

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

IN THE MATTER OF:

GRAY PORTLAND CEMENT AND
CLINKER FROM MEXICO
Final Results of the Sixth Antidumping
Administrative Review (August 1, 1995
through July 31, 1996)

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SECRETARIAT FILE NO.
USA-98-1904-02

OPINION AND ORDER OF THE PANEL

May 26, 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 (Gregory J. Spak, Esq. and Kristina Zisis, 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.)

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I. INTRODUCTION

This Binational Panel was 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 to consider issues presented in the requests for review of the March 16, 1998 determination made by the Department of Commerce (“the Department”), International Trade Administration in the Sixth Administrative review of the August 30, 1990 antidumping duty order issued on Gray Portland Cement and Clinker from Mexico.³ The Department’s Final Results for the period of review August 1, 1995 through July 31, 1996 were published in the Federal Register as *Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 12764, March 16, 1998.⁴

Binational Panel Review of these Final Results was initiated pursuant to requests filed by CEMEX, S.A. de C.V. (“CEMEX”), Cementos de Chihuahua, S.A. de C.V. (“CDC”),⁵ and the Southern Tier Cement Committee (“STCC”), all filed on April 14, 1998. Complaints and amended complaints were filed by CEMEX, CDC, and STCC pursuant to Rule 39 of the NAFTA Rules challenging various determinations made by the Department in the Final Results.

II. ISSUES PRESENTED AND SUMMARY OF DECISIONS.

The original and amended complaints alleged that the Department’s Final Results were unsupported by substantial evidence on the record, or otherwise not in accordance with the law,

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 This Opinion will reference many of the administrative reviews, judicial opinions and binational panel determinations in the extended Mexican Cement and Clinker investigation. For ease of reference, these will be referred to as the Order, the Final Results for the appropriate administrative review, the Court citation, or the appropriately numbered Panel Opinion. Full citations are set forth in the attached Appendix A.

⁵ 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.

with regard to a number of issues. CEMEX alleged that the selection of merchandise for model matching purposes on a “sold or invoiced as” basis, rather than a “produced as” basis, was contrary to law; that the Department’s determination that home market sales of cement sold as Type V LA and Type II LA cement were outside “the ordinary course of trade”, and the exclusion of cement produced at the Campana and Yaqui plants sold as Type I cement from the calculation of normal value, were not supported by substantial evidence or otherwise not in accordance with the law; that the Department’s use of facts available and selection of facts available in the calculation of the difference in merchandise adjustment (DIFMER adjustment) was not supported by substantial evidence in the administrative record; and that the use of both bagged and bulk Type I cement for home market sales comparison was contrary to law.

CDC alleged that the Department’s issuance of the original antidumping order, and its initiation and conduct of the instant review, was contrary to law, because it had been based on a petition that was not supported by producers accounting for all or almost all of the production in the region; that the determination to collapse CDC and CEMEX for purposes of calculating a dumping margin was not supported by substantial evidence and/or was otherwise contrary to law; that the Department’s methodology for calculating the DIFMER adjustment for CDC was not supported by substantial evidence and/or was otherwise contrary to law; and that the decision to deny an adjustment to CDC’s indirect selling expenses for the cost of financing antidumping duty cash deposits was not supported by substantial evidence and/or was otherwise contrary to law.

STCC complained that the change by the Department during the Sixth Review from “as invoiced” to “as produced” was not based on any factual basis in the administrative record, and conflicted with long standing practice; that the Department erred based on facts found at

verification in not excluding all of CEMEX's sales from Hermosillo, and applying, as an adverse inference, the highest dumping margin previously determined for CEMEX; that the Department had erroneously granted constructed export price ("CEP") offset adjustments to both CEMEX and CDC; that the Department erred in classifying CEMEX's and CDC's expenses of operating distribution terminals in the US as indirect selling expenses; that the Department should have used total adverse facts available to apply a 20% adverse DIFMER adjustment; that CEMEX and CDC were allowed improper deductions from normal value for freight expenses based on information that did not comply with the Department's requirements; that the Department improperly allowed CEMEX adjustments to normal value for allocated rebates; that the Department improperly allowed CDC a deduction from normal value for claimed "other adjustments"; that Commerce did not deduct foreign indirect selling expenses incurred on U.S. sales in calculating CEP as required, and did not properly account for foreign indirect selling expenses in its calculation; and that the Department had improperly classified U.S. sales by CDC as indirect export price sales rather than constructed export price sales.

Between the filing of the complaints and the final briefing in this review, decisions reached by the Court of Appeals for the Federal Circuit ("CAFC") upheld the methodologies utilized by the Department with regard to several issues that had been raised.⁶ In addition, based on developments in subsequent administrative reviews of the Mexican cement antidumping order, the parties have changed certain positions.⁷

With these withdrawals, the issues remaining for review by the Panel are (with a Summary of the Panel's decisions):

⁶ Micron Technology, Inc. v United States 243 F.3d 1301 (CAFC 2001) (various CEP issues); U.S. Steel Group v. United States 225 F.3d 1284 (CAFC 2000) (certain CEP expenses); NTN Bearing Corporation of America v. United States 295 F.3d 1263 (CAFC 2002) (cash deposits).

⁷ Supplemental Brief of STCC, April 17, 2001; Issues Statements by CEMEX, CDC, and STCC all dated May 24, 2004; February 23, 2005 Hearing, Transcript at pages 134, 148.

A. Revocation of Order

Was the Department's refusal to revoke the Antidumping Duty Order based upon alleged defects in the initiation of the original less than fair value ("LTFV") investigation supported by substantial evidence on the record and otherwise in accordance with law?

The Panel affirms the Department's decision to refuse to revoke said Order.

B. Ordinary Course of Trade

1. Was the Department's determination that CEMEX's home market sales of Type V cement sold as Type II and Type V cement produced at the Hermosillo plants were outside the ordinary course of trade supported by substantial evidence on the record and otherwise in accordance with the law?

The Panel remands this issue to the Department for further consideration.

2. Was the Department's decision that home market sales of Type V cement produced at the Hermosillo plants and sold as Type I cement could not be used for determination of normal value, and the Department's decision to use sales of Type I cement produced at other Mexican plants for normal value comparison, supported by substantial evidence on the record and otherwise in accordance with the law?

The Panel upholds the Department's rejection of the home market sales of Type V cement sold as Type I cement from the Hermosillo plants for normal value comparison, and the use of partial adverse facts available by using sales of Type I cement produced at other Mexican plants.

C. Collapsing

Was the Department's decision to treat CDC and CEMEX as a single entity, i.e., to "collapse" both producers for purposes of calculating a single dumping margin, supported by substantial evidence on the record and otherwise in accordance with the law?

The Panel affirms the Department's decision to collapse CDC and CEMEX.

D. Bulk and Bagged

Was the Department's determination that bulk and bagged sales constitute identical merchandise, with only an adjustment allowing for differences in packaging, so that the entire universe of Type I sales was properly included in its calculation of normal value, supported by substantial evidence on the record and otherwise in accordance with law?

The Panel upholds the Department's determination that bulk and bagged cement constituted identical merchandise for normal value comparison purposes.

E. Terminal Charges

Was the Department's determination to classify CEMEX's and CDC's U.S. terminal expenses as indirect selling expenses supported by substantial evidence and otherwise in accordance with law?

The Panel affirms the Department's decision regarding the treatment of terminal charges.

F. DIFMER adjustment

1. Was the Department's use of partial adverse facts available to calculate the DIFMER adjustment supported by evidence in the record and in accordance with the law?

The Panel upholds the Department's determination to use partial adverse facts available in calculating the DIFMER adjustment.

2. Was the Department's DIFMER calculation accurately based on the information available in the record?

The Panel remands the determination to the Department for further analysis and explanation regarding the calculation.

G. Classification of certain CEP sales

Was the Department's request for remand to reclassify certain sales as CEP sales proper?

The Panel remands the issue to the Department for reclassification of the subject sales.

III. BACKGROUND

Procedural History

The Department of Commerce issued an antidumping duty Order on Gray Portland Cement and Clinker from Mexico on August 30, 1990.⁸ Subsequent to the Order, numerous administrative reviews and judicial proceedings have occurred. (See Appendix A.) This proceeding is concerned with the Sixth Administrative Review, covering the period of investigation from August 1, 1995 through July 31, 1996. The Department published its Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part for this review on August 12, 1996.⁹ The Preliminary Results of Antidumping Duty Administrative Review: Gray Portland Cement and Clinker from Mexico were published on September 10, 1997.¹⁰ The final results, portions of which are challenged in this proceeding, were published on March 16, 1998.¹¹

⁸ Antidumping Duty Order: Gray Portland Cement and Clinker from Mexico, 55 Fed. Reg. 35443.

⁹ 61 Fed. Reg. Issue. No. 156.

¹⁰ 62 Fed. Reg. 47626.

¹¹ 63 Fed. Reg. 12764.

Cement and Clinker

Cement is a calcined mixture of clay and limestone, generally mixed with other chemical components. Gray Portland Cement is a hydraulic cement (sets or hardens under water) used as an industrial binding agent. Cement clinker is an intermediate product produced during the manufacture of cement, and has no use other than being ground into finished cement. Clinker is generally in the form of small, grayish black pellets, whereas finished cement is in the form of a gray powder.

Cement is produced by grinding together naturally occurring materials such as limestone, clay, and iron ore. These materials undergo a heat treatment to create clinker, which is then ground and, where required, mixed with other materials such as gypsum to make the cement product. Naturally occurring minerals in the raw materials may affect the nature of the finished product. Cement, mixed with water, sand, and other aggregates, such as gravel or crushed stone, produces concrete. Concrete is largely consumed by the construction industry, in highway building construction, and the manufacture of concrete blocks and precast concrete units.

During the period of review, gray portland cement in both the United States and Mexico was classified in conformity with standards established by the American Society for Testing Materials (“ASTM”). ASTM categories begin with Type I, for use when no special properties are required, and include Type II, Type III, Type IV, and Type V. Each type has a more stringent specification. Generally, a higher type of cement (e.g. Type V) will also meet the standards for, and be capable of the same uses as, lower grades such as Type II or Type I.¹²

¹² Physical characteristics and uses of Gray Portland Cement and Clinker are described in Gray Portland Cement and Cement Clinker from Japan, Mexico, and Venezuela, Investigation Numbers 303-TA-21 (Review) and 731-TA-451, 461, 519 (Review), US ITC Publication 3361, October 2000, at p I-23-27.

IV. GOVERNING LAW

NAFTA Article 1904 (1) provides for binational panel review, when requested by the parties, to replace judicial review of final antidumping determinations. Although the domestic court of the country whose antidumping determination is being challenged is replaced by a binational panel, the binational panel is nevertheless required to make its decision based solely on the national law of the importing country, utilizing “the 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.”¹³ For this review, the binational panel acts in the place of the United States Court of International Trade (“CIT”), and, like that court, is bound by judicial precedents of the Court of Appeals for the Federal Circuit and the United States Supreme Court.

The panel recognizes, and discusses at appropriate points in this opinion, that neither CIT decisions nor binational panel opinions are binding on this panel. However, in the same way that a CIT judge may defer to the persuasive nature of an earlier decision issued by another CIT judge on the same issue, this panel can and does look to both CIT opinions and other binational panel opinions for guidance, with the authority to be given such opinions based on the analysis, reasoning, and persuasiveness of the arguments made.¹⁴

Binational panel review is made on the basis of review of the administrative record made during the specific investigation being challenged.¹⁵

¹³ NAFTA, Article 1904.2

¹⁴ Rhone Poulenc v. United States, 583 F. Supp. 607, 612 (CIT 1984)

¹⁵ NAFTA Article 1911 defines “administrative record” to mean:

(a) all documentary or other information presented to or obtained by the competent investigating authority in the course of the administrative proceeding, including any governmental memoranda pertaining to the case, including any record of *ex parte* meetings as may be required to be kept;

V. STANDARD OF REVIEW

A binational panel hearing a Chapter 19 dispute under NAFTA is required to use the standard of review specified by NAFTA Article 1904 (3) and NAFTA Annex 1911. For review of a decision made by a U.S. agency, the required standard is that set forth in 19 USC § 1516a(b)(1)(B), which requires 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 law.”

These two criteria have been the subject of considerable judicial interpretation. The Supreme Court has stated that the substantial evidence standard requires evidence on the record which is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” The evidence “must do more than create a suspicion of the existence of the fact to be established...it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.”¹⁶

The substantial evidence test, however, constitutes “something less than the weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.”¹⁷ The

(b) a copy of the final determination of the competent investigating authority, including reasons for the determination;

(c) all transcripts or records of conferences or hearings before the competent investigating authority; and

(d) all notices published in the official journal of the importing Party in connection with the administrative proceeding.

¹⁶ Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951), *citing* Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229, and Labor Board v. Columbian Enameling & Stamping Co., 306 US 292, 300.

¹⁷ Consolo v. Federal Maritime Commission 383 U.S. 607, 620 (1966).

panel is required to give “considerable deference” to the agency’s expertise and, given a choice between “two fairly conflicting views”, cannot substitute its judgment for that of the agency.¹⁸

Although afforded great deference, the agency’s determination must be based on adequate analysis and reasoning. There must be a rational connection between the facts found and the choice made by the agency, and a reasonably discernable path of reasoning with sufficient explanation to allow the panel to meaningfully assess the agency’s position.¹⁹

The second concept under the mandated standard of review is that the agency determination must be made “in accordance with law”. This concept has been discussed and developed at length in the wake of the decision of the Supreme Court in Chevron USA, Inc. v. National Resources Defense Counsel, Inc.²⁰ Under this Chevron Doctrine, the panel must conduct a two step analysis. The first question is whether Congress has spoken directly on the specific question at issue. Where this occurs, the unambiguously expressed intent of Congress must be given full effect. In areas where Congress has not directly addressed the question, however, the reviewing panel must determine whether the agency, in applying the statute, has acted reasonably and made a permissible construction. Where the agency has made an appropriate determination, a panel is not permitted to substitute its own judgment for that of the agency.²¹

The application of these concepts requires the Panel to uphold the determinations of the Commerce Department in the Final Results whenever the Panel finds such determinations both supported by evidence on the record and in accordance with law. These principles have been

¹⁸ GMN Georg Mueller Nurnberg AG v. United States, 763 F. Supp. 607, 611 (CIT 1991); PPG Industries, Inc. v. United States, 708 F. Supp. 1327, 1329 (CIT 1989).

¹⁹ These concepts are discussed, and substantial citations provided, in the Fifth Review Panel Opinion of June 18, 1999, pages 16-18.

²⁰ 467 U.S. 837 (1984).

²¹ Steel Authority of India, Ltd. v. United States, 146 F. Supp. 2d 900, 905 (CIT 2001).

discussed at greater length in numerous Panel decisions under both NAFTA and the U.S.-Canada Free Trade Agreement. The Panel particularly recommends, and hereby adopts, the discussions of the Standard of Review in the Fourth, Fifth, and Seventh Review Panel Opinions on Cement and Clinker from Mexico.²²

VI. DISCUSSION OF ISSUES

A. Revocation

Issue presented

Was the Department's refusal to revoke the Antidumping Duty Order based upon alleged defects in the initiation of the original LTFV investigation supported by substantial evidence on the record and otherwise in accordance with law?

The Department's Decision

During the Sixth Administrative Review, CDC argued to the Department that the original less than fair value investigation initiated on October 16, 1989 was jurisdictionally deficient, as the Department had assumed without measuring that the petition had the required support of a regional industry. CDC argued that the Department must not only terminate this current review, but also revoke the underlying antidumping duty order. In the Final Results of the Sixth Review, the Department determined that it properly initiated the original antidumping investigation and found that it lacked the legal authority to revoke the order in this review.

Arguments of the Parties

CDC

CDC argues that the Department conducted the investigation and issued the order in plain violation of the standing requirements under the regional industry provisions of the antidumping

²² Fourth Review Opinion pp 4-8; Fifth Review Opinion pp. 11-23, Seventh Review Opinion pp. 49. These Opinions are available on the NAFTA Secretariat website, www.nafta-sec-alena.org, Chapter 19 Panel Decisions, under the case numbers set forth in Appendix A.

statute, since the Department's investigation and order were based on a regional industry petition that was not filed on behalf of the requisite level of producers in the region. CDC points out the statutory linkage between the "on behalf of" concept and the term "industry."²³ CDC notes that a petitioner's standing to request antidumping relief, and the Department's authority to provide such relief, depend on how "industry" is defined. Under 19 U.S.C. §1677 (4)(C) the standard focuses on producers representing "all or almost all" of the production within the market. CDC indicates that it was established during the investigation that only 62 percent of the regional production supported the petition.²⁴

STCC

STCC states in its Brief that CDC could have challenged the Department's decision to initiate the original investigation by filing an appeal to the CIT within 30 days of the date of publication of the antidumping duty order pursuant to 19 U.S.C. § 1516a.

STCC also points out that CDC did not exhaust its administrative remedies in the original investigation. NAFTA Article 1911 covers the principle of "exhaustion of administrative remedies", which must be applied by binational panels. "Both the [NA]FTA and pertinent U.S. case law require that parties exhaust their administrative remedies before seeking panel review of an issue"²⁵ Since the administrative remedies were not exhausted, the Department did not have the opportunity to cure any defect in the petition by self-initiating an investigation under 19 USC § 1673a(a) or collecting additional information regarding the degree of industry support for the petition.

The Department

²³ See, Gilmore Steel Corp. v. United States, 585 F. Supp. 670, 674-77 (Ct. Int'l Trade 984)

²⁴ CDC Brief of February 18, 1999 at p 62.

²⁵ See, Certain Cut-To-Length Carbon Steel Plate from Canada, USA-93-1904-04 (US-Canada FTA October 31, 1994).

The Department notes that challenges to the original LTFV investigation are untimely and beyond the authority of this Panel. In the Notice of Initiation of the original investigation, the Department not only announced that a “petitioner has alleged that it has standing to file the petition” but also invited any domestic interested parties that “wished to register support for, or opposition to, this petition, to file written notification with the Assistant Secretary for Import Administration.”²⁶ The Department points out that no member of the domestic cement industry ever notified the Department that it was opposed to the petition or the initiation of the investigation.²⁷ None of the Mexican cement producers²⁸ questioned that the Department’s initiation of that proceeding as contrary to law. The petitioner was the only party to appeal the Department’s final LTFV determination.²⁹

Analysis

CDC raised the same issue and the same arguments were made in the Third, Fourth, and Fifth Reviews preceding this Sixth Review, and indeed they have been made in the Seventh through the Thirteenth Reviews. The Department’s consistent decision that it “has no authority to rescind its initial LTFV investigation” has been considered and upheld by Binational Panels in the Third, Fifth, and Seventh Reviews.³⁰

Although decisions made by other Panels are never considered binding authority, the consistent, well reasoned and fully expressed opinions of these Panels overwhelmingly support the Department’s position that any jurisdictional challenge could only be made in response to the

²⁶ See, Gray Portland Cement and Clinker from Mexico, 54 Fed. Reg. 43190 (October 23, 1989).

