IN THE MATTER OF:

New Steel Rail, Except
Light Rail, from Canada

USA 89-1904-08

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UNITED STATES-CANADA BINATIONAL PANEL REVIEW

NEW STEEL RAIL, EXCEPT LIGHT RAIL, FROM CANADA	)	USA 89-1904-08

ALGOMA STEEL CORPORATION, LIMITED
Complainant

V.

UNITED STATES DEPARTMENT OF COMMERCE,
INTERNATIONAL TRADE ADMINISTRATION,
Respondent

AND

BETHLEHEM STEEL CORPORATION
Respondent-Intervenor

Decided: August 30, 1990

Before: Lawrence R. Walders, Esq., Chairman, Professor William P. Alford, A. L. Bissonnette, Q.C., Gail T. Cumins, Esq., E. David Tavender, Q.C., Panelists.

Ryan Trainer, of Dow, Lohnes & Albertson, Washington, D.C., argued for Complainant. With him on the briefs were William Silverman, and Robert Herzstein and Daniel K. Tarullo of Shearman & Sterling.

Tina M. Stikas, of the Office of the Chief Counsel for Import Administration, International Trade Administration, U.S. Department of Commerce, Washington, D.C., argued for Respondent. With her on the briefs was Stephen J. Powell, Chief Counsel for Import Administration.

James R. Cannon, Jr., of Stewart and Stewart, Washington, D.C., argued for Respondent-Intervenor. With him on the briefs were Eugene L. Stewart, Terence P. Stewart, Vincent J. Branson, and Patrick J. McDonough.

I. INTRODUCTION

Following a request for Panel Review and a complaint filed by the Algoma Steel Corporation, this review proceeded pursuant to Article 1904 of the United States - Canada Free Trade Agreement ("FTA") and Title IV of the United States - Canada Free Trade Agreement Implementation Act for 1988, 19 U.S.C. § 1516a(g)(2)(1989 Supp.) to contest the final affirmative determination of sales at less than fair value by the U.S. Department of Commerce, International Trade Administration ("ITA") in the antidumping investigation of New Steel Rail, Except Light Rail, From Canada, 54 Fed. Reg. 31984 (August 3, 1989).

II. BACKGROUND

On September 26, 1988, the Bethlehem Steel Corporation filed with the ITA and the U.S. International Trade Commission a "Petition Requesting the Imposition of Antidumping and Countervailing Duties on Imports of New Steel Rail, Except Light Rail, from Canada." Public Record (hereinafter P.R.) 1.[1/] Bethlehem's allegations of sales at less than fair value were based upon estimates of the comparison of U.S. prices and home market sales prices, Canadian production costs, and Canadian export prices to third countries. Id. at 11-21. The ITA

[1/] The petition was directed at imports of "steel rail, whether of carbon, high carbon, alloy or other quality steel", "suitable for railroad rails." P.R. 1 at 4. Specifically excluded from the petition were: "light rails, such as are used in amusement park rides"; and relay rail ("rail which has been taken up by a railroad or other users from a primary line and relaid in a relay yard or on a secondary track ('cascaded')"). Id. at 4-5.

initiated an antidumping duty investigation of new steel rail, except light rail, from Canada on October 17, 1988. 53 Fed. Reg. 41392 (Oct. 21, 1988); P.R. 7, 14.

On November 4, 1988, the ITA presented its antidumping questionnaire to Algoma Steel Corporation. P.R. 23. The antidumping questionnaire identified the period of investigation as April 1, 1988 through September 30, 1988. Id. at Cover Letter, p. 1; p. 1 of questionnaire. For the determination of foreign market value, Section B of the questionnaire requested information concerning Algoma's sales in the home market, if such sales were sufficient, or in third countries. Algoma responded on November 23, 1988 and December 12, 1988, supplying U.S. and home market sales data. P.R. 32, 37.

On January 19, 1989, Bethlehem made its first request that Commerce initiate a cost of production ("COP") investigation, alleging that Algoma's home market sales were below their cost of production.[2/] P.R. 45. Bethlehem supplemented its COP allegations on February 3 and February 14, 1989. P.R. 53, 59.

