

ARTICLE 1904 BINATIONAL PANEL
USA-89-1904-01

IN THE MATTER OF RED RASPBERRIES FROM CANADA

CLEARBROOK PACKERS, INC., MARCO ESTATES
LTD./LANDGROW and MUKHTIAR & SONS PACKER, LTD.,

Complainants.

v.

UNITED STATES DEPARTMENT OF COMMERCE,
INTERNATIONAL TRADE ADMINISTRATION,

Respondent.

William K. Ince, of Cameron, Hornbostel & Buttermann,
Washington, D. C., argued for Complainants. With him on
the brief was Gregory J. Bendlin.

Gregory Drew Shorin, of the Office of the Chief
Counsel, Import Administration, International Trade
Administration, U.S. Department of Commerce, Washington,
D.C. argued for the Respondent. With him on the brief
was Stephen J. Powell, Chief Counsel for Import
Administration.

OPINION OF THE PANEL
UPON REMAND

DECIDED: April 2, 1990

Before Ivan R. Feltham, Q.C., Chairman,
Robert C. Cassidy, Jr., Peter Clark, Warren E. Connelly
and Glen A. Cranker, Panelists.

Determination On Remand

We remanded this case to the Department because it failed to provide an adequate explanation of why it had rejected the home market sales of Clearbrook and Mukhtiar as the basis for determining fair market value. The Department submitted its Remand Determination to the Panel on January 26, 1990, and the complainants filed their comments in opposition on February 9, 1990. We find the Department's explanation for its rejection of home market sales to be legally deficient and, therefore, remand with instructions that the Department calculate foreign market value for Clearbrook and Mukhtiar using home market sales. The basis for our decision is as follows.

The Department received during the course of its second administrative review information that home market sales were made by both Clearbrook and Mukhtiar. Significantly, the Department did not find that these sales were not bona fide arm's-length sales or were not made in the usual commercial quantities. Rather, the Department initially rejected them because they were "negligible" in relation to U.S. sales, measured either in units or number of transactions. However, the Department did not explain why the home market sales were inadequate as a basis for foreign market value and, therefore did not provide an adequate basis for comparison.

See 54 Fed. Reg. 6559.

The Explanation the Department has provided for its conclusion, in its response to the remand by this Panel, is in its entirety, as follows:

In the second administrative review of the antidumping order on red raspberries, the third country benchmark was either minuscule or nonexistent. Therefore, the Department determined to disregard Clearbrook's and Mukhtiar's home market sales because they are less than five percent by volume. Application of the five percent standard in this case is appropriate because it is the only promulgated measure by which the Department judges market viability. This approach is consistent with Section 773 of the Tariff Act of 1930 since the viability test is designed to ensure that any measure of foreign market value is adequate for comparison with sales to the United States.

Remand Determination at 4. This "explanation" is unresponsive to the Panel's concerns. In particular, we sought the Department's rationale for its original conclusion that home market sales were "negligible" and, therefore, did not provide an adequate basis for price-to-price comparison. Instead of

providing its rationale for its original determination, the Department has substituted a new "five percent by volume" test for its original "negligibility" test. However, the Department does not explain, other than by passing reference to the "five percent standard" used in comparing home market sales to third country sales, why the five percent test should be used in the unusual factual situation found in this case (involving few or no third country sales). It is not obvious in this case why sales in the home market, although they comprise, less than five percent by "volume," i.e., units of measurement (in this case, pounds), are an unreliable basis for determining foreign market value, and the Department has failed to explain why this should be the rule here.

The Department, apparently to avoid being compelled to use home market sales by its own newly adopted five percent rule when the number of transactions, rather than the number of units, are compared, has sub silentio dropped the transaction number test from consideration on remand. Its failure to explain its basis for doing so, after considering the home market transaction number to be relevant in its original determination, forms a second basis for remand.

To put it another way, the Department's own five percent rule is satisfied when the number of sales transactions which Clearbrook and Mukhtiar had in the home market is compared to the number of their transactions in the U.S. Home market transactions of Clearbrook and Mukhtiar constituted 12.5 percent and 7.7 percent, respectively, of U.S. transactions. Having considered the number of transactions as relevant to the evaluation of home market viability in its original determination, the Department had an obligation to explain why they were no longer relevant upon remand.

In conclusion, the choice of market to be used for dumping comparisons is among the most crucial determinations that must be made in the administration of the U.S. antidumping law. The Department has an obligation to make a reasoned determination in choosing among home market sales, third country sales, and constructed value when making comparisons with U.S. prices. The Department has failed to fulfill its obligation upon remand in this case.

It is hereby ordered that the Department file an amended final results determination within 30 days using home market sales of Clearbrook and Mukhtiar as the basis for foreign market value. Clearbrook and Mukhtiar will then have 20 days to comment upon the results of the amended determination. Additional review proceedings by this Panel, if necessary, will be conducted after consultation with the parties.

SO ORDERED:

Ivan R. Feltham, Q.C., Chairman

Robert C. Cassidy, Jr., Panelist

Peter Clark, Panelist

Glenn A. Cranker, Panelist

Warren E. Connelly, Panelist