

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

IN THE MATTER OF:

Gray Portland Cement and Clinker
from Mexico; Final Results of the
Seventh Antidumping Administrative
Review (August 1, 1996 – July, 31, 1997)

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) Secretariat File No.
) USA-MEX-99-1904-03
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**DECISION OF THE PANEL CONCERNING
THE MAY 27, 2003, FINAL RESULTS OF
REDETERMINATION OF THE DEPARTMENT OF COMMERCE**

PANEL:

Louis S. Mastriani, Chairman.
Gustavo Vega Canovas.
Mark R. Joelson.
Kevin C. Kennedy.
Ruperto Patino Manffer.

COUNSEL:

For CEMEX, S.A. de C.V. ("CEMEX"): Manatt, Phelps & Phillips (Irwin P. Altschuler, Esq., Jeffrey S. Neeley, Esq., and Kasey L. Iovino, 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. and Michael P. Mabile, Esq., and J. Michael Taylor, Esq.)

For the Investigating Authority: U.S. Department of Commerce, Office of the Chief Counsel for Import Administration (David W. Richardson, Esq.)

On May 27, 2003, the Department of Commerce ("Commerce") issued its Final Results of Redetermination in this matter.¹ Two issues are challenged before this Panel: (1) CEMEX, S.A. de C.V. ("CEMEX") challenges Commerce's application of Cementos de Chihuahua, S.A. de C.V.'s ("CDC's") sales of NOM I Cement to CEMEX's Hidalgo sales; and (2) CDC challenges Commerce's decision to apply adverse facts available to CDC in calculating CDC's importer-specific rate.

As to the first issue, this Panel unanimously rejects CEMEX's challenge, and affirms Commerce's redetermination on remand. The Panel finds Commerce's application of CDC's sales of NOM I Cement to CEMEX's Hidalgo sales to be supported by substantial evidence and otherwise in accordance with law. The Panel notes that Commerce used the exact same methodology and obtained the exact same choice of adverse facts available in the Final Results, the first remand, and the second remand. Given this Panel's prior affirmance of Commerce's selection of adverse facts available, we find Commerce's methodology for choosing facts available to be the law of the case. See In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895); Briggs v. Pennsylvania R.R. Co., 334 U.S. 304, 306 (1948). In reaching this decision, the Panel affirms Commerce's acceptance of The Southern Tier Cement Committee's ("STCC's") May 16, 2003, submission in which it asserts that there is a clerical error in Commerce's margin calculations. See, e.g., Neenah Foundry Co. v. United States, 142 F. Supp.2d 1008, 1018 (Ct. Int'l Trade 2001) ("[I]t

¹ This is Commerce's second remand determination. Commerce's first remand determination was issued September 27, 2002.

is always within the discretion of a[n] . . . administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.") (quoting American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970)).

As to the second issue, this Panel remands Commerce's decision to apply adverse facts available to CDC in calculating CDC's importer-specific rate.² It is undisputed that CDC fully cooperated with Commerce in the seventh administrative review. CDC responded fully and accurately to all requests for information, was available for verification, participated in Commerce's hearing, and cooperated in all respects during this review. It is Commerce's practice to decline to apply the most adverse facts available to a cooperative party, even when a cooperative party has some connection to an uncooperative party. For example, in Live Cattle from Canada, 64 Fed. Reg. 56739 (October 21, 1999), Commerce did not impose adverse facts available on those companies in a group that cooperated, when one of the companies in the group did not cooperate. Instead, Commerce applied partial adverse facts to those companies in the group that cooperated. See 64 Fed. Reg. at 56745. See also Fresh Cut Flowers from Mexico, USA-95-1904-05 ("The Panel determines that the Department [of Commerce] properly determined that the Complainants provided misleading and evasive statements concerning their respective tax statuses and that the Department [of Commerce] properly invoked

² Panelists Joelson and Kennedy dissent on this issue. See pages 6 to 12, infra.

BIA given the substantial evidence on the record in this action. However, the first-tier BIA rate imposed by the Department is not justified by substantial evidence on the record and is not otherwise in accordance with law. Based upon the substantial evidence on the record, the Panel remands the action with instructions to assign a second-tier rate of 18.20 percent, which is taken from the Department's original investigation and takes into account the substantial cooperation provided by the Ranches.).