²⁷ See, Final LTFV Determination, 55 Fed. Reg. 29244 (1990).

²⁸ CEMEX, APASCO S.A de C.V. and CDC

²⁹ AD Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, Slip Op. 94-152 (September 26, 1994).

³⁰ Third Review Panel Opinion pp. 9-28; Fifth Review Panel Opinion pp. 24-43, Seventh Review Panel Opinion pp. 65-70.

original LTFV determination and the antidumping duty order based thereon.³¹ There is no difference in the factual record from review to review regarding this claim. This Panel adopts the opinions of the Third, Fifth, and Seventh Review Binational Panel decisions on this issue, and takes special note of footnote 9 to the Seventh Panel decision regarding the lack of mechanisms within the panel process “for deterring unwanted and frivolous claims.”³²

B. Ordinary Course of Trade

1. First Issue Presented

Was the Department’s determination that CEMEX’s home market sales of Type V cement sold as Type II and Type V cement produced at the Hermosillo plants were outside the ordinary course of trade supported by substantial evidence on the record and otherwise in accordance with law?

The Department’s Decision

In the Final Results of the Sixth Review, the Department determined that CEMEX’s home market sales of Type V cement sold as Type II and Type V cement produced at the Hermosillo plants were outside “the ordinary course of trade” and could not be used as the basis for calculating normal value.³³ Specifically, with respect to Type II cement, the Department found that:

(1) the volume of Type II home market sales is extremely small compared to sales of other cement types; (2) the number and type of customers purchasing Type II cement is substantially different from other cement types; (3) Type II is a specialty cement sold to a niche market; (4) shipping distances and freight costs for Type II cement sold in the home market is significantly greater than for sales

³¹ The Panel notes that these findings relate specifically to annual administrative reviews, and takes no position regarding reviewability of the issues under sunset review procedures.

³² Seventh Review Panel Opinion, footnote 9 at p. 70, states in full: “CDC’s persistence in pursuing this claim after having had it rejected by two previous panels highlights for the panel one of the shortcomings of the binational panel review process, namely, the lack of an effective sanctioning mechanism for deterring unwarranted and frivolous claims. See CIT Rule 11(b).”

³³ Final Results of the Sixth Review at 12770-773.

of other cement types; and (5) CEMEX's profit on Type II sales is small in comparison to its profits on all cement types.³⁴

The Department further noted that:

(i) CEMEX did not sell Type II cement in Mexico until it began production for export in the mid-eighties, despite the fact that small domestic demand for such existed prior to that time; and (ii) sales of Type II cement continue to exhibit a promotional quality that is not evidenced in CEMEX's ordinary sales of cement.³⁵

The Department also found that, although sales of Type V cement as Type V were "less unusual" than sales as Type II, Type V cement was nevertheless outside the ordinary course of trade based on the same factors mentioned above concerning Type II cement.³⁶

Arguments of the Parties

The Department

The Department made its ordinary course of trade determination on the basis of the following statutory language:

19 U.S.C. § 1677(15) Ordinary course of trade

The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade:

- (A) Sales disregarded [as being below cost] under section 1677b(b)(1) of this title.
- (B) Transactions [between affiliated persons that are] disregarded [for purposes of calculating cost] under section 1677b(f)(2) of this title.

³⁴ Id., at 12771.

³⁵ Id.

³⁶ Id.

Reading the statute and the Statement of Administrative Action³⁷ (“SAA”) together, the Department found it –

clear that a determination of whether sales (other than those specifically addressed in section 771(15) are in the ordinary course of trade must be based on an analysis comparing the sales in question with sales of merchandise of the same class or kind generally made in the home market (*i.e.*, the Department must consider whether certain home market sales of cement are ordinary in comparison with other home market sales of cement).³⁸

To reach its decision the Department acknowledged the purpose of the ordinary course of trade provision, which is “to prevent dumping margins from being based on sales which are not representative” of the home market.³⁹ The Department noted that Congress has not specified particular criteria for the Department to use, but that the Department has discretion to choose how best to analyze the many factors involved in determining whether sales are made in the ordinary course of trade.⁴⁰ The Department evaluates all the circumstances particular to the sales in question recognizing that each company has its own conditions and practices particular to its trade. Here, the Department’s decision to exclude sales of Type II and Type V cement from the calculation of normal value “centered around the unusual nature and characteristics of these sales compared to the vast bulk of CEMEX’s other home market sales” and the conclusion that these sales were outside the ordinary course of trade.⁴¹

Additionally, the Department issued a questionnaire to CEMEX on March 10, 1997 regarding two items: historical sales trends and the “promotional quality” of CEMEX’s Type II sales. CEMEX did not respond to these two items, and the Department concluded that the facts

³⁷ The SAA, in considering the statutory language, states that “Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market. SAA, H.R. Doc. No. 103-316, Vol. 1, 103d Cong. (1994), at 834 (emphasis added).

³⁸ Final Results of Sixth Review, at 12770.

³⁹ Id.

⁴⁰ Id.

⁴¹ Final Results of Sixth Review, at 12770

about them for this Sixth Administrative Review had not changed from the Second Administrative Review when they were addressed and it was found that the sales trends and promotional quality of Type II (and Type V) sales rendered them outside of the ordinary course of trade.

The Department rendered its decision solely on the record of the Sixth Review, but it acknowledged that the facts were very similar to those which led the Department to conclude in the Second Review that home market sales of Type II and Type V cement were outside the ordinary course of trade, and that determination was upheld by the Federal Circuit in the CEMEX case (133 F. 3d 897 (CAFC 1998) (“... Commerce’s decision that the sales of Types II and V cements were outside the ordinary course of trade was supported by substantial evidence.”))

CEMEX

In its Panel Rule 57(1) brief, and consistently throughout this review, CEMEX did not criticize the applicable law but asserted that the Department failed “to consider or acknowledge the evidence of record which indicated that CEMEX’s home market sales of Type V LA cement to Type II LA customers and Type V LA customers were within the ordinary course of trade.”⁴² CEMEX argued that the final results “only acknowledge evidence which purportedly supports a preconceived result from prior determinations” and fails to take into consideration certain factors normally relevant to the ordinary course of trade determinations.⁴³

⁴² CEMEX Panel Rule 57(1) brief, (February 14, 1999) at 12.

⁴³ Id., at 13.

First, CEMEX argued that its home market sales of Type II and Type V cement were made pursuant to a bona fide customer demand for those cement types.⁴⁴ Although in previous administrative reviews, the Department verified that an established home market existed for these types of cements and that CEMEX's customers required these cements, in the final results of this review the Department failed to acknowledge that such demand exists.⁴⁵ CEMEX claimed that the presence or absence of a bona fide home market demand "has been a key factor, addressed in virtually every Commerce ordinary course of trade analysis".⁴⁶ Conversely, the Department has "consistently found that the absence of a home market demand is indicative of sales made outside the ordinary course of trade."⁴⁷

CEMEX asserted that the focus of the ordinary course of trade inquiry is whether the sales themselves, not their volume, were made in the ordinary course of trade.⁴⁸ Consequently, CEMEX claimed that "the small relative sales volume of sales to Type II LA and Type V LA customers compared to Type I sales, in isolation, is not indicative of sales made outside the ordinary course of trade, when, as in this case, absolute sales volume is significant and those sales are made to satisfy a bona fide home market demand."⁴⁹

⁴⁴ Id. CEMEX clarified that "{w}hereas Type I cement is a general purpose cement, Type II LA and Type V LA cements are higher specification cement required, for example, for certain construction projects in which the cement will have contact with ground water (i.e., dams, underground subway systems, underground sewage systems).

⁴⁵ Id. CEMEX noted that in the Second Administrative Review the Department confirmed an established need for Type II and Type V cement exists in Mexico stating that "customers have certain specifications which they must meet, and cannot switch to a cheaper type of CEMENT." (citing Prop. Doc. 55; Sixth Review Home Market Sales Verification Report, at 17)

⁴⁶ Id. See, e.g., Certain Welded Carbon Steel Pipes and Tubes from Thailand, 61 Fed. Reg. 1328, 1331 (1996); Electrolytic Manganese Dioxide from Japan, 58 Fed. Reg. 28551, 28552 (1993); Television Receivers, Monochrome and Color, from Japan, 56 Fed. Reg. 24370, 24371 (1991).

⁴⁷ Id., at 15. See e.g., Welded Stainless Steel Pipe from Malaysia, 59 Fed. Reg. 4023, 4025 (1994); Certain Welded Carbon Steel Pipes and Tubes from India, 51 Fed. Reg. 64753, 64755 (1986); Industrial Nitrocellulose from the Federal Republic of Germany, 55 Fed. Reg. 21058, 21059 (1990).

⁴⁸ Id., at 18. See East Chilliwack Fruit Growers Cooperative v. United States, 11 CIT 104, 108, 655 F. Supp. 499, 503 (1987) (the court held that relative sales volume, or whether the seller ordinarily sell the product, by themselves, were factors not relevant to the ordinary course of trade analysis.)

⁴⁹ Id.

Second, CEMEX claimed that the Department failed to consider other record evidence concerning factors that have been deemed to be relevant to the ordinary course of trade analyses in previous cases, including whether the sales in question were of obsolete, defective, or second-quality merchandise.⁵⁰ CEMEX asserted that in their ordinary course of trade analyses, the Department and reviewing courts have both considered whether sales in question were of obsolete, defective or second-quality merchandise.⁵¹

Specifically, CEMEX said that the Department failed to acknowledge that “all of CEMEX’s sales of Hermosillo-produced cement were of first-quality cement and were not of obsolete, defective or second-quality merchandise.”⁵² CEMEX further asserted that the Sixth Review Home Market Sales Verification Report establishes that CEMEX’s home market customers actually had a specific need for Type II and Type V cement and used these products for their intended purposes.⁵³ CEMEX argued that the use of these cements for their intended purposes in the home market is further supported by “the fact that the subject merchandise was not export overrun merchandise.”⁵⁴

Finally CEMEX argued that in its ordinary course of trade determination, the Department should not have considered factors of which there is no evidence in the record. Specifically, CEMEX urges that since the administrative record does not contain information which would suggest that home market sales of Type II and Type V cements were subject to “special contractual arrangements, special pricing policies or special sales, payment or shipment terms”,

⁵⁰ Id., at 15.

⁵¹ Id. See Monsanto Co. v. United States 12 CIT 937, 698 F. Supp. 275, 278 (1988); Hot-Rolled Carbon Steel Flat Products from France, 58 Fed. Reg. 37125, 37126 (1993); Certain Stainless Steel Welded Pipes and Tubes from Taiwan, 57 Fed. Reg. 27735, 27736 (1992).

⁵² Id.

⁵³ Id., at 16.

⁵⁴ Id.

these factors should not have been considered as indicative of sales in the ordinary course of trade by the Department.⁵⁵

STCC

Initially, STCC set forth the applicable standard of review. It noted that the premise behind the U.S. antidumping law⁵⁶ is to compare prices fairly and accurately and in order to achieve this goal the Department must exclude sales made outside the ordinary course of trade. The focus of this NAFTA Chapter 19 Review Panel, therefore, should be whether the Department's decision to exclude home market sales from the calculation of normal value was in fact supported by substantial evidence,⁵⁷ and that in determining whether the decision was supported by substantial evidence the Panel may not reweigh the evidence or substitute its judgment for that of the Department⁵⁸ but, must take into account all relevant factors including those that may ultimately detract from the Department's original determination.⁵⁹

First, STCC concurs with the Department's finding that CEMEX's sales of Type II and Type V cement are outside the ordinary course of trade since CEMEX implemented changes in the production and distribution of these cement types after the issuance of the antidumping order and created a "highly restricted, niche market for those products that had the purpose and effect of manipulating the dumping margin."⁶⁰ Specifically, STCC asserted that although CEMEX continued to export Type II cement to the United States it ceased exporting Type I cement.⁶¹ Additionally, STCC argued that in an effort to decrease the normal value of Type II and Type V

⁵⁵ Id., at 16. See e.g., Electrolytic Manganese Dioxide from Japan, 58 Fed. Reg. 28551, 28552 (1993); Color Television Receivers from Japan, 56 Fed. Reg. 243370, 24731 (1991).

⁵⁶ 19 U.S.C. § 1677(b).

⁵⁷ STCC Rule 57(3) Brief (May 3, 1999), at 7-8 (*citing*, CEMEX, SA v. United States, 133 F.3d 897, 900-01 (Fed. Cir. 1998)).

⁵⁸ Metallwerken Nederland B.V. v. United States, 728 F. Supp. 730, 734 (Ct. Int'l Trade 1989).

⁵⁹ Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

⁶⁰ STCC Rule 57(3) Brief, at 10.

⁶¹ Id., at 11.

cements, CEMEX (1) artificially lowered the ex-factory home market price of Type II and Type V cement while simultaneously increasing the ex-factory price of all other types of cement sold in the home market; and (2) consolidated production of Type II and Type V cement far from the customers who had demand for it, resulting in high freight costs which under antidumping law need to be deducted from normal value as movement expenses.⁶² STCC argued that this increase in freight costs “drastically lowered CEMEX’s normal value on sales of Type II and Type V sales – the products which were identical to the products CEMEX sold to the United States.”⁶³

STCC further claimed that CEMEX began absorbing the high-freight costs on sales of Type II and Type V cements to make them more palatable to the restricted number of customers demanding these products.⁶⁴ According to STCC, CEMEX was able to absorb these costs since they were offset by the much higher ex-factory prices on its high-volume sales of other products.⁶⁵

Second, STCC argued that in past administrative reviews the Department has found CEMEX’s home market sales to be outside the ordinary course of trade. According to STCC, those previous determinations should serve as guiding precedent upon this Panel. Additionally, STCC claimed that the Panel is bound by the decision of the U.S. Court of Appeals for the Federal Circuit affirming the Department’s ordinary course of trade determination in the Second Administrative Review.⁶⁶ STCC argued that because the administrative record outlining the ordinary course of trade issue in the second review is factually “very similar” to the one currently before the Panel, the Panel is bound by the Federal Circuit’s decision.⁶⁷

⁶² Id., at 11-12.

⁶³ Id., at 12.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ CEMEX, 133 F. 3d at 902.

⁶⁷ STCC Rule 57(3) Brief, at 25 (citing Department of Commerce final results, 63 Fed. Reg. 12771).

Third, STCC responded to the substantive merits of CEMEX's ordinary course of trade argument. STCC notes that CEMEX does not dispute that the Department's decision was unsupported by substantial evidence, but rather claims it failed to take all required factors into account and incorrectly considered irrelevant factors.⁶⁸ STCC further claimed that all the factors the Department relied upon in making its ordinary course of trade determination were supported by substantial evidence.

Specifically, STCC stated that the long shipping distances and high freight costs associated with sales of Type II and Type V cements are atypical to CEMEX's usual practice since shipment of cement generally takes place over short distances.⁶⁹ STCC further argued that irregularities in CEMEX's profit margins between Type II cement sales and other types suggest sales outside the ordinary course of trade. Relative profitability can be "one of several significant 'conditions...in the trade under consideration' within the meaning of § 1677(15)."⁷⁰ Furthermore, STCC reminded the Panel that the U.S. Court of Appeals for the Federal Circuit has already rejected CEMEX's argument that the proper comparison of profitability should be absolute rather than relative terms.⁷¹

Fourth, STCC argued that Type II and Type V cements are specialty cements sold to a "niche" market and thus are sales made outside the ordinary course of trade.⁷² Type I cement, a general-purpose cement, is sold throughout the country.⁷³

Fifth, STCC claimed the small sales volume of Type II and Type V cements is indicative of sales being outside the ordinary course of trade. STCC reiterated that contrary to CEMEX's

⁶⁸ Id., at 26-27.

⁶⁹ Id., at 33-34.

⁷⁰ See Laclede Steel v. United States, 18 CIT 965, 967 (1994).

⁷¹ CEMEX, 133 F. 3d, at 901.

⁷² CEMEX does not dispute the characterization of Type II and Type V cements as specialty cements. As such, its sales are concentrated within the Mexico City area.

⁷³ STCC Rule 57(3) Brief at 30.

assertion, it is the relative rather than absolute sales volume that is the proper measure of sales being outside the ordinary course of trade.⁷⁴ Additionally, STCC claimed there was no support for CEMEX's proposition that an existence of a bona fide home market demand makes a low sales volume irrelevant.⁷⁵

Sixth, STCC supported the Department's finding that the number and types of customers for Type II and Type V cement sales differed from customers of other cement types. STCC noted that CEMEX has not disputed the Department's finding that the number and type of customers of Type II and Type V cement were different from other cement types.⁷⁶

Seventh, STCC argued that CEMEX's home market sales were outside the ordinary course of trade because they did not occur until mid-1980s when exports to United States began. STCC said that the Department properly relied upon facts available in the Second Administrative Review to arrive at the conclusion that sales were outside the ordinary course of trade.⁷⁷ Furthermore, STCC cited examples of evidence from the Sixth Administrative Review that it claims would support this conclusion with substantial evidence.⁷⁸

Finally, STCC claimed that CEMEX sold Type II and Type V cement for motives other than to obtain profit. STCC again directs the Panel to the finding of the Federal Circuit after the second review, noting it had found "{t}he promotional quality of the sales of Type

⁷⁴ See, e.g. Certain Welded Non-Alloy Steel Pipe From The Republic Of Korea, 62 Fed. Reg. 36761, 36762 (1997), Certain Cold-Rolled And Corrosion-Resistant Carbon Steel Products from Korea, 62 Fed. Reg. 18404, 18437 (1997), Canned Pineapple Fruit From Thailand, 60 Fed. Reg. 29553, 29563 (1995), Certain Welded Carbon Steel Standard Pipes And Tubes From India, 56 Fed. Reg. 64753, 64755 (1991).

⁷⁵ STCC Rule 57(3) Brief at 66 (citing CEMEX, S.A. v. United States, 19 CIT 587, 590 n. 5 (1995) "The courts...have repeatedly emphasized looking at the totality of the circumstances, not just one factor...Further, Commerce has found that other factors may indicate that sales made to satisfy home market demand were not in the ordinary course of trade.")

⁷⁶ Id. at 70

⁷⁷ STCC Rule 57(3) Brief at 74-75 (citing The Department's Ordinary Course of Trade Memorandum, at 5-6, 8).

⁷⁸ Id., at 75-78.