On March 3, 1989, three days before the deadline for the preliminary determination, the ITA issued to Algoma Section D, a 16-page, detailed cost questionnaire, having determined that "a cost investigation is warranted." P.R. 72. The ITA requested Algoma to provide information regarding its costs of producing

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[2/] Under 19 U.S.C. § 1677b(b), when the ITA finds that a sufficient number of home market sales are at prices below the cost of production, the ITA is required to use constructed value as the basis for foreign market value.

new steel rails "on a quarterly basis from January 1988 through September 1988."[3/] Id. at 3.

The ITA issued a preliminary determination of sales at less than fair value on March 6, 1989, in which Algoma's foreign market value was based upon home market prices, and its antidumping duty rate was 2.72 percent. P.R. 75.

Algoma submitted its response to Section D on March 27, 1989, in which it calculated the costs of producing new steel rail using standard costs, with variances. P.R. 89. During April 1989, the ITA issued three requests for supplemental information. P.R. 92, 98, 105. Algoma issued written replies on April 14, April 26, and May 11, 1989 (following a verbal report at verification). P.R. 97, 99, 109.

From May 8 through 17, 1989, ITA officials conducted a verification of Algoma's sales and cost information at its offices in Sault Ste. Marie and Mississauga, Ontario. P.R. 111 (Sales Verification Report), P.R. 113 (Cost Verification Report, June 7, 1989). The cost verification report revealed certain problems with Algoma's standard cost (plus variance) methodology.[4/]

[3/] "Cost of production" refers to the cost of producing merchandise for sale in the home market, and includes the cost of manufacturing (materials and fabrication) and general, administrative and selling expenses. "Constructed value" includes these elements as well as profit and packing expenses for transportation to the United States. P.R. 72 at 1-2.

[4/] The adjusted standard costs did not reconcile with the inventory values utilized in Algoma's cost accounting system in the normal course of business, and the ITA was not able to review (continued...)

Bethlehem argued that Algoma's cost data should be rejected in favor of the best information available, in its case brief and rebuttal brief presented to the ITA. P.R. 118, 121. Algoma responded to this argument in its rebuttal brief. P.R. 122.

On July 26, 1989, the ITA issued the final affirmative determination of sales at less than fair value, and determined the weighted-average margin for Algoma to be 38.79 percent. For foreign market value, the ITA used the petitioner's data to develop constructed values, as the best information available.

On September 1, 1989, Algoma submitted a request for panel review of the ITA's final determination. In its complaint, Algoma contended that the ITA's rejection of Algoma's cost data and its use of best information available are unsupported by substantial evidence on the record and otherwise not in accordance with law. On June 18, 1990, Algoma filed a motion to amend its complaint to clarify that it also contests the ITA's choice of cost data supplied by Bethlehem as the best information available.

[4/](...continued)
engineering standards, time/motion studies or other references to actual costs from which the standards were derived. P.R. 113 at 4, 14.

III. STANDARD OF REVIEW

In accordance with Article 1904(3) of the U.S.-Canada Free Trade Agreement, this Panel is required to "apply the standard of review described in Article 1911 and the general legal principles that a court of the importing party otherwise would apply to a review of a determination of the competent investigating authority."[5/] The scope of this Panel's review is limited to the administrative record before the agency. The Panel may also consider, as provided under Article 1904(2):

> 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.

As the United States is the importing country in this proceeding, Article 1911 of the FTA directs the Panel to apply the standard of review of 19 U.S.C. § 1516A(b)(1)(B). Under that provision, the Panel must "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law."

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Matsushita Electric Industrial Co., Ltd. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984), citing Consolidated Edison Co. v. NLRB, 305 U.S. 197,

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[5/] Article 1911 defines "general legal principles" as "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies."

229 (1938). See also Atlantic Sugar Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984); Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 966 (Ct. Int'l Trade 1986), aff'd per curium 810 F.2d 1137 (Fed. Cir. 1987). Substantial evidence is "something less than the weight of the 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." Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-20 (1966).

When determining whether an agency's application and interpretation of a statute is in accordance with law, a court need not conclude that "[t]he agency's interpretation [is] the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 n.11 (1984); American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986). Cf. Consumer Products Division, SCM Corp. v. Silver Reed America, Inc., 753 F.2d 1033, 1039 (Fed. Cir. 1985). "Agency interpretations of statutes which they are charged with administering shall be sustained if permissible, unless Congress has directly spoken to the precise question at issue." Rhone Poulenc, Inc. v. United States, 899 F.2d at 1185, 1190 n.9 (Fed. Cir. 1990), citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, supra, 467 U.S. 842-45.

