

**IN THE MATTER OF**

**GRAY PORTLAND CEMENT AND  
CLINKER FROM MEXICO**

**File no. USA-97-1904-02**

**OPINION AND ORDER OF THE PANEL**

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Separate Opinion of Panelist Victor Carlos Garcia Moreno

**IN THE MATTER OF Gray Portland  
Cement and Clinker from Mexico  
(4th Administrative Review)**

**FILE No. USA-97-1904-02**

Appearances:

Irwin P. Altschuler, David R. Amerine, Thomas P. Ondeck and Ronald M. Wisla, for CEMEX, S.A. de C.V.

Stephen J. Powell, Bernice Brown and Thomas H. Fine for the United States Department of Commerce

Joseph W. Dorn and Michael P. Mabile for the Southern Tier Cement Committee

**BINATIONAL PANEL OPINION  
AND ORDER**

This binational panel review concerns a challenge by CEMEX, S.A. de C.V. (“Cemex”) to the “first tier” “best information available” (“BIA”) dumping margin assigned by the U.S. Department of Commerce (“Investigating Authority” or “The Department”) in its final results of the Fourth Administrative Review of the United States antidumping order, Gray Portland Cement and Clinker from Mexico (62 Fed. Reg. 17,581 (1997)). Cemex contests the Investigating Authority’s decision to use as BIA the 109.43 percent rate determined for Cemex and affirmed by the Court of International Trade in an earlier review on the ground that the 109.43 percent rate was determined well after the expiration of the 12 month period for conducting administrative reviews. The Investigating Authority, and Petitioner Southern Tier Cement Committee (“STCC”), defend the application of the 109.43 percent rate, and argue that Cemex is barred from raising this claim before this Panel for failure to exhaust administrative remedies. We affirm the Department of Commerce determination.

## **I. Procedural History of the Case**

This Panel opinion is being issued nearly 18 months after Cemex properly requested panel review on May 8, 1997<sup>1</sup>, rather than within the 315 days specified in NAFTA,<sup>2</sup> owing to factors beyond the control of either the participants or the panelists. While the Cemex complaint and various motions, discussed below, were timely filed from May through August 1997, the panel review was suspended on September 3, 1997, by the United States NAFTA Secretary because a panel had not been appointed.<sup>3</sup> The panel review was resumed on March 17, 1998, after the selection of panelists,<sup>4</sup> and has proceeded in a normal fashion since that date.

The Cemex complaint, filed June 6, 1997, contained two claims. Claim One charged that the Investigating Authority lacked statutory authority to impose antidumping duties because of its alleged failure to ascertain industry support for the petition during the initial investigation. Claim Two challenged the 109.43 percent BIA rate.

When the proceeding resumed on March 17, 1998, two motions were pending, which were decided by the Panel on April 20, 1998.<sup>5</sup> The Panel denied as moot a consent motion of the Investigating Authority of July 3, 1997, for an extension of time to file the administrative record,<sup>6</sup> since the record was actually filed on July 23, 1997.<sup>7</sup> The Panel also denied a motion filed on July 8, 1997, by the Petitioners<sup>8</sup> and supported by the Investigating Authority<sup>9</sup> to dismiss Claim One. The Panel declined to decide Claim One on motion rather than in the normal course of the proceedings, citing possible due process concerns (if no public hearing were held on the issue) and other procedural and cost concerns.<sup>10</sup>

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<sup>1</sup> NAFTA Panel Docket No. 1.

<sup>2</sup> NAFTA, Art. 1904.14.

<sup>3</sup> Docket no. 46.

<sup>4</sup> Docket no. 63.

<sup>5</sup> Docket no. 80.

<sup>6</sup> Docket no. 18.

<sup>7</sup> Docket no. 38.

<sup>8</sup> Docket no. 23.

<sup>9</sup> Docket no. 32.

<sup>10</sup> Order of April 20, 1998, at 2, Docket no. 80.

A public hearing was held on August 6, 1998, in Washington, D.C. to provide participants with an opportunity for oral argument.<sup>11</sup> At the public hearing, Cemex formally abandoned Claim One if its complaint.<sup>12</sup> Simultaneous interpretation in English and Spanish was provided, and transcripts in both languages were made available to the panelists and participants.

## II. Facts

The recitation of the facts in this case can be brief, as they are not in dispute. On August 30, 1990, the Investigating Authority issued an antidumping order relating to Gray Portland Cement and Clinker from Mexico.<sup>13</sup> This (fourth) administrative review was initiated by the Investigating Authority on September 16, 1994, at the request of both Cemex and STCC.<sup>14</sup> On May 14, 1996, the Investigating Authority issued its preliminary results, assigning Cemex a BIA rate of 61.85 percent, which at the time was the highest prior dumping margin rate determined for any producer or importer in the original investigation or subsequent reviews.<sup>15</sup> The Investigating Authority indicated that it used this “first-tier” BIA rate because Cemex had been uncooperative in providing certain requested information— Mexican sales data on Type I cement — to the Investigating Authority on a timely basis.<sup>16</sup>

Subsequent to the preliminary results, but before the final results were issued, the Court of International Trade (“CIT”), on October 24, 1996, affirmed the Investigating Authority’s second remand results of the second administrative review, where the dumping rate assessed against Cemex was determined to be 109.43 percent.<sup>17</sup> When, on April 10, 1997, the Investigating Authority issued its final results in this fourth administrative review, it used as first-tier BIA, not

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<sup>11</sup> See NAFTA Panel Rule 67.

<sup>12</sup> Official Transcript of Public Hearing, Docket no. 105 (English); Docket no. 106 (Spanish) [*hereinafter* “OT”] at 7-8. (Citations in the English language opinion are to the English version of the official transcript, Docket no. 105).

<sup>13</sup> 55 Fed. Reg. 35,443 (1990).

<sup>14</sup> 59 Fed. Reg. 47609 (1994).

<sup>15</sup> 61 Fed. Reg. 24,283, 24,285 (1996).

<sup>16</sup> *Id.* at 24,284.

<sup>17</sup> *Cemex, S.A. v. United States*, Slip-Op. 96-170 (CIT 1996).

the 61.85 percent rate used in the preliminary results, but the 109.43 percent rate approved by the CIT on October 24, 1996.<sup>18</sup> The Investigating Authority again cited Cemex’s failure to cooperate as the grounds for applying first-tier BIA, and, in accordance with Department practice, applied “the highest rate found for any firm in the second administrative review, i.e., CEMEX’s margin, as amended pursuant to court-ordered remand proceedings, 109.43 percent.”<sup>19</sup> The Department addressed at length objections by Cemex to the refusal of the Department to accept late filing of the requested information concerning Mexican sales data on Type I cement, but the Department did not specifically address reasons for changing the first-tier BIA rate from 61.85 percent used in the preliminary results to the more recently affirmed 109.43 percent used in the final results.<sup>20</sup>

Cemex complains that the final results under review by this Panel were issued by the Investigating Authority only on April 10, 1997, more than two and one half years after the review was initiated on September 16, 1994, and utilized a rate approved by the CIT on October 24, 1996, more than one year after the expiration of the 12 month period for conducting administrative reviews.<sup>21</sup>

### **III. Binational Panel Jurisdiction and the Standard of Review**

Binational panel review of final antidumping determinations by the investigating authorities of the NAFTA Parties is founded on Chapter 19 of the North American Free Trade Agreement (“NAFTA”). Article 1904.1 of NAFTA provides that “each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.” The term “final determinations” includes final results of administrative reviews by the Investigating Authority.<sup>22</sup>

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<sup>18</sup> 62 Fed. Reg. 17,581 (1997).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 17584-86 (1997).

<sup>21</sup> Cemex brief of April 24, 1998, Docket no. 5, at 5.

<sup>22</sup> For the United States, NAFTA Annex 1911 defines “final determination” *inter alia*, as including the final results of administrative reviews by the Department of Commerce under section 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. § 1675(a) (1994)).

The law that governs binational panel reviews is not international law, but national law.

Under NAFTA, Article 1904.2, panels are to apply:

“[T]he 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.”

This is significant. It means that panel reviews will be governed by different legal principles depending on which NAFTA country is the “importing party,” which could lead to different results in different NAFTA Parties. Thus, in the United States, a common law jurisdiction, panels must rely on court decisions, in this case the CIT and the Court of Appeals for the Federal Circuit (“CAFC”) which are the courts that panel review replaces. Binational panels sitting in the United States are bound by decisions of the CAFC,<sup>23</sup> and will normally give great weight to precedents issued by the CIT, just as one CIT judge respects the decisions of another CIT judge. In contrast, in Mexico, a civil law country with a different legal tradition, decisions of the competent local court, the Tribunal Fiscal de la Nacion (Federal Tax Court), might well be given far less weight because in Mexico court decisions do not have the same precedential value as do court decisions in the United States.<sup>24</sup>

NAFTA Article 1904.3 directs panels to apply the “standard of review . . . that a court of the importing Party otherwise would apply . . . .” Further, Annex 1911 specifies that when the importing Party is the United States, panels will apply the standard of review specified in section

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<sup>23</sup> The Court of Appeals for the Federal Circuit exercises exclusive appellate jurisdiction over decisions by the Court of International Trade. 28 U.S.C. § 1295(a)(5) (1998).

