

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

IN THE MATTER OF:

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)	
GRAY PORTLAND CEMENT AND)	SECRETARIAT FILE NO.
CLINKER FROM MEXICO)	USA-98-1904-02
Final Results of the Sixth Antidumpin)	
Administrative Review (August 1, 1995)	
through July 31, 1996))	

**OPINION AND ORDER OF THE PANEL CONCERNING THE FINAL RESULTS OF THE
FIRST REDETERMINATION BY THE DEPARTMENT OF COMMERCE**

November 3, 2005

Before: Steven W. Baker, Chair
Peggy Louie Chaplin, Panelist
Alejandro Castaneda Sabido, Panelist
Ricardo J. Gil Chaveznava, Panelist
Hernany Veytia Palomino, Panelist

Appearances: For CEMEX, S.A. de C.V. (“CEMEX”): Greenberg Traurig (Irwin P.

Altschuler, Esq., David Amerine, Esq., Jeffrey S. Neeley, Esq., and Rosa Jeong, Esq.)

For Cementos de Chihuahua, S.A. de C.V.: White & Case (Walter J. Spak, Esq., Gregory J. Spak, Esq. and Kristina Zissis, Esq.)

For The Southern Tier Cement Committee: King & Spalding (Joseph W. Dorn, Esq., J. Michael Taylor, Esq., and Michael P. Mabile, Esq.)

For the Investigating Authority: US Department of Commerce, Office of the Chief Counsel for Import Administration (John D. McInerney, Esq., David W. Richardson, Esq., and Christina Sohar, Esq.)

I. INTRODUCTION

This Binational Panel, established pursuant to Article 1904 of the *North American Free Trade Agreement* (“NAFTA”)¹ and Title IV of the *North American Free Trade Agreement Implementation Act*² issued an Opinion and Order concerning challenges to the March 16, 1998 determination made by the Department of Commerce (“the Department”), International Trade Administration in the Sixth Administrative review of the antidumping duty order issued on Gray Portland Cement and Clinker from Mexico³ on May 26, 2005. That Opinion affirmed the Department’s determinations with regard to all of the issues raised with the exception of whether Type V cement sold as Type V and Type II cement was properly considered outside of the ordinary course of trade; whether the Department’s DIFMER calculation was accurately based on the information available in the record; and with regard to the classification of certain CEP sales. The Panel remanded these issues to the Department for further consideration in accordance with the Panel Opinion.

The Department issued its Final Results of Redetermination Pursuant to *NAFTA Panel* Opinion in the Sixth Administrative Review (Redetermination Results) on July 25, 2005. This Binational Panel Review of the Redetermination Results was initiated pursuant to requests filed by CEMEX, S.A. de C.V. (“CEMEX”) and Cementos de Chihuahua, S.A. de C.V. (“CDC”),⁴ on

¹ North American Free Trade Agreement (“NAFTA”), signed at Washington, D.C., Mexico City, and Ottawa, December 7, 1992; supplemental agreements signed September 14, 1993; reprinted in H. Doc. 103-159, Vol. I, and in 32 I.L.M. 605 (1993) (entered into force January 1, 1994).

² Pub. Law No. 103-182, approved December 8, 1993, 107 Stat. 2057; codified at various sections of title 19 and several other titles.

³ Antidumping Duty Order, Gray Cement and Clinker from Mexico, 55 Fed. Reg. 35443 (August 30, 1990).

⁴ CDC has been succeeded as a corporate entity by GCC Cemento, S.A. de C.V. The company will be referred to as it existed during the period of review, CDC, for purposes of this opinion.

August 22, 2005. The Department and the Southern Tier Cement Committee (“STCC”) filed arguments supporting the redetermination by the Department.

II. ISSUES PRESENTED AND SUMMARY OF DECISIONS.

CEMEX and CDC challenged the Department’s Redetermination, arguing that the ordinary course of trade finding made by the Department in the redetermination does not comply with the Panel’s Opinion and Order, and that the Department’s calculation of the DIFMER adjustment and its rationale for such adjustment does not comply with the Panel’s instructions. CDC in addition requests that any further remand to the Department regarding the ordinary course of trade issue should be accompanied by an instruction to compare CDC’s sales to the most appropriate sales of the collapsed entity. No challenges were raised with regard to the calculations made based on the reclassification of CEP sales.

The Panel affirms the recalculations made by the Department based on the reclassification of CEP sales. The Panel again remands to the Department for reconsideration in accordance with this opinion the ordinary course of trade determination regarding sales of Type V cement as Type V and Type II cement, and its calculation of the DIFMER adjustment.

III. BACKGROUND, GOVERNING LAW, AND STANDARD OF REVIEW

This Binational Panel discussed the background of this case, including the procedural history and the nature of the product under consideration, in its May 26, 2005 Opinion and Order. The additional procedural history in this case consists of publication by the Department of the Draft Results of the Remand Determination on July 5, 2005; issuance of the Final Results of Redetermination, considered in this Opinion, on July 25, 2005; and filing of the administrative record with the NAFTA Secretariat on August 1, 2005. Following the challenges raised by CEMEX

and CDC to the Department's redeterminations, the parties filed arguments as to whether or not the Department had properly complied with the Panel's Opinion and Order on the ordinary course of trade and DIFMER issues. CEMEX also raised issues regarding inclusion of additional materials on the record, which have been resolved by separate Order of the Panel.

