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)	)	Secretariat File No. USA-MEX-99-1904-03

DECISION OF THE PANEL CONCERNING
THE SEPTEMBER 15, 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., David R. Amerine, Esq., Jeffrey S. Neeley, Esq., and Kasey L. Iovino, Esq.)

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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 September 4, 2003, this Panel issued its second remand decision.[1] In that decision, this Panel instructed the Department of Commerce ("Commerce") to apply non-adverse facts available to CDC for the Hidalgo plant sales. Decision of the Panel Concerning The May 27, 2003, Final Results Of Redetermination Of The Department Of Commerce ("NAFTA Panel Second Remand Decision") at 5. To accomplish this objective, the Panel instructed Commerce to "apply CEMEX's sales of ASTM Type V cement sold as Type I cement for the Hidalgo plant" in calculating CDC's importer-specific rate. Id.

On September 15, 2003, the Department of Commerce ("Commerce") issued its Final Results of Redetermination in this matter. See Final Results of Redetermination Pursuant to NAFTA Panel. (hereinafter "Third Remand Determination").[2] In its Third Remand Determination, Commerce elected to not follow the Panel's instructions. Commerce proffers two reasons for this decision. First, Commerce asserts that CDC is not entitled to its own importer-specific assessment rate. See Third Remand Determination at 5. Second, Commerce explains that it is "impossible" to "apply CEMEX's sales of ASTM Type V cement sold as Type I cement for the Hidalgo plant" because the record does not contain

[1] This Panel issued its first remand decision on April 11, 2003. This Panel issued its original decision on May 30, 2002.

[2] This is Commerce's third remand determination. Commerce's first remand determination was issued September 27, 2002, and its second remand determination was issued May 27, 2003.

reliable information concerning home-market sales at the Hidalgo plant. See Third Remand Determination at 7.

As explained below, Commerce's reasoning for failing to implement this Panel's specific instructions is disingenuous and without merit. As such, this Panel finds Commerce's decision to deliberately disobey this Panel's instructions to be particularly disturbing.[3] This Panel remands the Third Remand Determination back to Commerce and instructs Commerce to strictly abide by, and implement to the letter, the remand instructions set forth in the NAFTA Panel Second Remand Decision. In implementing these instructions, this Panel further instructs Commerce to use as non-adverse facts available for all sales at the Hidalgo plant, an average of CEMEX's prices for Type V cement sold as Type I cement, and instructs Commerce to apply that price to the quantity of Hidalgo sales.

A. Commerce's Assertion That CDC Is Not Entitled To Its Own Importer-Specific Rate Is Fundamentally Flawed

In the Third Remand Determination, Commerce asserts that CDC is not entitled to its own importer-specific assessment rate. See Third Remand Determination at 5. This Panel finds that assertion to be without merit in light of the fact that Commerce, on numerous other occasions, has collapsed both CDC and CEMEX for purposes of calculating the cash deposit margin, and at the same time,

[3] This Panel is also troubled by the fact that Commerce did not follow its past practice and allow respondents an opportunity to comment on Commerce's draft remand determination before Commerce submitted its final remand determination to this Panel.

has calculated separate importer-specific assessment rates for their importers.[4] Commerce undertook these actions in the Fifth Administrative Review (and in remand decisions in the NAFTA Panel appeals of the final results in that review), the Sixth Administrative Review, and, most notably, in the underlying Seventh Administrative Review. In the Sixth Administrative Review, Commerce went so far as to say that "importer-specific duty assessment rates are necessary." See Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review, 63 Fed. Reg. 12764, 12782 (March 16, 1998).

In light of Commerce's past practice of applying importer-specific assessment rates when it had collapsed CEMEX and CDC, the Panel finds Commerce's present assertion that CDC is not entitled to its own importer-specific assessment rate to be insupportable and devoid of credibility.

This Panel is aware that Commerce has used a single assessment rate in all administrative reviews of the Mexican cement antidumping order subsequent to the Seventh Administrative Review. However, as Commerce recognized in the Eighth Administrative Review, whether to use a single assessment rate is based on the particular facts of each administrative review. See Issues and Decision Memo for the Administrative Review of Gray Portland Cement and Clinker from Mexico – August 31 [sic], 1997, Through July 31, 1998, 65 Fed. Reg. 13943 (March 15, 2000) (Response to Comment 17) ("[O]ur decision to calculate a single importer-specific assessment value in the instant administrative review was not influenced by prior

[4] Panelists Joelson and Kennedy concur on this issue. See page 10, infra.

reviews of this order. Rather, our decision was based on and limited to the facts on the record in this administrative review."). Accordingly, there is no *per se* ban on importer-specific assessment rates as Commerce would like this Panel to believe.

