigned to that respondent during any prior proceeding, or the highest rate assigned to any respondent in the administrative review then underway. Id.

It should be noted that the two-tier methodology may, in proceedings involving a small number of companies, result in a company receiving the same rate under either the first or the second tier of the two-tier test. As the two-tier methodology is an administrative practice developed by the Department itself, the Department has the right to depart from this methodology in such a situation, see Krupp Stahl A.G. v. United States 822 F. Supp. 789, 795 (Ct. Int'l Tr. 1993), provided that it explains the reasons for its departure and does not act arbitrarily. See Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1087-88 (Ct. Int'l Tr. 1988).

In the case before us, however, the Department decided not to depart from its two-tier BIA methodology. This decision resulted in CEMEX being assigned the same antidumping margin it would have been subject to under BIA had it simply been unable to provide the requested information, rather than unwilling.

As discussed above, the Department is to use BIA when its reasonable requests for information are not met. 19 U.S.C. § 1677e(b) (1992). In choosing not to provide a statutory definition of BIA, Congress, in effect, left Commerce free to develop and apply its own methodologies for determining BIA. The Department's practice, embodied in the implementing regulations, of using BIA to foster compliance with its requests for the data needed to complete its investigations under the antidumping laws in the absence of subpoena power, has been upheld by the courts. See, e.g., Allied Signal, 996 F.2d at 1189-90. The particular two-tier methodology applied to CEMEX has been upheld by the Court of Appeals for the Federal Circuit as "a reasonable and

permissible exercise of the ITA's statutory authority to use the best information available when a respondent refuses . . . to provide requested information." Allied-Signal, 996 F.2d. at 1192.

With regard to the Department's discretion over its use of BIA as a tool to induce compliance with information requests, both the Ad Hoc Committee and Commerce assert that the Rhone Poulenc decision requires the Department to select BIA that is adverse or unfavorable to the non-complying respondent. See Ad Hoc Committee Brief, at 30-31 (the DOC is under an "obligation to use a BIA margin that is unfavorable to the noncomplying respondent. Rhone Poulenc, 899 F.2d at 1190-91"); Commerce's Main Brief at 67 (April 2, 1996) ("Under the statute and regulations, the Department must draw an inference when selecting BIA that is reasonably adverse to the respondent and, therefore, likely to induce its cooperation in the future. Rhone Poulenc, 899 F.2d at 1191"). Where the parties differ is that Commerce argues that the BIA rate it selected was sufficiently adverse to induce future cooperation, in spite of being the same rate a cooperative BIA respondent would have received. Commerce bases its position on the fact that the BIA rate it selected (61.85%) was considerably higher than the rate assigned in the second administrative review (42.74%). The Ad Hoc Committee argues, on the other hand, that such an increase from the second to the third administrative review was not in itself sufficient to support the Department's contention, and that, in fact, the BIA rate of 61.85% assigned to CEMEX in the third review was not adverse because, under the two-tier methodology, this was the same rate CEMEX would have received if it had been a cooperative BIA respondent. Although this panel may read the legal effect of Rhone Poulenc somewhat differently than do the parties,<sup>28</sup> we do not need to reach that issue in order to decide the

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<sup>28</sup> The cited passages recognize the authority of the Department to assign high BIA rates to uncooperative respondents based on the assumption that these respondents would supply the withheld  
(continúa...)

case before us. Even if Commerce was required by law to select as BIA a margin adverse to CEMEX, as argued, we find that the Department was not acting arbitrarily or without substantial evidence when it selected the rate of 61.85%.

The Ad Hoc Committee makes much of language in previous cases suggesting that the Department's choice of BIA is a "rebuttable presumption," as though this creates a particular standard for court or NAFTA panel review of the Department's BIA decisions. We decline to endorse this view for the following reasons. First, the "rebuttable presumption" notion seems to arise from the fact that Commerce has been allowed to take into account, in determining BIA, whether or not the respondent is cooperative in providing information. 19 C.F.R. § 353.51 (1988); Rhone Poulenc, 899 F.2d at 1190-91. Although the attitude of a party would normally seem irrelevant to a factual determination such as the BIA in a particular proceeding, the courts have allowed the Department to presume that the highest prior margins are the best information of current margins, based on "a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." Rhone Poulenc, 899 F.2d at 1191. This presumption "fairly places the burden of production on the importer, which has in its possession the information capable of rebutting the agency's inference." Id. at 1190-91.

The purpose of the "rebuttable presumption" notion thus seems to be to encourage potentially uncooperative parties to comply with the DOC's requests for information by rebutting

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<sup>28</sup>(...continuación)

information, if said information would result in lower rates. The Rhone Poulenc court upheld the practice against a charge that it should be prohibited as punitive, but said nothing, even in dicta, that would require Commerce to tailor its selection of BIA to achieve any particular objective. Rhone Poulenc, 899 F.2d at 1190-91.

presumptions which the Department is allowed to make. The Ad Hoc Committee's assertion of a right to rebut Commerce's use of its normal two-tier BIA methodology does not comport with this understanding of the purpose underlying the "rebuttable presumption" notion.