This proceeding continues to be controlled by NAFTA Article 1904(1), and conducted on the basis of review of the administrative record made during the specific investigation being challenged. The standard of review, requiring that the reviewing authority "hold unlawful any determination, finding or conclusion found...to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law"⁵, as discussed in the May 26, 2005 Opinion, is again followed in this review of the redetermination.

IV. DISCUSSION OF ISSUES

A. Ordinary Course of Trade-Type V Cement Sold as Type V and Type II Cement Issue Presented

Was the Department's determination that CEMEX's home market sales of Type V cement sold as Type V and Type II cement produced at the Hermosillo plants are outside the ordinary course of trade (OCT) supported by substantial evidence on the record, in compliance with the Panel's Opinion and Order regarding the issue, and otherwise in accordance with law?

The Department's Decision

In the Remand Determination for the Sixth Review, the Department states that it reconsidered its ordinary course of trade decision in view of the Seventh Review remand, and redetermined that sales of Type V cement sold as Type II and Type V cement produced at the

⁵ 19 USC 1516a(b)(1)(B).

Hermosillo plant were made outside the ordinary course of trade during the Sixth Review period. The Department indicated that its decision in the Seventh Review Remand did in fact ““reflect[...] a further development” in the Department’s consideration of the ordinary course of trade issues in the Cement and Clinker proceedings.⁶ The Department states, however, that this “further development”, although it resulted in a different conclusion in the Seventh Review Remand, does “not equate...to a change in methodology.”⁷

The Department states that it employed the exact same ordinary course of trade methodology-an examination of the totality of facts on each record-in both the Sixth and Seventh Remand Reviews, but that while the analysis was the same, the facts differed. In the Sixth Review, Type V cement sold as Type V and Type II was shipped for unusually long distances, a situation which did not occur in the Seventh Review comparisons of Type V sold as Type I. Although these costs may have been reflected in comparative profits, the long shipping distances nevertheless constituted a significant difference in the handling of the different products. In addition, the Type II sales showed a profit which was “small” in comparison to Type I; even though the Type V sales had a profit level similar to Type I, viewed in totality the profit levels were not considered comparable.

The Department also found differences in the character of the cement products being sold, in volume, in the number and type of customers; and in the promotional quality of the sales, sales to a “niche” market, and the historical sales record (products sold only after the imposition of the antidumping duty order). The Department indicated that, even if the profit differential between sales

⁶ Sixth Review Remand Determination dated July 25, 2005 (Remand Determination), at 22.

⁷ Remand Determination, at 23.

of Type V and Type II cement to Type I cement was assumed to be “not significant”, the other factors, taken together, would indicate that such sales are outside the ordinary course of trade.⁸

Arguments of the Parties

CEMEX and CDC

CEMEX challenges the Department’s Remand Determination for its failure to comply with the Panel Opinion and Order⁹. Specifically, CEMEX points out that the Panel explicitly instructed the Department to take into account the Seventh Review Remand Determination. CEMEX states that the Department must either follow the reasoning of the Seventh Review Remand Determination or give a rational explanation for any departure, and merely denying a methodology change was made is not reasoned explanation.

CEMEX further argues that the Department was instructed to use *only* the criteria used in the Seventh Review Remand Determination, and provides its analysis to demonstrate that the Sixth Review Remand did not comply with that standard. CEMEX also provides its own review of the factors considered (number and type of customers, profitability, and volume). CEMEX questions the use of other factors-promotional quality, historical sales trends, “niche” market-when these factors were not examined in the Seventh Review.

CDC supports CEMEX’s arguments, and further requests that, if the issue is remanded, the Department be instructed to compare CDC sales to the most appropriate sales of the collapsed entity.¹⁰

The Department

⁸ Remand Determination, at 10.

⁹ CEMEX Brief dated August 23, 2005.

¹⁰ CDC Brief dated August 22, 2005.

Counsel for the Department asserts that the methodology for legal analysis by the Department was unchanged between the Sixth and Seventh reviews-the determination as to whether the sales at issue were made under normal conditions and practices was based on the totality of the facts and circumstances. The Department re-examined the facts and circumstances in the Seventh Review, but did not change the underlying methodology.¹¹

In the Sixth Review Remand Determination, the Department re-evaluated the totality of facts in the case to determine if there were any unusual reasons or circumstances for these sales. This re-examination included factors in the Sixth Review record that were not present in the Seventh Review. The additional factors included the extraordinarily long shipping distances, significantly greater freight costs, small volume, unique products with few customers, promotional nature of the product, a “niche” demand, and the historical fact that the products were never produced by CEMEX until after the issuance of the antidumping duty order. Noting that, while profits for the Type V as Type V sales were “similar” to profits for the Type I sales, the Department states that the Type V as Type II profits were smaller. The Department also notes that even if the profit comparability is assumed to be the same as in the Seventh Review Remand Determination, this does not erase the existence of all of the other factors supporting the determination that the sales were outside the ordinary course of trade. The seven factors (extremely small sales volume, significantly greater shipping distances and freight costs, small profits, substantially differently number and type of customers, unique promotional quality, historical sales trends, and specialty products sold to a “niche” market) are reviewed in some detail.

