IN THE MATTER OF:

Red Raspberries from Canada

USA-89-1904-01

Available in Canada through

your local bookseller

or by mail from

Canada Communication Group--Publishing

Ottawa, Canada K1A 0S9

Catalogue No. E100-2/2-89-1904-01E

ARTICLE 1904 BINATIONAL PANEL
USA-89-1904-01

IN THE MATTER OF RED RASPBERRIES FROM CANADA

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

Complainants,

v.

UNITED STATES DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION,

Respondent.

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

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

DECIDED: December 15, 1989

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

OPINION OF THE PANEL

This is the first case referred to a binational panel for review under Article 1904 of the Canada-United States Free-Trade Agreement ("FTA").[1] It raises questions regarding: (1) the definition of "such or similar" merchandise under the antidumping statute; and (2) the circumstances under which the International Trade Administration ("ITA") may disregard sales of such or similar merchandise in the home market of the exporting country or in third countries and, instead, calculate foreign market value on the basis of constructed value.

This action was initiated by Clearbrook Packers, Inc. ("Clearbrook"), Mukhtiar & Sons Packers, Ltd. ("Mukhtiar"), and Marco Estates Ltd./Landgrow ("Marco") to contest the final results of the U.S. Department of Commerce, International Trade Administration's administrative review of the antidumping duty order on red raspberries from Canada for the period June 1, 1986, through May 31, 1987. The Panel has jurisdiction of this action pursuant to Article 1904.2 of the FTA and Section 516A(g)(2) of the Tariff Act of 1930 ("Tariff Act").[2]

In the final results of the administrative review, the ITA found that--

(1) Marco had no home market or third country sales of merchandise that was the same as, or similar to, the merchandise subject to the antidumping order; and

(2) (a) home market sales by Clearbrook, and

(b) home market and third country sales by Mukhtiar,

---

[1]27 I.L.M. 281 (1988) (entered into force Jan. 1, 1989).

[2]19 U.S.C. § 1516a(g)(2) (1988).

were too small in relation to the number and volume of their respective U.S. sales to provide an adequate basis for determining the foreign market value.

The complainants challenge these findings, as well as the ITA's consequential use of constructed value to determine the foreign market value of the merchandise subject to the review.

Article 1904.3 of the FTA requires this Panel to apply the standard of review set forth in section 516A(b)(1)(B) of the Tariff Act of 1930, which provides that:

> The Court shall hold unlawful any determination, finding, or conclusion, found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law.[3]

Upon examination of the record and after consideration of the arguments presented by the parties, this Panel:

(1) affirms the finding of the International Trade Administration that fresh market raspberries sold by complainant Marco in the home market are not the same as, or similar to, the bulk-packed red raspberries which are the subject of the antidumping order under review and further affirms the ITA's use of constructed value as the basis for determining Marco's foreign market value.

(2) holds defective and remands the ITA's findings that home market sales of Clearbrook and Mukhtiar are not adequate for

---

[3]19 U.S.C. § 1516a(b)(1)(B).

use as the basis for determining foreign market value with instructions that the Panel be provided within 30 days explanations of the basis for the ITA's findings such that the Panel may determine whether there is substantial evidence on the record to support the ITA's findings.

BACKGROUND

The ITA Decisions

On July 23, 1984, the ITA initiated an antidumping duty investigation of red raspberries from Canada.[4] The investigation covered "fresh and frozen red raspberries packed in bulk containers and suitable for further processing."[5] In its final determination, the ITA concluded that the merchandise was being sold in the United States at less than fair value ("LTFV").[6] It published its notice of the antidumping duty order on June 24, 1985.[7]

On July 17, 1987, the ITA initiated the second administrative review of the antidumping duty order and examined imports from four processors/exporters, including Mukhtiar, Clearbrook, and Marco, during the period June 1, 1986 through May 31, 1987. It is this administrative review that is the subject of the case before this Panel.

On August 3, 1987, the ITA sent questionnaires to the firms subject to the second review requesting information on their

---

[4]49 Fed. Reg. 30342 (1984).