II...cement...differentiated them from CEMEX's other products and therefore rendered them outside the ordinary course of trade."⁷⁹ Similarly, the Department found this promotional quality based on facts available during the Sixth Review.⁸⁰ STCC requested the Panel to disregard an assessment of whether the Department properly relied upon facts available and instead allow the evidence alone to demonstrate this factor.⁸¹

STCC supported the Department's position on ordinary course of trade, stating that the Department correctly and accurately considered all relevant evidence. Additionally, STCC said CEMEX had the burden to otherwise overcome this presumption.⁸²

Analysis

The parties in this case have commented on how their understanding of the issues has evolved and developed during the course of multiple administrative reviews and judicial/NAFTA panel determinations.⁸³ The Binational Panel Review of the seventh administrative review (1996-1997) provides an illustration of this process in connection with consideration of the ordinary course of trade.⁸⁴ In its original determination, issued May 30, 2002, the Seventh Panel found that Type V cement sold as Type V and as Type II was outside the ordinary course of trade, despite having "some reservations".⁸⁵ Based on Commerce's consideration of numerous factors and the Panel's finding that "a balancing test that is fact specific and based on the totality of the circumstances...is well nigh impossible...to reverse"⁸⁶, the Panel upheld the Department.

⁷⁹ CEMEX, 133 F. 3d, at 901.

⁸⁰ Grey Portland Cement and Clinker From Mexico, 62 Fed. Reg. 17153, 17154.

⁸¹ STCC Rule 57(3) Brief, at 82-83.

⁸² Grupo Industrial Camesa v. United States, 85 F.3d 1577, 1582 (Fed. Cir. 1996).

⁸³ Statements made at the February 23, 2005 Hearing in Washington, DC, Transcript at pp. 6, 78.

⁸⁴ Seventh Review, Panel Opinion.

⁸⁵ Id. at 16.

⁸⁶ Id. at 22.

With regard to the treatment of Type V cement sold as Type I, however, the Seventh Panel found that Commerce had failed to give “an adequate explanation of why these various factors support the conclusion.”⁸⁷ While recognizing that the determination that Type V cement sold as Type I could be found to be outside the ordinary course of trade based on a totality of the circumstances, the panel remanded the issue to Commerce with instructions to explain why its findings supported that determination.⁸⁸

On remand, Commerce reversed its position on this issue in the Final Results of Redetermination Pursuant to NAFTA Panel issued on September 27, 2002.⁸⁹ Commerce reconsidered the differences in freight costs, relative profit levels, the number and type of customers, and the disparities in handling charges, and found that only one factor, disparity in sales volume, would support its original conclusion. Upon reconsideration, Commerce found that sales of both types of cement were made to the same types of customers, and that the level of profitability was “comparable”. Differences in freight costs and disparity in handling charges were considered, but Commerce noted that the “net effect of the differences is reflected in the profitability of the two types of cement”, and “that those differences are ultimately reflected in their relative profit levels.”⁹⁰ Commerce therefore determined that the Type V cement sold as Type I was sold in the ordinary course of trade, a determination upheld by the Seventh Panel in its April 11, 2003 decision.⁹¹

The redetermination by Commerce following the Seventh Panel’s original decision reflects a further development and change in the methodology used by Commerce in considering

⁸⁷ *Id.* at 33.

⁸⁸ *Id.* at 34.

⁸⁹ First Remand Determination Pursuant to NAFTA Panel, Seventh Review.

⁹⁰ Quotations from the Final Results of Redetermination reproduced in the Seventh Panel decision, Gray Portland Cement and Clinker from Mexico (Seventh Review) (Remand), USA-Mex-99-1904-03 (NAFTA April 11, 2003), at pp 11-12.

⁹¹ *Id.*, at 14.

ordinary course of trade issues in the cement and clinker investigations. This new methodology, or understanding of the relationship of the factors involved in the OCT issue, was raised by CEMEX as a reason for reconsidering, in this sixth review, the determination that Type V cement sold as Type V and Type II cement is outside of the ordinary course of trade. CEMEX argues that, when costs due to shipping distances and handling charges are contained in the determination of net profitability, in the same way that Type V cement sold as Type I in the Seventh Review was found to have “comparable” but not identical profitability, the Type V cement sold as Type V and as Type II cement in this Sixth Review shows “comparable” levels of profitability.⁹²

Commerce, in its Remand Determination in the Seventh Review, found that the number of customers for Type V cement sold as Type I was “significantly fewer” than the number of customers for Type I, but that this was “unremarkable given that CEMEX sold substantially less Type V as Type I than it did Type I.”⁹³ This reasoning would indicate that the number of customers can be an alternative indicator of the volume of sales, which, treated as a single factor, was insufficient to support a finding that sales were outside the ordinary course of trade.

CEMEX also disputes the use of “facts available” in considering the promotional quality of the sales.⁹⁴ Although the Department asserts that the information provided by CEMEX⁹⁵ was

⁹² Supplemental Brief of CEMEX, S.A. de C.V., May 4, 2004 at 4. Although only referenced by the Department in footnote 5 of its May 13, 2004 Reply to CEMEX’s Supplemental Brief, CEMEX argues that shipping distances must be considered part of the net profitability determination.

⁹³ Final Results, *supra*, note 7, at 4.

⁹⁴ Reply Brief of CEMEX, S.A. de C.V., June 15, 1999. at 27.

⁹⁵ Prop. Doc. #40, CEMEX verification Exhibit 32, at 24, states: “CEMEX, like any full-service company in a multiproduct industry, benefits from a marketing standpoint for each product it is trying to sell by the fact that it offers every other product in the cement line. This is true for Type II low alkali cement and its marketing assistance for other types of cement that CEMEX offers. It is also equally true for Type I cement or Type V cement, or pozzolanic cement, or white cement, or any other type of CEMEX cement, including Type II in alkali cement.”

struck from the record⁹⁶, CEMEX disputes this claim⁹⁷, and an examination of the Prop. Doc. #67 verifies that the information was not part of the 18 documents listed as being struck.

This panel recognizes that there is a “line of cases indicating that mere policy changes should not be allowed to alter final agency determinations.”⁹⁸ Nevertheless, the Court of Appeals for the Federal Circuit indicated that “an agency must be allowed to assess the “wisdom of its policy on a continuing basis.”⁹⁹ “The Chevron Doctrine contemplates that agencies can and will abandon existing policies and substitute new approaches.”¹⁰⁰ “Under the Chevron regime, agency discretion to reconsider policies does not end once the agency action is appealed.”¹⁰¹ “Any assumption that Congress intended to freeze an administrative interpretation of a statute, which was unknown to Congress, would be entirely contrary to the concept of Chevron-which assumes and approves the ability of administrative agencies to change their interpretation.”¹⁰² This applies particularly in a situation where “remand orders did not compel Commerce to adopt a new policy.”¹⁰³

During the course of this investigation, while the case remained under appeal, Commerce (in the Seventh Remand Determination) changed its methodology, or at least its understanding of the interaction of the factors involved, in making the ordinary course of trade determination. Because the Seventh Panel had not anticipated this change, its decision upholding the finding that Type V cement sold as Type V and Type II cement was outside the ordinary course of trade became final. Subsequent administrative reviews involving this issue were completed before the

⁹⁶ Brief of the United States Department of Commerce, May 4, 1999, and cases cited therein.

⁹⁷ Reply Brief of CEMEX, *supra*, note 94, at 27-28.

⁹⁸ Corus Staal BV. v. United States Slip.Op. 03-25 (2003) at p5, and cases cited therein.

⁹⁹ SKF USA Inc. v. United States, 254 F.3d 1022, 1030 (Fed. Cir. 2001), quoting Chevron, 467 U.S. at 864.

¹⁰⁰ Tung Mung Development Co., Ltd. v. United States, 03-1073 (CAFC January 15, 2004).

¹⁰¹ SKF, *supra*.

¹⁰² Micron Tech. Inc. v United States, 243 F.3d 1301, 1312 (Fed. Cir. 2001).

¹⁰³ Tung Mung, *supra*.

remand determination in the Seventh review, and accordingly did not consider this changed understanding.¹⁰⁴

Based on the policy that agency interpretation can change during the appeals process, the fact that Commerce did in fact change its determination in the Seventh Panel remand, and the fact that this issue remains alive under the appeals process in the Sixth Review, this Panel remands the issue to Commerce for a reconsideration of whether Type V cement sold as Type V and Type II cement is outside the ordinary course of trade. The Panel is unable to determine from the Department decision in this case how it would consider the issues described above pursuant to the methodological change (in understanding) made in the Seventh Review Remand Determination. It is not the role of the panel to speculate on how Commerce would apply this methodological change (in understanding) to the specific facts on the record for the Sixth review, but rather to remand to allow the Department to make its own determination.

2. Second Issue Presented

Was the Department's decision that home market sales of Type V cement produced at the Hermosillo plants and sold as Type I could not be used for determination of normal value, and the Department's decision to use sales of Type I cement produced at other Mexican plants for normal value comparison, supported by substantial evidence on the record and otherwise in accordance with the law?

Department's Decision

The Department found that, because it only received information that cement produced at the Hermosillo plants meeting Type V ASTM specifications was being sold as Type I cement in the home market at verification, it:

¹⁰⁴ Final Results of Eighth Review. Final Results of Ninth Review.

...was unable to determine whether these sales provided an appropriate basis for calculating NV. In particular, the Department lacked information which would allow it to determine whether these sales were made above cost or within the ordinary course of trade.¹⁰⁵

The Department points out that it was only at verification that it learned that production costs for various types of cement produced at Hermosillo were based upon an allocation tied to sales ratios. The Department therefore excluded home market sales of Type I cement produced at the Hermosillo plants from consideration, and used facts available based on sales of Type I cement produced at other locations.

Arguments of the Parties

CEMEX

CEMEX argues that it had, in fact, provided information in its supplemental questionnaires sufficient to advise the Department regarding the nature of production at the Hermosillo facilities. It further argues that there is information contained in the record which would allow the Department to make a normal value comparison, and that the various arguments as to why Type V cement sold as Type I cement should be considered outside the ordinary course of trade-similar to those discussed above regarding Type V cement sold as Type V and Type II cement do not warrant a finding that the product is outside the ordinary course of trade.¹⁰⁶

STCC

STCC supports the Department in its decision to exclude the sales of Type V cement sold as Type I cement produced at the Hermosillo plants, and to use facts available to make a normal value comparison. STCC points out that any decision to use facts available must only be a

¹⁰⁵ Sixth Review Final Results at 12772.

¹⁰⁶ CEMEX Brief of June 19, 1999 at 29-30.

reasonable, and not the only possible, interpretation of the facts.¹⁰⁷ STCC also argues that the choice to use facts available, unless unsupported by substantial evidence or otherwise not in accordance with the law, is properly within the discretion of the Department.¹⁰⁸

The Department

The Department similarly asserts that its decision to use facts available to exclude sales of Type I cement produced at Hermosillo is appropriate where, as here, an interested party withholds or fails to provide timely information, which significantly impedes the administrative review or provides information that cannot be verified.¹⁰⁹ Because the Department did not learn until verification the nature of cement production at the Hermosillo plants, it was unable to verify the information that had been provided, and determined that at least some of the information (allocation of costs based on sales ratios) did not relate to any actual differences in cost of production. The Department cites a series of cases for the proposition that it is the Department, and not the respondent, which is responsible to select the accurate and complete information required.¹¹⁰

Analysis

This panel accepts the Department's rejection of Type V cement sold as Type I cement produced at the Hermosillo plants for the purposes of normal value comparison. CEMEX did not include complete information on Type V cement sold as Type I cement from the Hermosillo plants in its responses to the Department's information requests¹¹¹, thus forcing the Department to rely on facts available in making its determination. The Department did not know until

¹⁰⁷ STCC cites Borden, Inc. v. United States, 4 F. Supp. 2d 1221 1246 (CIT 1998).

¹⁰⁸ NSK, Ltd. v. United States, 919 F. Supp. 442 (CIT 1996).

¹⁰⁹ 19 USC Section 1677e(a)(1)(2).

¹¹⁰ May 3, 1999 Brief of the Department at p 40.

¹¹¹ Daido Corp. v. United States, 893 F. Supp. 43, 49-50 (CIT 1995), noting the Department has "discretion to determine whether a respondent has complied with an information request". See also Ansaldo Componenti, S.p.A. v. United States, 628 F. Supp. 1998, 205 (CIT 1986), and the discussion in the section on DIFMER.

“verification that cement produced at the Hermosillo plants and invoiced as Type I was, in fact, physically identical to the cement labeled as ...Type V. Because neither party raised the ordinary course of trade issue with respect to Type I sales, the Department was not prepared, nor able, to verify this issue.”¹¹² As pointed out by STCC, not only the decision to use facts available, but also the selection of the appropriate information, is within the discretion of the Department.¹¹³

The panel therefore upholds rejection of the home market sales of Type V cement sold as Type I cement from the Hermosillo plants for normal value comparison, and the use of partial adverse facts available by using sales of Type I cement produced at other Mexican plants.

C. Collapsing

Issue Presented

Was the Department’s decision to treat CDC and CEMEX as a single entity, i.e., to “collapse” both producers for purposes of calculating a single dumping margin, supported by substantial evidence on the record and otherwise in accordance with the law?

The Department’s Decision

In its Final Results, the Department decided to collapse CEMEX and CDC (i.e. to treat them as a single entity for the calculation of dumping margins).

According to the Department’s policies regarding collapsing¹¹⁴, the Department should collapse based on the following three criteria:

¹¹² Final Results of Sixth Review at 12772.

¹¹³ STCC Brief of May 3, 1999, at 126, citing Rhone Poulenc v. United States, 710 F. Supp. 341, 346 (CIT 1989), aff’d 899 F. 2d 1185 (CAFC 1990).

¹¹⁴ Set forth in Section 351.401(f) of Antidumping Duties; Final Rule, 62 FR at 27296 – 27,410 (May 19, 1997).

- (1) if the producers are affiliated,
- (2) if the producers have production facilities that are sufficiently similar so that a shift in production would not require substantial retooling, and
- (3) if there is a significant potential for the manipulation of price or production.

In the Final Results, the Department considered CEMEX and CDC to be affiliated:

“...because CEMEX indirectly owns more than five percent of the outstanding voting shares of CDC, the Department considers CEMEX and CDC to be affiliated within the meaning of section 771(33)(F) of the Act.”¹¹⁵

The Department decided as well that there was enough similarity between the production facilities of CEMEX and CDC:

“...as CEMEX and CDC have similar production processes and facilities, a shift in production would not require substantial retooling.”¹¹⁶

And finally, the Department deemed potential for price manipulation to be significant in this case:

“...given the level of common ownership and cross board members, which provides a mechanism for the two parties to share pertinent pricing and production information, similar production facilities that would not require substantial retooling, as well as intertwined business operations, the Department finds that if CDC and CEMEX are not collapsed, there is a significant potential for price manipulation which could undermine the effectiveness of the order.”¹¹⁷

Arguments of the Parties

CDC

In its initial complaint, filed on May 14, 1998, CDC alleged that the Department’s decision to collapse it with CEMEX was not supported by substantial evidence and/or was otherwise contrary to law.

¹¹⁵ Final Results of Sixth Review at 12,774.

¹¹⁶ *Id.*, at 12,774.

¹¹⁷ *Id.*, at 12775.

“The Department’s determination that, if CDC and CEMEX are not treated as single entity (i.e. “collapsed”) for purposes of calculating a dumping margin, there is significant potential for price manipulation, was not supported by substantial evidence and/or was otherwise contrary to law.”¹¹⁸

According to CDC, as a general rule exporters and producers are entitled to their own rates¹¹⁹, and collapsing them is an exceptional practice¹²⁰ reserved for special cases in which there is a *significant*¹²¹ –not just *any*¹²²– potential for manipulation

CDC argues that before it collapses producers, the Department “must undertake a careful analysis of the factual circumstances applying the requirements for collapsing,”¹²³ considering each one of those requirements individually¹²⁴, and that in this case the “Department’s decision to collapse is based on an insufficient analysis of the record facts and a flawed application of the standard for collapsing.”¹²⁵

CDC challenges the Department’s analysis of the record facts alleging that it fails to

“discuss issues such as intertwined business operations, sharing of sales information, involvement in pricing and production decisions, shared facilities and employees, or significant transactions between the affiliated producers.”¹²⁶

¹¹⁸ CDC’s *Initial Claim* (dated May 14, 1998) at 2.

¹¹⁹ CDC refers to 19 U.S.C. §1677f-1(c)(1), as well as the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Art. 6.10.

¹²⁰ CDC’s *Rule 57(3) brief* (dated June 15, 1999) considers collapsing to be “exceptional”, based on the fact that 1) it is not the norm even among affiliated parties and that it occurs in relatively unusual situations, characterized by a certain type of relationship. CDC supports its affirmation quoting Certain Welded Non-Alloy Steel Pipe from the Republic of Korea (62 Fed. Reg. at 13170, Oct. 27, 1997), Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany (54 Fed. Reg. 18992– 19089, May 3, 1989), Nihon Cement Co. v. United States (17 C.I.T. at 400, 1993) and Corrosion-Resistant Carbon Steel Products from Canada (panel decision at 24).

¹²¹ CDC quotes Nihon Cement Co. v. United States (17 C.I.T. at 400, 1993) and Fresh Cut Flowers from Colombia (61 Fed. Reg. 42,833– 42,853, Aug. 19, 1996).

¹²² CDC refers to Department’s regulations implementing the Uruguay Round Agreements Act. Antidumping Duties; Countervailing Duties; Final rule (62 Fed. Reg. 27296– 27345, 1997) (preamble to regulations).

¹²³ CDC’s *Rule 57(1) Brief* (dated February 18, 1999) at 13.

¹²⁴ CDC quotes Nihon Cement Co. v. United States (17 C.I.T. at 426, 1993), FAG Kugelfischer Georg Schafer KGaA v. United States (932 F. Supp. at 315, C.I.T., 1996), Corrosion-Resistant Carbon Steel Products from Canada (panel decision at 24), as well as Department’s Final rule, 62 Fed. Reg. at 27345.

¹²⁵ CDC’s *Rule 57(1) Brief* at 13.

¹²⁶ CDC’s *Rule 57(1) Brief* at 23.