The Department further argues that the request made by CDC to compare its sales with

¹¹ Department Brief dated September 12, 2005.

CEMEX's home market sales is an issue which existed at the time the original determination was made, but does not appear in any complaint and has not been briefed. Therefore, it has not been properly raised before the Panel.

STCC

STCC supports the Department's position that no new methodology was adopted, and that the Panel review did not limit the Department to consideration of only the factors involved in the Seventh Review Remand Determination.¹² STCC points out that the Department's determination that Type V/V and Type V/II sales are outside the ordinary course of trade were upheld by both the CAFC and two NAFTA Panels, in the Second, Fifth, and Seventh Reviews, and was not revisited by the Seventh Review Panel following the Seventh Review Remand Determination. STCC states that the burden of showing that the Department made an error in its OCT determination rests with the challenging party, and the Department is due tremendous deference in connection with the determination.

Analysis

The Department is correct in its position that the Panel intended that it review the remanded OCT issue based on all of the facts involved, and not solely the factors considered in the Seventh Review Remand Determination. The Department is also correct that "comparable" profit levels would not, by themselves, mandate that the challenged decision in the Sixth Review receive the same conclusion reached in the Seventh Review Remand Determination. What the Department failed to do in the Sixth Review Remand Determination, however, was to adequately explain the impact of the positions taken in the Seventh Review Remand Determination on the interaction of

¹² STCC Brief dated September 12, 2005.

the factors considered in the Sixth Remand, as required by the Panel. The Department also failed to adequately explain its continued use of facts available for the promotional quality issue despite the Panel's questions regarding the presence of information on the record.

There is much discussion in the Remand Determination and the briefs filed by the parties concerning whether the analysis made on the OTC issue in the Seventh Review Remand Determination amounts to a change in methodology by the Department. The Panel accepts the Department's statement that the methodology itself-an examination of the totality of facts on the record-has not changed. However, what the panel also termed a change in "understanding of the relationship of the factors involved"¹³, and the Department agrees is a "further development"¹⁴ and an acknowledgement of "basic economic principle"¹⁵, clearly occurred. It is the failure of the Department to discuss, apply, or differentiate this "development" which leads the Panel to remand this issue again for further explanation by the Department.

In the Seventh Review Remand Determination the Department considered how basic economic principles indicated that certain factors first analyzed as separate issues were so interrelated that they required analysis as a single factor. Specifically, profitability levels incorporated differences in freight and handling charges, and the number of customers (as opposed to the type of customers) is related to the volume of sales. This type of analysis is clearly consistent with the Department's repeated refrain that it "must view each fact in the context of the other surrounding facts."¹⁶

¹³ Sixth Review Panel Opinion, at 27.

¹⁴ Remand Determination, at 22.

¹⁵ Remand Determination, at 6.

¹⁶ Remand Determination at 6; Department's Brief at 7.

In the Sixth Review Remand Determination the Department explains that shipping distances were not considered as a factor in Seventh Review, but were in the Sixth, and that this is a difference in the facts involved in the two reviews. The Department does not make any attempt, however, to analyze the economic rationale for or the effect of the greater distances in the Sixth Review issue.

Because Type V/V and V/II cement are produced only at the Hermosillo plants, shipment throughout Mexico necessarily involves greater shipping distances than Type I, whose production is dispersed. While this is clearly a difference in how Type V/V and V/II are sold compared with Type I sales, is it, when freight costs can be factored into profitability comparisons, indicative of sales which “cannot be said to be representative of “normal” home market sales”?¹⁷ As the Department noted in the Seventh Review Remand Determination, “some circumstances surrounding a set of sales can be unusual and yet the sales are made in the ordinary course of trade.”¹⁸

The Remand Determination discusses volume and number of customers (as opposed to type of customers) as separate issues. This is another area where “economic principle” led the Department in the Seventh Review Remand Determination to merge the two concepts, noting that the smaller volume naturally implied a smaller number of customers. The Sixth Review Remand Determination does not provide any explanation of why this should differ from the Seventh Review characterization. In addition, the Department does not indicate why the concept of a “niche” market should be considered an additional factor beyond the differences in the merchandise and the number and type of customers.

The Department’s remand determination in the Sixth Review also discusses the factors of niche markets, promotional quality, and historical sales trends, with all of these factors decided

¹⁷ Seventh Review Remand Determination, at 11.