In addition to Live Cattle from Canada, we note that the other cases cited by STCC for the proposition that this Panel should apply facts available against CDC are inapposite to the factual situation to the instant case. Specifically, in Welded Large Diameter Line Pipe for Mexico, 67 Fed. Reg. 566 (January 4, 2002), and in Hot-Rolled Carbon Steel Flat Products from Taiwan, 66 Fed. Reg. 49618 (September 28, 2001), *both* respondents were found by Commerce to be uncooperative. Meanwhile, in Circular Welded Non-Alloy Steel Pipe from the Republic of Korea, 63 Fed. Reg. 32833 (June 16, 1998), the two collapsed companies failed to report certain information in a single response.³

In short, no case – or statute or regulation -- supports the proposition that the most adverse facts available should be applied to a cooperative company that is collapsed with an uncooperative company. We, therefore, remand this issue to Commerce, as we find Commerce's decision on this issue to be demonstrably

³ In spite of this non-reporting, Commerce applied *non-adverse facts available* to the collapsed entity – not adverse facts available.

arbitrary and capricious and not in accordance with law. In remanding this issue, we note that Commerce's discretion when drawing adverse inferences is not unbounded. See, e.g., Kao Hsing Chang Iron & Steel Corp. v. United States, 206 F. Supp.2d 1297, 1304 (Ct. Int'l Trade 2002); Nippon Steel Corp. v. United States, 146 F. Supp.2d 835, 845 (CT. Int'l Trade 2001). We also note that the policy and purpose underlying adverse facts available – to provide respondents with an incentive to cooperate in the future and to ensure future compliance⁴ – would not be served by applying adverse facts available to CDC. CDC and CEMEX were separate companies – with, among other things, different management, financial statements and questionnaire responses -- during the seventh administrative review. Applying adverse facts available to CDC would not serve the underlying purposes of adverse facts available since CDC, as explained above, was fully cooperative during this review.

On remand, we instruct Commerce to apply non-adverse facts available to CDC for the Hidalgo plant sales. That is, we instruct Commerce to apply CEMEX's sales of ASTM Type V cement sold as Type I cement for the Hidalgo plant. In so doing, we observe that CDC calls the application of non-adverse facts available "fair and consistent with Department [of Commerce] and CIT cases for the application of

⁴ See, e.g., F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (noting the purpose of adverse facts available is to "provide respondents with an incentive to cooperate"); Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185 (Fed. Cir. 1993) (noting that Commerce's policy of not applying the same harsh adverse facts available to those companies that cooperate is long standing and is aimed at "encouraging future compliance").

facts available to cooperative companies that are collapsed with companies to which adverse facts available is applied," see CDC's July 14, 2003, Rebuttal Comments at 7, and says "[s]uch an amount would be representative of Type V sales for matching purposes, and, at the same time, would not penalize CDC. The Department [of Commerce] can achieve this easily through a simple change in the programming language, which is provided in Exhibit 2." See CDC's June 16, 2003, Comments at 9.

This Panel remands to Commerce its decision to apply adverse facts available to CDC in calculating CDC's importer-specific rate for resolution within 30 days from the date of this Panel opinion.

Dissenting View of Panelists Joelson and Kennedy Concerning the Majority Opinion to Remand to Commerce Its Decision to Apply Adverse Facts Available to the Collapsed CEMEX/CDC Entity

We dissent from the Panel's majority opinion to remand to Commerce its decision to apply partial adverse facts available to the collapsed CEMEX/CDC entity. For us the issue boils down to the amount of deference Commerce is to be accorded where the governing statute and its legislative history are silent on the precise issue before the Panel. To determine whether a Commerce determination, finding, or conclusion is not "in accordance with law," this Panel must undertake the two-step analysis mandated by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Under the first step, this Panel must review Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the

precise question at issue." Id. at 842. "To ascertain whether Congress had an intention on the precise question at issue... [this Panel]... employ[s] the 'traditional tools of statutory construction.'" Timex V.I., Inc. v. United States, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing Chevron, 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving its plain meaning. Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." Id. (quoted in Windmill Int'l Pte., Ltd. v. United States, 193 F. Supp. 2d 1303,1305-06 (Ct. Int'l Trade 2002)). Beyond the statute's text, "the tools of statutory construction include the statute's legislative history, the statute's structure, and the canons of statutory construction." Steel Auth. of India, Ltd. v. United States, 146 F. Supp. 2d 900, 905 (Ct. Int'l Trade 2001).

If, after undertaking the first step, the Panel concludes that the statute is ambiguous with respect to the specific issue, the panel will proceed to the second step. Id. at 906. Under the second step, "the narrow legal question is whether the agency's statutory interpretation is a permissible construction of the statute." Id. This involves an inquiry into the reasonableness of Commerce's interpretation. Windmill, 193 F. Supp. 2d at 1306. If Commerce has acted rationally, this Panel may not substitute its judgment for that of the agency. Id. Rather, the Panel must defer to Commerce's reasonable interpretation, Steel Authority, 146 F. Supp. 2d at 906, and must "sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the

evidence." Windmill, 193 F. Supp. 2d at 1306. In determining whether Commerce's interpretation is reasonable, this Panel "considers the following non-exclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole." Id.

Based on the foregoing principles, the applicable standard of review requires that this Panel uphold Commerce's remand redetermination if it is (a) supported by substantial evidence on the record and (b) not contrary to law, even if this Panel would have reached a different conclusion had it considered the case de novo. Applying Chevron deference in this case, we believe that Commerce has acted rationally by treating the collapsed CEMEX/CDC entity as a single entity for purposes of applying partial adverse facts available. In the context of a collapsed entity situation, Commerce's decision to attribute to CDC CEMEX's inadequate response with respect to CEMEX's Hidalgo plant sales cannot be deemed to be beyond the bounds of reason.