This Panel also finds it telling that in the instant case, none of the parties in appealing the final decision on the Seventh Administrative Review to this Panel, challenged the fact that Commerce provided for separate importer-specific assessments rates in its underlying decision. If CDC was, in fact, not entitled to its own importer-specific assessment rate, this argument should have been raised in the original appeal to this Panel. See e.g., Washington Post Co. v. U.S. Department of Health and Human Services, 865 F.2d 320, 327 (D.C. Cir. 1989) ("a party cannot raise anew on remand an issue that it failed to pursue in the appeal.").

Based on the foregoing, we reject Commerce's non-meritorious assertion that CDC is not entitled to its own importer-specific assessment rate. We also reject Commerce's assertion that it made a ministerial error when it "inadvertently calculated separate assessment rates for CEMEX and CDC as part of the 7th AR Final Results and in the Second Remand." See Third Remand Determination at 5. 19 U.S.C. § 1675(h) defines ministerial errors as "errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial." Considering that in the Fifth Administrative Review (and in the remand decisions in the NAFTA Panel appeals of the final results in that review) and in the Sixth Administrative Review,

Commerce collapsed both CDC and CEMEX for the purposes of calculating the cash deposit margin, and at the same time, calculated separate importer-specific assessment rates for their importers, this Panel finds Commerce's argument that it made an "inadvertent" error to be wholly lacking in credibility.[5]

Further, in light of the fact that none of the parties in appealing the final decision of the Seventh Administrative Review to this Panel challenged the fact that Commerce provided for separate importer-specific assessment rates in the underlying decision, this Panel seriously questions if, as a matter of fact, Commerce made any error at all in calculating separate importer-specific assessment rates for CEMEX and CDC.[6]

B. Commerce's Assertion That It Was "Impossible" To "Apply CEMEX's Sales Of ASTM Type V Cement Sold As Type I Cement For The Hidalgo Plant" Because The Record Does Not Contain Reliable Information Concerning Home-Market Sales At The Hidalgo Plant Is Likewise Fundamentally Flawed

In the Third Remand Determination, Commerce asserts that it is "impossible" to "apply CEMEX's sales of ASTM Type V cement sold as Type I cement for the Hidalgo plant" because the record does not contain reliable

[5] The Panel notes that Commerce concedes that the purported error is one that involves methodology by its statement, "It is well established that the Department cannot deviate from its normal methodologies without a reasonable explanation." *See*, Response of the United States Department of Commerce to comments on the Third Remand Determination at page 4.

[6] Since the issue of whether Commerce made any error at all in calculating separate importer-specific assessment rates for CEMEX and CDC was not timely raised, it is not properly before this NAFTA Panel.

information concerning home-market sales at the Hidalgo plant. See Third Remand Determination at 7. This Panel finds Commerce's assertion to be wholly without merit in light of Commerce's own May 27, 2003, Second Remand Determination (hereinafter "Second Remand Determination").[7]

In the Second Remand Determination, Commerce faced the same set of circumstances as it did in the Third Remand Determination, viz., it had no information as to the type of cement comprising the Hidalgo sales. That is, Commerce did not know which Hidalgo sales were actually of NOM Type I cement, which sales were actually of ASTM Type V cement sold as Type I cement, which sales were actually of ASTM Type I cement, and which sales were of another type of cement. Nevertheless, notwithstanding the lack of such information, Commerce, in the Second Remand Determination, applied as adverse facts available, the highest normal value for NOM Type I sales to the quantity of Hidalgo sales. Commerce did not indicate at this juncture that it was "impossible" to apply the highest normal value for NOM Type I sales to the quantity of Hidalgo sales because there was no information on the record to distinguish the sales of cement produced at the Hidalgo plant between NOM Type I and other types of cement. Just as it was not "impossible" for Commerce to apply the highest normal value for NOM Type I sales to the quantity of Hidalgo sales because there was no information on the record to distinguish the sales of cement produced at the Hidalgo plant, it simply does not

[7] Panelists Joelson and Kennedy dissent on this issue. See pages 10-11, infra.

now follow that it is now "impossible" for Commerce to apply an average of CEMEX's prices for Type V cement sold as Type I cement to the quantity of Hidalgo sales. This is necessarily the case inasmuch as all that is changing is the type of cement whose prices are being applied to the quantity of Hidalgo sales.