¹⁸ Seventh Review Remand Determination, at 12.

based on determinations made in prior reviews, as the Department found that CEMEX did not address these issues on the record in the Sixth Review. The Department “recognize[d]” that the Panel had discussed the issue of facts on the record in this regard, but dismissed this as “merely restat[ing] CEMEX’s arguments.”¹⁹ Specifically responding to the Department’s arguments that the relevant information had been struck from the record, in the remand opinion by the Panel, we state “an examination of the Prop. Doc. #67 verifies that the information was not part of the 18 documents listed as being struck.”²⁰ The Department has neither demonstrated that this material is not a part of the record, or, if it is, addressed how it would affect its analysis of the issue.²¹

The Department notes that even if the assumption is made that the profitability levels for Type V/V and Type V/II in the Sixth Review are comparable to the level of Type V/I in the Seventh Review, the other factors on the record would independently be sufficient to support the determination that the Type V/V and Type V/II sales are outside the ordinary course of trade.²² For this reason, it is particularly important that the Department specifically address the facts, if any, on record regarding these other issues.

The Panel recognizes that there are differences between the Type V/V and Type V/II product considered in this review and Type V/I product analyzed in the Seventh Review. The Panel further understands that the Department must make its determination by a reasonable examination of all of the fact on the record in *this* Review. What the Panel requires is that the Department conduct this examination in a manner which fully recognizes the implications of the economic interrelationship of issues developed in the Seventh Review Remand Determination. In addition, because of the

¹⁹ Remand Redetermination, at 29.

²⁰ Sixth Review Panel Opinion, at 28

²¹ Footnote 95 of the Sixth Review Panel Opinion cites the source and the language of the explanation made by CEMEX .

²² Remand Determination, at 10.

importance of the interaction of all of the factors involved, the Panel requires the Department to specifically address whether there are actually facts on the record in the Sixth review regarding promotional quality; if so, how those facts affect the Department's analysis of the issue; and how any changes in that analysis affect its view of the "totality of facts".

The request made by CDC to have its sales compared with the most appropriate sales of the collapsed entity is similar to the request filed in connection with the Seventh Review Panel process. When the Department in the Seventh Review Remand Determination found Type V cement sold as Type I cement to be within the ordinary course of trade, and properly used a as comparison for CEMEX, CDC sought to have its sales compared with CEMEX's sales of Type V as Type I. The Department and STCC argued that CDC had failed to raise the matching issue previously and thereby exhausted its administrative remedy. The Seventh Review Panel, in an extensive analysis, found that the change in position by the Department regarding sales in the ordinary course of trade was an appropriate basis for allowing an exemption to the Doctrine of Exhaustion, and remanded the issue to the Department for the agency's consideration.²³

Over the course of two further Remand Determinations and Panel Opinions in the Seventh Review, the Panel ultimately instructed the Commerce Department to use CEMEX's sales of Type V cement as Type I cement for comparison purposes with CDC sales, with specific instruction to the Department on how the comparison was to be made.²⁴ At this time, it is not yet known what position the Department will reach on this remand in the Sixth Review regarding the sales of Type V/V and Type V/II cement. If the Department reaches a determination which alters the selection of sales for comparison purposes from that made in the original and first Remand Determination,

²³ Seventh Review Remand Determination, pp 58-64.

²⁴ Seventh Review Remand Determinations of September 4, 2003 and November 25, 2003.

it is instructed to consider the comparison issues raised by CDC in conformity with the positions taken by the majority opinions in the Seventh Review Panel.

The Panel therefore directs the Department to readdress the issue of whether the Type V/V and Type V/II sales by CEMEX are representative of the normal conditions and practices of sales in the home market in accordance with the terms of this Opinion.²⁵

B. Calculation of the DIFMER adjustment

Issue Presented

Was the Department's selection of adverse facts available DIFMER data supported by substantial evidence on the record, in conformity with the Panel's Opinion and Order, and otherwise in accordance with law?

The Department's Decision

Original Determination

In the original determination in this review, the Department calculated the dumping margin by comparing CEMEX's sales in the United States of Type V cement (invoiced as Type II) with Mexican domestic sales of Type I. This occurred because the sales of physically identical merchandise (Type V invoiced as Type V, II and I) were excluded by the Department. With regard to Mexican domestic sales of Type V invoiced as Type V and II cement, the Department determined that they were not in the ordinary course of trade. (This issue is also considered in this remand decision.) The sales of Type V, invoiced as Type I, were excluded by the Department based on facts

²⁵ The Department and STCC both note that the issue of whether Type V/V and Type V/II sales are within in the ordinary course of trade were addressed in the Second, Fifth, and Seventh Reviews, and that the Department's finding that they were not was upheld by the CAFC and by the Fifth and Seventh Review Panels. None of these findings, however, was made after the "further development" of the issues by the Department in the Seventh Review Remand Determination. Even the Panel in the Seventh Review had completed its analysis and confirmed the Department's decision on this issue before the Seventh Review Remand Determination was made, and had no opportunity to address it thereafter. The Department has regularly noted that it is free to change its methodology in ongoing reviews; while the Panel may agree that the "further development" in the Cement and Clinker investigations is not a new methodology, it nevertheless remains a change which requires reasoned explanation within the scope of the Sixth Review.

available. Thus, according to the antidumping statute, the Department used Type I cement as the comparison merchandise, which was the most similar merchandise that meets the statutory requirements.