[5]Id. at 49129, 49130. Fresh raspberries were classified under item numbers 146.54.00 and 146.56.00 of the Tariff Schedules of the United States Annotated and frozen raspberries were classified under item number 146.74.00.

[6]50 Fed. Reg. 19768 (1985).

[7]50 Fed. Reg. 26019 (1985).

home market, third country, and U.S. sales of fresh and frozen raspberries. Clearbrook, Marco and Mukhtiar all responded to the questionnaires.[8]

Marco responded that it made 19 sales of bulk-packed red raspberries in the United States during the review period. Marco made one sale of fresh market red raspberries in Canada, but had no sales of bulk-packed red raspberries for use in further manufacturing or processing. Marco had no sales to third countries during the review period.

Clearbrook responded that it made 16 sales of bulk-packed raspberries in the United States totalling approximately 1,800,000 pounds during the review period and two sales of bulk-packed raspberries in Canada totalling about 50,000 pounds. It had no sales during that period to third countries.

Mukhtiar responded that it made 13 sales of bulk-packed raspberries in the United States totalling approximately 1,800,000 pounds and one sale of such raspberries in Canada totalling 10,000 pounds during the review period. Mukhtiar also made one sale of bulk-packed raspberries in Japan totalling approximately 35,000 pounds.

---

[8]The fourth Canadian exporter which responded to an ITA questionnaire, Jesse Processing, Ltd., is not a party to this action, and its questionnaire responses are not summarized.

The information on U.S., home market, and third country sales by Clearbrook, Marco, and Mukhtiar is summarized in the following table:

	SALES		
	U.S.	3d Country	Home Market
Marco			
No. of sales	19	0	1*
Total lbs. (000)	[ ]	0	[ ]
Clearbrook			
No. of sales	16	0	2
Total lbs. (000)	1,800	0	55
Mukhtiar			
No. of sales	13	1	1
Total lbs. (000)	1,800	35	10

* Fresh market raspberries

The complainants have stated that all their sales in the home market and the third country were arm's-length transactions and were made at prices above the cost of production.[9] There is no evidence in the record as to whether the home market or third country sales were made within or outside the ordinary course of trade.

The issue of constructed value was first raised in a January 27, 1988, meeting between complainants' counsel and ITA

[9]The complainants have not offered any proof for their contentions, but we find it unnecessary to decide whether or not the sales were at arm's-length and above cost since the ITA did not base its rejection of these sales on a failure of proof as to either of these points.

staff. The ITA informed complainants at that time that it intended to use constructed value to calculate foreign market value because the complainants had "insufficient" home market sales to provide a basis for price-to-price comparisons.

The ITA published the preliminary results of the second administrative review on July 28, 1988.[10] Using constructed value as the basis for foreign market value, the ITA estimated dumping margins of 8.33 percent for Clearbrook, 9.92 percent for Marco, and 4.45 percent for Mukhtiar. Complainants contested the ITA's use of constructed value in written briefs and at a hearing held on August 30, 1988.

The ITA issued the final results of the second administrative review on February 13, 1989.[11] Again, using constructed value, it calculated dumping margins of 2.59 percent for Clearbrook, 9.15 percent for Marco, and 3.67 percent for Mukhtiar.

The final results state that, with respect to Marco's home market sale, fresh market raspberries were not subject to the original investigation because they were not covered by the petition. Further, Marco's home market sale of fresh market raspberries during the review period was not a sale of such or

---

[10]53 Fed. Reg. 28425 (1988).

[11]54 Fed. Reg. 6559 (1989).

similar merchandise within the meaning of section 771(16) of the Tariff Act, 19 U.S.C. § 1677(16), because fresh market raspberries have a "different purpose and use" from the bulk-packed berries under review. As a result, the ITA determined that the price charged in Marco's single home market sale of fresh market raspberries could not be used as a basis for its foreign market value.[12]