Based on the foregoing, we reject Commerce's non-meritorious assertion that it is "impossible" to "apply CEMEX's sales of ASTM Type V cement sold as Type I cement for the Hidalgo plant".

* * * *

Based on the foregoing, this Panel rejects Commerce's assertion that CDC is not entitled to its own importer-specific rate, as well as its assertion that it is "impossible" to "apply CEMEX's sales of ASTM Type V cement sold as Type I cement for the Hidalgo plant." Accordingly, this Panel remands the Third Remand Determination back to Commerce and instructs Commerce to strictly abide by, and implement to the letter, the remand instructions set forth in this Panel's Second Remand Decision. Specifically, this Panel instructs Commerce to apply non-adverse facts available to CDC for the Hidalgo plant sales. To do so, this Panel instructs Commerce to apply CEMEX's sales of ASTM Type V cement sold as Type I cement for the Hidalgo plant in calculating CDC's importer-specific rate. In implementing these instructions, this Panel further instructs Commerce to use as non-adverse facts available for all sales at the Hidalgo plant, an average of CEMEX's prices for Type V cement sold as Type I cement, and instructs Commerce to apply that price to the quantity of Hidalgo sales.

This Panel also instructs Commerce to issue its draft remand determination to the parties within ten (10) days from the date of this Panel decision. The parties' comments on Commerce's draft remand determination shall be limited to ministerial errors and must be submitted to Commerce within five (5) days from the date Commerce issues its draft remand determination. The Panel further instructs Commerce to issue its final remand determination within five (5) days from the deadline to submit ministerial error comments, or if no ministerial error comments are received, within two (2) days from the deadline for the parties to submit ministerial error comments.

Views of Panelists Joelson and Kennedy Concurring in Part and Dissenting in Part with the Majority Opinion

We concur with the opinion of the Panel majority insofar as it holds that Commerce's denial of an importer-specific rate to CDC at this late stage of the proceeding is not in accordance with law and should be set aside. (Point A of the Panel Decision). As the majority points out, Commerce has treated this issue as one that may turn on the particular facts of each administrative review, and, until the most recent redetermination in this review, Commerce considered it appropriate for CDC to have its own importer- specific rate. Moreover, this issue is moot because it was not timely raised on appeal to this Panel. Although 19 U.S.C. ' 1675 (h) confers fairly broad discretion on Commerce to determine which errors it may correct as "ministerial", Commerce's authority in this regard is not "unbridled" and is limited to the correction of errors that may be deemed inadvertent or simply based on oversight. Geneva Steel v. United States, 914 F. Supp. 563, 607-08 (Ct. Int'l Trade 1996); Fabrique de Fer Charleroi SA v. United States, 166 F. Supp. 2d 593, 607 (Ct. Int'l Trade 2001. Commerce's belated attempt to change course here so as to apply a single assessment rate for the two companies does not meet this standard.

With respect to the separate issue of how CDC's importer-specific rate should be calculated, we adhere to the views expressed in our dissenting opinion of September 4, 2003. As we stated then, we conclude that, given the context of a collapsed entity situation, Commerce was acting within its authority in deciding to

attribute to CDC CEMEX's inadequate response with respect to CEMEX's Hidalgo plant sales.

In short, we reject the majority's position regarding the use of adverse facts available against CDC, but agree with the majority that CDC and CEMEX are entitled to separate duty rates. Thus, there should be two duty rates, but the two rates would, of course, be the same rate under our view. We fully appreciate that such a result amounts to harmless error from a substantive standpoint. Nevertheless, we join the majority on the single rate vs. separate rate issue in order to underscore that the panel is unanimous in the view that Commerce's reliance on ministerial error as the rationale for making this kind of last minute change exceeds the bounds of the ministerial error exception.

November 25, 2003. Date Issued.

Louis S. Mastriani, Chairman
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