When non-identical merchandise serves as the basis for the calculation of Normal Value, the antidumping statute authorizes an adjustment to Normal Value to account for differences in the physical characteristics of the merchandise being compared. This calculation is an adjustment for cost differences solely attributable to physical differences.²⁶ This adjustment is usually called a “DIFMER” adjustment. In the sixth review, the Department made a DIFMER adjustment based upon partial facts available because the Department determined that CEMEX did not comply with its request for information regarding the Type of cement that was produced at the Yaqui and Campana plants in Hermosillo. The Department calculated an adverse adjustment by using CEMEX’s own cost data. As partial facts available, the Department calculated the DIFMER adjustment based upon a comparison between the variable costs at the Hermosillo plants with the lowest variable cost of a CEMEX Type I plant.²⁷

In the Preliminary Results, once the Department reached the decision of adverse facts available for CEMEX’s DIFMER adjustment, the Department applied a twenty percent upward adjustment to normal value (the maximum usually permitted by the Department).²⁸ However after considering the comments received after the Preliminary Results, the Department looked for alternatives to calculate the DIFMER adjustment that were sufficiently adverse but were based on CEMEX cost data.²⁹

In the final results the Department stated that because CEMEX produced Type I cement at multiple plants, the Department had to be sure that the new calculation did not reflect differences in production efficiencies across the numerous plants. For this reason, the Department concluded

²⁶ 19 U.S.C. 1677b(a)(6)(C)(ii).

²⁷ Gray Portland Cement and Clinker from Mexico, (Sixth Review Final Results) 63 Fed. Reg. at 12779.

²⁸ 62 Fed. Reg. at 47628.

²⁹ Sixth Review Final Results, 63 Fed. Reg. at 12779.

that it could not "compare the variable costs at the Yaqui and Campana facilities with the variable cost of CEMEX's numerous facilities producing Type I cement." Sixth Review Final Results, 63 Fed. Reg. at 12779. Thus, to avoid the impact of production efficiencies, the Department calculated CEMEX's DIFMER adjustment by comparing "CEMEX's variable costs to produce cement at the Hermosillo plants (sold as Types I, II and V) to the lowest variable costs reported by a CEMEX Type I facility." Id.

In the Panel decision, the Panel questioned whether the comparison of the variable costs from the Hermosillo plant with the lowest variable cost of a CEMEX Type I factory was a proper procedure to minimize the impact of plant efficiencies. The Panel stated "The Panel finds that the Department has failed to adequately explain how its choice of the single facility producing Type I cement having the lowest variable costs serves to minimize the effect of plant efficiencies." The Panel remanded to the Department to provide further analysis and explanation regarding plant efficiency issues in the calculation of the DIFMER adjustment.

Remand Determination

In the final Remand Decision published on July 25, 2005, the Department responded that the Final review results "confuses two separate concepts, the plant-efficiency concept with the adverse facts-available concept". The Department explains the methodology that it implements whenever it has accurate and verified data to calculate the DIFMER adjustment. The Department then explains that whenever the data could not be supported by verification, the Department uses facts available and applies adverse inferences. The Department states: "At this point, the issue of plant efficiency is no longer a relevant issue".

The Department then argues that it had basically four options: It could use the data for CDC for Type I and Type II cement, it could compare the weighted-average variable costs of CEMEX's Type I facilities with the variable costs of the Hermosillo plants, it could use the data of CEMEX's Type I plant with the lowest variable cost and compare it with the variable costs of the Hermosillo

plants, or it could apply the maximum DIFMER permitted. The Department discarded the first option because the comparison products were different types of cements and the comparison was not considered adverse to CEMEX. The Department argues that it could not use the weighted variable average cost of all CEMEX cement plants because that would have been the natural outcome had CEMEX properly complied with the information requests, and thus it would have been non-adverse to CEMEX.

On the basis of these arguments the Department determined that among the two remaining options (the maximum DIFMER permitted and the comparison with the CEMEX’s Type I plant with the lowest variable cost) the less adverse for CEMEX was the comparison with the CEMEX plant with the lowest variable cost. The Department argues that this choice is not punitive because it is based on CEMEX’s own costs “and the adjustment remains significantly less than the 20-percent maximum DIFMER adjustment permitted by law”³⁰.

Arguments of the Parties

CEMEX

CEMEX contends “that the sole issue before the Department in this remand pertaining to DIFMER was the plant efficiency issue; the Department’s remand analysis should have been limited only to that issue”³¹.

CEMEX argues that the Department adopted “an entirely new *post hoc* rationalization for selecting”³² the methodology adopted in the final results of the sixth review. “In doing so, the Department attempts at this late date to rescind or take back one of the key aspects of its DIFMER decision”³³. In CEMEX’s view, when the Department claims that it was confused, the Department is trying to avoid complying with the instructions of the Panel by discarding the issue altogether.