Following these principles and Article 1904.3 of the FTA, the Panel is precluded from substituting its judgment for that of

the ITA. Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); Corning Glass Works v. U.S. Int'l Trade Comm'n, 799 F.2d 1559, 1565-66 (Fed. Cir. 1986); Matsushita, 750 F.2d at 933.

Thus, the Panel cannot reverse the ITA's finding merely because it would have come to a contrary factual conclusion or interpreted a statute differently, so long as the ITA acted reasonably. If the Panel concludes that the ITA reasonably interpreted the statutes and the evidence, it must affirm the determination under review.

IV. DISCUSSION

A. The ITA's Rejection of Algoma's Cost Data

In the instant proceeding, the ITA rejected the standard cost data submitted by Algoma because of its conclusion that the data "was materially deficient and could not be verified." 54 Fed. Reg. 31984, 31985 (Aug. 3, 1989). This conclusion was described in the ITA's final determination, which details both the inherent problems with the data and the ITA's inability to verify it:

> The Department did not accept the cost of production information provided in the response for the following reasons. The Department requested actual costs in its questionnaire. However, respondent developed information for the investigation based on the standard product costs used by the company, which were not part of the normal financial accounting system and which were for a period subsequent to the period of investigation. Moreover, the company had a cost system which reported actual costs for each product but chose not to use this information for its response. The company also did not provide documentation to support the reported standard costs or to tie them to the company's financial records. In addition, the standard

> costs, as adjusted, submitted by respondent did not reconcile to the company's actual inventory costs and were developed based on data outside the period of investigation. . . .
>
> Based on the respondent's failure to report actual costs and its inability to provide supporting documentation for the standard costs at verification, the Department determined that Algoma's cost response could not be relied upon for this final determination.

Id. at 31985-31386 (DOC Position in Response to Comment 1).

The antidumping statute requires that the ITA verify all information that is relied upon in the final determination; otherwise, the ITA "shall" use the "best information available":

> The administering authority shall verify all information relied upon in making . . . a final determination in an investigation . . . If the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action, which may include, [in a final determination in an investigation], the information submitted in support of the petition.

19 U.S.C. § 1677e(b). The ITA is also required to use the best information otherwise available "whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation." 19 U.S.C. § 1677e(c). The Conference Report to Accompany the Trade Act of 1984 reflects the intent of Congress that:

> As under current law, the administering authority is authorized to use the best information available as the basis for its action if it does not receive timely, complete, or accurate responses, or if it is unable to verify the accuracy of the information submitted.

H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 5220, 5294.

Section 353.37 of the Department of Commerce regulations provide that the Secretary "will use the best information available whenever the Secretary":

> (1) Does not receive a complete, accurate, and timely response to the Secretary's request for factual information; or
> (2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted.

19 C.F.R. § 353.37 (1989).[6/] In enacting the 1989 amendments to its regulations, the ITA explained the reason it is required to reject information that it is unable to verify:

> Verification is designed to establish the accuracy and completeness of a questionnaire response. If either of these factors cannot be established, regardless of "fault," the Department must, under the statute, adopt the "best information otherwise available" . . .

54 Fed. Reg. 12742, 12766 (1989) (citing Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556 (Fed. Cir. 1984).

The ITA's cost verification report supports the conclusion that the ITA officials were unable to verify the accuracy of Algoma's standard cost methodology. The cost verification report prepared by the ITA indicates, consistent with the final determination, that: Algoma could present no documentary evidence supporting the development of its standard cost methodology; the standard costs were not for the period of investigation; and there were substantial differences between the standard costs and the inventory costs -- which were part of Algoma's normal cost

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[6/] Similar to this provision, section 353.51(b) of the regulations superseded in 1989 authorized the ITA to utilize BIA "[w]henever information cannot be satisfactorily verified."

accounting system, and, unlike the standard costs, tied into Algoma's financial statements.

At verification, ITA officials found that Algoma could not prove that the reported standard costs (plus variances) were accurate reflections of the actual costs of producing each product. In attempting to verify the standard costs, which "are prepared from budgets, rolling rates, yields, etc.," ITA accountants "were not able to review engineering standards, time/motion studies, or other references to actual costs from which the standards were derived." P.R. 113 (Cost Verification Report, June 7, 1989) at 14.[7/] The report also notes that "[d]uring the POI, the standards had been revised in September of 1988"; yet the "November standards were the only complete set of standards that had been retained for fiscal year 1988."[8/] Id. at 14-15.