With respect to Mukhtiar, the ITA stated,

> In order to determine whether . . . price discrimination exists, we must compare prices charged in the United States with an appropriate measure of FMV. The regulations direct us to test home market sales against third country sales for the purpose of choosing the appropriate market for determining FMV. However, the sales in the selected market must be of sufficient magnitude to provide a meaningful basis for price-to-price comparisons.
>
> Section 353.4 of the regulations establishes a five-percent test for assessing the viability of a foreign market in normal situations. Although the home market in this case is technically viable according to the five-percent test, we are presented with the unusual situation where the volume and number of sales of the subject merchandise in both the home market and third country markets do not provide an adequate basis for price-to-price comparisons. Where home market sales are greater than five percent of third country sales but are negligible compared to both the volume and number of sales to the United States, constructed value should be used to determine FMV.
>
> . . . Rather than taking [Mukhtiar's] single home market sale of a quantity significantly

[12]Id. at 6561.

> smaller than the quantity sold to the United States, as representative of sales made in the ordinary course of trade, the [ITA] determined that FMV should be based on constructed value.[13]

As to Clearbrook, the ITA noted that there were no third country sales during the review period covered by the second administrative review. It concluded that the combined volume of Clearbrook's two home market sales was "so small in relation to the number and volume of sales to the United States that [it] did not provide a reasonable basis for price-to-price comparisons."[14]

Complainants' Arguments

Marco maintains that the ITA erred by refusing to consider the sale of its fresh market berries in Canada to be a sale of "such or similar merchandise." It states that fresh market raspberries are "such or similar merchandise" and that the fresh market berries can reasonably be compared with Marco's sales of bulk-packed raspberries in the United States.

All three complainants advance three principal arguments in challenging the application of the market viability test and consequential use of constructed value in the administrative review:

---

[13]Id. at 6559-60.

[14]Id. at 6560.

First, the complainants argue that the Tariff Act of 1930 and the ITA's regulations enumerate all the circumstances under which the ITA may ignore home market or third country sales and that the facts on the record before the ITA in this administrative review do not fall within any of the enumerated circumstances. In particular, the complainants contend that the "plain language" of the statute and regulations prohibit the ITA from ignoring bona fide home market sales made in the ordinary course of trade. Because the ITA allegedly has not disputed that the home market sales in question were bona fide and has not asserted that they were not made in the ordinary course of trade, the complainants argue that the ITA should have used each complainant's home market sales prices as the basis for foreign market value. To put it another way, the statutory "home market viability test," embodied in the ITA's regulations as the "five-percent rule," has been literally satisfied by the home market sales of each of the complainants because those sales in each case constitute at least five percent of third country sales. Further, the relative smallness of the home market sales volume compared to U.S. sales is legally irrelevant, in complainants' view of the applicable statutory and regulatory language.

Second, the complainants argue that there is no substantial evidence on the record to support the ITA's conclusion that the complainants' home market sales do not provide an accurate measure of foreign market value. The complainants contend that, at

the very least, the ITA must provide some explanation for its conclusion that the complainants' home market sales were insufficient for comparisons with U.S. sales.

Third, the complainants argue that, to the extent that the Tariff Act permits the ITA to disregard home market sales that are insufficient in number or volume, the decision to do so in this case amounts to a rule of general applicability and ITA must promulgate such a rule pursuant to the rulemaking requirements in section 553 of Title 5, United States Code (5 U.S.C. § 553) (1988).[15] The complainants assert that the ITA's determination in the second review was invalid because it failed to comply with the notice and comment requirements of section 553.

[15]Sections 500-559 and Chapter 7 of Title 5 are popularly referred to as the "Administrative Procedures Act" ("APA").

DISCUSSION

Marco's Home Market Sale of Fresh Market Berries

Marco argues that its home market sale of fresh market raspberries should be compared with its U.S. sales of bulk-packed raspberries. This Panel disagrees.

The Petition for Antidumping Duty Relief that was the basis for the investigation leading to the antidumping order subject to the annual review explicitly excluded fresh market berries, and fresh market berries were not subject to the less than fair value investigation. Moreover, in its questionnaire response and other submissions, Marco itself cogently described the differences between fresh market and bulk-packed raspberries. For example, it stated,

> The raspberries exported to the U.S.A. are of inferior quality and are for the purpose of making raspberry juice whereas the small quantity of raspberries sold in Canada were fresh berries, packaged in flats, to be sold as fresh fruit in retail stores. The two products are in no way comparable. The raspberries exported were, in addition to the above statement, the normal summer variety whereas the raspberries sold domestically were an autumn variety demanding a significantly higher price when sold as fresh fruit.[16]

---

[16]Marco's Questionnaire Response of November 16, 1987 for the Period June 1, 1986 through May 31, 1987, at 3.