³⁰ Remand Decision at 35.

³¹ CEMEX Brief at 29.

³² *Id.* at 29.

³³ *Id.* at 30.

According to CEMEX the Department is asking the Panel to forget about the plant efficiency issue and to affirm the Department's substantial discretion. CEMEX argues that the confusion argument is not convincing, as the Department defended in the Department's Rule 57(2) response brief the original rationale advanced in the Final Results. In CEMEX view, "the plant efficiency issue became irrelevant and confusing only after the Panel questioned the logic of the Department's reasoning"³⁴.

CEMEX argues that the courts "have the power to remand an agency determination and to set specific parameters as to what the agency is to consider in a particular remand...In this case, the Panel properly set the parameters to reconsider only the plant efficiency considerations"³⁵.

According to CEMEX the "CIT has repeatedly rejected attempts by the Department to advance new positions or rationales beyond the scope of the remand"³⁶. CEMEX contends that the panel should follow the same procedure. In CEMEX view, "the Panel relied on the Department's pre-remand position to analyze the issues and issued specific instructions based on that position. Accordingly the Department was limited to clarifying its position with respect to the plant efficiency issue as instructed"³⁷.

CEMEX argues that a DIFMER adjustment based on the weighted average variable costs is sufficiently adverse. CEMEX contends that the DIFMER that results from the Department's calculation gives a difference from the maximum permissible DIFMER that can hardly be characterized as significantly less. CEMEX also contends that the Department does not explain how selecting the data from the plant with the lowest variable cost is non-punitive.

CEMEX claims that the factually correct decision on DIFMER should be a zero adjustment. CEMEX defends this argument by saying that there is no cost differential attributable to the physical difference between Type I and Type V cement, and according to CEMEX, any adjustment larger

³⁴ *Id.* at 32.

³⁵ *Id.* at 32.

³⁶ *Id.* at 33.

³⁷ *Id.* at 36.

than zero is adverse to CEMEX.

CEMEX refers on this point to the decision in the ninth administrative review that found that the chemical differences between Type V and Type I results from the chemical composition of clay and limestone that are naturally present at the quarries near the respective plants. CEMEX does not add additives to create the properties of Type V cement.

CEMEX also argues that the Department should have used the information from CDC to calculate DIFMER. Alternatively CEMEX argues that the Department could have used the data from any one of CEMEX's 10 Type I plants, or any combination of the plants, to calculate DIFMER.

STCC

The STCC contends that the Panel “declined to limit Commerce’s discretion in complying with its remand order.”³⁸ According to STCC the Panel did not prohibit the Department from reaching the same result on remand as long as it provided a sufficient explanation to meet the Panel’s concerns.

The STCC believes the Department carried out the Panel’s instruction to the letter.

The STCC denies that the Department deviated from the remand instructions by making the same choice that it made in the final results of the administrative review. The STCC argues that the Panel was careful to leave the choice to the Department among the different options for facts available. The STCC contends that the Panel never instructed Commerce not to make the same selection of adverse facts available.

The STCC contends that the aim of the Department in making an adverse inference is to “ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing adverse inferences, one factor {Commerce} will consider is the extent to which a party may benefit from its own lack of cooperation” SAA, H.R: Doc. 103-316 (1994), at 870. For the STCC, CEMEX’s claim that the Department was punitive ignores this principle.

³⁸ STCC Brief at 26.

In response to the argument made by CEMEX with regard to the findings of the ninth administrative review in relation with DIFMER, the STCC argues that by “affirming Commerce’s use of partial facts available for the DIFMER adjustment, the Panel necessarily rejected CEMEX’s argument”³⁹.

In response to CEMEX’s argument that asks for a DIFMER calculation based on CDC’s data, the STCC argues that this procedure would lead to a distorted comparison by using data that compares different products.

The STCC also argues against the use of the weighted-average Type I cost as the standard of comparison because this standard would not be adverse to CEMEX, as this standard would have been the choice by the Department if CEMEX had chosen to cooperate.

The Department

The Department criticizes CEMEX for having a mistaken impression regarding the Panel remand: “CEMEX seems to be under the mistaken impression that the Panel merely remanded the determination to Commerce so that Commerce could only agree that the original explanation was internally inconsistent but could not further analyze and explain the partial adverse facts available selection”⁴⁰. According to the Department, the Panel did not instruct the Department to analyze only the plant efficiency issue. The Department states that the Panel remanded the “issue for further analysis and explanation”, and according to the Department, the “issue” to which the Panel was referring was the selection of what to use as partial facts available.

The Department states that the used of the weighted average variable cost from all Type I facilities is not adverse to CEMEX because it would have been the approach chosen by the Department if CEMEX had cooperated.

³⁹ *Id.* At 33.

⁴⁰ Department Brief at 23.