<sup>24</sup> As two expert commentators have noted, “The ‘judicial precedents’ are part of the anti-dumping provisions only ‘to the extent that a court of the importing party would rely on such materials in reviewing the final determination . . . .’ Neither the Fiscal Tribunal [of Mexico] nor the federal tribunals would ever use the decisions of other courts as a source of domestic law.” J.C. Thomas & Sergio Lopez Allon, “NAFTA Dispute Settlement and Mexico: Interesting Treaties and Reconciling Common and Civil Law Systems in a Free Trade Area,” 1995 Canadian Yearbook of International Law 75, 106.

516A(b)(1)(B) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a(b)(1)(B) (1995)). Section 516A(b)(1)(B) states, in pertinent part, that “[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.”

Considering the NAFTA requirement that panels apply “judicial precedents” in the same manner as the national courts of the importing country, NAFTA panel review of United States agency actions is quite narrow. The Supreme Court has adopted a two-stage approach to judicial review of an agency’s interpretation of its governing statutes. In the leading case, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, a unanimous Supreme Court stated the basic principle 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, 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.”<sup>25</sup>

With respect to the first stage, where Congress has “unambiguously expressed” its intent, the Court stated that “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”<sup>26</sup> As to the second stage, where a court determines that “Congress has not directly addressed the precise question at issue,” the Court stated that the courts “need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction.”<sup>27</sup> In

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<sup>25</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 476 U.S. 837, 842-43 (1984).

<sup>26</sup> *Id.* at 843, n. 9.

<sup>27</sup> *Id.* at n.11.

such a case, the law does not permit the reviewing court to substitute its own views on the proper construction of a statute for those of the Investigating Authority.

The *Chevron* standard of review must be applied even if judges or panelists might have favored a different, perhaps fairer or more reasonable, interpretation of the statute. Where Congress has not addressed the question, the standard of review requires judicial deference to “reasonable interpretations by an agency of a statute that it interprets.”<sup>28</sup> In such a case, it is sufficient that the interpretation of the statute by the agency is “plausible, if not preferable” in the eyes of the reviewing court.<sup>29</sup> When the statute is silent or ambiguous, a court or a binational panel reviewing an agency interpretation must give great deference to the agency’s views. The *Chevron* Court stated that a court “may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>30</sup>

“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.”<sup>31</sup>

The importance of the standard of review is underlined by the fact that one of the very limited grounds for appeal of a binational panel decision through the “extraordinary challenge procedure,” is that the panel “manifestly exceeded its powers, authority or jurisdiction . . . for example, by failing to apply the appropriate standard of review.”<sup>32</sup> As one panel has aptly

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<sup>28</sup> *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

<sup>29</sup> *Id.* at 419.

<sup>30</sup> *Chevron*, 467 U.S. at 844 (citations omitted).

<sup>31</sup> *Id.*; See also *Daewoo Elec. Co. v. International Union of Electronic, Elec. Technical, Salaried and Mach. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994).

<sup>32</sup> NAFTA, Article 1904.13(a)(iii) (emphasis added).

admonished, “[p]anel must conscientiously apply the standard of review”, “must follow and apply the law, not create it” and “must understand their limited role and simply apply established law.”<sup>33</sup>

#### IV. Discussion

The Complaint submitted by Cemex on June 6, 1997 raised two issues:

- A. Claim One challenged the validity of the imposition of antidumping duties on the ground that the Investigating Authority had not determined that the petition in the original investigation had the requisite support of the regional cement industry, in alleged violation of a 1992 GATT panel decision;
- B. Claim Two contended that the Investigating Authority had improperly used as BIA the margin ultimately applied by the Investigating Authority to Cemex in the second remand of the second administrative review, 109.43 percent.<sup>34</sup>

Cemex did not pursue Claim One in its briefs,<sup>35</sup> and, as noted in Section I, counsel for Cemex confirmed at the public hearing that Cemex did not intend to pursue Claim One in this proceeding.<sup>36</sup> Thus, only one substantive issue, Claim Two, remains. Both the Investigating Authority and the STCC have argued in their briefs that this Panel should not decide Claim Two because Cemex failed to raise that issue before the Investigating Authority during the administrative review, and thus impermissibly failed to exhaust its administrative remedies.<sup>37</sup>

We discuss the procedural issue— exhaustion of administrative remedies— first, followed by consideration of the substantive issue— whether the Investigating Authority was justified in using the 109.43 percent BIA margin in the circumstances herein. In each instance, the parties’ positions are briefly summarized at the outset.

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<sup>33</sup> *Certain Cut-To-Length Carbon Steel Plate From Canada*, USA-93-1904-04 (Oct. 31, 1994).

<sup>34</sup> Cemex Complaint at 3, Docket no. 7.

<sup>35</sup> Cemex brief of April 24, 1998, Docket no. 82; Cemex reply brief of July 8, 1998, Docket no. 98.

<sup>36</sup> OT at 7-8. The issue raised in Claim One was decided against Cemex in *Gray Portland Cement and Clinker from Mexico*, USA-95-1904-02 (Sept. 13, 1996), at 11.

<sup>37</sup> Investigating Authority brief at 20-21; STCC brief at 27-34.

A. Exhaustion of Administrative Remedies

Both the Petitioner and the Investigating Authority contended in their briefs and at oral argument that this Panel should not decide Cemex' BIA claim because Cemex had failed to exhaust its administrative remedies before the Investigating Authority in the course of the administrative review.<sup>38</sup> In their view, Cemex's failure to contest the application of the 109.43 percent BIA rate during the administrative proceedings precludes Cemex from raising this issue before this Panel.<sup>39</sup>

Cemex counters that exhaustion of administrative remedies was not mandatory in this instance. The applicable statute indicates only that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."<sup>40</sup> Thus, the court, or this Panel, has discretion according to the circumstances to determine whether to require exhaustion, and should not do so where the affected litigant has not had an adequate opportunity to raise the issue before the administrative entity.<sup>41</sup> Since the Investigating Authority used what Cemex considered the appropriate BIA rate in the preliminary results, Cemex believes it had no need to comment at that time. The higher 109.43 percent margin became available owing to CIT approval in the second remand of the second administrative review, on October 24, 1996, well after the close of the comment period.<sup>42</sup>

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<sup>38</sup> Investigating Authority brief at 20-21; STCC brief at 27-34.

<sup>39</sup> According to STCC's exhibit at the public hearing, Cemex failed to argue in its post preliminary results brief or at the Commerce hearing that a higher BIA should be barred for the legal reason cited to this panel, and again failed to raise that legal issue when STCC argued in a submission of August 26, 1996, that any available higher rate should be used. STCC exhibit no. 1; *see* OT at 87-89.

<sup>40</sup> 28 U.S.C. § 2637(d) (1982).

<sup>41</sup> Cemex reply brief at 2-3; Docket no. 98.

<sup>42</sup> *Id.*

Exhaustion of administrative remedies is generally required before a litigant will be allowed to raise a claim or issue in judicial review of agency action.<sup>43</sup> Nevertheless, in cases other than those relating to import classification, Congress has left the matter to judicial discretion. The applicable statute provides “the Court of International Trade shall, *where appropriate*, require the exhaustion of administrative remedies.”<sup>44</sup> Thus, unless it considers exhaustion “appropriate”, the CIT will allow a party to raise an issue not previously raised with the Investigating Authority. In determining whether to require exhaustion of administrative remedies the CIT has stated that “[t]he judicial determination of whether to require exhaustion of remedies in non-classification actions is thus individual to the circumstances of each case, with each exercise of judicial discretion in not requiring litigants to exhaust administrative remedies characterized as ‘an exception to the doctrine of exhaustion.’”<sup>45</sup> Consequently, the CIT and, by analogy, this Panel, should analyze the applicability of the doctrine of exhaustion on a case-by- case basis.

Further, in applying the exception to the doctrine of exhaustion set forth in 28 U.S.C. § 2637(d), courts have consistently stated that “courts must resist inflexible applications of the doctrine . . . which frustrate the ability to apply exceptions developed to cover ‘exceptional cases or particular circumstances . . . where injustice might otherwise result’ if it were strictly applied.”<sup>46</sup> More to the point in the present proceeding, the court in *A.L. Tech Special Steel Corporation v. United States* reasoned,

[t]hat inherent in the application of the exhaustion doctrine . . . lies a responsibility for the agency, necessarily vested with control over the administrative proceedings, to allow a sufficient opportunity to raise issues. Thus in determining whether questions are precluded from consideration on appeal, the [c]ourt will assess the

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<sup>43</sup> *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952); *Philipp Bros., Inc. v. United States*, 630 F.Supp. 1317, 1319 (Ct. Int’l Trade 1986), *Rhone Poulenc S.A. v. United States*, 583 F.Supp. 607, 609 (Ct. Int’l Trade 1984);

<sup>44</sup> 28 U.S.C. § 2637(d) (1982) (*italics added*); *Alhambra Foundry Co., Ltd. v. United States*, 685 F.Supp. 1252, 1255-57 (Ct. Int’l Trade 1988)

<sup>45</sup> *Alhambra*, 685 F.Supp. at 1255 (*citations omitted*).