Thus, there is substantial evidence on the record supporting ITA's conclusion that fresh market berries have a different purpose and use than bulk-packed raspberries. The Panel is not free to overturn a finding by the ITA that is supported by such evidence and, therefore, affirms the ITA's determination that fresh market raspberries are not "such or similar merchandise," within the meaning of section 771(16) of the Tariff Act.

Mukhtiar's and Clearbrook's Home Market Sales

Section 773 of the Tariff Act provides three bases for determining foreign market value in an antidumping duty investigation: Home market sales, third country sales, and constructed value. Section 773 states in part:

> (1) In general--The foreign market value of imported merchandise shall be the price . . .
>
> (A) At which such or similar merchandise is sold . . . or offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption, or
>
> (B) If not so sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States. . . .

> (2) Use of constructed value--If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise. . . .[17]

The regulations promulgated by the Department of Commerce pursuant to the Act generally track the language of the statute. Thus, the regulations provide that foreign market value ordinarily is to be determined on the basis of home market prices.[18] However, if such sales are so small in relation to sales to countries other than the United States "as to be an inadequate basis for determining foreign market value," then the regulations provide that the ITA may use either the third country sales prices or constructed value as the basis for determining the foreign market value.[19] Third country prices are "generally to be preferred" over constructed value.[20]

Under the regulations, home market sales are "normally" considered to be an inadequate basis for determining foreign market value when they constitute less than 5 percent of sales to third

---

[17]19 U.S.C. § 1677b(a).

[18]19 C.F.R. § 353.3(a)(1) (1987). See Smith Corona Group v. United States, 713 F.2d 1568, 1576 n. 20 (C.A.F.C. 1983), cert. denied, 465 U.S. 1022 (1984), ("home market sales are clearly the preferred basis").

[19]19 C.F.R. § 353.4(a).

[20]19 C.F.R. § 353.4(b).

countries.[21] Further, if sales to a single third country "do not provide an adequate sample," then sales to additional countries may be aggregated.[22] The statute and the regulations thus require the ITA to assess the appropriateness of foreign market sales as the benchmark for price comparisons. This requirement is often referred to as the foreign market "viability test."

In applying the foreign market viability test during the second administrative review, the ITA noted that Mukhtiar and Clearbrook presented "unusual" situations because the number and volume of their home market and third country sales were relatively small or non-existent in relation to their sales to the United States. Mukhtiar's home market sale represented 29 percent of its third country sales by volume. Its home market sale represented 8 percent of its U.S. sales by number and 0.6 percent of U.S. sales by volume. The third country sale represented 8 percent of Mukhtiar's U.S. sales by number and 2 percent of its U.S. sales by volume. The ITA determined that, although the volume of Mukhtiar's home market sales "technically" satisfied the 5 percent viability test in Section 353.4 of the regulations, its home market and third country sales were nonetheless too small to provide an adequate basis for foreign market value.

---

[21] Id.

[22] 19 C.F.R. § 353.5(d).

Clearbrook's home market sales represented 12.5 percent of its U.S. sales by number and 3 percent of its U.S. sales by volume. The ITA found that Clearbrook's home market sales were also too small to form an adequate basis for calculation of foreign market value.

In reviewing the complainants' challenge to the ITA's construction of the Act and implementing regulations, this Panel must address two questions. The first is whether Congress has directly spoken to the precise question at issue. If Congressional intent is clear, our inquiry ends as we must give effect to that intent. If, on the other hand, Congress has not directly addressed the specific question at issue, then the question for this Panel is whether the ITA's actions are based on a permissible construction of the statute, keeping in mind that a reviewing body must afford great deference to the interpretation of a federal agency charged with implementing a statute.[23]

The doctrine of deference means that this Panel need not find that the ITA's construction of section 773 of the Tariff Act and its implementing regulations is the only reasonable construction in order to sustain the ITA's interpretation.[24]

---

[23]See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-844 (1984).