Analysis

The purpose of the DIFMER adjustment is to determine differences in cost attributable to physical characteristics. The Department has discussed the necessity “to isolate the cost attributable to the difference, not just assume that all cost of production differences are caused by the physical differences. When it is impossible to isolate the cost differences, we should at least determine that conditions unrelated to the physical differences are not the source of the cost differences.”⁴¹

In the Opinion and Order issued by this Panel on May 26, 2005, the Panel found that because CEMEX had not been fully cooperative in providing information regarding the type of cement produced at the Hermosillo plants, it had failed to cooperate to the best of its ability to comply with a request for information, and the use of adverse inferences for partial facts available with regard to the DIFMER adjustment was appropriate.⁴² 19 USC 1677e provides that facts available can be used when an interested party withholds or fails to provide verifiable information, and that inferences adverse to the interests of that party can be used.

It is clear that the selection of facts of available is subject to broad discretion by the Department, and considerable deference is owed to the Department’s choice based on its knowledge of the particular case and specialized expertise in the antidumping process.⁴³ The Department does not, however, have unlimited discretion when making adverse inferences. “Commerce’s discretion in these matters, however, is not unbounded.”⁴⁴

The purpose of adverse facts available is to provide incentive to the party to provide timely, accurate information. The incentive is provided by knowing that the Department will select adverse

⁴¹ Import Administration Policy Bulletin Number 92.2, July 29, 1992.

⁴² Sixth Review Panel Opinion at 80.

⁴³ Numerous cases are cited in STCC’s Brief at 30.

⁴⁴ F.LLI De Cecco Di Filippo Fara S. Martino S.p.A v. United States 216 F.3d 1027, 1032 (Fed. Cir. 2002).

facts to fill any void due to non-cooperation by the party. The facts selected by the Department, however, are intended to be a reasonably accurate estimate, with some built in increase as a deterrent. The use of facts available must therefore be sufficiently adverse to insure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully, but at the same time cannot be overly punitive.

In a recent decision, the US Court of International Trade discussed at some length previous decisions by the Court of Appeals for the Federal Circuit on this issue. While, in the case under consideration, the Court found that the corroboration requirement did not directly apply, it found:

...the rationale underlying the corroboration requirement, as articulated by the Court of Appeals for the Federal Circuit, to be instructive in this case: it is clear from Congress's imposition of the corroboration requirement in 19 USC 1677e(c) that it intended for an adverse facts available rate to be a reasonably accurate estimate of the [plaintiff's] actual rate, albeit with some built in increase intended as a deterrent to non-compliance. Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to a respondent's actual dumping margin. Obviously a higher margin creates a strong deterrent, but Congress tempered deterrent value with the corroboration requirement. It could only have done so to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrents. Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1340 (Fed.Cir. 2002). Therefore, under the Federal Circuit's reasoning, Commerce must nevertheless insure that the rate chosen "[is] a reasonably accurate estimate of [each company's] actual rate..." F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States 216 F.3d 1027, 1032 (Fed. Cir. 2002).⁴⁵

Cemex has argued that the Department's selection of the variable costs for its plant producing Type I cement with the lowest variable costs is "punitive", and that information exists in the record from which a less detrimental but still adverse inference can be made. "In order for the agency's application of the best information rule to be properly characterized as punitive, the agency

⁴⁵ Shan Dong Huarong General Group Corporation v. United States, Slip. Op. 04-117 at 13.

would have had to reject low margin information in favor of high margin information that was demonstratively less probative of current conditions”.⁴⁶

STCC and the Department have argued, and the Panel agrees, that by accepting facts available, the Panel has accepted that in the Sixth Review a non-zero DIFMER is appropriate, and that an appropriate methodology to determine this DIFMER must be developed. The Panel agrees with the Department that it could not use CDCs data for Type I and Type II cement because the data is for different cement, closer in physical characteristics, and would not properly reflect the differences between Type V and Type I cement. The Panel also agrees with the Department’s finding, carried over from the initial determination, that the use of the 20% maximum DIFMER allowance (which was utilized in the preliminary determination) is inappropriate due to the availability of less adverse, more probative data based on verified information in the record.

The Panel does not agree, however, with the Department’s determination that the weighted average data for all plants producing Type I cement would necessarily be the same non-adverse data the Department might have used had CEMEX cooperated and reported accurately. If CEMEX had accurately reported the nature of the cement produced at the Hermosillo plants, the Department could well have found that the Type V cement sold as Type I produced in the Hermosillo plants provided the appropriate comparison product, in which case

there would have been no physical difference between the products to establish a DIFMER allowance.⁴⁷

⁴⁶ *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185,1190.

⁴⁷ In the Remand Determination at footnote 69, the Department states its belief that the Panel misstated the Seventh Review Remand findings, and implied that there was no physical difference between Types I, II, and V cement. The Panel understands that the Seventh Review Remand determination made comparisons between an identical product (Type V cement, whether sold as Type V, Type II, or Type I).