Furthermore, CDC considers that Department's application of the standard for collapsing is flawed since its Preliminary Collapsing Memorandum

“demonstrates an over-reliance on the corporate relationship between CEMEX and CDC in its decision to collapse and a failure to engage in any meaningful analysis of the ‘significant potential’ for manipulation criterion.”¹²⁷

Moreover, highlighting the importance of the *significant potential for manipulation* prong in the collapsing analysis, CDC asserts that “the Department fails to provide a proper analysis of this key criterion or to support its finding of a significant potential for manipulation with evidence of actual or possible manipulation or control,”¹²⁸ since it avoids performing “an analysis of the ‘type and degree’ of the relationship between CDC and CEMEX,”¹²⁹ and in conclusion, “the Department’s analysis in the Final Results and the Preliminary Collapsing Memorandum provides no basis for concluding that a significant potential for manipulation exists.”¹³⁰

Additionally, on the one hand, CDC asserts, “the record contains no information suggesting the conclusion that CEMEX’s role as an engineering consultant on [[.....] ‘affects’ any of CDC’s pricing or production decisions,”¹³¹ and on the other, CDC states that even though the Department recently found that collapsing is not appropriate where affiliated parties did not have intertwined operations¹³², “there is no evidence on the record of this review of ‘intertwined operations’”¹³³ taking place between CEMEX and CDC.

Finally, CDC performs an analysis of the significant potential of manipulation factors and others relied upon by the Department:

¹²⁷ CDC’s Rule 57(1) Brief at 20-21.

¹²⁸ CDC’s Rule 57(1) Brief at 18.

¹²⁹ CDC’s Rule 57(3) brief at 7.

¹³⁰ CDC’s Rule 57(1) Brief at 25.

¹³¹ CDC’s Rule 57(1) Brief at 26.

¹³² CDC quotes Welded Carbon Steel Pipes and Tubes from Thailand (63 Fed. Reg. 55578–55583, Oct. 16, 1998)

¹³³ CDC’s Rule 57(1) Brief at 29.

1. Regarding the level of common ownership, CDC states that even though it does not dispute its affiliation to CEMEX, the latter's indirect interest is a minority interest and does not grant it control over CDC and can not give rise to a 'significant potential' of price or production manipulation.

2. With regard to the overlapping of boards of directors, CDC argues that the fact that members of CEMEX management sit on the board of directors of CDC and affiliated companies does not result in a significant potential for manipulation since, on the one hand, they are a minority, and on the other, CDC's pricing and production are not discussed thereat.

3. With respect to intertwined business operations, CDC claims that this factor was not analyzed by the Department, and that when applied to the record evidence, the four indicia of intertwined business operations demonstrate that the operations of CEMEX and CDC are not intertwined. Therefore, both companies can not be collapsed¹³⁴, because (i) there is no evidence that they share information on possible sales opportunities in Mexico or the United States, (ii) pricing, sales and production decisions are made solely by management of CDC, and there is no evidence of CEMEX and CDC coordinating pricing strategies; (iii) each company has its own facilities, employees and accounting records; and (iv) "there were no commercial transactions between the parties during the sixth review."¹³⁵ Additionally, CDC states that the companies are not billed jointly by suppliers, each one has its own distinct sales distribution process and U.S. importer, and they do not supply any material inputs to each other.

4. CDC also argues that the Department did not consider that the "three policy reasons that the Department has given for departing from its general practice of calculating

¹³⁴ CDC quotes Welded Carbon Steel Pipes and Tubes from Thailand (at 55583).

¹³⁵ CDC's *Rule 57(1) Brief* at 38.

separate rates and instead collapsing producers,”¹³⁶ are absent: (i) CDC and CEMEX do not constitute a single entity, (ii) accurate dumping margins are not obtained by collapsing CEMEX and CDC, and (iii) without regard to the antidumping duty rates derived from collapsing, manipulation would not be possible based on the special regional characteristics of the cement¹³⁷ and the geographical features of CDC’s market, on CEMEX’s lack of control over CDC’s decisions, as well as on the Department’s ability –derived from the current and future administrative reviews- to detect changes in both companies’ operations.

STCC

STCC considers that the Department correctly collapsed CEMEX and CDC for purposes of calculating a dumping margin¹³⁸, and controverts CDC’s allegations based on four main arguments:

1. Doc’s decision to collapse is consistent with the Statute¹³⁹, the Regulations and with Commerce’s longstanding practice, including its determinations in the original investigation and in all five previous administrative reviews.”¹⁴⁰

The policy underlying the Department’s longstanding practice of collapsing certain producers and exporters tends to prevent circumvention of the Antidumping Law; therefore, “it is the significant potential that CEMEX and CDC could jointly work to circumvent the

¹³⁶ CDC’s *Rule 57(1) Brief* at 39, quoting *Queen’s Flowers de Colombia v. United States* (981 F. Supp. at 622).

¹³⁷ CDC quotes an International Trade Commission statement made at *Gray Portland Cement and Clinker from Mexico* (Inv. No. 731-TA-451 (Final) USITC Pub. 2305, at 12, August, 1990).

¹³⁸ In their *Supplemental Briefs according to Panel’s Order* (dated April 17, 2001), STCC and the Department notice that the latter’s decision to collapse in the Fifth Review was upheld by the binational panel in charge of its review, and that this panel must base its decision on substantially identical evidence and factors as those found in the Fifth Review.

¹³⁹ STCC quotes *Queen’s Flowers de Colombia v. United States* (981 F. Supp. 617 - 622, C.I.T., 1997)

¹⁴⁰ STCC’s *Brief in Response to Briefs Submitted by CEMEX and CDC* (dated May 3, 1999) at 135.

antidumping order that is at the heart of Commerce’s repeated decisions to collapse these companies.”¹⁴¹

According to STCC, the significant potential test contained in the Department’s Final Regulations¹⁴² is the Department’s collapsing standard¹⁴³ and involves the consideration of three questions: (i) whether the producers are affiliated, (ii) whether they have similar production facilities, and (iii) whether there is a significant potential for the manipulation of price or production; “all three prongs of the test must be satisfied in order to collapse the affiliated producers.”¹⁴⁴

For STCC, the definition of affiliation by the U.S. Code leaves no doubt that the first prong of the test is complied with, and the second prong’s compliance was found as well by the Department. STCC highlights this prong’s importance on the fact that it is the similarity of production facilities that affords the companies the ability to manipulate their manufacturing priorities¹⁴⁵.

As for the third prong, STCC asserts that in order to determine whether there is a *significant potential* for the manipulation of price or production, the Department may consider a number of factors such as level of common ownership and the existence of overlapping boards of directors and of intertwined operations, all of which “need not be present in order to find a significant potential for the manipulation of price or production if parties are not collapsed.”¹⁴⁶

¹⁴¹ STCC’s *Brief in Response to Briefs Submitted by CEMEX and CDC* at 136.

¹⁴² In reference to the Regulations implementing the Uruguay Round Agreements Act. Antidumping Duties; Countervailing Duties; Final rule (62 Fed. Reg. at 27296, 1997).

¹⁴³ STCC refers to Id., at 27,410 (section 351.401(f)).

¹⁴⁴ STCC’s *Brief in Response to Briefs Submitted by CEMEX and CDC* at 138, referring to the Regulations implementing the Uruguay Round Agreements Act. Antidumping Duties; Countervailing Duties; Final rule at 27,346 and quoting Stainless Steel Wire Rod from Korea (63 Fed. Reg. 40404 – 40410, 1998).

¹⁴⁵ STCC quotes Koenig and Bauer-Albert AG v. United States Slip.Op. 99-25(March 16, 1999).

¹⁴⁶ STCC’s *Brief in Response to Briefs Submitted by CEMEX and CDC* at 138, referring to 19 C.F.R. §351.401(f) and quoting Certain Welded Carbon Steel Standard Pipes and Tubes from India (62 Fed. Reg. at 47638) as well as Certain Fresh Cut Flowers from Colombia (61 Fed. Reg. at 42853)

STCC adds that this prong is only meant to determine if such manipulation *may* happen in the future, not if it is currently happening or if it has happened in the past¹⁴⁷.

STCC states as well that the Department's collapsing practice has repeatedly been held to be consistent with the Antidumping Statute, and that such practice is not exceptional nor is it reserved for special cases, challenging CDC's assertions and its reliance on the authorities used to support its arguments, offering STCC's own interpretation thereof¹⁴⁸.

Regarding CDC's arguments about CEMEX's lack of control over CDC, STCC emphatically states that

“a finding of a significant potential for the manipulation of prices is not dependent upon a finding that one of the affiliated companies has such control over the other... A finding that one company has control over another company is not, and never has been, a necessary element of the collapsing analysis.”¹⁴⁹

2. The Department's determination to collapse CEMEX and CDC is supported by substantial evidence on the record.

STCC states that there is substantial evidence on the record supporting the Department's determination to collapse CEMEX and CDC, based on the facts that all prongs of the collapsing test are clearly satisfied, since: (i) it is undisputed that CEMEX and CDC are affiliated¹⁵⁰, (ii) there is not either any dispute to the fact that CEMEX and CDC have sufficiently similar

¹⁴⁷ STCC refers to the Department's preamble to its Final Regulations (62 Fed. Reg. at 27346) quoting FAG Kugelfischer Georg Schafer KGaA v. United States (932 F. Supp. at 315, 322-25, C.I.T., 1996) and Accord Fresh Atlantic Salmon from Chile (63 Fed. Reg. 31411 - 31421, 1998). STCC also quotes Asociación Colombiana de Exportadores de Flores v. United States (6 F. Supp. 2d at 895, C.I.T. 1998).

¹⁴⁸ STCC explains its own vision of the decisions in Nihon Cement Co. v. United States and in FAG Kugelfischer Georg Schafer KGaA v. United States, as well as the panel's decision at Corrosion-Resistant Carbon Steel Products from Canada, and quotes Asociación Colombiana de Exportadores de Flores v. United States (at 894 – 896).

¹⁴⁹ STCC's Brief in Response to Briefs Submitted by CEMEX and CDC at 149, quoting Certain Welded Carbon Steel Standard Pipes and Tubes from India v. United States, Certain Hot-Rolled Carbon Steel Flat Products, and Certain Corrosion-Resistant Carbon Steel Flat Products from Japan (58 Fed. Reg. 37154 – 37159, 1993), Cellular Mobile Telephones and Subassemblies from Japan (54 Fed. Reg. 48011 – 48015, 1989), as well as Certain Pasta from Italy (61 Fed. Reg. 30326 – 30351, 1996).

¹⁵⁰ STCC makes reference to CDC's statement with this regard at CDC's Rule 57(1) Brief at 24.

production facilities¹⁵¹, and (iii) the record clearly demonstrates that the Department properly applied the *significant potential* test by considering the level of common ownership between the companies, the extent to which they have overlapping boards of directors, as well as the existence of intertwined operations between them.

STCC emphasizes that:

“Commerce’s inquiry into this issue was prospective in nature. Its purpose was not to determine whether there was evidence of actual manipulation of prices or production, but whether relation of the parties’ relationship created a potential for manipulation of sufficient magnitude as to justify collapsing.”¹⁵²

Furthermore, through a vast analysis, STCC concludes that CEMEX’s dominant role in the Mexican market and around the world, its level of ownership in Control Administrativa Mexicano, S.A. de C.V. (“CAMSA”) and the other members of the CDC group, its presence on CDC’s board, as well as the existence of intertwined operations between CEMEX and CDC grant CEMEX the opportunity to influence CDC’s decisions to participate in circumvention schemes¹⁵³.

3. CDC’s invitation to the panel to substitute its judgment for Commerce’s regarding U.S. Antidumping policy should be rejected.

¹⁵¹ STCC bases its affirmation on the Department’s findings about CEMEX’s and CDC’s facilities set forth in its Collapsing Memorandum at 3.

¹⁵² STCC’s *Brief in Response to Briefs Submitted by CEMEX and CDC* at 156.

¹⁵³ Throughout its analysis STCC quotes Asociación Colombiana de Exportadores de Flores v. United States (at 893 and 895), Ferro Union, Inc. v. United States (1999, C.I.T. LEXIS 24, March 23, 1999), Japanese Steel (58 Fed. Reg. at 7102), Italian Steel (58 Fed. Reg. at 7102), Stainless Steel Sheet and Strip in Coils from Italy (64 Fed. Reg. at 116, 1999, preliminary determination), Canadian Steel (60 Fed. Reg. at 42511), Anti-Friction Bearings (other than Tapered Roller Bearings) and Parts thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom (58 Fed. Reg. 39729 – 39772, 1993), FAG (U.K.) Ltd. v. United States (24 F. Supp.2d, 297 – 302, C.I.T. 1998) (citing Asociación Colombiana de Exportadores de Flores v. United States).

Based on the fact that in its Final Results the Department determined that CEMEX and CDC had to be collapsed to prevent them from manipulating their prices or production, STCC asserts that CDC's invitation to the panel to substitute its judgment for Commerce's regarding U.S. Antidumping policies should be rejected since "An administrative agency's formulation of policy based on its interpretation on the statute it is entrusted to administer is entitled to substantial deference under U.S. law,"¹⁵⁴ and the current standard of review is limited to determining if the Department's determination is supported by substantial evidence on the record, and is otherwise in accordance with law.

4. There is no barrier to the manipulation of the order.

Regarding CDC's assertion that manipulation would not be possible based on the special regional characteristics of the cement and the geographical features of CDC's market, STCC controverts the fact that CDC's market is limited to 300 miles from its plants, and furthermore, states that CDC and CEMEX are currently capable of competing with one another in the U.S. and Mexico since there is a natural overlap in their markets.

Finally, STCC disregards CDC's assertion that the Department's ability to detect changes in CEMEX and CDC's operations would as well constitute a barrier to the circumvention of the antidumping order, based on the fact that it is irrelevant to the U.S. antidumping law since it's intention is to prevent, or to anticipate such circumventions from happening.

The Department

The Department also contends CDC's assertions and states that its determination to collapse CEMEX and CDC is reasonable, supported by substantial evidence, and otherwise in accordance with law.

¹⁵⁴ STCC's *Brief in Response to Briefs Submitted by CEMEX and CDC* at 172, quoting Chevron, U.S.A. v. Natural Resources Defense Council (467 U.S. 837, 842 – 843, 1984) and Asociación Colombiana de Exportadores de Flores v. United States (at 894) citing Zenith Radio Corp. v. United States (437 U.S. 443 – 450, 1978).

In doing so, first the Department states that its “longstanding practice is to calculate a single dumping margin for foreign producers, i.e. “collapse” them, when affiliated producers who are so interconnected through common ownership, management, or other business ties, that the relationship may serve as a vehicle for manipulating price or production to evade the antidumping duty order.”¹⁵⁵

The Department emphasizes that it has collapsed both companies in every prior segment of the proceeding of its investigation on CEMEX, and explains its collapsing standards¹⁵⁶.

Regarding the first criterion (affiliation), the Department explains that based on its findings, it determined that CEMEX’s indirect ownership interest in CDC established an affiliation between the two cement producers under the definition of the U.S. Code¹⁵⁷.

The Department asserts that given this relationship, it next confirmed compliance with the second criterion (similar production facilities), noticing that CEMEX and CDC had “virtually identical production processes and equipment which demonstrated that substantial retooling of either CEMEX or CDC would not be necessary to restructure manufacturing priorities.”¹⁵⁸

Finally, according to the Department, it turned to the third prong of its collapsing analysis and concluded that there was a significant potential for manipulating prices and production, based on the facts that “CEMEX indirectly owns a large percentage of CDC and CEMEX managers or directors sit on the board of directors of CDC and/or its affiliated companies.”¹⁵⁹ In addition “This relationship provides a significant potential for affecting CDC’s pricing and production decisions. In fact, CEMEX had significant input with respect to the design and

¹⁵⁵ The Department’s *Rule 57(2) brief* (May 3, 1999) at 41, citing to Anti-Friction Bearings (other than Tapered Roller Bearings) and Parts thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, 58 Fed. Reg. 39729

¹⁵⁶ See the Department’s *Rule 57(2) brief* at 41.

¹⁵⁷ 19 U.S.C. §1677(33)(E).

¹⁵⁸ The Department’s *Rule 57(2) brief* at 43 – 44.

¹⁵⁹ The Department’s *Rule 57(2) brief* at 44.

construction of CDC's Samalayuca plant,"¹⁶⁰ referring next to the declarations CDC's and CEMEX's officials had made during the verification, confirming the Department's findings regarding the nature of the relation between both companies.

Furthermore, the Department states that CDC's contentions to the Department's findings on the third criterion "are unpersuasive because they rely upon an erroneous construction of the evidentiary standard for finding manipulation under the Department's practice."¹⁶¹ The Department confirms that its findings regarding significant potential for manipulation of prices and production were correct, based on the fact that the Department considered all the relevant facts¹⁶². Even though all the factors that may be used by the Department to find the significant potential for manipulation need not be met¹⁶³ in order for it to determine to collapse, all three factors considered by the Department were satisfied: CDC and CEMEX had significant common ownership¹⁶⁴, they had interlocking boards of directors¹⁶⁵, and that their operations were intertwined¹⁶⁶ during the period of review.

Finally, the Department rejects CDC's assertions that collapsing is an exceptional practice reserved for special cases¹⁶⁷, that the Department failed to support its finding with

¹⁶⁰ Id.

¹⁶¹ The Department's *Rule 57(2) brief* at 42.

¹⁶² The Department quotes Anti-Friction Bearings (other than Tapered Roller Bearings) and Parts thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, Nihon Cement Co. v. United States, as well as Asociación Colombiana de Exportadores de Flores v. United States (at 895). Additionally, the Department makes reference to Certain Welded Pipes and Tubes from Thailand (at 55583).

¹⁶³ The Department bases its statement in Antidumping Duties; Countervailing Duties; Final rule (at 27295 and 27345-46) and quotes Nihon Cement Co. v. United States (at 425) and Certain Fresh Cut Flowers from Colombia (at 42833 and 42853-54).

¹⁶⁴ The Department quotes Certain Cold-Rolled Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Italy (58 Fed. Reg. 7,100, 1993), Certain Welded Pipes and Tubes from Thailand (63 Fed. Reg., 55578–55580, 1998).

¹⁶⁵ The Department bases on Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada (60 Fed. Reg. 42,511, 1995), and Anti-Friction Bearings (other than Tapered Roller Bearings) and Parts thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom (at 39,772), and Certain Pasta from Italy.

¹⁶⁶ The Department quotes Asociación Colombiana de Exportadores de Flores v. United States citing Nihon Cement (at 426).

¹⁶⁷ The Department refers to its explanation set forth in Preamble to Final Regulations (62 Fed. Reg. at 27345)

evidence of actual or possible manipulation or control of CDC by CEMEX¹⁶⁸, that the Department decided to collapse solely on the basis of affiliation of both companies, and that there is no policy reason to justify collapsing¹⁶⁹, concluding that “the Department considered all of the factors it was required to consider under the law, and that each element of its determination was premised upon undisputed record evidence.”¹⁷⁰

Analysis

In the Sixth Review –as well as in all the other reviews so far- the Department determined to collapse CEMEX and CDC. The reason stated by the Department for treating both companies as a single entity for the calculation of dumping margins was that there was a significant potential for price manipulation which could undermine the effectiveness of its antidumping order against CEMEX.