<sup>46</sup> *A.L. Tech Specialty Steel Corporation v. United States*, 661 F.Supp. 1206, 1210 (Ct. Int’l Trade 1987), quoting *Rhone Poulenc*, 583 F.Supp. at 609.

practical ability of a party to have its arguments considered by the administrative body.<sup>47</sup>

Following this reasoning, the CIT has held that the doctrine of exhaustion should not apply where a party does not have an opportunity to raise the issue before the administrative agency.<sup>48</sup> For example, in *American Permac, Inc. v. United States*, a West German manufacturer of dry cleaning machinery brought an action contesting the final results of a periodic review of an anti-dumping finding, arguing that import entries covered by the review were barred from consideration because of a four year statute of limitation on the liquidation of such entries. The Investigating Authority argued that the plaintiff failed to raise the limitation on liquidation issue at the administrative level and thus could not raise this issue before the Court. The Court concluded that the four year limitation period had not expired until long after the plaintiff's comment period in the administrative proceedings. On this basis the Court concluded the plaintiff did not have an opportunity to raise this issue during the comment period, and determined the exhaustion doctrine was not applicable.<sup>49</sup>

Additionally, in *Carnival Cruise Lines, Inc. v. United States*, the ITC also refused to apply the doctrine of exhaustion in circumstances analogous to the present case. In *Carnival Cruise Lines* the Court concluded that the U.S. Customs Service had not decided the issue in question. Accordingly, there had been no decision which the plaintiff could protest in the administrative proceeding. Thus, the Court concluded that the plaintiff did not have an opportunity to present that issue to the Customs Service.<sup>50</sup>

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<sup>47</sup> 661 F.Supp. at 1210 (*citations omitted*).

<sup>48</sup> *Geneva Steel v. United States*, 914 F.Supp. 563, 606 (Ct. Int'l Trade 1996); *Carnival Cruise Lines, Inc. v. United States*, 866 F.Supp. 1437, 1441 (Ct. Int'l Trade 1994); *Philipp Bros.*, 630 F.Supp. at 1321; *American Permac, Inc. v. United States*, 642 F.Supp. 1187, 1188 (Ct. Int'l Trade 1986)

<sup>49</sup> 42 F.Supp. at 1188.

<sup>50</sup> 866 F.Supp. at 1441.

Finally, in *Geneva Steel v. United States*, the CIT declined to apply the exhaustion doctrine because the plaintiff was not made aware of an Investigating Authority determination regarding a particular issue until after the administrative agency's amended determination. On this basis the Court allowed the plaintiff to present the issue to the court despite not having raised it before the administrative agency.<sup>51</sup> Thus, courts have consistently held that the doctrine of exhaustion of administrative remedies is not appropriate where the plaintiff does not have an opportunity to raise its argument to the administrative agency.

In addition to the lack of opportunity to raise a particular issue before an administrative agency, courts have set forth other circumstances in which the exhaustion doctrine should be inapplicable. Courts have held that the exhaustion doctrine should not apply if raising the issue before the agency would be futile.<sup>52</sup> The CIT has also declined to apply the doctrine where the plaintiff raises a purely legal issue that does not require further agency involvement.<sup>53</sup>

The facts and circumstances of this case indicate that Cemex did not have an appropriate opportunity to raise an objection to the Investigating Authority to challenge the 109.43 percent margin as first-tier BIA. The 109.43 percent was affirmed by the CIT on October 24, 1996, seven months after the issuance of the preliminary results in the present proceeding, where the Department used a lower margin rate of 61.85 percent as first-tier BIA. As noted earlier, the Investigating Authority did not apply the 109.43 percent margin to Cemex's fourth administrative review until it issued its final results on April 10, 1997,<sup>54</sup> well after the termination of the regulatory comment period. The Investigating Authority could not have made its decision to use the 109.43 percent dumping margin until sometime after October 24, 1996. Both the October 1996 and the April 1997 dates were well after the termination of the comment period, which

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<sup>51</sup> 914 F.Supp. at 606.

<sup>52</sup> *Rhone Poulenc*, 583 F.Supp. at 610; *Alhambra*, 685 F. Supp. at 1256.

<sup>53</sup> *Id.* at 611-12; *Saarstahl v. United States*, 949 F.Supp. 863, 868-9 (Ct. Int'l Trade 1996).

<sup>54</sup> 62 Fed. Reg. 17,581 (1997).

ended June 20, 1996.<sup>55</sup> The use of the 109.43 percent margin was not disclosed to Cemex until April 10, 1997. Accordingly, Cemex lacked the practical ability at any time during the administrative proceeding to raise an objection to the 109.43 percent margin.<sup>56</sup> This Panel believes that it would be inappropriate to require Cemex to anticipate the possibility that the 109.43 percent margin would be applied in final results, which were not published until nearly ten months after the close of the comment period.

Based on these facts and the Panel's discretion to apply the exhaustion doctrine on a case-by-case basis, this Panel concludes that it would be inappropriate to preclude Cemex from contesting the 109.43 percent margin for failure to exhaust administrative remedies.

B. Use of the 109.43 Percent Dumping Margin as BIA

The Panel notes initially that the remaining substantive issue in the proceeding raised by Cemex is a narrow one. Cemex challenges only the use of the 109.43 percent margin as first-tier BIA in place of the 61.85 percent margin used in the preliminary results. At the time of the preliminary results (May 14, 1996) and at the time the 12 month period for administrative reviews expired (August 31, 1995), 61.85 percent was the highest available margin for use as BIA under Investigating Authority policy.<sup>57</sup> Cemex does not challenge the Investigating Authority's use of

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<sup>55</sup> In the Administrative Record provided to this Panel by the Investigating Authority, the only substantive document listed after the filing of the rebuttal briefs on June 20, 1996, was a filing by STCC bringing two recent CIT decisions to the Investigating Authority's attention, on August 26, 1996, which document was accepted by the Investigating Authority for filing. (A.R. Investigating Authority. No. 86.) The preliminary results specified that briefs commenting on the preliminary results be filed within 30 days of the publication of the preliminary results were published on May 14, 1996, and rebuttal briefs, within 37 days. 61 Fed. Reg. 24,283, 24,285 (1996). The thirty-seventh day was June 20, 1996.

<sup>56</sup> Cemex could perhaps have responded to the STCC filing of August 26, 1996, which advocated a first-tier BIA rate of 82.86 percent, but Cemex had no obligation to do so. Cemex's failure to respond to STCC's August 26, 1996 submission has no bearing on its asserted failure to exhaust administrative remedies with the respect to the application of the 109.43 percent margin.

<sup>57</sup> The Investigating Authority's policy is set out in the Final Results of the Fourth Administrative Review. *See infra*, note 61 and accompanying text.

“best information available” to determine Cemex’s dumping margins for this review, conceding that it had failed to provide certain information requested by the Investigating Authority. Nor does Cemex challenge the Investigating Authority’s use of adverse “first-tier” BIA margin for Cemex,<sup>58</sup> since that usage was consistent with then applicable law as interpreted by the Investigating Authority,<sup>59</sup> and approved by the Court Appeals for the Federal Circuit.<sup>60</sup> The Investigating Authority explained its BIA policy as follows:

“Generally, the Department will assign BIA based on the following two-tier methodology: (1) When a company refuses to cooperate with the Department or otherwise significantly impedes the proceedings, we use as BIA the higher of (a) the highest of the rates found for any firm for the same class or kind of merchandise in the same country of origin in the LTFV [original] investigation or prior administrative review, or (b) the highest rate found in this review for any firm for the same class or kind of merchandise in the same country of origin, and (2) when a company substantially cooperates with our requests for information, but fails to provide the information requested in a timely manner or in the form required, we use as BIA the higher of (a) the highest rate (including the ‘all others’ rate) ever applicable to the firm for the same class or kind of merchandise from either the LTFV investigation or a prior administrative review, or (b) the highest calculated rate in this review for any firm for the class or kind of merchandise from the same country of origin.”<sup>61</sup>

Essentially, Cemex argues that where the Investigating Authority fails to complete an administrative review within in the 12-month period, it may not take advantage of that delay by using a more adverse, unduly punitive BIA that became available after the 12-month period, but before the final results in the current administrative review are issued.<sup>62</sup> In other words, Cemex contends that, because

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<sup>58</sup> Cemex brief, at 8; Docket no. 82.