Second, none of the cases cited by the Ad Hoc Committee to support its "rebuttable presumption" argument hold that a party in the position of the Ad Hoc Committee, a petitioner in an antidumping action, has any particular right to rebut the DOC's BIA presumption. The cases either recognize a right of respondents to rebut Commerce's BIA presumptions by supplying withheld information, in accordance with the cooperation-inducing function of BIA discussed above, *see, e.g., Rhone Poulenc*, 899 F.2d at 1190-91, or recognize the right of the Department to depart from its usual two-tier methodology in particular proceedings, *see, e.g., Krupp Stahl A.G.* 822 F. Supp. 789, 795, a right that can be understood as nothing more than the normal right of an agency to depart from established practice in particular cases, so long as it explains the reasons for its departure and does not act arbitrarily. *See Citrosuco Paulista, S.A.*, 704 F. Supp. at 1087-88.

In the opinion of this panel, information submitted by the Ad Hoc Committee to the DOC on this issue should be treated no differently than information placed on the record with regard to any comparable determination. The question for the reviewing court or NAFTA panel remains whether the Department's decision was supported by substantial evidence and was otherwise in accordance with law. To state the problem somewhat differently, the question is not whether the record evidence would have justified a departure by Commerce from its two-tier BIA methodology, but whether the record evidence required such a departure -- that is, whether, absent such a departure, the Department should be found to have acted arbitrarily. We find that the record evidence did not require such a departure.

## V. DISPOSITION OF PENDING MOTIONS

Also pending before this panel are three procedural motions. The first was filed by the Government of Mexico to appear before this panel as amicus curiae, and accompanied by a brief submitted for this purpose. We note that while Article 1904 of the Panel Rules does not specifically address appearances by amicus parties, this panel has the authority to adopt procedures not covered by those rules in the particular case before it. See Statement of General Intent, Preamble to Rules of Procedure for Article 1904 Binational Panel Reviews. Under the Rule 76 of the CIT, an entity wishing to appear as amicus may do so at the discretion of the court. Accordingly, we hereby grant this motion.

Second, Commerce has moved to strike Exhibit 1 to CEMEX's Reply Brief. Exhibit 1 is a memorandum of law by Professor Ralph G. Steinhardt of George Washington University that was apparently prepared for this litigation in response to a request by CEMEX. This panel agrees in principle with Commerce that the submission of a legal memorandum prepared by non-party to the case may be improper. For example, the Steinhardt memorandum neither attests to specific facts in the record nor constitutes a published scholarly writing. The document discusses generally the international legal dimensions of the GATT, and offers a specific legal opinion on a matter before this panel: the legal effect of the 1992 GATT panel report vis-a-vis Commerce's refusal to revoke the antidumping duty order.

However, there is nothing in the NAFTA Article 1904 Rules precluding the submission of such documents. And since there are no page limitations on briefs submitted to this panel, it cannot be said that CEMEX improperly extended its briefing by attaching the memorandum to its reply brief. Finally, while a sworn affidavit by, or the appearance of, Mr. Steinhardt would have

been more appropriate, in view of the fact that the memorandum to a certain extent reflects Mr. Steinhardt's published views on international law (e.g., R. Steinhardt, The Role of International Trade as a Canon of Domestic Statutory Construction, 43 Vanderbilt L. Rev. 1103 (1990)), the panel declines to strike the memorandum from CEMEX's pleadings.<sup>29</sup> Commerce's motion to strike Exhibit 1 of CEMEX's Reply Brief, then, is hereby denied.

Finally, Commerce and the Ad Hoc Committee have moved to strike the brief filed by CdC, because that brief allegedly exceeds the scope of permissible intervention by raising arguments which have not already been presented in the pleadings of the existing parties. In ruling on CdC's intervention, this panel permitted arguments that "support[ed] positions framed by the complaints." Because we find that CdC's arguments are within the scope of permissible intervention, the motion to strike is denied.

The arguments presented in CdC's brief are not materially different than that raised by CEMEX. For example, CdC argues that the "plain language" of the U.S. antidumping statute requires that Commerce revoke the underlying 1990 antidumping order. While CEMEX argues that the GATT Ad-Code, as interpreted by the 1992 GATT panel, requires Commerce to revoke the antidumping order, both parties have acknowledged that the language of the relevant U.S. antidumping law and the GATT are identical. CEMEX Main Brief at 39-40; CdC Main Brief at 14 (Jan. 16, 1996). Furthermore, both CEMEX and CdC argued that Commerce improperly issued the antidumping order in 1990 because it failed to investigate, prior to initiation, whether the petition had

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<sup>29</sup> We note however, that Professor Steinhardt's memorandum acknowledges that the unadopted 1992 GATT panel report does not create an international obligation on the U.S. Furthermore, the opinions offered therein do not address issues of res judicata, statutes of limitation, and the limitation on the scope of this panel's review.

the support of the requisite regional industry as required by law. Therefore, we find that the legal arguments raised by CdC in its brief, while not identical to those presented by CEMEX, at least support the arguments framed by the pleadings of the parties. There would be little point to allowing a party to intervene only to restrict its briefing to the identical arguments already raised by other parties.

## **VI. CONCLUSION**

For the reasons discussed above, this panel finds that the U.S. Commerce Department's final determination in its third administrative review of the antidumping order on gray portland cement and cement clinker, 60 Fed. Reg. 26,865 (May 19, 1995), to have been based upon substantial evidence on the record and in accordance with law.

September 13, 1996.Dated Issued.

John M. Peterson.

John M. Peterson, Chairman.

Víctor Blanco Fornieles.

Víctor Blanco Fornieles.

William P. Alford.

William P. Alford.

Eduardo Magallón.

Eduardo Magallón.

Morton Pomeranz.

Morton Pomeranz.