With regard to this decision, more than in the existence of the Department’s collapsing powers, the debate is centered in the way such powers can be exerted and the limitations thereto.

Regardless of whether the collapsing practice may be deemed to be exceptional or not, the Final Rule on Antidumping Duties; Countervailing Duties¹⁷¹, says that, in order to be able to collapse two or more companies, the Department must conduct a ‘collapsing test’, consisting in the application of three criteria to each case: (1) the Department must find that the producers are affiliated, (2) the Department must verify and conclude that the producers have production facilities that are sufficiently similar so that a shift in production would not require substantial retooling, and (3) the Department must find indicia of a significant potential for the manipulation

¹⁶⁸ The Department quotes Asociación Colombiana de Exportadores de Flores v. United States (at 895) and controverts CDC’s interpretation of Pipes and Tubes from India (62 Fed. Reg. 47632, 47638-39, 1997).

¹⁶⁹ The Department quotes Queen’s Flowers de Colombia v. United States (at 622), Mitsubishi Elec. Corp. v. United States (700 F. Supp. 538– 555, C.I.T., 1988).

¹⁷⁰ Department’s *Rule 57(2) brief* at 54 – 55.

¹⁷¹ 62 FR 27295-27424, May 19, 1997.

of price or production to undermine the effectiveness of the antidumping order if the companies are not collapsed.

All parties¹⁷² to this review agree that the first prong of the collapsing test is met, considering that CEMEX's indirect ownership interest in CDC fits the U.S. Code definition for 'affiliation'¹⁷³:

"The following persons shall be considered to be 'affiliated' or 'affiliated persons':

...

(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.

...."

Likewise, the fact that CEMEX and CDC have production processes and facilities that are similar to a point in which a shift in production would not require substantial retooling is also admitted by CDC.

"...CDC does not contest that the first two collapsing criteria –affiliation and similar production facilities- are satisfied."¹⁷⁴

"CDC concedes in its Initial Brief, and repeats here, that it satisfies the first two prongs of the Department's collapsing test: it is 'affiliated' with CEMEX under the statutory standards, and CDC's production facilities are similar to those of CEMEX."¹⁷⁵

Consequently, the controversy with regard to the correctness of the Department's exertion of its collapsing powers is centered on the third prong of the collapsing test.

"The only finding in dispute is whether there is a significant potential for manipulation of price or production if CEMEX and CDC are not collapsed."¹⁷⁶

¹⁷² CDC's *Rule 57(1) Brief* at 24 states: "*CDC and CEMEX do not contest the obvious fact that they are 'affiliated'.*"

¹⁷³ 19 U.S.C. § 1677(33).

¹⁷⁴ CDC's *Rule 57(1) Brief* at 25.

¹⁷⁵ CDC's *Rule 57(3) brief* at 4, footnote 7.

¹⁷⁶ STCC's *Brief in Response to Briefs Submitted by CEMEX and CDC* at 155.

As mentioned by all parties in their briefs, for the third prong to be met, the applicable regulation requires the Department to conclude that there is a significant potential for the manipulation of price or production¹⁷⁷. For that purpose, the DOC must use a ‘significant potential’ test, in the performance of which, according to the Code of Federal Regulations:

“...the factors the Secretary **may** consider include:

- (i) The level of common ownership;
- (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
- (iii) Whether operations are intertwined, **such as** through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.”¹⁷⁸

Before analyzing if these factors are met in this case, it is important to notice, firstly, that according to the statute their consideration is not mandatory, since the word ‘may’ means that the Department is entitled, but not bound, to analyze each one, and secondly, that even in the case where the Department’s analysis indicated that one or more of those factors were not met, the Department would still be in the position to consider that a significant potential for manipulation exists. Notwithstanding, as evidenced on the record, the Department did in fact consider these three factors, and concluded that they were all satisfied.

First, regarding the level of common ownership criterion, the record confirms that the Department analyzed this issue and concluded that the amount of CEMEX’s equity stake in CDC placed it in a position to potentially influence its decision making processes.

¹⁷⁷ According to 19 CFR 351.401(f)(1), where treatment of affiliated producers in antidumping proceedings in general is regulated: “*In an antidumping proceeding under this part, the 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 a significant potential for the manipulation of price or production.*”

¹⁷⁸ 19 CFR 351.401(f)(2) (emphasis added).

Second, with regard to the extent to which members of CEMEX sit on the board of directors of CDC, not only does the record register, but CDC has also acknowledged that “members of CEMEX management sit on the boards of directors of CDC and affiliated companies,”¹⁷⁹ and the Department asserts having taken this fact into consideration.

Third, regarding consideration of whether CEMEX’s and CDC’s operations are intertwined, the regulation mentions some cases that could lead the Department to consider that they are. Once again, it is important to notice that by using the expression ‘such as’, the regulation reveals that the mere occurrence of any of these cases or the finding of other indicia could convince the Department of the existence of intertwined operations between the parties and enable it to consider the potential of manipulation to be significant.

From the listed cases (sharing of sales information, involvement in production and pricing decisions, sharing of facilities or employees, and existence of significant transactions between the affiliated producers) it is the last one the one that the Department found evidence of, and the one that caused the greatest controversy between the parties.

Evidence in the record demonstrates that despite CDC’s statement that unlike what occurred in previous reviews, “there were no commercial transactions between the parties during the sixth review,”¹⁸⁰ the Department identified an agreement between CEMEX and CDC and considered that it demonstrated the existence of intertwined operations between both, that further supported its conclusion that there was a significant potential for manipulation of the antidumping order –which is the policy reason to justify collapsing.

¹⁷⁹ CDC’s *Rule 57(1) Brief* at 33.

¹⁸⁰ CDC’s *Rule 57(1) Brief*, dated February 18, 1999 at 38.

It is worth noticing that more recently¹⁸¹ CDC retracted the affirmation above, saying that “the only transaction between CDC and CEMEX during the relevant period [is] –a consulting contract involving the construction of... [a] plant-...,” and asked for that transaction to be considered in the context of the contracting process; nevertheless, as stated by the Department, “The collapsing standard does not require Commerce to distinguish between different types of inter-company transactions. Commerce must only address whether transactions took place between the companies”¹⁸².

Additionally, even when CDC insists on the need to analyze the history and the nature of that contract by saying that “the Department could have provided some analysis of whether this record information suggested that the decision to award the contract to CEMEX seemed reasonable and justified by objective facts, or whether the affiliation between the parties essentially assured CEMEX of receiving the contract”, the truth is that independently of the results of such analysis –had it been done-, the Department would have still been enabled to determine that there is a significant potential for manipulation, since it is the Department’s entitlement to ‘weigh’ “the evidence [...] to discern whether the companies are, in fact, separate entities or whether they are sufficiently intertwined as to properly be treated as a single enterprise....”¹⁸³

Likewise, since the nature of collapsing is preventive more than corrective or remedial, it is only necessary for the Department to find the potential of manipulation to be significant (based on the aforementioned prongs, factors and other indicia) for it to be enabled to collapse, not needing to support its findings with evidence of actual manipulation or control of CDC’s pricing or production decisions by CEMEX.

¹⁸¹ In its *Rule 57(3) Brief*, dated June 15, 1999 at 7.

¹⁸² Asociación Colombiana de Exportadores de Flores v. United States (at 895).

¹⁸³ Certain Welded Non-Alloy Steel Pipe from the Republic of Korea (62 Fed. Reg. at 55588).

This Panel shares concerns of the Panel for the Fifth Administrative Review regarding the significantly negative impact that the Department's collapsing decisions have had on CDC. The consistent determination by the Department over 13 administrative reviews, in the absence of any evidence of manipulation of the order by the Mexican producers, would seem at the least to support consideration of that concern when in the future the Department considers collapsing CDC into CEMEX.

Nevertheless, considering that this panel is constrained to apply the US standard of review (deference to the Department's conclusions unless they are either unsupported by substantial evidence on the record, or otherwise not in accordance with law), even though the evidence could conceivably support contrary conclusions, this panel upholds the Department's decision to collapse CEMEX and CDC.

D. Bulk and Bagged

Issue Presented

Was the Department's determination that bulk and bagged sales constitute identical merchandise, with only an adjustment allowing for differences in packaging, so that the entire universe of Type I sales was properly included in its calculation of normal value, supported by substantial evidence on the record and otherwise in accordance with law?

The Department's Decision

The Department, in the Sixth Review Final Results, discussed the treatment of bagged and bulk cement in the section on level of trade. In response to claims by CEMEX that there "were three levels of trade in the home market-sales to end users concrete manufacturers, and distributors through two channels of distribution, bulk and bagged cement", the Department "determined that CEMEX sells to one level in the home market." In addition, the Department

“included the entire universe of Type 1 sales in its calculation of NV because bulk and bag sales constitute identical merchandise. The only difference between these products is the packaging; therefore, the Department has made an adjustment for packaging differences.” The Department went on to note that any comparison by discrete channel of distribution was not warranted based on its finding that there was only one level of trade.¹⁸⁴

Amended Complaint

In their initial complaints, the Mexican parties did not challenge either the determination of a single level of trade in the home market (although there was a different single level found for each company), or the inclusion of both bulk and bagged cement in the “similar” Type 1 merchandise selected for purposes of calculating normal value. On June 18, 1999 the Binational Panel in the Fifth review announced its finding, which remanded the case to the Department with instructions to recalculate normal value on the basis of Type 1 cement in bulk only.¹⁸⁵ Six days later, CEMEX filed a Notice of Motion for leave to file an amended complaint.¹⁸⁶ STCC and the Department opposed the Motion.¹⁸⁷

CEMEX argued that the panel had the authority to grant the Motion pursuant to Rule 20 (1) of the NAFTA Article 1904 Panel Rules. It stated that extending the normal time for filing an amended complaint was warranted because the timing of the review would not be delayed, as the panel had not yet been formed; the amendment of the complaint was made only as a consequence of the Fifth Review Panel Decision; failure to allow amendment would result in unfairness or prejudice to CEMEX because its claim would not otherwise be heard; and amendment of the complaint would cause little hardship to the other parties. In opposition to

¹⁸⁴ Sixth Review Final Results, 63 FR. at 12777 (Comment 10).

¹⁸⁵ Fifth Review Panel Opinion, June 18, 1999.

¹⁸⁶ CEMEX Motion for Leave to File an Amended Complaint, June 24, 1999.

¹⁸⁷ STCC Response, July 1, 1999; Department Response July 1, 1999.

CEMEX, STCC noted that the motion had been filed long after the expiration of the time period permitted for filing an amended complaint under Rule 39(5); and that CEMEX could have raised the issue in its initial complaint, and by its own choice did not do so. The Department similarly argued the applicability of Rule 39(5) and the failure of CEMEX to raise the issue in its initial complaint. The parties also presented arguments concerning treatment of the fifth review panel determination as an intervening judicial decision.

In an Order issued October 8, 1999¹⁸⁸, the then members of the panel granted the Motion, accepted the amended complaint, and granted the parties leave to file supplemental briefs limited to Claim Four of the amended complaint of CEMEX. The Panel Order found that the conditions of Rule 20(1) had been satisfied, and it was appropriate for the parties to brief the participants in this panel on the findings and relevance of the immediately preceding panel decision; and that any delay caused by extending the deadline would be minimal. Claim Four of CEMEX's amended complaint states¹⁸⁹:

In the final results, Commerce compared US sales of bulk cement with home market sales of bulk and bagged cement. Commerce's failure to limit home market sales used to calculate normal value to comparable sales of bulk cement was contrary to law.

Arguments of the Parties

In its August 10, 1999 brief, CEMEX argued that the Department had failed to consider all of the requisite statutory factors involved when determination of the appropriate "foreign like product" cannot be made on the basis of identical merchandise, but instead is based on "the home market merchandise which is most similar to merchandise sold in the United States." The criteria listed in 19 USC Section 1677 (16)(B) for similar merchandise necessitate production in the same country and by the same person as the subject merchandise; merchandise like that

¹⁸⁸ Panel Order, October 8, 1999.

¹⁸⁹ Amended Complaint of CEMEX, June 24, 1999.

merchandise in component material or materials and in the purposes for which it is used; and merchandise approximately equal in commercial value to that merchandise. CEMEX argues that the Department made its decision solely on the fact that the bulk and bagged cement of the same type share the same physical characteristics (aside from the packaging), failing to consider whether the bulk and bagged cement were alike in component material, used for the same general purpose, and were approximately equal in commercial value. CEMEX cited cases holding that it was reversible error for the Department to fail to consider all these criteria.¹⁹⁰

CEMEX cited to the Fifth Review Panel Decision which found that the Department had not made the analysis as prescribed by law, and argued that an appropriate analysis of the statutory criteria must determine that bulk and bagged cement are not similar merchandise.

CEMEX argued that the packaging (bags) is a physical difference between the products; that bulk and bagged cement are sold for different general purposes, bagged cement exclusively to distributors for resale, and bulk cement almost exclusively to end user customers; and that there were significant price differentials between prices for bulk cement and bagged cement, establishing that bagged and bulk cement of the same type are not approximately equal in commercial value.

CEMEX further argued that the determinations in the Fifth and Sixth administrative reviews were directly contrary to the Department's determinations in all earlier reviews under the antidumping duty order, where the Department had consistently determined that bulk and bagged cement were distinct product types. The determinations in the Fifth and Sixth reviews were claimed to be "an abrupt and inexplicable departure from its prior administrative precedent" for which no sufficient explanation was provided.

¹⁹⁰ Nihon Cement Co. v. United States, 17 CIT 400 (May 25, 1993); Timkin Co. v. United States, 11 CIT 786, 792, 673 F.Supp. 495 (1987); Koyo Seiko Co., Ltd. v. United States, 16 CIT 366, 375, 796 F. Supp. 517 (1992).

In its brief of November 8, 1999, STCC argued that CEMEX had waived its right to appeal the bulk versus bagged issue, never having presented the issues at the administrative level. STCC noted that CEMEX's argument before the Department had been limited to level of trade arguments, and its original May 14, 1998 complaint did not challenge either the finding that bulk and bagged type cement were sold at only one level of trade in the home market, or the inclusion of both bulk and bagged Type 1 cement in the foreign like product. STCC notes that CDC, CEMEX's collapsed affiliate, likewise did not challenge this inclusion. STCC argues that, by failing to challenge the Department's matching methodology in its original complaint, CEMEX waived its right to appeal.

STCC further claimed that while CEMEX challenged the Department's matching methodology under the level of trade provisions of the statute during the administrative phase, no challenge was ever made concerning selection of foreign like product. Therefore, under the doctrine of exhaustion of administrative remedies, that claim cannot be raised for the first time before a court or binational panel. STCC does discuss the availability of the exception to exhaustion of administrative remedies based on an intervening judicial decision, but notes that intervening case law can only be used to bolster a claim that exhaustion should be waived, and that generally more is needed, citing Pohang Iron and Steel Co. v. United States, Slip.Op. 99-112 (October 20, 1999) and Rhone-Poulenc, 7 CIT 135 (1984). Arguing that CEMEX made a tactical decision not to raise the claim when initially filing the Sixth review, and is relying solely on the intervening judicial decision exception to the exhaustion requirement, absent a further basis for an exception to the exhaustion requirement, STCC states the claim should be dismissed without consideration on the merits.

STCC notes that the Fifth review, unlike the Sixth, included objections by CEMEX to the Department's preliminary determination to include bagged Type 1 cement in the foreign like product, and that claim was also included in its original complaint to the NAFTA panel on appeal. STCC claims that there is no statutory basis for excluding a portion of the home market sales of Type 1 cement from the foreign like product, as both bulk and bagged satisfy the requirements of Section 1677 (16)(B). Bulk and bagged Type 1 cement have identical physical specifications, and both are used to make concrete. Both are also "approximately equal in commercial value" based on variable cost of production. The Department does not ordinarily look to the form of presentation in determining foreign like product.

STCC agrees that in the original investigation, US sales of bulk cement were compared with home market sales of bulk cement, while US sales of bagged cement were compared with home market sales of bagged cement. STCC notes CEMEX's request in the original investigation that the Department disregard packaging in making comparisons. In the Second, Third, and Fourth reviews, no conclusions were reached on matching bagged cement with bulk cement, based on an original Second review determination (later reversed) that Type 1 cement was not going to be used for matching purposes, and in the latter two investigations on CEMEX's refusal to report transaction specific data for home market sales and the Department's use of best information available. STCC notes that the Fifth and Sixth review decisions by the Department were consistent with decisions in the cement and clinker cases for Japan, France, and Venezuela, as well as for other countries and products where foreign market value was based on both bulk and packed merchandise.

STCC further argues that the Fifth review panel decision is not binding, is not precedent, and lacks any persuasive authority. It argues that the panel violated the standard of review by

reviewing the matching issue *de novo*, and failing to remand to the Department for further consideration, and by basing its decision on new interpretations of the statute without allowing any party an opportunity to address those interpretations; by disregarding Federal Circuit precedent requiring substantial deference to the Department's model matching determinations; and by misinterpreting requirements regarding the "purposes for which used", "approximately equal in commercial value" and "similar in component materials" provisions. STCC further argues that the Fifth panel decision was based on an erroneous conclusion that the Department had granted a DIFMER adjustment, rather than a packing adjustment, for sales of bulk and bagged cement, and that the panel had improperly admitted and considered as evidence material that had not been presented in the underlying administrative review.

STCC presented further argument to demonstrate that CEMEX's arguments against matching bulk and bagged cement are both legally and factually erroneous. STCC states that there is no requirement that the Department equate "commercial value" and "price" for purposes of selecting foreign like product, and that even if such action was taken, the market prices paid for bulk and bagged cement are approximately equal. The component materials for bulk and bagged cement are identical, and packaging is merely a form of presentation, not a component material of the product. Bulk and bagged Type 1 cement have the same use-the production of concrete; and arguing that bulk cement has a construction end use and bagged cement a distributor end use inappropriately shifts the focus from the subject merchandise-cement-to the downstream product-concrete.

STCC closes its arguments by noting that, even if the panel believes that the Department's determinations are not supported by substantial evidence in the record, because CEMEX did not challenge the preliminary determination before the Department, the panel would

be obligated to remand the case to the Department for consideration, rather than attempt to make de novo factual determinations and apply methodological choices to the record of the review.

The Department also filed a brief on November 8, 1999 arguing that CEMEX's claim should be dismissed because CEMEX failed to exhaust its administrative remedies during the Sixth review, and that if the panel does consider the claim, the panel should affirm the Department's selection of a foreign like product or remand the issue to the Department for further consideration.