<sup>59</sup> Under 19 U.S.C. § 1677e(c) (1994), the Investigating Authority is authorized to use BIA whenever “an interested party or any other person withholds information . . . fails to provide such information by the deadline . . . or in the form and manner requested . . . [or] significantly impedes” the proceeding. The then applicable Department of Commerce regulations, 19 C.F.R. § 353.37, also provide for use of BIA in such circumstances.

<sup>60</sup> *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1192 (Fed. Cir. 1993).

<sup>61</sup> 62 Fed. Reg. 17,585. In the present proceeding, the Investigating Authority used the “first-tier” [(1), above] BIA rate methodology.

<sup>62</sup> Cemex brief, at 8.

the review was initiated on September 16, 1994, and should have been completed by August 31, 1995,<sup>63</sup> the Investigating Authority was limited to using the highest prior rate available as of August 31, 1995— the end of the 12-month period for completion of administrative reviews— or 61.85 percent.<sup>64</sup> Thus, Cemex contends that as of the date the final results were issued (April 10, 1997), the Investigating Authority was barred from using what then was the highest prior rate, the 109.43 percent rate resulting from the affirmance by the CIT October 24, 1996<sup>65</sup> of the recalculated Cemex dumping margin in the second remand in the second administrative review.

The Investigating Authority and STCC contend that the Investigating Authority has broad discretion in determining what BIA rate to use for a particular administrative review and is not restricted by whether the highest prior rate for any firm is finally determined within the 12-month period, or subsequently, prior to the Investigating Authority's completion of the administrative review. The Investigating Authority and STCC rely on various court decisions holding that the 12-month period is directory, not mandatory, and that no legal penalty— such as restricting the Investigating Authority's use of a higher prior dumping margin as BIA— may be imposed on the Investigating Authority for failure to meet the deadline.<sup>66</sup>

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<sup>63</sup> One year from the last day of the anniversary month of the original antidumping order; see 19 U.S.C. § 1675(a)(1), *Antidumping Duty Order: Gray Portland Cement and Clinker from Mexico*, 55 Fed. Reg. 35,443 (Aug. 30, 1990). Relevant dates in the 4<sup>th</sup> Administrative Review are as follows:

September 16, 1994	Initiation of the 4 <sup>th</sup> Administrative Review
August 31, 1995	12-month period for completion of administrative review
May 14, 1996	Preliminary Results issued
June 20, 1996	Close of comment period
April 10, 1997	Final Results issued

<sup>64</sup> The 61.85 percent rate used in the preliminary results in this proceeding was at that time the highest rate that had been assigned to any firm. *Preliminary Results of Antidumping Duty Administrative Review; Gray Portland Cement and Clinker from Mexico*, 61 Fed. Reg. 24,283, 24,285 (1996).

<sup>65</sup> See *Gray Portland Cement and Clinker from Mexico; Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 17,581, 17,586 (1997); Cemex Exh. 1 (time line).

<sup>66</sup> Investigating Authority brief at 30-31; Docket no. 94; STCC brief at 36 et seq.; Docket no. 96.

## 1. Time Period for Administrative Reviews

The 12-month time period for completing administrative reviews is laid down in Department of Commerce regulations adopted pursuant to provisions of the Tariff Act of 1930, as amended. At the time of the fourth administrative review the statute, codified at 19 U.S.C. §1675(a)(1), provided in relevant part:

“ . . . At least once during each 12-month period beginning on the anniversary of the date of publication of . . . an antidumping duty order . . . the administering authority . . . shall . . . review, and determine . . . the amount of any antidumping duty, and . . . shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed . . . .”<sup>67</sup>

The Department’s regulations provided that the Secretary “will . . . not later than 365 days after the anniversary month, issue the final results that include . . .the weighted-average dumping margin, if any, during the period of review . . . .”<sup>68</sup>

In evaluating the extent to which, if at all, the statutory 12-month time line for annual reviews renders unreasonable the Investigating Authority’s application of a BIA margin that came

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<sup>67</sup> The quoted language is extracted from the following provisions of 19 U.S.C. §1675(a)(1994):

- (1) In general. At least once during each 12-month period beginning on the anniversary of the date of publication of . . . an antidumping duty order under this subtitle . . . the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—

\* \* \*

- (B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

\* \* \*

- (C) . . . Shall publish the results of such review, together with notice of any duty to be assessed . . . in the Federal Register. . . .

<sup>68</sup> 19 C.F.R. §353.22(c)(7)(1994).

into effect after this 12-month period, we are constrained by the limited scope of our review under *Chevron*, and by relevant judicial precedent regarding the nature of 19 U.S.C. §1675(a)(1).

Applying the *Chevron* framework set out above, this Panel can glean no clear Congressional direction from the language of the statute with respect to the completion of administrative reviews within one year. We find sufficient ambiguity in the statutory language of §1675 to render it impossible for this Panel to determine that Congress “unambiguously expressed” an intent to require the Department to initiate and complete the administrative review, and to determine the amount of duty within the 12-month time period. The statute’s 12-month period may instead refer to the time periods embraced by periodic administrative reviews. One plausible reading is that the quoted language requires each successive annual administrative review to begin on the anniversary date of the publication of the antidumping duty order. All that is clear from the legislative history is that Congress intended that administrative reviews of antidumping determinations expedite the administration of the assessment phase of antidumping investigations.<sup>69</sup> Therefore, following the Supreme Court’s *Chevron* opinion, since “Congress has not directly addressed the precise question”<sup>70</sup> of the time within which the Department must complete administrative reviews, we must accord great deference to the Department’s construction of the statute.

The Department’s regulations, quoted above, provide for a 12-month period for completion of annual administrative reviews; however, Department practice regards that time period as “directory” rather than mandatory. And, reading the statute together with the Department’s regulations, the courts have agreed. Ample judicial precedent interprets §1675 and the Department’s regulations as merely “directory” in the sense that the Department’s failure to comply with the 12-month time limit does not entail restriction of the Department’s regulatory action. In *Nissan Motors*,<sup>71</sup> the Court of International Trade acknowledged that the 12-month time

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<sup>69</sup> H.R. Rep. 317, 96th Cong., at 72 (1979).

<sup>70</sup> *Chevron*, quoted in the text at *supra*, note 25.

<sup>71</sup> 651 F.Supp. 1450, 1455 (Ct. Int’l Trade 1986).

limit of §1675(a) and the Department's regulations are not mandatory and determined that the Department is not precluded from obtaining more current data upon which to base a final determination notwithstanding its failure to complete an administrative review in a timely manner. In this and other contexts, statutory time periods are not regarded as mandatory unless the statute prescribes consequences for failure of the Department to comply with the time periods.<sup>72</sup>

In *Phillip Bros.*, the court refused to impose a penalty of deemed liquidation absent specific language in the statute or its legislative history that compels the conclusion that statutory suspension of liquidation terminates when the Department exceeds the 12-month time limit.<sup>73</sup> While the court did not condone the Department's failure to comply with the time limit, failure to act in a timely manner does not restrain the Department from acting after the year period has elapsed.<sup>74</sup> In view of well-established case law to the contrary, it would exceed the scope of our review authority to impose negative consequences on the Department for failure to complete its administrative review within 12 months, where Congress has not chosen to mandate specific consequences.

Cemex, both in its brief and at oral argument, points this Panel to judicial discussions of the §1675 time period in cases concerning the Investigating Authority's failure to complete administrative reviews. In *UST v. United States*, the CIT declined to decide whether to issue a writ of mandamus, citing the Department's proposed schedule as a viable alternative.<sup>75</sup> The CIT noted that while antidumping time lines were not mandatory, they could not be ignored entirely.

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<sup>72</sup> See *Canadian Fur Trappers Corp. v. U.S.*, 884 F.2d 563, 566 (Fed. Cir. 1989) (statute providing that when suspension of liquidation of an entry of merchandise is removed, entry shall be liquidated within 90 days is directory rather than mandatory, so that failure to liquidate within 90 days does not result in entry being deemed liquidated); *Nakajima All Co. v. United States*, 682 F.Supp 52 (Ct. Int'l Trade 1988); *Stickstoffwerke Piesteritz GmbH v. U.S.*, 989 F.Supp. 253, 257 (Ct. Int'l Trade 1997) (noting that a statute is not mandatory unless the statute includes consequential language).

<sup>73</sup> *Phillip Bros., Inc. v. United States*, 630 F.Supp 1317, 1324 (Ct. Int'l Trade 1986).

<sup>74</sup> *Id.*

<sup>75</sup> 648 F.Supp. 1, 6 (Ct. Int'l Trade 1986), *aff'd* 831 F.2d 1033 (Fed. Cir. 1987).

In affirming the CIT's denial of a preliminary injunction, the Federal Circuit noted its concern about the Department's lengthy and seemingly unwarranted delay in completing administrative reviews of antidumping orders.<sup>76</sup> However, the cited cases involved petitions for writs of mandamus to compel the Investigating Authority to complete administrative reviews. The cases did not address the Department's authority to complete reviews after expiration of the 12-month time period. Cemex's assertion that *UST* stands for the proposition that courts have interpreted §1675(a)(1) as imposing a one-year requirement for completing administrative reviews is overly broad.