Commerce's collapsing practice is codified at 19 C.F.R. 351.401(f), and provides in part:

[T]he Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is significant potential for the manipulation of price or production. [Emphasis added.]

Commerce's practice of treating closely related parties as a single exporter or producer for purposes of an antidumping inquiry is long standing and has been

consistently affirmed by the courts under the Chevron principle that the agency may fill in the interstices of the statutory scheme. See, e.g., AK Steel Corp. v. United States, 34 F. Supp. 2d 756, 764-65 (Ct. Int'l Trade 1998), rev'd in part on other grounds, 226 F.3d 1361 (Fed. Cir. 2000); Koenig & Bauer-Albert AG v. United States, 90 F. Supp. 2d 1284, 1286-88 (Ct. Int'l Trade 2000).

In this case, Commerce made the necessary findings under the law for purposes of collapsing CEMEX and CDC. See 64 Fed. Reg. 13148, 13152 (March 17, 1999). The propriety of collapsing CEMEX and CDC is not before this Panel. Indeed, CDC is not presently challenging Commerce's decision to collapse it with CEMEX. On the contrary, CDC successfully obtained a remand from the Panel and then a subsequent remand redetermination from Commerce that enabled it to obtain the benefit of the collapse by having its U.S. sales matched with CEMEX's Mexican sales. Prior to CDC's seeking the benefit of the collapse, Commerce had matched CDC's U.S. sales with CDC's Mexican sales and had not attributed partial adverse facts available to CDC. Now, in the course of the second remand of this seventh administrative review panel proceeding, Commerce granted CDC's request by matching CDC's U.S. sales with CEMEX's home market sales of Type V cement. As part of this changed approach, Commerce also applied partial adverse facts available to the collapsed CEMEX/CDC entity (the occasion for applying partial adverse facts available in the first place was Commerce's inability to verify information concerning the cement sold at CEMEX's Hidalgo plant). We do not see how this decision can be considered an abuse of discretion by Commerce or how this

Panel can reverse Commerce in light of the deference that we must give the agency's practice and judgment.

In our view, the precedents that the majority cites do not control this issue, one way or the other. The case law relied upon by the majority establishes that Commerce's discretion in the application of facts available is not unbounded or unbridled. We have no quarrel with that proposition. However, the cases do not shed any light on the precise question we face here of applying adverse facts available to a collapsed entity where one respondent has been cooperative and the other has not.

Nor is Commerce's past practice in this area particularly illuminating. For example, in Certain Hot-Rolled Carbon Steel Flat Products from Taiwan, 65 F.R. 13,943 (March 15, 2000), as the majority points out, Commerce found that both collapsed respondents had been uncooperative in applying adverse facts available to the collapsed entity. However, that determination does not make the converse proposition true, namely, that a cooperative respondent may not have adverse facts available applied to it because of the conduct of an uncooperative, collapsed co-respondent. Furthermore, Live Cattle from Canada, 64 F.R. 56,739 (Oct. 21, 1999), is not dispositive agency practice either. What Commerce did there was to apply only partial, as opposed to total, adverse facts available against the uncooperative party in recognition of the fact that the other collapsed parties had been cooperative. In other words, the uncooperative party benefited from the cooperation of the other collapsed parties. In the end, however, the sins of the uncooperative

party were in fact visited upon the cooperative parties, albeit in a somewhat diluted form as result of the averaging of dumping margins. The fact remains that the cooperative parties did not escape unscathed from their co-respondent's lack of cooperation.

Moreover, the Live Cattle from Canada case involved a situation where each affiliated company's U.S. sales were matched with its own home market sales and not with those of another party. That is precisely the situation that CDC successfully avoided in the second remand by convincing Commerce to match its U.S. sales with CEMEX's home market sales. Now that CDC's U.S. sales have been matched with CEMEX's home market sales, a goal that it so persistently sought, it seems eminently reasonable that it also suffer the disadvantage of CEMEX's failure to properly provide the necessary data to Commerce. In order to accomplish the same result in our case as was reached in Live Cattle from Canada, CDC's U.S. sales would have to be compared to CDC's home market sales, which is precisely the matching methodology used prior to the remand, precisely the matching methodology that CDC complained about, and precisely the matching methodology that Commerce agreed to change in the second remand. In our view, CDC wants it both ways, i.e., to have the benefit of a product match with CEMEX, but not to have partial adverse facts available applied to it.

In sum, if there were settled case law or a settled administrative practice on the issue, that, of course, would be controlling. But we discern no such definitive law or practice supporting the majority's viewpoint and, therefore, cannot

characterize Commerce's decision here as an abuse of discretion or as unreasonable, at least not consistently with the governing standard of review. It is, after all, not for us, the Panel, to fine-tune the antidumping law according to what we think is the best approach. We respectfully dissent.

September 4, 2003, Date Issued.

Louis S. Mastriani, Chairman
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