The Department states that CEMEX failed to contest the foreign like product selection during the Sixth administrative review, limiting its arguments on bagged versus bulk to level of trade issues. In a footnote¹⁹¹, the Department states that its early statement in its opposition to CEMEX's Motion for Leave to file the amended complaint that the "claim which CEMEX seeks to raise in an amended complaint is one which was raised before the Department in the underlying administrative review" is inaccurate, because the claim made has no relationship to the level of trade issue which was raised before the agency. Under the doctrine of exhaustion of administrative remedies, a reviewing court should not consider an issue that the complainant did not raise at the administrative level. Recognized exceptions to the exhaustion of administrative remedies include the raising of a new argument that was purely legal and requires no further agency involvement; lack of timely access to record evidence; an intervening judicial determination; and futility. The Department argues that none of these exceptions apply, including the intervening judicial decision. The Department states that the Fifth panel review does not reflect binding authority, and is not dispositive of the issue which CEMEX seeks to litigate. The Department also states that the Fifth review panel based its decision upon the facts developed during the Fifth review, and that the Sixth review has a separate and unique record

¹⁹¹ Department Brief of November 8, 1999, footnote 4.

such that the panel's factual findings in the Fifth review have no impact on the merits of the Department's action in the Sixth review.

With regard to the merits of CEMEX's claim, the Department states that it selected the foreign like product in accordance with its long standing model match methodology, based on commercially relevant physical characteristics. The Department further argues that if this panel should determine that the Department did not demonstrate that selection of comparison merchandise is consistent with the statute, the issue should be remanded for further consideration. The Department also points out that the Fifth review panel relied on "extra record evidence" to support its findings. The Fifth Panel improperly presumed that all significant differences in respondent's prices reflect differences in value. The Fifth Panel also improperly found that each statutory element in 19 USC Section 1677 (16)(B) must be accorded equal significance; the Department cites numerous cases where the courts have affirmed the Department's decisions to accord greater significance to physical characteristics of the merchandise.

In its reply brief of November 19, 1999 CEMEX argues that it did in fact raise the issue comparing US sales of bulk cement to home market sales of bagged cement before the Department in several contexts, and while it may not have fully developed the arguments, the Doctrine of exhaustion of administrative remedies requires only that a party raise an issue below. It may then expand and elaborate on its argument on appeal. CEMEX argues that if it is found to have failed to exhaust its administrative remedies, the intervening judicial decision exception applies. An intervening judicial decision need not be one that is binding, or dispositive of the issues. Although one CIT judge's opinion is not binding on another judge, it may well be considered persuasive, and has been applied by the CIT to allow consideration of the argument.

CEMEX further argues that the Department applied the wrong legal standard to the foreign like product analysis, and that the Fifth panel correctly understood the meaning of “commercial value”, the difference in components between bulk and bagged merchandise, and the different purposes for which the merchandise was used. CEMEX further argued that the Fifth panel was correct in the scope of its remand, that the record evidence in the Fifth review did not support a finding that bagged and bulk cement are similar, and the panel in the Fifth review was correct to remand with instructions to render a finding consistent with the “only factual support on the record”.

CEMEX states that the Department’s prior treatment of bulk versus packed products has lacked consistency, and that the Department has never adequately explained its shifting and inconsistent decisions.

Due to the delays involved in the completion of this Sixth panel review, the panel requested that the parties provide supplemental briefings to update the panel on any developments relevant to the issues before the panel.¹⁹² On the bulk versus bagged issue, the two developments discussed by the parties were the decision rendered by the Extraordinary Challenge Committee on the Fifth review¹⁹³, and the decision of the Seventh review panel regarding the bag and bulk issue.¹⁹⁴

CEMEX and CDC point out that the ECC upheld the decision of the Fifth panel, denying the claims that the panel had manifestly exceeded its powers, authority or jurisdiction by failing to apply the appropriate standard of review. They point out that the ECC concluded:

[I]t is apparent that the panel understood and applied the substantial evidence standard, as well as the Chevron Doctrine of great deference to agency decisions,

¹⁹² Panel Order, April 13, 2004; May 3, 2004 Supplemental Briefs.

¹⁹³ ECC-2000-1904-01 USA, October 30, 2003

¹⁹⁴ Seventh Review Panel Decision, April 11, 2002.

in its analysis, even if the manner in which it applied those standards to the factual issue that is the subject of this petition appears to be erroneous from the perspective of the United States and the STCC.

Consequently, the Fifth panel review decision is binding for the Fifth review. With regard to the Seventh review panel decision, CEMEX and CDC point out that, although the panel affirmed the Department's finding that bulk and bagged cement should be treated as the same foreign like product, the issue became moot due to the Department finding, on remand, that Type V cement sold as Type I cement would be used as the basis for normal value.

STCC and the Department stress the limited role of the ECC in conducting reviews, and the fact that the ECC opinion cannot be interpreted as having supported the underlying panel decision on the merits. They further point out in that regard that to the extent any inferences can be drawn, the ECC opinion states, as dicta, its belief that the dissenting opinion in the Fifth review is the better reasoned opinion. STCC further notes that the Seventh review panel, which had before it the panel decision of the Fifth review, rejected the argument made by CEMEX, and that the Department made a "permissible construction" of 19 USC Section 1677 (16)(B) in comparing US cement sales with home market sales regardless of whether they were in bulk or in bags. STCC also pointed out that the Seventh panel had noted that every administrative review in this case following the Seventh review had resulted in the same determination by Commerce on this issue.

Analysis

CEMEX raised concerns regarding use of bagged cement for price comparison purposes early in the Sixth review, and continued to press these issues through and including the briefs filed subsequent to the preliminary determination by the Department. These materials, however, and particularly the arguments in the briefs following the preliminary determination (which

proposed using both bulk and bagged Type I cement as “similar” merchandise for calculating normal value), were addressed to level of trade issues. CEMEX argued that the bagged merchandise was sold through different distribution chains at different levels of trade than bulk cement, and failed to specifically address the issue of the use of both bulk and bagged cement as similar merchandise following the Department’s determination of a single level trade in the home market. The challenges raised to this issue in the immediately preceding and subsequent reviews make clear that CEMEX understood and was able to articulate the issue. CEMEX also failed, in its initial complaint leading to this panel review, to challenge any aspect of the bulk and bagged cement comparisons, either under level of trade or normal value comparison issues.

The panel therefore concludes that CEMEX failed to exhaust its administrative remedies by not specifically raising this issue at the administrative level. In the absence of any exceptions to this policy, therefore, CEMEX would be precluded from raising the issue at this time. See 28 USC 2637(d).

28 USC 2637 sets forth the applicable rules regarding exhaustion of administrative remedies before the CIT. Subsection (d), applicable to this case, provides that the court “shall”, where appropriate, require the exhaustion of administrative remedies. In Hontex Enterprises, Inc. v. United States, Slip.Op. 04-55 (May 21, 2004) the court points out that it “enjoys discretion to identify circumstances where exhaustion of administrative remedies does not apply,” citing to Consol. Bearings Co. v. United States, 348 F. 3d 997, 1003 (Fed. Cir. 2003), itself citing CEMEX, S.A. v. United States, 133 F. 3d 897, 905 (Fed. Cir. 1998). In Hebei Metals and Minerals Import and Export Corporation v. United States, Slip.Op. 04-88 (July 19, 2004) the court again notes the lack of any absolute requirement of exhaustion in the Court of International Trade in non-classification cases, and notes that the court has “discretion to

determine the circumstances under which it is appropriate to require the exhaustion of administrative remedies,” citing China Steel, 306 F. Supp. 2d at 1310 and again citing to CEMEX S.A., *supra*. In Fabrique de fer de Charleroi S.A. v. United States, Slip.Op. 01-82 (August 29, 2001) the court provides a discussion of its discretion to determine the circumstances when exhaustion shall be required, at footnote 1. This panel is, of course, bound to apply the law in the same manner as it would be applied by the US Court of International Trade. This Panel, therefore, has the same authority within the context of a NAFTA review to determine whether an exception to the requirement for exhaustion of administrative remedies will apply.

CEMEX has claimed that it is covered by the intervening judicial decision exception to the doctrine of exhaustion of administrative remedies, based on the decision of the NAFTA panel in the Fifth administrative review. CEMEX claims that, even though it admits to not previously raising the issue based on litigation strategies, the scope and effect of the Fifth panel determination on the issue is an appropriate intervening determination to allow for application of the exception to the exhaustion doctrine.

STCC and the Department argue that this exception is not applicable. They first claim that only judicial decisions which are dispositive of the issue in question and binding on the tribunal give rise to the doctrine and can be used as a basis for the exception. CEMEX points out that this has not been the practice of the US Court of International Trade, which has recognized in appropriate situations decisions of other judges of the court, co-equal with and not binding on another judge, as sufficient basis to allow the exception. The panel agrees that decisions at an equal judicial level can appropriately be used to claim the intervening judicial decision for the exhaustion of administrative remedies. See Timken Co. v. United States, 15 CIT 658, 779 F.

Supp. 1402 (1991); Alhambra Foundry Co., Ltd. v. United States, 12 CIT 343, 685 F. Supp. 1252 (1988), which led to a remand and a subsequent court opinion, 12 CIT 1110, 701 F. Supp. 221 (1988) where the court upheld the Department's decision on remand which affirmed its original decision; Rhone Poulenc S.A. v. United States, 7 CIT 133, 583 F. Supp. 609 (1984).

STCC and the Department next claimed that NAFTA panel decisions, because they are expressly limited, are never precedential, and need not be followed by the Department in subsequent reviews, are not judicial decisions within the scope of the exception to the doctrine. This Panel notes that under the NAFTA provisions, where panel review has been invoked the panel decision takes the place of the Court of International Trade in providing judicial review to actions of the Department and the ITC. The role of judicial review of administrative actions is well established in federal jurisprudence¹⁹⁵. Within NAFTA, particularly on issues which will arise only in NAFTA cases, panels provide the only available judicial review for administrative action. Like decisions of co-equal judges of the CIT, panel decisions are not binding upon subsequent panels, but are given credence to the extent that they are persuasive on the issues discussed. This panel therefore holds that the determination of another NAFTA panel, even though it does not constitute precedent and is not binding on the current panel, is a "judicial decision" for the purposes of applying the exception to the doctrine of administrative remedies, at least within the scope of NAFTA reviews.

STCC also argued that the intervening judicial decision exception to the doctrine of the exhaustion of administrative remedies necessitates both the intervening determination and something more, citing Pohang, Slip.Op. 99-112. In that case, the court found an additional factor ("lack of a fair opportunity to raise the issue before the agency") and allowed an

¹⁹⁵ "...judicial review of administrative action "is the rule, and nonreviewability an exception which must be demonstrated." Barlow v. Collins, 397 US 159, 166-67 (1970)." General Motors Corp. v United States, 10 CIT 569, 573 (1986).

exception. To the extent that more than the intervening decision itself is necessary to invoke the exception, this Panel finds that the extensive discussion of the issue during the Sixth administrative review, although not specifically in the context of normal value comparisons; the continuing importance of this issue in the Fifth, Seventh, and subsequent reviews; and the fact that sufficient data was found on the record in this review for all parties to argue the merits of their positions at length; is sufficient to invoke the exception.

The panel therefore considered the merits of the claims raised by CEMEX. CEMEX's position is that the Department's determination of the appropriate "foreign like product" failed to consider all of the statutory factors for similar merchandise listed in 19 USC Section 1677 (16)(B). While there was no argument regarding the merchandise being produced in the same country and by the same person as the subject merchandise, CEMEX claims that only bulk cement is "like" the cement exported to the United States in component material or materials, and in the purposes for which it is used; and that only bulk merchandise is approximately equal in commercial value to that merchandise. Bagged merchandise, on the other hand, demonstrates a physical difference between the products (bags); is sold for different general purposes (resale to distributors rather than use in construction projects); and demonstrated significant price differentials from bulk cement of the same type. CEMEX also argued that the decision made by the Department rested solely on the fact that the bulk and bagged cement shared the same physical characteristics, and failed to consider the above listed differences in its analysis.

STCC and the Department respond that the only difference between the products is the packaging, and the form of presentation is not generally considered by Commerce in making its determinations. The Department further notes that CEMEX's invoices for bagged merchandise, in at least certain instances, included specific line items for the cost of bagging a product,

bolstering its argument that the bags are not a component material. STCC and the Department point out that the end use of the cement-the production of concrete-is identical regardless of the form of presentation. The Department's determination of similar "commercial value" does not necessitate a finding of similar "price"; even if it does, however, an analysis of comparison pricing of bulk and bagged Type 1 cement, utilizing gross prices or net prices paid by the customer, demonstrates that the pricing for the products was in fact "similar".

All parties argue the persuasiveness of the Fifth panel review, with CEMEX and CDC supporting the majority opinion and the Extraordinary Challenge Committee's determination that the decision would not be disturbed; and STCC and the Department supporting the dissent to the original panel decision, and its approval, in dicta, in the ECC decision. The STCC and the Department further note that the Seventh panel, reaching its conclusion before the ECC challenge was determined, failed to apply the decisions reached by the majority in the Fifth panel review, and upheld the use of bulk and bagged merchandise as "similar" for normal value comparison purposes.

This panel has some reservations concerning the Department's determinations on the bulk versus bagged issue, whether treated as a level of trade (chain of distribution) issue or a similar merchandise issue. We believe that the concerns raised by the Fifth panel reflect significant market differences between the bagged and bulk product, and that the Department has demonstrated inconsistencies in the treatment of bulk and bagged merchandise, both in the Mexican investigation and in other cement and clinker investigations. If reviewing the issues de novo, the panel might well find that there was substantial evidence on the record supporting different conclusions.

That is, however, not the role of judicial review, whether by the CIT or a NAFTA panel. The panel here determines that there is substantial evidence on the record supporting the determination by the Department to treat all Type I cement, both bulk and bagged, as “similar” merchandise for purposes of calculating normal value. Both bulk and bagged merchandise are made in the same country by the same producer. The cement is produced in one common process, and is physically identical apart from the bag; even if a different reviewer might find that the bag constitutes a different material, decisions in previous and similar cases are varied, and the invoice documentation with a separate line item for packaging costs supports the finding of an identical product differing only in its packaging. With separate channels of distribution not being recognized in this review, the end use of the cement—the production of concrete—is the same. The price comparison, which also might not be reflective of different channels of distribution, is nevertheless a reasonable (even if not the only possible) interpretation of the facts by the Department in this review. The Department made its decision based on multiple factors, did not exclude consideration of any of the statutory criteria, and is not required to give equal weight to each factor. The panel holds that the decision to use both bulk and bagged merchandise for normal value comparison purposes is a “permissible construction” of the statute and supported by substantial evidence on the record.

The Panel upholds the Department’s determination that bulk and bagged cement constituted identical merchandise for normal value comparison purposes.

E. TERMINAL CHARGES

Issue Presented

Was the Department's determination to classify CEMEX's and CDC's U.S. terminal expenses as indirect selling expenses supported by substantial evidence and otherwise in accordance with law?

The Department's Decision

In the Final Results, the Department classified CEMEX's and CDC's reported U.S. terminal expenses as indirect selling expenses:

"Finally, in response to petitioner's argument that CEMEX and CDC's U.S. terminal expenses should be considered movement expenses, we confirmed at verification (see U.S. Sales Verification Report dated July 21, 1997), that the reported terminal expenses are the expenses associated with making sales in the United States from the various sales offices/terminals. The evidence on the record does not indicate that these are expenses associated with the storage or movement of the subject merchandise prior to, or subsequent to the final sale. The Department reviewed the methodology employed by CEMEX and CDC to determine if the reported expenses were in accordance with Departmental practice. We found no discrepancies with respondent's reporting of U.S. indirect selling expenses and, consistent with our final determination in the fifth administrative review, we continue to treat the reported terminal expenses as U.S. indirect selling expenses".¹⁹⁶

These expenses were incurred by CEMEX's and CDC's corresponding affiliated parties in the United States: Pacific Coast Cement (Long Beach Terminal) ("PCC") and Sunbelt Cement (Phoenix and Tucson Terminals) ("Sunbelt") for CEMEX, and by Rio Grande Portland Cement Company (Albuquerque and El Paso terminals) ("RGPCC"), for CDC.¹⁹⁷

Contentions of the Parties

¹⁹⁶ Final Results of Sixth Review.

¹⁹⁷ CEMEX's November 22, 1996 Questionnaire Response, Prop. Doc. 8, at Exhibit C-20 (Appendix 22); CDC's November 22, 1996 Questionnaire Response, Prop. Doc. 9, at C-23 and Exhibit C6 (Appendix 23)

STCC

The STCC argues that the Department should have treated certain¹⁹⁸ U.S. terminal expenses associated with the cement distribution terminal as movement expenses, pursuant to 19 U.S.C. § 1677a(c)(2)(A), instead of indirect selling expenses¹⁹⁹. The STCC claims that when a CEP offset adjustment is granted, as in this case, the increase in U.S. indirect selling expenses permits more indirect selling expenses to be deducted from normal value.²⁰⁰

The STCC acknowledges that it is arguably possible for CEMEX and CDC to demonstrate that some portion of their U.S. terminal expenses reflects indirect selling expenses (because some selling activity is conducted at the terminals). However, the STCC requests the Department to treat all of the U.S. terminal expenses as warehousing expenses (and thus movement expenses) if it is not possible to segregate warehousing expenses from selling expenses.²⁰¹

The STCC contends that in this review, the Department did not even request that CEMEX and CDC segregate the warehousing portion of the terminal expenses from the indirect selling expense portion²⁰², while in the Seventh Review the Department was able to segregate warehousing expenses, properly treated as movement expenses, from selling expenses, properly treated as indirect selling expenses²⁰³, and in the Eighth Review the Department has requested

¹⁹⁸ In its initial brief, the STCC requests that all the reported terminal expenses be treated as movement expenses, but in its Reply Brief of June 15, 1999, at 65, recognizes that some selling activity is conducted at the terminals, and in its Supplemental Brief of May 3, 2004 at 3, requests that the warehousing expenses be classified as movement expenses.

¹⁹⁹ Brief of the Southern Tier Cement Committee (Feb 18, 1999) at 79.

²⁰⁰ *Id.* at 80.

²⁰¹ *Id.*

²⁰² Reply Brief of the Southern Tier Cement Committee (June 15, 1999) at 66.