The ITA verifying officials found that Algoma's "financial accounting system" is "based on actual costs in Algoma's cost accounting system, rather than allocating a variance based on a

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[7/] At the May 31, 1990 oral argument before this Panel, counsel for Algoma acknowledged that it was unable to provide certain engineering studies, time or motion studies or other supporting documentation establishing the manner in which Algoma's standard costs were established. Transcript of Oral Argument at 180, 185.

[8/] According to Algoma, at verification "all material costs and the production rates and efficiencies upon which the earlier partial set of standard costs were based were the same as those used in the November 1988 standard costs." Memorandum of Complainant The Algoma Steel Corporation, Limited In Support Of Its Notice Of Motion For Judgment Upon The Administrative Record (hereinafter "Algoma Memorandum") at 13 n.36. Yet there is no indication in the cost verification report that Algoma established this to be true during the verification.

standard cost accounting system." Id. at 11. The cost verification report describes in detail Algoma's cost accounting system, which is reflected in its inventory values. Algoma "records per unit inventory values at each production stage in its cost accounting system in the normal course of business." Id. at 4. The report notes that "[t]he inventory balances were traced to the 1988 Statement of Financial Position." Id. at 22-23.

In contrast to the inventory values, which were part of Algoma's normal accounting system, the verification team found that:

> Standards are used for forecasting the profitability of rail product sales. Variances are not developed in the normal course of business as a part of the cost accounting system or the forecasting system. The standards are updated as necessary to reflect changes in production processes, equipment and material and labor costs. The standards had recently been updated during 1988 in September and November.
>
> * * *
>
> Standards are not a part of Algoma's cost accounting system in the normal course of business. These standards are used to predict the profitability of products. They are prepared from budgets, rolling rates, yields, etc. These standards were developed to predict the profitability of products in the future.

Id. at 12, 14.[9/]

[9/] At oral argument before this Panel, counsel for Algoma said that "standard costs simply do not tie into [Algoma's] financial records," and "there is not a direct correlation between" a "particular cost in standard cost to an actual cost experience for that particular product of that element." Transcript of Oral Argument at 46, 48.

Finally, the ITA accountants found substantial differences between Algoma's inventory values and the standard costs (plus variances):

> A quarterly average of inventory values for finished rails was compared to the quarterly standard costs adjusted by the variances as reported in the COP/CV. The respondent explained that the inventory values for prime rail could be compared to the standard adjusted for the variance at the completion of the Rail Finishing stage, plus the cost for Bonus Plan Class 1.
>
> Based on our comparison, a substantial number of the inventory values were higher than the standards adjusted for the variance. The comparison between the standards adjusted for the variance and the inventory values did not account for methodologies used by the respondent in its submission, i.e., the purchased steel surcharge, which were different from its normal accounting records. . .

Id. at 16. The accountants concluded "[t]he standard costs so adjusted to 'actual' did not reconcile to the inventory values reflected on the company's records." Id. at 4.[10/]

Algoma claims, however, that the ITA "successfully verified each element of Algoma's standard costs, as adjusted." Algoma Memorandum at 44. Specifically, at page 45 of its memorandum, Algoma claims that the ITA verified:

1. "[T]he quarterly total rail COS data (which were based on the finished rail inventory costs and were at the heart of Algoma's submitted COP data) reconciled fully with the company's financial statements."

[10/] Contrary to Algoma's assertions, the ITA has not made a post-hoc rationalization by including in its brief before this Panel a comparison of Algoma's adjusted standard costs and inventory costs. See ITA Memorandum at Exhibit A. Algoma itself included a similar comparison in Exhibit Seven of its June 19, 1989 "Initial Brief" to the ITA. Confidential Record 38. Both documents were derived from data presented to the ITA during verification, and in Algoma's cost submissions.

Algoma cites to a statement in the cost verification report that the ITA officials "traced the cost of goods sold for prime rails to the financial statements." Yet the "cost of goods sold" in this statement refers to the variances (which were traced to the inventory costs, which are in turn reflected in the financial statements); it does not refer to the standard costs. See Cost Verification Report, P.R. 113, at 22.[11/]

2. That "Algoma had included the full universe of costs properly attributable to rail production."

Algoma cites examples of verification of four elements of cost. While it appears that the ITA satisfactorily verified one of these elements, the energy costs, the ITA identified problems with each of the other three cited cost elements in its report.[12/] Moreover, even if Algoma's statement were correct, the ITA would still have been justified in rejecting the standard cost data on the grounds that it did not reconcile with the

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[11/] The statement appears in the section for "Variance Calculation", below the heading "Verification Procedures;" the only statement concerning financial statements is that "[t]he company's financial records attribute separate inventory costs to prime rail and secondary rail." P.R. 113 at 20.