Moreover, the CIT has determined that the remedy for the Department's failure to complete an administrative review within time limits is a suit to enforce the deadline,<sup>77</sup> a remedy that Cemex did not pursue. Although Cemex now complains that one of the consequences of the delay-- the availability of a higher 109.43 percent prior dumping margin for BIA-- has been injurious to Cemex, there is no evidence that Cemex asked the Investigating Authority during the course of the administrative review to complete the review promptly, or that it necessarily would have benefitted from prompt completion of the review. In fact, Cemex appears to have encouraged the Investigating Authority not to issue the preliminary results promptly.<sup>78</sup> Rather, the only participant seeking prompt completion of the review was the STCC, whose representatives met with officials

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<sup>76</sup> *UST*, 831 F.2d at 1032.

<sup>77</sup> *American Permac v. U.S.*, 642 F.Supp 1187, 1197 (Ct. Int'l Trade 1986) (not condoning the Department's failure to meet time limits, but noting that "the availability of an action to enforce those time limits accords adequate protection to parties who are truly aggrieved by undue agency delays").

<sup>78</sup> See Cemex submission of Dec. 15, 1995, A.R. Pub. Doc. No. 67, at 1-2, "[a]lthough CEMEX believes as a general rule that Investigating Authority should complete all on going [sic] reviews as promptly as possible, in this fourth administrative review the Investigating Authority is not required to complete the administrative review within a prescribed time period. Consequently, there is no reason for the Investigating Authority [to] immediately issue the preliminary results."

of the Investigating Authority on February 3, 1996, to request prompt completion of the proceedings.<sup>79</sup>

Despite some thinly-veiled but unsubstantiated accusations by Cemex,<sup>80</sup> there is also no evidence that the Investigating Authority intentionally delayed the issuance of the final results so that the intervening higher 109.43 percent rate would be available for use as BIA in this proceeding.<sup>81</sup> Although the CIT confirmed the 109.43 percent rate in the second review on October 24, 1996, the final results were not issued in the fourth review until almost six months later. Had the Investigating Authority wanted to punish Cemex, it presumably would have issued the final results earlier, so that imports would have been subject to the higher cash deposit rate sooner. Also, as noted below, counsel for both Cemex and the Investigating Authority confirmed at oral argument that under the then-applicable statute delays beyond the 12-month period in completing reviews were not unusual.<sup>82</sup>

On a few occasions, interested parties have become so frustrated with the Investigating Authority's delays in completing reviews that they have appealed to the CIT for assistance. In one such instance, *Nakajima All Co., Ltd. v. United States*,<sup>83</sup> the CIT initially refused to issue a writ of mandamus to the Investigating Authority, although it directed the Investigating Authority in its opinion to comply with a specific schedule for completing the review.<sup>84</sup> A few months later, after the Investigating Authority had issued its preliminary results, the court issued mandamus directing the Investigating Authority to complete the reviews by a certain date.<sup>85</sup> In *Nakajima*, the

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<sup>79</sup> STCC brief at 44, note 7, citing a memorandum dated Feb. 22, 1996, to the file, A.R. Pub. Doc. No. 75. (Given that the review was not completed until fourteen months later, this direct approach to the Investigating Authority proved similarly ineffective.)

<sup>80</sup> OT at 14-15.

<sup>81</sup> The comment period closed on June 20, 1996, and the Final Results were issued April 10, 1997. The record contains no explanation of the reasons for the nine-month delay.

<sup>82</sup> See *infra*, notes 97 and 98, and accompanying text.

<sup>83</sup> 682 F.Supp. 52 (Ct. Int'l Trade 1988).

<sup>84</sup> 682 F.Supp. at 59-60.

<sup>85</sup> *Nakajima All Co., Ltd. v. United States*, 691 F.Supp. 358, 364 (Ct. Int'l Trade 1988).

respondent was objecting to delays in completing five administrative reviews, one of which had been pending for nearly five years, another for nearly four years, and a third for nearly three years.<sup>86</sup> However, no penalty was imposed on the Investigating Authority for the delays, nor was any benefit conferred on the plaintiff, other than responding to its wish to have the reviews completed. In *Koyo Seiko Co., Ltd. v. United States*, the court ordered the Investigating Authority to recalculate the firm's margins, using an earlier, more favorable model match methodology.<sup>87</sup> Once again, however, the delays were extreme— sixteen years had passed since the initial entries.<sup>88</sup> Even there, the remedy was designed to compel the Investigating Authority to complete the review, not to penalize it for delays.

Cemex also cites two cases for the proposition that when the Investigating Authority fails to adhere to statutory requirements in an administrative review, it may not act in a manner substantially prejudicial to the respondent. In *Hide-Away Creations, Ltd. v. United States*,<sup>89</sup> the Department conducted an administrative review of an antidumping order without publishing timely notice of initiation of the review in the Federal Register. The CIT determined that plaintiffs were prejudiced by lack of proper notice, and ordered the Department to consider data that plaintiffs had been entitled to submit.<sup>90</sup> In *Leather Wearing Apparel from Mexico*,<sup>91</sup> the NAFTA Panel cited *Hide-Away* in determining that the Department's failure to adhere to the statutory and regulatory provisions requiring timely notice unfairly prejudiced complainants.<sup>92</sup>

However, the cited cases involved the Department's failure to timely publish its notice of initiation of administrative reviews, rather than failure to complete administrative reviews within

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<sup>86</sup> *Id.* at 359. In *Matsushita Elec. Indus. Co., Ltd. v. United States*, 688 F.Supp. 617, 625 (Ct. Int'l Trade 1988), the court directed the Investigating Authority to complete four outstanding administrative reviews by a date certain. No penalty was imposed on the Investigating Authority for its delays.

<sup>87</sup> *Koyo Seiko v. United States*, 796 F.Supp. 517, 524 (Ct. Int'l Trade 1992).

<sup>88</sup> *Id.* at 523.

<sup>89</sup> 577 F.Supp. 1021 (Ct. Int'l Trade 1983).

<sup>90</sup> *Id.* at 1026.

<sup>91</sup> Secretariat File No. USA-94-1904-02 (Apr. 11, 1995).

<sup>92</sup> *Id.* at 53-4.

the 12-month period. In *Hide-Away*, the Department did not dispute that publication of notice in the Federal Register of initiation of administrative reviews was a statutory requirement, but claimed that their notice of intent to conduct a review within twelve months satisfied the statutory requirement.<sup>93</sup> The court noted that the statute places an explicit obligation on the Department to publish a notice in the Federal Register prior to the initiation of an administrative review, which notice must include the specific date of commencement of the review.<sup>94</sup>

Moreover, in the cited cases, lack of proper notice was substantially prejudicial to respondents, because it excluded directly relevant evidence from the administrative review. Investigating Authority failure to give proper notice implicates procedural due process concerns in a way that failure to complete an administrative review within the one-year period does not. Finally, in *Hide-Away*, there were no other means for plaintiffs to have ascertained the actual date of commencement of the review.<sup>95</sup> As stated above, Cemex could have sought a remedy for the Department's failure to adhere to the administrative review time line by bringing suit to compel the Department to complete the review.

The members of the panel are deeply troubled by the fact that in this case the Investigating Authority substantially exceeded the 12-month period for completion of administrative reviews, in this instance by more than 19 months. Apparently this was not unusual at the time. The Investigating Authority exceeded the 12-month limit in many other reviews arising before changes in the statute adopted in 1995.<sup>96</sup> Counsel for the Investigating Authority conceded at oral argument that "it was not at all unusual for reviews to take longer than 12 months."<sup>97</sup> Counsel for Cemex, in response to a question from the Panel, indicated that as an experienced trade attorney

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<sup>93</sup> *Hide-Away*, 577 F.Supp. at 1025-26.

<sup>94</sup> *Id.* at 1027.

<sup>95</sup> *Hide-Away*, 577 F.Supp. at 1026.

<sup>96</sup> *See Nakajima All. Co., Ltd. v. United States*, 682 F.Supp. 52, 59-60 (Ct. Int'l Trade 1988), in which respondents (unsuccessfully) sought mandamus to require the Investigating Authority to complete five administrative reviews which at the time of the decision had been ongoing nearly 5, 4, 3, 2 and 1 years, respectively.

<sup>97</sup> OT at 53.

he could not recall a case in which the Investigating Authority had completed a review within the 12-month period.<sup>98</sup>

Moreover, in the present case the adverse impact of the delay is obvious. If the Investigating Authority had completed the review by August 31, 1995, the highest BIA rate then available would have been 61.85 percent, and assignment of that rate as BIA for the fourth review would have resulted, according to Cemex, in a savings of \$13 million for Cemex' imports as compared to duties payable at the 109.43 percent rate.<sup>99</sup>

It is also readily apparent that delays in completing administrative reviews may have adverse consequences for all interested parties. Where a foreign manufacturer or importer provides information to the Investigating Authority which ultimately results in a reduction in dumping duties (and cash deposits on future shipments<sup>100</sup>), the foreign manufacturer or importer is prejudiced by delays in issuance of the final determination that results in a reduction of the duties. Conversely, where the information provided to the Investigating Authority ultimately results in an increase in the dumping duties and cash deposits, the delay in implementing the higher rate prejudices the domestic industry, since it does not receive the benefit of the higher dumping duties designed to counteract the impact of injurious dumping on the domestic industry. In both instances the purposes of the dumping laws are frustrated.