²⁰³ The STCC points out “Commerce determined on remand from the binational panel in the Seventh Review that the expenses of operating distribution terminals in the United States “are appropriately classified as warehousing expenses and, therefore, movement expenses” Final Results of Redetermination Pursuant to NAFTA Panel (Sept 27, 2002), at 43.” Second Supplemental Brief of the Southern Tier Cement Committee (May 3, 2004) at 2-3.

separate reporting by CEMEX and CDC of indirect selling expenses and warehousing expenses incurred at their U.S. distribution terminals.²⁰⁴

The STCC argues that the Department's treatment of the terminal expenses was contrary to the statute²⁰⁵, the Department's practice²⁰⁶, and to the evidence of record.

Regarding the last argument, the STCC claims that the Department did not confirm, or even attempt to confirm, "the characterization of these expenses by CEMEX and CDC as indirect selling expenses."²⁰⁷ According to the STCC, all that the Department did with respect to U.S. warehousing expenses at verification was to "confirm that the amounts of the expenses were accurately reported based on CEMEX's and CDC's internal records."²⁰⁸

The Department

In response, the Department does not contend that the statute and the Department's practice requires it to treat warehousing expenses as movement expenses. However, the Department finds that the evidence on the record supports its determination to treat the terminal expenses incurred as a result of the sales activities supporting U.S. sales as indirect expenses: "The evidence on the record supports the Department's determination that CEMEX and CDC properly classified the expenses associated with the sales activity as indirect selling expenses while treating the

²⁰⁴ Reply Brief of the Southern Tier Cement Committee (June 15, 1999) at 66.

²⁰⁵ The STCC acknowledges that the statute does not refer specifically to warehousing expenses. However, it refers to the SAA which explains that the expenses deductible under §1677a(c)(2)(A) include "transportation and other expenses, including warehousing expenses, incurred in bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." SAA at 823 (emphasis added)." Id. at 81-82

²⁰⁶ The STCC quotes Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 63 Fed. Reg. 13,170, 13179 (1998) "(pre-sale warehousing expenses treated as movement expenses and deducted from US price); Static Random Access Memory Semiconductors From Taiwan, 62 Fed. Reg. 51442, 51446 (1997). And Porcelain-On-Steel Cookware from Mexico, 62 Fed. Reg. 42496, 42502 (1997); Frozen Concentrated Orange Juice from Brazil, 62 Fed. Reg. 5588, 5589 (1999). "Because the statute contains virtually identical language with respect to movement expenses adjustments to US price and movement expense adjustments to normal value, there should be no difference in result depending on whether the transaction is a home market or CEP/EP sale. Compare 19 USC § 1677a(c)(2)(A) with 19 USC §1677(a)(6)(B)(ii)." Id. at 82-83.

²⁰⁷ Id.

²⁰⁸ Id.

warehousing of merchandise at these terminals as movement expenses.”²⁰⁹ The Department quotes Cemex’s and CDC’s responses to Section C of the Department’s questionnaires, in which CEMEX and CDC distinguished the expenses arising out of the sales activities at U.S. terminals from expenses incurred as a result of transporting and warehousing subject merchandise.²¹⁰

In its Rule 57 (2) Brief, the Department stated “The Department properly treated CEMEX’s and CDC’s freight and warehousing expenses as movement expenses, and treated “terminal expenses” incurred as a result of the sales activities supporting U.S. sales as indirect selling expenses”.²¹¹

Therefore, the Department requests the Panel to affirm the Department’s determination.

CEMEX and CDC

CEMEX and CDC, like the Department, do not contend that warehousing expenses should be treated as movement expenses. However, they claim that the Department verified their corresponding terminal expenses, and properly concluded that these expenses should be treated as selling rather than warehousing expenses.²¹²

CEMEX states that Sunbelt and PCC’s warehouses serve as sales offices and the expenses are reported in its accounting system are reported as selling expenses. It refers to the US Sales Verification Report, July 21, 1997, to support that the Department confirmed at verification that the reported terminal expenses are expenses associated with making sales in the United States from the various sales offices/terminals.

Similarly, CDC claims that the Department verified CDC’s terminal expenses and properly

²⁰⁹ Brief of the Department (May 3, 1999) at 120.

²¹⁰ CEMEX section C response, C.R. 8 at C-14, C-15, and C-23, as well as CDC Section C response, C.R. 9 at C-12, C-15, C-16, C-24, and C-25. Id.

²¹¹ Brief of the Department (May 3, 1999) at 120.

²¹² Brief of Cementos de Chihuahua (May 3, 1999) at 17. See Brief of CEMEX (May 3, 1999) at 37.

concluded in the Final Results that these expenses should be characterized as selling rather than warehousing expenses. CDC relies on the verification report, at which the US verification held that at RGPCC, the Department “reviewed worksheets for indirect selling expenses and corresponding worksheets for corporate headquarters and the terminals” and that it tied these expenses to RGPCC’s accounting records, demonstrating that CDC’s terminal expenses are comprised in large part of selling expenses.²¹³

In particular, CDC states that its terminal expenses include many expenses (e.g. copying, and microfilming, dues and subscriptions, travel, meals, entertainment, auto-rental, training, conferences meetings, licenses and permits, and quality control test/inspection) that relate only to selling activities from these facilities, rather than storing the cement.²¹⁴

Analysis

All the parties agree that CEMEX’s and CDC’s corresponding affiliated parties in the United States have warehousing and selling capabilities.

All the parties also agree to treat as movement expenses the U.S. terminal expenses associated with the cement warehouse prior to, or subsequent to the final sale to U.S. customers, and as indirect selling expenses the U.S. terminal expenses incurred as a result of the sales activities supporting U.S. sales.

In the Final Results, the Department classified CEMEX’s and CDC’s reported U.S. terminal expenses as indirect selling expenses.

However, the STCC claims that the Department treated all of the U.S. terminal expenses as indirect expenses, instead of warehousing expenses or properly allocated in some fashion as

²¹³ Id. at 17.

²¹⁴ CDC quotes the CDC US Verification Exhibit 22 at 4-5; Prop. CDC US Exh. Doc #22. Id. at 18.

warehousing expenses²¹⁵. Therefore, the STCC requests the Department to treat all U.S. terminal expenses as movement expenses if it is not possible to segregate the portion of the warehousing expenses from selling expenses.

On the other hand, the Department, CEMEX and CDC state that during verification, the Department confirmed that the reported U.S. terminal expenses correspond to expenses associated with making sales in the United States, and therefore, they request the Panel to confirm the Department's determination to treat them as indirect selling expenses.

Therefore, it is appropriate to question if the evidence on the record indicates that the reported terminal expenses are effectively the expenses associated with making sales in the United States from the various sales offices/terminals, or if, as the STCC suggests, some of them are expenses associated with the storage or movement of the subject merchandise prior to, or subsequent to the final sale.

With regard to the evidence on the record that supports the Department's determination, there are two main elements to consider in order to analyze it: the questionnaires cited by the Department, CEMEX and CDC, and the verification reports.

The questionnaires cited by the Department, CEMEX and CDC distinguished expenses arising out of sales activities and those involved in freight and warehousing. The information contained in those questionnaires, although succinct, provides support to the Department's determination. Such information indicates that the transport and warehouse expenses were reported separately from terminal expenses.

²¹⁵ Hearing transcript at 28.

With regard to the question of whether some of the expenses from the offices/terminal are not associated with the making of sales in United States, the Panel finds that the Department confirmed during verification that sales activities were performed at the terminal facilities and the reported activities correspond to selling activities. Considering that the Department needs only make a reasonable interpretation of the facts, and not necessarily the most reasonable, as well as the deference to be afforded to the Department with regard to its verification activities²¹⁶, the Panel finds that it is proper to uphold the Department's determination regarding the treatment of the reported U.S. terminal expenses as indirect selling expenses.

This Panel affirms the Department's determination regarding the treatment of the reported U.S. terminal expenses as indirect selling expenses.

F. DIFMER Decision

Issues to be Resolved

1. Was the Department's use of partial adverse facts available to calculate the DIFMER adjustment supported by evidence in the record and in accordance with law?
2. Was the Department's DIFMER calculation accurately based on the information available in the record?

The Department's Decision

To calculate the dumping margin, the Department compared CEMEX's sales in the United States of Type V (invoiced as Type II) cement with Mexican domestic sales of Type I cement. This occurred because the sales of physically identical merchandise (Type V invoiced

²¹⁶ Under Chevron, USA, Inc. v. Natural Res. Def. Council, Inc., 467 US 837, 842-43 (1984), "any reasonable construction of the statute is permissible construction" Torrington v. United States, 82 F. 3d 1039, 1044 (Fed. Cir) 1996). "To survive judicial scrutiny, [Department's] construction need not be the only reasonable interpretation or even the most reasonable interpretation...Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citing Zenith Radio Corp. v. United States, 437 US 443, 450 (1978)).

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. The sales of Type V, invoiced as Type I, were excluded by the Department based on facts 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.²¹⁷ 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.²¹⁸

²¹⁷ 19 U.S.C. 1677b(a)(6)(C)(ii).

²¹⁸ Gray Portland Cement and Clinker from Mexico, 63 Fed. Reg. at 12779.

1. Was the Department's DIFMER adjustment based upon Partial Adverse Facts Available supported by substantial evidence in the record and in accordance with law?

Arguments of the Parties

The Department

Due to the fact that Types I and V cement are not identical products, in accordance with 19 U.S.C. § 1677b(a)(6)(C)(ii), the Department is authorized to make a DIFMER adjustment to normal value in order to make the price comparisons between Type I and Type V cement. However, according to the Department, “the Department could not calculate an accurate DIFMER adjustment because CEMEX failed to provide information which reflected its actual cement production at the Yaqui and Campana plants in Hermosillo.”²¹⁹ These factual circumstances compelled the Department to calculate CEMEX's DIFMER adjustment using partial adverse facts available.

The Department states that “Section 1677e(a) of the antidumping statute directs the Department to resort to facts available if necessary information is not available on the record, or (else if) an interested party withholds requested information.”²²⁰ 19 U.S.C. § 1677e(a)(1); 1677e(a)(2)(A).

In this regard, the Department further states that “the facts available rule serves(as) an inducement for respondents to provide the Department with timely, complete, and accurate responses so the agency can calculate accurate dumping margins. Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990).”²²¹ The Department states that when, “a respondent withholds factual information critical to the Department's analysis, application of the

²¹⁹ Brief of the U.S. Department of Commerce on behalf of the Investigating Authority, dated May 3, 1999, at 56.

²²⁰ Id.

²²¹ Id., at 57.

facts available rule is not only appropriate but necessary to ensure future compliance with the Department's information requests.’²²²

The Department states that in three different questionnaires the Department requested information about variable manufacturing costs incurred in the production of the different cement types. In the first questionnaire, the Department asked for information on variable manufacturing costs. The Department explains that in its response, CEMEX provided weighted-average variable cost data for Types I and II cement. CEMEX also explained that all production processes “are “essentially the same” for all cement types, the only difference being the chemical composition of raw materials.’²²³

CEMEX also supplied a chart that identified, by plant, the type of cement produced. There is no indication in that chart that shows that CEMEX was producing Type V cement in any of its plants. According to that chart, all of the CEMEX plants were producing either Type I or Type II cement. CEMEX Supp. Sect. A Response, Jan. 29, 1997, P.R. 72; C.R. 20 at Exhibit SA-7.

With the aim of calculating the DIFMER adjustment, in a second questionnaire, the Department requested again information regarding variable manufacturing costs elements which are solely attributable to physical differences. CEMEX reiterated its statement that differences in costs between Type I and II were attributable to chemical differences in raw materials. CEMEX Supp. Sect. D Response, Feb. 13, 1997, P.R. 76; C.R. 24 at 42.

In a third supplemental questionnaire, the Department asked for clarification upon whether the reported differences in variable costs for Types I and II were due to differences in physical characteristics. CEMEX responded that the information was based upon variable costs

²²² Id.

²²³ Id.

of manufacturing for each plant calculated on a weighted average methodology. The Department deems the response as incapable of providing the requested explanation. In that questionnaire, the Department asked CEMEX if the submitted DIFMER information was based on the weighted-average difference in variable cost of manufacture (VCOM) for producing Type I and Type II. In the response, CEMEX asserted: "Because of the chemical composition of limestone and clay used in Hermosillo, the Type II LA is only produced in (CPN {Campana} and Yaqui) ...It is impossible to determine whether the difference in VCOM results from the differences in material costs, which vary at each plant based on the different physical and chemical composition of raw materials used, or the effect of weight averaging. CEMEX submits that while it is impossible to isolate a single or even a group of different raw material costs, the fact remains that differences in VCOM reflect differences in physical characteristics for Type I and Type II cement." CEMEX Supp. Response, April 7, 1997, P.R. 91; C.R. 31 at 64-65. In another section of the same supplemental questionnaire, CEMEX responded that "cements produced and sold at CPN {Campana} were Type II, Type V and puzzolanic. The cement produced and sold at Yaqui were Type I, Type II and puzzolanic cement." CEMEX Supp. Response, April 17, 1997, P.R. 91; C.R. 31 at 65.

At verification, the Department discovered that CEMEX produced only Type V cement at the Hermosillo plants (Campana and Yaqui). CEMEX also agreed that the reported weighted-average variable cost information was based on an allocation of sales invoiced as Type I, II, and V from the Yaqui and Campana plants. Thus, the cost differences were not due to physical characteristics. CEMEX and CDC Cost Verification Report, P.R. 131; C.R. 53 at 14-15. According to the Department's brief: "CEMEX also admitted (in the Verification Report) that

differences in production costs between type I cement from Yaqui and type I cement from other plants were the result of plant efficiencies.”²²⁴

For the Preliminary Results, the Department concluded that the information on the record was insufficient for purposes of calculating a DIFMER adjustment for comparisons of Type I and V. The Department argues that it could not use CEMEX's submitted information since CEMEX had not calculated the differences in variable costs based upon physical differences between Types I and V cement. In the Final Results, the Department reaffirmed this determination, stating that “the DIFMER reported for cement sold as Types I and II at these facilities {Yaqui and Camapana} did not reflect differences in merchandise and was not a proper basis for a DIFMER adjustment.”²²⁵ 63 Fed. Reg. at 12779.

CEMEX

CEMEX argues that the basic statement by the Department that supports the partial facts available decision is that CEMEX did not inform it properly about the type of cement that was produced at the Hermosillo facilities (El Yaqui and Campana). CEMEX argues that “this is an incorrect characterization of the facts of the record of the review.”²²⁶ According to CEMEX, in its response to the Department’s supplemental questionnaire issued on December 24 1996, CEMEX addressed the issue. In the answer to question 6 CEMEX states, “El Yaqui and CPN {Campana} plants produce a natural Type V LA cement, because their quarry chemical composition proves those qualities. El Yaqui had some sales of cement meeting the technical specifications of Type II LA (and Type V LA) cement to customers wishing only Type I during the period of review.” CEMEX’s January 29, 1997 Supplemental Response, Prop. Doc. #20 at 22. In the answer to question 7 CEMEX further stated: “As explained in the above answer to

²²⁴ Brief of the U.S. Department of Commerce on behalf of the Investigating Authority, dated May 3, 1999, at 60.

²²⁵ *Id.*, at 61.

²²⁶ Reply Brief of CEMEX, dated June 15, 1999, at 31.

question 6, CEMEX had sales of cement meeting the technical specifications of Type V LA cement as Type II LA and Type I cement during the POR.” CEMEX claims that neither the Department nor STCC could claim that they were unaware of these facts until verification.

CEMEX also argues in its Brief,²²⁷ that all these problems emerge because of the confusion created by the adoption of the “sold as” methodology. CEMEX claims that the only methodology consistent with the antidumping statute is the “produced as” methodology.

STCC

The STCC argues that the Department requested from CEMEX, on repeated occasions, information on the relationship between variable cost data reported by CEMEX and differing physical characteristics of Type I and Type II cement, however CEMEX was not forthcoming with this information. The STCC further states that during the verification visit, the Department discovered that the DIFMER reported by CEMEX was not based on physical differences, but it was based on “allocation of costs between Type I and Type II cement sales for what was in fact the same physical product –Type V cement.”²²⁸ During verification, the Department discovered that all cement produced at the Hermosillo plants (other than puzzolanic cement) was Type V. Therefore, according to the STCC, CEMEX’s DIFMER information was unusable and the Department was compelled “to rely on facts available as the basis for CEMEX’s DIFMER.”²²⁹

Analysis

Although the Panel agrees with CEMEX that the information provided by CEMEX in the answers to the supplemental questionnaire issued on December 24, 1996 address the issue of the Type of cement produced at El Yaqui and Campana, the answer is not clear enough to inform

²²⁷ *Id.*, at 34.

²²⁸ 62 Fed. Reg. 47626, 47629 (1997). See response brief of the STCC dated May 3, 1999, at 106.

²²⁹ Response brief of the STCC dated May 3, 1999, at 107.

whether Type V was the only cement produced at these plants. The answer to question 6 specifies only that “El Yaqui and CPN {Campana} produce a natural type of Type V LA cement, because their quarry chemical composition provides those qualities...,” however this answer is not specific enough to show whether this was the only type of cement produced at these facilities.

Second, CEMEX has no explanation as to why the chart supplied indicates that Campana produced Type II and El Yaqui produced Type I and Type II cement. This statement cannot be explained by the hypothesis about the confusion created by the methodology “produced as” versus the methodology “sold as.”²³⁰ According to the findings at verification, CEMEX produced Type V LA cement at these facilities and sold this Type V cement as Type V, Type II and Type I cement, so if the chart wanted to reflect the Type of cement according to the “as sold” methodology it should have stated the three types of cement: Type V, Type II and Type I. Similarly, if the chart wanted to reflect the Type of cement “as produced” it should have stated Type V. With regard to this chart this Panel concludes that CEMEX’s assertions were misleading with regard to the Type of cement produced at the Hermosillo facilities.

Third, in the answers to the third questionnaire, the Panel finds statements that implied that the Campana plant produced Type II, Type V and puzzolanic, whereas the cement produced at El Yaqui was Type I, Type II and puzzolanic. CEMEX Supp. Response, April 7, 1997, P.R. 91; C.R. 31 at 65. These suggestions are not consistent with the findings at verification. CEMEX should have clearly stated that CEMEX produced Type V and sold this cement to Type V, Type II and Type I customers.

The Panel finds the fact that CEMEX was reporting weighted-average variable costs calculated on an allocation methodology based on the sales of Type V, II and I cement from the

²³⁰ These explanations were emphasized by CEMEX at the February 23, 2005 hearing.

Hermosillo plants even more troublesome. The Panel finds that this methodology is clearly unusable for the purpose of calculating the DIFMER margin. Also, the Panel finds a clear inconsistency between the assertion by CEMEX in the third supplemental questionnaire that stated: “the fact remains that differences in VCOM reflect differences in physical characteristics for Type I and Type II cement” with the findings at verification.