[24]See Chevron, 467 U.S. at 844; FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981) Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 75 (1975); Udall v. Tallman,

Further, this Panel cannot impose its own construction of the statute and regulations if the ITA proposes a reasonable interpretation.[25]

Complainants contend that the ITA's interpretation of the statute and regulations is unreasonable. In effect, they argue that the statute and regulations enumerate all the circumstances under which the ITA may disregard home market sales and that such circumstances are not present in this case.

We do not accept complainants' argument that the ITA must use home market prices in all circumstances except those specifically enumerated in the statute and regulations. Neither side has brought to our attention in their very well researched and written briefs any evidence that Congress ever considered the precise factual situation presented in this review. Thus, we cannot say how Congress would have determined that the home market's viability be evaluated had the situation been considered. As a result, the ITA must be afforded the discretion to interpret the Act in accord with its expertise.

While the ITA is free to fill in this apparent gap in the statute and regulations, it cannot choose among the options available to it for determining foreign market value without

---

380 U.S. 1, 16 (1965).

[25]See Chevron, 467 U.S. at 844.

articulating a reasonable justification for its decision based on the facts on the record.[26] Here, the ITA refused to use either the home market and third country prices of Mukhtiar or the home market prices of Clearbrook as the basis for foreign market value. Clearbrook's circumstances raise an issue that is not specifically addressed by the regulations: Small home market sales and no third country sales against which to test viability. On the other hand, Mukhtiar's circumstances do appear to be addressed by regulations. In neither case, however, did the ITA explain why it decided that the home market sales or, in the case of Mukhtiar, the third country sale, were not an adequate basis for foreign market value. The only reasons proffered by the ITA to support its decisions were a series of statements that purported to be self-evidently conclusive that the "volume and number" of such sales were "inadequate," or "insufficient," and that they did not provide an "evidentiary base" for comparison with U.S. sales. Indeed, the ITA's counsel stated during oral argument that the ITA simply "know[s] inadequacy . . . when we see it."[27] However, the ITA did not provide the factual basis for its conclusion that the home

---

[26]See NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 442-43 (1965) (When an agency "exercises the discretion given to it by the Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.'"), citing, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941); see also Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-69 (1962); Shell Oil Co. v. FERC, 707 F.2d 230, 235 (5th Cir. 1983).

[27]United States - Canada Free Trade Agreement Binational Secretariat Transcript: In the Matter of Red Raspberries from Canada, at 93 (October 20, 1989).

market and third country sales in this administrative review were inadequate as a basis for foreign market value. We cannot say, on the basis of the record, that such sales were inadequate given the fact that Mukhtiar's home market sales, by number, constituted 7.8 percent of its U.S. sales and Clearbrook's home market sales, by number, constituted 12.5 percent of its U.S. sales. We cannot conclude, as apparently ITA did, that these sales were de minimis without obtaining the basis for the ITA's conclusion.

Statements that the home market and third country sales of Mukhtiar and the home market sales of Clearbrook were "insufficient" or "inadequate" to provide a basis for calculating foreign market value do not provide this Panel a basis on which to assess whether the ITA decisions are supported by substantial evidence on the record. An explanation of the reasons for the ITA decisions based on the record of this review is essential before this Panel can conduct a proper review.[28] The duty to provide such an explanation was recently emphasized in a related context by Congress in the amendment to section 771(7) of the Tariff Act made by Section 1328 of the Omnibus Trade and Competitiveness Act of 1988.[29]

---

[28]See Toho Titanium Co., Ltd. v. United States, 657 F. Supp. 1280, 1286 (C.I.T. 1987).

[29]Section 1328 amended section 771(7) to require the International Trade Commission to "explain its analysis of each factor considered" in making certain determinations regarding material injury. See 19 U.S.C. § 1677(7). See also 19 U.S.C. § 1673d(d).