Notwithstanding such concerns, U.S. case law is clear. Although regulations adopted pursuant to the statute specify a one year time frame for completion of administrative reviews, the failure of the Investigating Authority to meet this deadline does not carry any resulting penalties for

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<sup>98</sup> OT at 21.

<sup>99</sup> OT at 37. On the other hand, as discussed earlier, Cemex on at least one occasion urged the Investigating Authority not to complete the review promptly.

<sup>100</sup> Under U.S. law, the margin rate determined in an annual review serves as the cash deposit rate applicable to new imports of the merchandise until the completion of a subsequent review, 19 U.S.C. § 1675(a)(2) (1988). Thus, in this 4<sup>th</sup> review, the final results stated in pertinent part, "Furthermore, the following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results of review . . . ." 61 Fed. Reg. 17,581, 17,589 (1997).

the Investigating Authority, or otherwise limit the Investigating Authority's powers in conducting the administrative review. This includes, but is not limited to, the Department's authority to choose a particular BIA-based dumping margin. U.S. courts have consistently held that such statutory time limits are "directory" and not mandatory.<sup>101</sup> Thus, while we fully sympathize with the concerns expressed by our colleague in his dissenting opinion, we cannot accept his reasoning or his result.

Cemex concedes that Congress has declined to impose a negative consequence on the Investigating Authority should it not complete its administrative reviews within the one year time frame.<sup>102</sup> Moreover, it is clear on the face of the statute that there is no explicit penalty for completion of an administrative review outside of the one year suggested deadline, or even outside of an explicit time-table. In short, at the time of the fourth administrative review, the time periods in United States law were not mandatory; the Department was not required by law to complete administrative reviews within the one year time period.

The pre-1995 statute that controls here can be contrasted with the law as changed on January 1, 1995, when the Uruguay Round Agreements Act became effective. The Act modified the law to set different time limits for preliminary and final determinations in annual reviews. The amended statute sets explicit time limits for preliminary determinations (245 days) and final determinations (an additional 120 days), subject to certain extensions to a possible total of 545

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<sup>101</sup> See *Philipp Bros., Inc. v. United States*, 630 F. Supp. 1317, 1323 (Ct. Int'l Trade 1986); *Nissan Motor Corp. in U.S.A. v. United States*, 651 F.Supp. 1450, 1455 (Ct. Int'l Trade 1986); *Usery v. Whittin Machine Works, Inc.*, 554 F.2d 498, 501 (1<sup>st</sup> Cir. 1977) (time limit in adjustment assistance statute held not mandatory); *Fort Worth National*

*Corp. v. Federal Savings & Loan Insurance Corp.*, 469 F.2d 47, 58 (5<sup>th</sup> Cir.1972) (FSLIC 90 day time limit not mandatory, as no consequences were specified in the statute for failure of agency to act within the time limit); *Katunich v. Donovan*, 594 F. Supp. 744, 748-50 (Ct. Int'l Trade 1984)(Labor Secretary did not lose jurisdiction under adjustment assistance statute when he failed to act within the specified 60 day time limit, since the statute did not purport to restrain the Secretary from acting subsequently or impose adverse consequences); *Alberta Gas Chemicals, Inc. v. United States*, 515 F.Supp. 780, 785 (Ct. Int'l Trade 1981) (Treasury Department's jurisdiction under antidumping statute was not affected within 30 day period specified in statute).

<sup>102</sup> Cemex brief at 14-15.

days, or approximately 18 months.<sup>103</sup> Still, since Congress declined to impose a penalty on the Investigating Authority for its failure to comply with the prescribed time periods, it is questionable whether the time periods in the new statute are mandatory rather than “directory” — an issue this Panel need not decide. In any event, if, as one panelist stated, it is dangerous for the Investigating Authority to have so much discretion to breach time limits,<sup>104</sup> it is the responsibility of Congress, not this Panel, to correct the situation. That being said, it remains the hope of the members of this panel that the Investigating Authority will fully consider the adverse consequences of its failure to follow the statutory time limits for completing reviews, and endeavor to comply with such time constraints in the future.

## 2. Investigating Authority Selection of a BIA Rate

The final step in our analysis of whether the scope of the Investigating Authority’s discretion under the “best information available” provision includes the authority to apply as BIA a margin that was not in effect during the one-year time period for administrative reviews, is to determine whether applying the 109.43 percent rate to Cemex under the circumstances of this case was unreasonable. The Department has discretion to determine the BIA rate, but that discretion is not unlimited. We must assess the reasonableness of the 109.43 percent rate under the Investigating Authority’s 1st-tier BIA methodology in light of the purposes of the BIA provision and the particular circumstances of the fourth administrative review.

The purpose of the BIA rule is to “facilitate the determination of dumping margins as accurately as possible within the confines of extremely short statutory deadlines.”<sup>105</sup> Since the Investigating Authority has no subpoena power, BIA effectively induces respondents to comply with agency requests for data necessary to conduct statutorily mandated administrative reviews.<sup>106</sup> Thus, the BIA rule induces respondents to provide timely, complete and accurate information and

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<sup>103</sup> 19 U.S.C. Section 1675(a)(3)(A).

<sup>104</sup> OT at 69.

<sup>105</sup> *Allied-Signal Aerospace Co. v. U.S.*, 996 F.2d 1185, 1191 (Fed. Cir. 1993).

<sup>106</sup> *Id.*, quoting *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1571 (Fed. Cir. 1990).

prevents respondents from controlling the results of administrative reviews by providing partial or delayed information.<sup>107</sup>

For the purposes of this Panel review, Cemex does not contest the Department's application of an adverse first-tier BIA margin.<sup>108</sup> Cemex contends, however, that application of a BIA rate that came into effect only after the deadline for completion of the administrative review is impermissible because it is contrary to the language and purpose of the entire statutory scheme. The Investigating Authority argues that it is a reasonable exercise of its discretionary authority to apply a BIA rate in effect on the date of its final results in an annual administrative review, and that the application of the 109.43 percent rate in this case was reasonably adverse to Cemex and was consistent with the purposes of BIA.

The Tariff Act of 1930, as amended, provides in relevant part as follows:

“If . . . an interested party . . . withholds information that has been requested by the administering authority . . . , fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . . , [or] significantly impedes a proceeding . . . the administering authority . . . shall . . . use the facts otherwise available in reaching the applicable determination under this title.”<sup>109</sup>

Applying the first step of the *Chevron* analysis to §1677(e), it is apparent that neither the plain language of the statute nor relevant legislative history reveal a clear Congressional direction regarding the selection or application of “best information available”.<sup>110</sup> The language of the statute evinces a clear Congressional intent that the Investigating Authority use BIA with respect to a respondent who withholds requested information, or does not supply information in a timely

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<sup>107</sup> See *Rhone-Poulenc, Inc. v. United States*, 710 F.Supp 341, 347 (Ct. Int'l Trade 1989)(stating that the purpose of using best information available is to elicit the fullest cooperation from recalcitrant respondents).

<sup>108</sup> Cemex brief at 8.

<sup>109</sup> 19 U.S.C. §1677(e).

<sup>110</sup> Other than a statement that Congress intended the Investigating Authority to use the most up-to-date information available, the House and Senate Reports accompanying the Trade Agreements Act of 1979 are silent on what constitutes BIA. See H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. (1979).

manner, or in the form required, or otherwise impedes the proceeding. However, the statutory language is silent regarding the issue in question in this panel review, whether the Investigating Authority can use as BIA a margin that came into effect after the one-year period for completion of the administrative review. Because the statute does not speak directly to the issue of temporal restrictions on the Investigating Authority's selection of BIA rates, this Panel's review of the Investigating Authority's interpretation of §1677(e) is guided by *Chevron's* second prong. Therefore this Panel must accord considerable deference to the Investigating Authority's interpretation of its statutory authority to select and apply a BIA rate pursuant to §1677(e).

Our conclusion that the statutory language of §1677(e) indicates no clear Congressional direction, and that *Chevron* thus commands this Panel to defer to reasonable Investigating Authority interpretations of the BIA provision, is supported by ample judicial authority. By not directly addressing what constitutes best information available, Congress "explicitly left a gap for the agency to fill."<sup>111</sup> Reviewing courts have repeatedly recognized that the Investigating Authority has broad discretion in executing the antidumping law.<sup>112</sup> Courts recognize that enforcing the Tariff Act is a difficult task given the intricate framework of the Act, the numbers of factors involved, the difficulty of quantification of those factors, and the repercussions on foreign policy.<sup>113</sup>

Nevertheless, the Panel notes that the Investigating Authority's discretion under the antidumping statute, while broad, is not completely unfettered. While use of BIA is an informal

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<sup>111</sup> *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1911 (Fed. Cir. 1993), quoting *Chevron*, 467 U.S. at 834-44.