In conclusion, the Panel finds that CEMEX was not cooperative with the information regarding the Type of cement produced at the Hermosillo plants. Additionally, the Panel finds that CEMEX did not calculate the reported weighted-average variable cost information under the right methodology,²³¹ and did not inform about the methodology that was being used. The Panel agrees with the Department’s assertion that states that under 19 U.S.C. 1677e(a) the statute authorizes the use of adverse inferences if the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. The Panel finds that CEMEX withheld important information with regard to the method for calculating weighted-average variable cost and also provided misleading responses with regard to the Type of cement produced at the Hermosillo’s facilities. Thus, the Panel affirms the use of partial facts available with regard to the DIFMER adjustment and finds that it was supported by substantial evidence in the record and in accordance with law.

2. Was the Department’s DIFMER calculation accurately based on the information available in the record?

Arguments of the Parties

The Department

Once the Department determined the application of facts available, the issue was how to calculate the DIFMER adjustment. The Department argues that CEMEX’s late disclosure did

²³¹ Based upon physical differences.

not allow the Department to obtain additional information needed to calculate an accurate DIFMER adjustment. According to the Department the need for more information was necessary because “CEMEX had admitted that the reported differences in variable costs of its Type I production facilities reflected differences in production efficiencies, not physical characteristics.”²³² CEMEX and CDC Cost Verification Report, P.R. 131; C.R. 553, at 15.

For the Preliminary Results, once the Department reached the decision to use 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).²³³ 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.²³⁴

The Department affirms 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 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. This calculation resulted in a [] percent upward adjustment to normal value.²³⁵ The Department stated that "this calculation results in an

²³² Brief of the U.S. Department of Commerce on behalf of the Investigating Authority, dated May 3, 1999, at 61.

²³³ 62 Fed. Reg. at 47628.

²³⁴ Sixth Review Final Results, 63 Fed. Reg. at 12779.

²³⁵ Final Results Calculation Memorandum, P.R. 223; C.R. 94 at 11.

upward adjustment to home market prices that in this case is sufficiently adverse, but is based on CEMEX's actual cost information." Sixth Review Final Results, 63Fed. Reg. at 12779.

CEMEX

CEMEX argues that it submitted to the Department the cost of production data covering Type I, Type II LA and Type V LA cement.²³⁶ According to CEMEX, such information was verified as accurate by the Department.²³⁷ CEMEX argues that these cost data were fully useable for the purpose of calculating the DIFMER adjustment.

CEMEX argues that the Department's use of variable cost from a single plant - the one with the lowest variable cost -- has an adverse effect.²³⁸ In CEMEX's opinion, instead of using the plant with the lowest variable cost producing Type I cement, the Department should have used information from all plants and used the weighted-average variable cost for Type I cement produced at all of CEMEX's Type I production facilities. According to CEMEX, "the use of weighted average costs from multiple production facilities is the standard approach used by the Department".²³⁹ CEMEX contends that this methodology is consistent with the phrasing of the Department's questionnaire which required CEMEX to present its weighted average cost: "If you produce the merchandise under review at more than one facility, you must report COP and CV based on the weighted average of the cost incurred at all facilities."²⁴⁰

CEMEX contends that by choosing the plant with the lowest variable cost the Department increased the adverse DIFMER adjustment by 400 percent when comparing this adjustment with

²³⁶ Prop. Doc. #24; Pub. Doc. #76.

²³⁷ Cemex's initial brief dated February 19, 1999, at 49.

²³⁸ See Department Brief at 67 ("The relevant case law, requires that the choice of facts available bear a rational relationship to the subject matter at issue.")

²³⁹ Reply Brief of CEMEX, dated June 15, 1999, at 40, citing Antifriction Bearings (Other Than Tapered Roller) And Parts Thereof From France, et. al., 57 Fed. Reg. 28360, 28367 (1992) ("the Department used the weighted average variable cost of manufacture (VCOM) of the corresponding bearing family in the calculation of DIFMER adjustments.")

²⁴⁰ Pub. Doc. #11 at D-2.

the adjustment calculated on the basis of weighted-average variable costs of all CEMEX's plants that produce Type I. In CEMEX's view, this increase is clearly punitive given that there is information in the record that would lead to a lower DIFMER adjustment. CEMEX argues that the DIFMER calculation was unreasonable because the Department rejected a lower adjustment in favor of a higher adjustment given that the higher number was less probative given the information in the record. CEMEX also contends that the calculation of the DIFMER adjustment is inconsistent with the remedial nature of the antidumping statute which requires that dumping margins to be calculated accurately.²⁴¹

CEMEX also suggests that given that CDC has been collapsed with CEMEX, the Panel should have used the DIFMER from CDC investigation.

STCC and the Department

Both the Department and the STCC contend that the legal standard for facts available gives the Department considerable deference. The STCC quotes the decision by the Federal Circuit in Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185 (Fed. Cir. 1993). The decision states that Congress "explicitly left a gap for the agency to fill" on the choice of best information available and thus, according to the STCC, the choice by the Department is entitled to considerable deference.²⁴² The Department adds that facts available has the same purpose as best information available and quotes the decision by the CIT in which the court maintains that the Department has the same discretion when selecting facts available under the URAA.

Both the Department and the STCC claim that it is not true that when using facts available the Department has to resort to verified factual information. Similarly, both the Department and the STCC contend that the cost information for the Yaqui and Campana plants

²⁴¹ Reply brief of Cemex, S.A. de C.V. dated June 15, 1999 at 41.

²⁴² Brief of the Southern Tier Cement Committee in Response to Briefs submitted by CEMEX, S.A. de C.V. and Cementos de Chihuahua, S.A. de C.V., dated May 3 1999, at 124.

was not verified. Thus, not all cost information was verified. Finally, both the Department and the STCC argue that the DIFMER information from the CDC investigation could not be used for the DIFMER adjustment for CEMEX because CDC's DIFMER is based on the differences in physical characteristics between Type II and Type I cement. For CEMEX, the DIFMER calculation should be obtained from a comparison between Type V and Type I cement.²⁴³

Analysis

During the Fifth Administrative Review, CEMEX requested, the Department granted, and the Binational Panel upheld a DIFMER adjustment favorable to CEMEX, based on information in that record indicating that both Type II and Type I cements were produced at a single facility. Although the Department indicated in that investigation that, where the compared merchandise is produced in more than one plant, it usually attempts to avoid distortions by basing its DIFMER adjustment on the weighted average cost for each product at all plants producing product; in the Fifth Review the choice of a single plant which produced both products sought to avoid distortion occasioned by plant efficiencies by isolating the DIFMER calculation to cost differences within a single plant.²⁴⁴

In the Seventh Review, after remand, when it was known that all of the merchandise produced in the Hermosillo facilities was Type V cement, and the comparison was made between exported Type V cement sold as Type II, and home market Type V cement sold as Type I, it was determined that there were no physical difference between the products, and therefore no DIFMER allowance was appropriate.²⁴⁵

²⁴³ See Final Results 63 Fed. Reg. at 12779.

²⁴⁴ Binational Panel Review, Gray Portland Cement and Clinker from Mexico, 1994-1995 (Fifth Review), June 18, 1999.

²⁴⁵ Final Results of Redetermination Pursuant to NAFTA Panel Gray Portland Cement and Clinker from Mexico, 1996-1997 (Seventh Review), September 27, 2002.

In this Sixth Review, CEMEX initially requested a DIFMER allowance on the same basis as that granted in the Fifth Review. When it became apparent to the Department that all the merchandise produced at the Yaqui facility was actually Type V cement, and the Department excluded Type V cement sold as Type V and Type II cement in the home market as being outside the ordinary course of trade, and excluded Type V cement sold as Type I cement in the home market due to the failure of verification, CEMEX sought to withdraw its request for a DIFMER adjustment. The Department, having determined to make a comparison between Type V cement produced at the Yaqui facility sold as Type II cement to the United States, and Type I cement produced at other facilities in Mexico as the home market product, found that a DIFMER adjustment was appropriate. It further found, as noted above, that a DIFMER adjustment adverse to CEMEX based on partial adverse facts available was appropriate.

As stated by the Department in its brief, the purpose of using adverse inferences in applying facts available is to “select information that is sufficiently adverse ‘to insure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.’”²⁴⁶ However, CEMEX notes that the SAA does not mandate that the use of adverse inferences in applying facts available should be so harsh that it becomes punitive in a manner inconsistent with the remedial nature and the fundamental purpose of the antidumping duty statute.

The concept of “punitive” is fundamental in order to evaluate the decision by the agency. The Court of Appeals for the Federal Circuit has determined that “in order for the agency’s application of best information rule to be properly characterized as punitive, the agency would

²⁴⁶ Department Brief at 65-66 *citing* SAA, H. Doc. 316, at 870.

have had to reject low margin information in favor of high margin information that was demonstrably less probative of current conditions.’²⁴⁷

CEMEX argues that the choice of the plant with the lowest variable cost is a choice that has quite an adverse effect. CEMEX also argues that there is evidence in the record that would lead to a lower DIFMER adjustment. In particular, CEMEX refers to the potential use of the weighted average variable cost of all CEMEX’s facilities that produce Type I cement. In CEMEX’s view a DIFMER adjustment calculated with this latter data would result in a substantially smaller adjustment. For CEMEX, this evidence shows that the Department was overly punitive.

The Department, after asserting that it has discretion with regard to the choice of best information, argues that it is erroneous to assume that the weighted average variable costs are an appropriate basis for DIFMER. It refers to CEMEX’s questionnaire responses (quoted above) regarding the inability to differentiate differences in material costs and the effects of weight averaging. From this the Department argues that the weighted average data is unusable for DIFMER purposes because it failed to isolate differences attributed solely to physical differences.

The Panel does not find that the above justification for rejecting the weighted averaging methodology advanced in the Department’s brief is reasonable. By definition, the weighted average methodology is always affected by the weighting choice. It is intrinsic to the weight averaging methodology for the weights to play a role. The Department has used weighted average figures in other investigations.²⁴⁸

²⁴⁷ Rhone Poulenc, Inc. v United States, 899 F.2d 1185, 1190

²⁴⁸ Antifriction Bearings (Other than Tapered Roller) and Parts Thereof from France, et.al., 57 Fed. Reg. 28360, 28367 (1992).

Additionally, the Panel finds that the choice made by the Department, to select as the comparison plant for Type I cement the facility with the lowest variable cost, is inconsistent with the aim explicitly stated by the Department. As explained in the Final Results and in the Department's brief, to minimize plant efficiency effects the Department selected a single plant for the comparison plant (the one with the lowest variable cost).²⁴⁹ The Department explains the rationale in its brief: "As the Department explained in the fifth administrative review, "cost differences at the single facility are more likely to be due to differences in material inputs and the physical differences which result from different production processes" rather than differences in production efficiencies."²⁵⁰ The Panel finds that this rationale does not apply to the case at hand. In this decision, the comparison between Type V and Type I is not being made at a single facility, as it was in the Fifth Review; it involves three facilities, the variable costs of the Yaqui and Campana plants with the plant with the lowest variable cost that produce Type I. We agree with the statement but it does not apply to the case at hand.

Second, given that the DIFMER is obtained from the comparison between plants, and considering that plant efficiencies affect the measurement of variable costs, it seems better to use the information that comes from several plants to control for the impact of plant efficiencies. The choice of a single plant may yield a larger bias in the impact that comes from plant efficiencies and this bias could go in either direction. Thus, this Panel does not find the selection of a single plant, as a strategy that minimizes the impact of plant efficiencies, is reasonable. Consequently, if the aim was to reach a DIFMER measurement that used some information from

²⁴⁹ The SAA states the policy of the Department with regard to the issue of plant efficiencies: "The Administration intends that Commerce will continue its current practice of limiting this adjustment to differences in variable costs associated with the physical differences. Thus, for example, Commerce will not make an adjustment under this section for cost differences attributable to: (1) . . . ; or (2) the fact that the domestic and exported products are produced in different facilities with differing production efficiencies." Statement of Administrative Action, H.Doc. 316 at 828.

²⁵⁰ Brief of the U.S. Department of Commerce on behalf of the Investigating Authority, dated May 3, 1999, at 67.

the record and that did not allow for the impact of plant efficiencies, the Department's methodology may not be appropriate for achieving that goal.

By choosing the single plant with the lowest variable cost, the Department may be choosing an efficient plant. Thus, one would expect that the comparison made by the Department not only accounts for physical differences but also includes differences in plant efficiencies. If one of the aims of the Department is to minimize the effect of plant efficiencies then this Panel is uncertain that the methodology followed in the case at hand is achieving that goal.

The Department argues in the final decision that differences in plant efficiencies did not allow the comparison of the variable costs from the Yaqui and Campana plants with the variable costs of multiple CEMEX Type I plants. However, the Panel does not understand how the use of the information from a single plant is superior, in methodological terms, from the use of information from several plants when the aim is to control for plant efficiencies.

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 remands the issue to the Department for further analysis and explanation.

G. Classification of Certain CEP Sales

Issue Presented

Was the Department's request for remand to reclassify certain sales as CEP sales proper?

Analysis

In a motion filed April 10, 2000, the STCC sought leave to file an amended complaint²⁵¹. This complaint alleged that CDC reported certain sales made by its US sales affiliate to unaffiliated US purchasers as "indirect" export sales, but that an intervening decision of the Court of Appeals for the Federal Circuit, AK Steel v. United States,²⁵² held that all sales made by a foreign exporter's US affiliated reseller must be treated as "constructed export price" sales for purposes of calculating US price. CDC and CEMEX both opposed granting leave to file an amended complaint, primarily based on the fact that the claim was being filed so late in the proceedings that it would unreasonably delay the completion of the work by the Panel, and also arguing that the petitioner had had an earlier opportunity to raise the issue during the pendency of the administrative proceeding²⁵³.

The Panel as then constituted determined to grant leave to file, and accepted the amended complaint²⁵⁴. The Department subsequently requested that the matter be remanded for reclassification of the subject sales in order to comply with the Court of Appeals finding in AK Steel²⁵⁵. Following acceptance of the amended complaint, CDC did not oppose the Department's request for remand²⁵⁶.

²⁵¹ STCC Motion for Leave to File a Second Amended Complaint, April 5, 2000.

²⁵² 226 F.3d 1361 (Fed.Cir.2000).

²⁵³ CDC Memorandum in Opposition to the Motion of STCC for Leave to File a Second Amended Complaint, April 18, 2000; CEMEX's Opposition to STCC Motion for Leave to File an Amended Complaint, April 18, 2000.

²⁵⁴ Panel Order Accepting STCC's Second Amended Complaint, April 16, 2001.

²⁵⁵ The Department's Reply Brief, May 17, 2001.

²⁵⁶ CDC Reply Brief, May 18, 2001.

The Panel accordingly remands this issue to the Department for reclassification of the subject sales.

VII. REMAND

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

1. Reconsider, in view of the changed methodology adopted in the remand determination in the Seventh Review, whether CEMEX's home market sales of Type V cement sold as Type II and Type V cement produced at the Hermosillo plants were outside the ordinary course of trade, and support whatever conclusion is reached with adequate reasoning based on substantial evidence in the record;

2. Further analyze and explain the plant efficiency issues in the calculation of the DIFMER adjustment in accordance with this opinion; and

3. Reclassify certain sales in accordance with the decision of the Court of Appeals for the Federal Circuit in AK Steel v. United States.²⁵⁷

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

²⁵⁷ 226 F. 3d 1361 (Fed. Cir 2000)

The Department is directed to complete its redetermination with regard to the remanded issues within 60 days of the date of this opinion.

Date Issued: May 26, 2005

Steven W. Baker
Steven W. Baker, Chair

Peggy Louie Chaplin
Peggy Louie Chaplin, Panelist

Alejandro Castaneda Sabido
Alejandro Castaneda Sabido, Panelist

Ricardo J. Gil Chaveznava
Ricardo J. Gil Chaveznava, Panelist

Hernany Veytia Palomino
Hernany Veytia Palomino, Panelist

APPENDIX A

Gray Portland Cement and Clinker from Mexico ITA Case # A-201-802

Antidumping Duty Order (August 30, 1990) 55 Fed. Reg. 35443

Final Results of First Administrative Review (1990-1991) (April 28, 1993) 50 Fed. Reg. 25803

Final Results of Second Administrative Review (1991-1992) (September 8, 1993) 58 Fed. Reg. 47253

CEMEX, S.A. v. United States, 133 F. 3d 897 (CAFC 1998)

Final Results of Third Administrative Review (1992-1993) (May 19, 1995) 60 Fed. Reg. 26865

Third Review Panel Opinion, USA-95-1904-02, September 13, 1996

Final Results of Fourth Administrative Review (1993-1994) (April 10, 1997) 62 Fed. Reg. 17581

Fourth Review Panel Opinion, USA-97-1904-02, December 4, 1998.

Final Results of Fifth Administrative Review (1994-1995) (April 9, 1997) 62 Fed. Reg. 17148

Fifth Review Panel Opinion, USA-97-1904-01, June 18, 1999

Remand Determination Pursuant to NAFTA Panel, November 15, 1999

Fifth Review Remand Panel Opinion, February 10, 2000

Final Results of Sixth Administrative Review (1995-1996), (March 16, 1998) 63 Fed. Reg. 12764

Final Results of Seventh Administrative Review (1996-1997), (March 17, 1999) 64 Fed. Reg. 48471

Seventh Review Panel Opinion USA-99-1904-03 May 30, 2002

First Remand Determination Pursuant to NAFTA Panel, September 27, 2002

Seventh Review Panel Redetermination Opinion (I) April 11, 2002

Second Remand Determination Pursuant to NAFTA Panel, May 27, 2003

Seventh Review Panel Redetermination Opinion (II) September 4, 2003

Third Remand Determination Pursuant to NAFTA Panel, September 15, 2002

Seventh Review Panel Redetermination Opinion (III), November 25, 2003

*Final Results of Eighth Administrative Review (1997-1998), (March 15, 2000) 65 Fed. Reg. 13943

Final Results of Sunset Review, (July 3, 2000) 65 Fed. Reg. 41049

Final Results of Ninth Administrative Review (1998-1999), (March 14, 2001) 66 Fed. Reg. 14889

Final Results of the Tenth Administrative Review (1999-2000) (March 19, 2002) 67 Fed. Reg. 12518

Final Results of Eleventh Administrative Review (2000-2001) (January 14, 2003) 68 Fed. Reg. 1816

Final Results of Twelfth Administrative Review (2001-2002) (September 16, 2003) 68 Fed. Reg. 54203

Final Results of Thirteenth Administrative Review (2002-2003) (December 29, 2004) 69 Fed. Reg. 77989

*Beginning with the Eighth Review, the full Decision Memoranda are not published in the Federal Register but are available on the ITA website.