[12/] Algoma's reference to "inventory transfers . . ." describes how the ITA verified that this element was included in the inventory costs -- not Algoma's standard costs. See P.R. 113 at 22-23. Furthermore, the section of the verification report on scrap value, to which Algoma cites, reveals that scrap values were a product of, among other things, an unverified "internal value" assigned annually, and unverified standard costs for "charged yield". Id. at 25-26. Finally, the cost verification report reveals that labor costs were also a product of the challenged standard costs. Id. at 27.

inventory costs, which were the basis of the financial statements.

3. That "Algoma's actual costs for all major material, labor, and other inputs were properly recorded in the company's records and reasonably allocated among different products."

Algoma is unable to point to any statement in the cost verification report that the ITA reached this conclusion, and we are unable to locate such a statement. Two of the three cost elements cited in support of this statement are the raw materials costs, which related to inventory costs, not standard costs, and the labor costs, which are based upon the unverified standards. See P.R. 113 at 23, 27-28.

4. That "Algoma's adjustments to the standard costs were accurately calculated."

The ITA's description of the verification of the variances does not identify any specific problems with the variance calculations. There is, however, no statement in the record that the variances were "accurately calculated," and Algoma's contention is directly contradicted by the ITA's conclusion that there were "substantial differences" between the standard costs + variances and the inventory costs.

Algoma also claims that the "ITA staff tied the quarterly rail COS data (which were the starting point for Algoma's submitted COP data) to the total cost of sales data (for all products) reflected in the company's financial statements." Algoma Memorandum at 46. However, the fact that total adjusted standard costs for all products may have equalled total costs appearing on Algoma's books and records does not represent

sufficient reason to overcome the ITA's reasonable conclusion that adjusted standard costs for particular products could not be verified, since: (1) nowhere in the Administrative Record is there evidence that Algoma explained to the satisfaction of the ITA the difference between actual and standard costs; and (2) nowhere in the Administrative Record is there evidence establishing the accuracy of standard costs in the first instance.

Algoma also attacks the ITA's refusal to accept a particular adjustment, and claims that its rejection is insufficient grounds for rejecting Algoma's entire cost submission. See Algoma Memorandum at 51-54. Because this adjustment is of a confidential nature, we will not discuss it in detail. It is sufficient to note that nowhere in the record is there a statement that this adjustment was the basis for the ITA's rejection of Algoma's cost data, and the Panel has no basis for ruling that the accuracy of the adjustment was verified.

Finally, in its reply brief Algoma attacks what it calls the ITA's "one percent rule," a reference to the ITA's comparison of standard costs and inventory values (attached to the Memorandum Of The Investigating Authority In Opposition To Complainant's Motion For Judgment On The Administrative Record, hereinafter "ITA Memorandum") which appears to define "immaterial" differences as those below one percent. There is no evidence in the record that the ITA's conclusion that the differences were

"substantial" was based upon a one percent rule, and we therefore find this line of argument to be unpersuasive.

Given the facts as evidenced in the cost verification report, which have not been refuted by Algoma, the ITA correctly concluded that the adjusted standard cost data was materially deficient and could not be verified. The ITA, therefore, acted in accordance with law in rejecting Algoma's standard cost data as the basis of COP.

The judicial and administrative decisions cited by Algoma in support of its claim do not require a contrary result, as all are clearly distinguishable from the facts and circumstances existing herein. Algoma cites Olympic Adhesives v. United States, 899 F.2d 1565 (Fed. Cir. 1990), for the proposition that because the company provided "complete, good faith responses to the ITA's questionnaires and gave full and conscientious answers to all of the questions posed by the ITA verification team . . . the ITA erred in rejecting Algoma's data simply because the data did 'not definitively resolve the overall issue' to ITA's satisfaction." Reply Brief of Complainant The Algoma Steel Corporation, Limited (hereinafter "Algoma Reply Brief") at 12.