<sup>112</sup> *Daewoo Electronics Co., Ltd. v. International Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993) (recognizing the ITA as the "master" of antidumping law worthy of considerable deference); *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986) (deferring to ITA's interpretation of statutory "reasonable indication" standard as entailing more than "mere possibility" as permissible in light of language and statutory intent).

<sup>113</sup> *Smith-Corona Group, Consumer Products Div., SCM Corp. v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983).

club,<sup>114</sup> it cannot be wielded arbitrarily.<sup>115</sup> Accordingly, courts have at times constrained the Department's resort to BIA. For example, the Department cannot invoke its BIA authority by making repeated requests for information which a party has already submitted until the party becomes frustrated and refuses to comply, or characterize a failure to list sales as a refusal to answer if in fact there were no sales.<sup>116</sup> Moreover, the Investigating Authority may not continue to use an antidumping duty rate that has been vacated during judicial review as erroneous.<sup>117</sup> The question of whether a 109.43 percent margin lies beyond the Investigating Authority's discretion under *Chevron*, and therefore is not in accordance with the law.

Cemex argues that applying the 109.43 percent in the fourth administrative review is unreasonable because it had no notice of Investigating Authority policy to apply a BIA margin that was not in effect during the 12-month period for completion of administrative reviews. In its brief, Cemex asserted that the Investigating Authority could cite no case where it applied as BIA a margin that was not in effect during the period for completion of administrative reviews. At oral argument, counsel for Southern Tier seemed to state that the BIA rate applied in the final results of the third administrative review came into existence after the 12-month period. The third review was initiated on September 30, 1993<sup>118</sup>, therefore the 12-month period for completing the administrative review elapsed on September 30, 1994. In the final results of the third review, issued well after the 12-month period on May 19, 1995, the Investigating Authority applied a BIA margin of 61.85 percent.<sup>119</sup> This 61.85 percent BIA rate was Cemex's own margin determined pursuant to the final remand in the original investigation, and approved by the CIT on September

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<sup>114</sup> See *Atlantic Sugar*, 744 F.2d 1556, 1560 (Fed. Cir. 1984).

<sup>115</sup> See *Olympic Adhesive, Inc. v. United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990).

<sup>116</sup> *Id.*

<sup>117</sup> *D&L Supply Co. v. United States*, 113 F.3d 1220, 1224 (Fed. Cir. 1997); *Sigma Corp. v. United States*, 117 F.3d 1401, 1410 (Fed. Cir. 1997) (rejecting the Department's use of an invalidated BIA).

<sup>118</sup> 58 Fed. Reg. 50153 (Sept. 30, 1993).

<sup>119</sup> 60 Fed. Reg. 26865 (May 19, 1995).

24, 1994.<sup>120</sup> Thus the 61.85 percent BIA rate, applied in the final results of the third review, had been judicially approved before completion of the 12-month period for the administrative review.<sup>121</sup> Neither the Investigating Authority nor Southern Tier has provided this Panel with a precedent for applying a BIA rate in the final results of an administrative review that was not in effect during the 12-month period.

However, we are cognizant that the 109.43 percent BIA rate is respondent's own margin from a previous review, and we consider this relevant to the reasonableness of applying the 109.43 percent margin to Cemex in the circumstances of the fourth administrative review. As the Investigating Authority notes, this number is based on information provided by Cemex itself during the second review, and was upheld by the CAFC after litigation in which Cemex participated extensively.<sup>122</sup>

In holding that the Department's two-tier methodology "is a reasonable and permissible exercise of the [Department's] statutory authority to use best information available when a respondent refuses or is unable to provide requested information," the CAFC cited with approval the " 'common sense inference' that the highest prior margins are the most indicative of current market conditions."<sup>123</sup> Selection of the highest prior margin as BIA thus "avoids rewarding the uncooperative and recalcitrant party for its failure to supply requested information."<sup>124</sup> Similarly, in the present case, the Department may rationally regard the selection of the 109.43 percent BIA

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<sup>120</sup> *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 18 CIT 917 (1994), 1994 WL 534945, *aff'd* 68 F.3d 487 (1995).

<sup>121</sup> Counsel for Southern Tier, in discussing the third review, stated that it was a precedent "where Commerce changed the rate from the preliminary to the final and after the one-year point had passed." OT at 84. For purposes of determining whether Cemex was on notice of this practice, however, changing the rate after the one-year period to a number that had been judicially approved within the one-year period is not the same as changing the rate to a number that was still in litigation and had not been judicially approved.

<sup>122</sup> Investigating Authority brief at 28-29.

<sup>123</sup> *Allied Signal*, 996 F.2d at 1192, quoting *Rhone Poulenc*, 889 F.2d at 1190.

<sup>124</sup> *Allied Signal* at 1192.

rate as “most indicative of current market conditions” and therefore as reasonably calculated to achieve the purposes of §1677(e).

The Participants disagree whether applying the 109.43 percent margin to Cemex in this review furthers the statutory purpose of inducing cooperation and preventing respondents from manipulating the review process. Cemex contends that the 109.43 percent margin was punitive because Cemex did eventually proffer the requested information in the fourth administrative review, and thus resort to BIA was unnecessary.<sup>125</sup> Yet Cemex conceded in its brief and before this Panel that it does not contest the Department’s application of 1st-tier uncooperative BIA in the fourth review.

The only basis for holding that the Investigating Authority exceeded its authority under the BIA statute would require a showing that use of the 109.43 percent margin was an unreasonable or otherwise unsupportable exercise of the Investigating Authority’s discretion. No such showing has been made.

Our colleague’s dissenting opinion suggests that the Department’s selection of the 109.43 percent margin was arbitrary and unreasonable, given that that number did not become available until long after the 12 month period for reviews had passed. The majority disagrees. If, as this opinion demonstrates, the Investigating Authority faces no legal obstacle in taking more than 12 months to complete an administrative review, and cannot be penalized for doing so, the Investigating Authority has the discretion— in seeking the highest available first tier BIA— to use the highest BIA approved in any prior review within the extended period, in this case, 109.43 percent. There is here no question of retroactivity. The 109.43 percent applied in the Department’s final results in this fourth Administrative Review cannot be characterized as “retroactive” for two reasons: First, the 109.43 percent was derived from a prior review (the

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<sup>125</sup> Cemex communicated to the Investigating Authority on February 8, 1996 that it was ready to submit the requested information regarding Type I. In a letter dated February 16, 1996, the Investigating Authority responded that the administrative record was closed and no further factual information would be accepted.

second Administrative Review), and, second, final judicial approval of the 109.43 percent in the second Administrative Review took place prior to the time at which the Department concluded the fourth Administrative Review.

As discussed above, the standard of review applicable in panel review of agency determinations in the United States requires this Panel to afford the Investigating Authority great deference in interpreting the antidumping laws. Considering that the 109.43 percent margin applied in the final results was calculated from data supplied by Cemex in a prior review, we believe that selection of this margin is neither arbitrary nor irrational and was within the Department's discretion.

V. **Order**

For the reasons set forth in this opinion, the final results of the fourth administrative review of the antidumping order in Gray Portland Cement and Clinker from Mexico are affirmed.

Decision Issued on December 4, 1998.

Executed in the original:

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David A. Gantz, Chairman

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Lewis H. Goldfarb

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Daniel G. Partan

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Jose Alejandro Romero Carreto

**DECISION OF VICTOR CARLOS GARCIA MORENO, CONCURRING IN  
PART AND DISSENTING IN PART**

I. Background

While I agree with much of the Panel's Opinion, my views go somewhat farther than on the analysis with regard to the absolute discretion attributed to the Department of Commerce. I do not agree with the Panel's ruling on the reasonableness of the Authority's discretion in selecting the 109.43 percent margin. In my view the matter should be remanded to the Authority with instructions to determine a fairer and more appropriate dumping rate.

It is perhaps important to stress that I have interpreted the mandate of NAFTA panels as being able not only to ask whether or not the Department of Commerce's determinations are supported by substantial evidence and accuracy of the record itself, but also whether the logical chains of connection which link the record to the final determination can be deemed reasonable and can be supported on the basis of best departmental practice.

It is odd that this appears to be the first time this precise question is arising. That is, when should a Department's authority be considered discretionary or arbitrary. I agree that it is not possible to legislate on a discretionary element; however, such an attribution of discretion should have limits, and a rationale.