The Panel also points out that CEMEX has argued that the only difference between Type I and Type V cement is the chemical composition of clay and limestone that is naturally present in the quarries near the respective plants. Citing to the Ninth Administrative Review, CEMEX indicates that the Department found that “CEMEX

Although analyzing what results would occur if the information requested had been properly supplied, based in part on findings in further reviews, is somewhat speculative, the Panel finds it reasonable that if CEMEX had fully complied with the information requests, a zero DIFMER adjustment could have been determined. If the fully responsive outcome could be a zero DIFMER adjustment, therefore, then other adjustments than the one chosen by the Department could be adverse as well.

While the Panel has approved the general concept of comparison between the Type V cement sold for export and the Type I cement produced at various other plants for domestic consumption, the Panel finds that this calculation must still be made in a manner that reflects differences in physical characteristics. The Department itself raised the issue of plant efficiencies in comparisons of variable costs in the original final determination. The Department has also discussed its concerns over different product efficiencies in its Antidumping Manual (January 22, 1997) which indicates that “adjustments cannot be made for DIFMERs based on...the fact that the domestic and exported products are produced in different facilities with different production efficiencies.”⁴⁸

In the Final Results, the Department is sought to make a comparison that was adverse to Cemex and at the same time isolated to physical characteristics (free from plant efficiency effects) in making the comparison between the different types of cement. The Panel, in its Opinion and Order,

did not need to add Kaolin to produce Type V LA because the raw material from the quarries CEMEX used to produce Type V LA during the period contained naturally occurring clays. Therefore, in this review CEMEX did not incur any additional costs with regard to this difference in physical characteristics”. (Ninth Review Final Results, 66 Fed. Reg. at 14889.) In the Sixth Review, in question six of the Department’s supplemental questionnaire issued on December 24, 1996, the response by CEMEX states, “El Yaqui and CBN {Companya} plants produce a natural Type V LA cement, because their quarry chemical composition provides those qualities”. The Panel notes that this response is consistent with the findings at verification (that CEMEX produces only Type V cement in those plants) and is also consistent with the argument that states that CEMEX does not incur additional costs with regard to the different physical characteristics. Thus, the Panel finds that if CEMEX adequately complied with the information requests and facts available were not applied, a zero DIFMER finding was feasible even in a comparison of Type V and Type I products.

⁴⁸ Antidumping Manual at 550.

found that the stated goal of controlling for plant efficiencies was not met by choosing the single plant producing Type I cement having the lowest variable cost.

The Department has argued that this choice is the only one using actual plant variable cost data which can be considered adverse to Cemex; if this were correct, its use as an adverse inference could be sustained. As discussed above, however, the Panel finds that other adjustments than the one chosen by the Department could be adverse as well. These choices would minimize the effect of plant efficiencies and could produce a DIFMER adjustment adverse to CEMEX, but not be overly punitive. These possibilities could include, in addition to the weighed average variable costs of all CEMEX's Type I plants, other options such as the variable cost for the single plant with the median plant efficiency, or a weighted average figure calculated after eliminating the plants with the greatest and least plant efficiencies.

The Panel agrees that the specific choice for the data to be used as an adverse inference should be made by the Department; that it should be adverse to CEMEX yet isolated to physical characteristics (free from plant efficiency effects); and that it must be non-punitive, and “more probative of the current conditions”⁴⁹ than the use of the lowest variable cost facility. Whatever selection is made by the Department must be adequately explained and supported by the facts on the record.

This issue is therefore again remanded to the Department to determine a DIFMER allowance which is adverse to CEMEX but not overly punitive, and accounts for plant efficiencies in a manner that is more probative of current conditions.

⁴⁹ Rhone Poulenc, Supra.

V. REMAND

For the reasons set forth above, the Panel remands this case to the Department of Commerce to:

1. Reconsider whether, the evidence in this record supports the conclusion that, Type V cement sold as Type V and Type II cement was not sold in the ordinary course of trade, and provide an explanation recognizing the implications of the economic interrelationship of issues developed in the Seventh Review Remand Determination, the presence or absence of facts on the record regarding promotional quality, and the resulting interaction of all of the factors examined in the reconsideration;

2. If, upon reconsideration, a determination is made which alters the selection of sales for comparison purposes from that made in the original and first remand determination, consider the comparison issues raised by CDC in conformance with the positions taken by the majority opinions in the Seventh Review Panel; and

3. Reconsider the calculation of the DIFMER allowance on the basis that any positive DIFMER allowance could be considered adverse to CEMEX, that the calculation must be a “reasonably accurate estimate” of the actual rate, that the calculation must be made in a manner that reflects differences in physical characteristics, and that the result must, while providing a deterrent for non-compliance, not be punitive, and provide an adequate explanation of that calculation.

The Department’s decision in the final results of the Sixth Administrative Review Remand Determination is, in all other respects, upheld.

The Department is directed to complete its redetermination with regard to remand issues within 45 days of the date of this Opinion.

Date issued: November 3, 2005

Steven W. Baker
Steven W. Baker, Chair

Peggy Louie Chaplin
Peggy Louie Chaplin, Panelist

Alejandro Castaneda Sabido
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