The complainants argue that the ITA cannot make a determination as to the adequacy of Mukhtiar's and Clearbrook's home market sales without promulgating a rule subject to the notice and comment requirements of the APA. In determining whether the home market sales of the complainants in this administrative review serve as an adequate basis for price comparisons with U.S. sales in this review, the ITA is applying the antidumping law to the particular, and somewhat unusual, facts of this case. ITA does not purport to be applying rules of general applicability. To the contrary, it effectively has said that it is addressing specific circumstances that either warrant an exception from its general rules or are not contemplated by its general rules.

We agree and conclude that ITA's decisions in this review are an adjudicative function rather than a rulemaking function. As such, ITA's decisions are not subject to the APA's notice and comment requirements.[30] The ITA must have the discretion to deal with problems such as these on a case-by-case basis if its administration of the antidumping laws is to be effective.[31] The fact that new policies may evolve through this process does not require ITA to proceed by rulemaking and does not subject it to the notice and comment requirements of the APA.[32]

---

[30]NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974), overruled on other grounds, NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981).

[31]See id. at 294.

[32]See id.

CONCLUSION

This Panel finds that--

(1) ITA's finding that fresh market raspberries are not such or similar merchandise is supported by substantial evidence on the record and that, because Marco had no home market sales of merchandise covered by the antidumping order, constructed value is the appropriate basis for calculating Marco's foreign market value, and

(2) because ITA has not provided an adequate explanation of its reasons for rejecting Mukhtiar's and Clearbrook's home market sales of red raspberries as a basis for calculating foreign market value, we are unable to apply the substantial evidence standard to determine the legality of that conclusion.

DECISION AND ORDER

The final results in this administrative review are affirmed in part and remanded in part to the ITA as follows:

(1) The Panel affirms the finding of the International Trade Administration that fresh market raspberries sold by complainant Marco in the home market are not the same as, or similar to, the bulk-packed red raspberries which are the subject of the antidumping order under review and further affirms the ITA's use of constructed value as the basis for determining Marco's foreign market value.

(2) The Panel holds defective and remands the ITA's findings that home market sales of Clearbrook and Mukhtiar are not adequate for use as the basis for determining foreign market value with instructions that the Panel be provided within 30 days explanations of the basis for the ITA's findings such that the Panel may determine whether there is substantial evidence on the record to support the ITA's findings.

The ITA shall file with the Panel within 30 days after the date of this decision its explanation of the reasons why Mukhtiar's and Clearbrook's home market sales do not form an adequate basis for calculating foreign market value. The

complainants shall file with the Panel any comments they may have on the results of the remand within 15 days after the filing of the ITA's explanation, and the ITA shall respond within 10 days after the filing of complainant's comments.

So ordered.

Ivan R. Feltham, Q.C., Chairman

Robert C. Cassidy, Jr., Panelist

Peter Clark, Panelist

Warren E. Connelly, Panelist

Glenn A. Cranker, Panelist

IN THE MATTER OF:

Red Raspberries from Canada

USA-89-1904-01

Determination On Remand

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

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

See 54 Fed. Reg. 6559.

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

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

Remand Determination at 4. This "explanation" is unresponsive to the Panel's concerns. In particular, we sought the Department's rationale for its original conclusion that home market sales were "negligible" and, therefore, did not provide an adequate basis for price-to-price comparison. Instead of providing its rationale for its original determination, the Department has substituted a new "five percent by volume" test for its original "negligibility" test. However, the Department does not explain, other than by passing reference to the "five percent standard" used in comparing home market sales to third country sales, why the five percent test should be used in the unusual factual situation found in this case (involving few or no third country sales). It is not obvious in this case why sales in the home market, although they comprise, less than five percent by "volume," i.e, units of measurement (in this case, pounds), are an unreliable basis for determining foreign market value, and the Department has failed to explain why this should be the rule here.

The Department, apparently to avoid being compelled to use

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

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

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

It is hereby ordered that the Department file an amended

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

SO ORDERED:

Ivan R. Feltham, Q.C., Chairman

Robert C. Cassidy, Jr., Panelist

Peter Clark, Panelist

Glenn A. Cranker, Panelist

Warren E. Connelly, Panelist