I clearly understand that binational panels sitting in the United States, as this one, are bound by decisions of the CAFC<sup>1</sup> in the United States, and do give great weight to precedents issued by the CIT. Indeed, NAFTA panel review of United States Agency actions are quite

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<sup>1</sup> The Court of Appeals for the Federal Circuit exercises exclusive appellate jurisdiction over decisions by the Court of International Trade, 28 U.S.C.\1295(a)(1998)

narrow, but the arguments set out in the key section on the nature of the Department of Commerce's absolute discretion provide an insufficient logical basis to allow it to decide, unilaterally, without informing the interested parties, to exceed the deadlines and to attribute retroactively, a first tier BIA rate that did not exist at the time that the administrative review was to be completed.

Of course, I do not wish to imply that the Department of Commerce does not have the authority to set the time limits for the response; rather, that it is unreasonable to apply a different rate that was approved by the CIT on October 24, 1996, more than one year after the established deadlines for conducting this administrative review, with a result that was prejudicial to the Complainant.

## **II. Discretionary v. Arbitrary**

When I mention discretionary v. arbitrary, I am referring to the fact that if one makes overuse of discretion, it could impair the rationality of the exercise of power. It is a fact that in most international organizations, the tendency is to constrain the authorities so as to avoid the excess use of their powers, or what is often referred to as "*Excès du Pouvoir*".

Arbitrariness means that the authority, in the use of the powers that the law gives it, can go beyond the existing laws without taking into consideration any norms of general character, which could result in injury on the rights of the individual. The use of discretionary faculties by the authority should be restricted to norms, principles and objective criteria, that should be as inviolable as those who are stipulated in a law or regulations.

In light of the preceding, it is very important to define and limit the discretionary faculties of an authority, so as to avoid arbitrary decisions that could affect the interest of the parties or individuals. In this regard, I feel that we should take into account the world tendency to limit clearly the discretionary powers of the authority, that is, to limit the attributions of the authority

along the lines that should correspond to the authority, according to the law that gives them this prerogative. In other words, we should take into consideration what is being done in countries with civil law, known as the Principle of Legality. That is to say that the authority should not go beyond what the letter of the law allows, and that the authority should not exceed itself in the use of its powers or attributions. This coincides with the French theory of *"Excès du Pouvoir"*.

In support of what has been said, and in line with the necessity of limiting the discretionary powers granted to the investigating authority, with regard to antidumping and subsidies, the World Trade Organization decided to establish time limits to conduct investigations and arrive at a resolution in a period of a year. The Article 5.10 of the Agreement with regard to the application of Article VI of the GATT of 1994, (Antidumping Code) says the following: *"Investigations shall, except in special circumstances, be concluded within one year after their initiation and in any case in a period not exceeding 18 months, counting from the beginning of the investigation"*.

As well, the Uruguay Round Agreements Act that became effective on January 1, 1995, also mentioned by the other panelists, sets explicit time limits of 245 days for preliminary determinations and 365 days for final determinations, and is subject to special extensions only up to 545 days.<sup>2</sup>

In this case, the Investigating Authority should have informed the parties within the period of the 4th Administrative Review, that it was going to exceed the time allocated for the investigation and for its final resolution. It should have provided a reasonable explanation to justify the reasons and/or exceptional circumstances that prevented them to conclude the administrative resolution within the established period.

The world tendency, in this respect, is to create a legal time margin uniformly for all countries alike, so that the authorities involved in administrative investigations, as well as the participating parties, have to abide by the legal terms and times established by legislation. That

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<sup>2</sup> 19 U.S.C. Section 1675(a)(3)(A).

would allow a better procedural equity between all parties involved, so that both the investigating authority as well as the parties or individuals involved would have the same obligations to comply with the procedural regulations according to the law, and the same responsibilities or sanctions would apply to all parties involved.

Another important factor is the principle of *"Delayed justice converts itself into injustice"*. This principle establishes that the fact that an authority delays its response to a particular petition, or else, that it delays the administration of justice, ends up in a serious prejudice to the parties and thus is similar to a negation of justice.

### **III. Adverse consequences to the parties**

The factor of injury is closely related to the factors earlier mentioned. The fact that an authority infringes upon the principle of legality and the fact that it does not administer its mandate in a fair manner means that it can cause injury to the parties.

In this particular case, it is obvious that the Department of Commerce, by delaying the issuance of its final determination, affected considerably the Complainant. It is also obvious that, as was mentioned in the Administrative Record, as well as in the transcription of the Public Hearing, that if the Department of Commerce had issued its final resolution in the time allotted according to the standard procedures, the highest existing first tier BIA margin of 61.85 percent, not the one of 109.43 percent that appeared more than a year later, would have been applied. It is also correct to say that Cemex was never given the opportunity, during the time of the Administrative Review, to raise an objection to the imposed margin of 109.43 percent. In this respect, I concur with the other panelists that it was inappropriate not to give Cemex an opportunity to reject the 109.43 percent rate applied by the Investigating Authority under the pretense that Cemex had failed to exhaust administrative remedies.

For example, in The World Trade Organization, the time for conducting administrative reviews has been limited to a year, with a clause that says that if it surpasses this time, it should

offer reasonable arguments to all parties, but in no case should it exceed eighteen months. We know that the Investigating Authority did not apply the 109.43 percent margin to Cemex's fourth administrative review until it issued its final results on April 10, 1997<sup>3</sup>, more than one year after the termination of the regulatory period. Since the use of the 109.43 percent margin was not disclosed to Cemex until April 10, 1997, more than a year after the preliminary results were presented by applying the highest rate in existence of the first tier BIA rate, which was 61.85 percent, it is correct to say that Cemex lacked the opportunity at any time during the administrative proceeding, to raise an objection to the 109.43 percent margin that was imposed in the final results.

I concur with the other panelists when they conclude that it would be inappropriate to preclude Cemex from contesting the 109.43 percent margin for failure to exhaust administrative remedies.

However, it is well established, in case law, that any reviewable determination may be remanded if it lacks a reasoned basis. See American Lamb Co. v. United States, 785.2d 994, 1003 (Fed. Cir. 1986) citing S. Rep. No. 249, 96th Cong., 1st Sess. 66 (1979); Carlisle Tire and Rubber v. United States, 564 F.Supp.834 (CIT,1983). I feel that in this case the Investigating Authority did not at anytime explain nor offer any logical arguments as to 1) why it had delayed the final determination, and, 2) why it felt that it should use a BIA rate higher than the highest one in existence at the time that the administrative review should have been completed.<sup>4</sup>

On the other hand, I consider that, independently from the principle of deference that is given to the Department of Commerce according to the American legislation, as well as the wide discretionary faculty that the Courts gives it, it is not plausible that these attributions could be used in a manner that is excessive, even less so when the exercise of these faculties end up in an adverse consequence to the parties involved.

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<sup>3</sup> 62 Fed. Reg. 17588 (1997)

<sup>4</sup> Because the fourth administrative review was initiated prior to the passage of the Uruguay Round Agreements Act, the administrative review was governed by the statute and regulations in effect at that time.

In Cemex's case, it is obvious that the application of the criterion of the highest first tier BIA is not questionable, given the fact that Cernex did not comply in providing all the information that was requested. In consequence, Cemex was imposed the sanction in accordance with the procedures, that is the first tier BIA, the highest rate then in existence, 61.85 percent. However, it is unjust and contrary to the law that the Department of Commerce, in an irrational and arbitrary manner, exceeded its discretionary attributions and applied a first tier BIA that did not correspond to the level in existence at the time that they should have rendered their decision.

In other words, even when the applicable law does not foresee any sanctions for the Investigating Authority in cases in which it does not comply with the established procedures which identify a time limit for the final resolution, it does not entail the authority to take advantage of the situation and administer a rate that was not in place at the time of the established deadlines.

On this point, I consider relevant to cite the case of Intercargo Insurance Co. v. United States, p.391 F.3d (Fed. Cir. 1996) with regard to the criterion that is used by American Courts in referring to errors and procedural mistakes committed by their governmental agencies.

The Federal Courts of the United States have determined that mistakes and errors on a notice of consultation that do not cause any injury to any of the parties, and that do not create confusion, should not be sanctioned, since they are considered as technicalities. The Supreme Court of the United States has determined that in the case of Brock v. Pierce County, 476 U.S. 253(1986) the fact that an Authority does not comply in a satisfactory manner with the procedural terms as established by law, should not deprive the parties from acting within the confine of established procedures.

In the same way, the Supreme Court determined that in the case of United States v. James Daniel Good Real Property, 510 U.S.43 (1993) if a law does not specify the consequences

for the failure to carry out the procedures contained in the law, the Federal Courts cannot impose its coercive sanctions.

In our case, it is obvious that the failure of the Department of Commerce to comply with the existing established deadlines has damaged considerably the interests of Cemex, and thus justifies the interpretation of '*contrario sensu*' the criterion of Intercargo, that it can not be considered as an "Inoffensive Error" when in reality the interests of the parties are affected.

Accordingly, I would remand the resolution to the Investigating Authority, requesting that they apply an alternative first-tier BIA rate, a rate that was in place at the time of the established statutory deadline for conducting this Administrative Review.

Signed in the original by:

Victor Carlos

Garcia Moreno

Issued on the 23rd of November, 1998