In Olympic, the Court of Appeals for the Federal Circuit held that the ITA may not resort to the use of best information available in circumstances "where a questionnaire is sent and completely answered, just because the ITA concludes that the answers do not definitively resolve the overall issue presented." 899 F.2d at 1574. The court specifically stated, "a 'No' answer

is not a refusal to provide information. If there is no data, 'No' is a complete answer." Id. at 1573. Finally, the Court pointed out that section 1677e(c)(1988) "clearly requires noncompliance with an information request before resorting to the best information rule is justified, whether due to refusal or mere inability." Id. at 1574 (emphasis in original).

The present case differs from Olympic, however, as it involves the rejection of data on the ground that it could not be verified. Indeed, unlike the plaintiff in Olympic, who provided the ITA with complete and accurate responses to all requests for information, Algoma was not able to provide the data requested by the ITA. In effect, Algoma's inability to provide documentation establishing how its standard costs were derived, constitutes noncompliance with an information request, which represents sufficient reason to reject the submission.

Moreover, in the recent decision in N.A.R., S.p.A. v. United States the Court of International Trade specifically stated that "it is not sufficient that NAR provided cost information according to its internal procedures if those procedures did not produce what the ITA requested." N.A.R., S.p.A. v. United States, No. 90-60, Slip Op. at 14 (June 26, 1990). The court further commented:

> the best information rule was never meant to be used only against the most obtrusive offenders. The statute and the accompanying regulations explicitly indicate that the best information rule is to be used when a party does not answer the ITA's question.

Slip Op. at 14 n.5 (citing 19 U.S.C. § 1677e; 19 C.F.R.

§ 353.51).

Algoma cites three other cases where either the ITA or the ITC have been reversed after rejecting the foreign producer's data and accepting other information as best information available. Algoma Memorandum at 26-28. See Daewoo Electronics Co., Ltd. v. United States, 712 F. Supp. 931, 944 (Ct. Int'l Trade 1989); Mitsubishi Electronic Corp. v. United States, 700 F. Supp. 538, 563-64 (Ct. Int'l Trade 1988); UST, Inc. v. United States, 596 F. Supp. 463, 465 (Ct. Int'l Trade 1984). These cases are easily distinguishable from the present case, as they are premised on an erroneous conclusion by the agency that respondents had failed to provide data in a timely manner, or in an appropriate format. The instant case, however, concerns the use of BIA after the information submitted could not be verified.

The U.S. courts have accepted the ITA's utilization of BIA when the ITA was "unable to verify the accuracy of the information submitted" and the ITA's determination regarding verification results was "reasoned." Ceramica Regiomontana, supra, 636 F.Supp. at 969; see also Florex v. United States, 705 F. Supp. 582, 588-89 (Ct. Int'l Trade 1989). This panel, like a U.S. court, will not "substitute its standards of proof . . . for the verification carried on by the ITA." Agrexco, Agricultural Export Co., Ltd. v. United States, 604 F. Supp. 1238, 1244 (Ct. Int'l Trade 1985). "It is within the discretion of Commerce how to verify . . . and due deference will be given to the expertise of the agency." Carlisle Tire & Rubber Co. v. United States,

622 F. Supp. 1071, 1082 (Ct. Int'l Trade 1985). See also: Timken Co. v. United States, 11 CIT 786, 811 (1987); Hercules Inc. v. United States, 11 CIT 710, 756 (1987); Al Tech Specialty Steel Corp. v. United States, 10 CIT 743, 751, 753 (1986).

Finally, contrary to Algoma's assertions, the ITA's decision to accept certain standard cost data in Certain All Terrain Vehicles from Japan, 54 Fed. Reg. 4864 (Jan. 31, 1989), does not compel the agency to accept standard cost data in every case, particularly where, as here, it is not verifiable.

B. The Issue Of Notice

The second issue raised by Algoma in its briefs is whether the ITA provided Algoma with adequate notice of the defects of its data. Algoma argues that the ITA failed to provide timely notice that its cost data was inadequate or would be disregarded due to methodological problems, and "never gave the company reasonable opportunity to correct the alleged inadequacies." Algoma Memorandum at 34. Algoma claims that the ITA was aware, prior to verification, that the standard cost data was not part of Algoma's normal financial accounting system; did not relate to the period of investigation ("POI"); was not the same as inventory costs; and did not reconcile to inventory costs. Id. at 36. By failing to notify Algoma prior to the final determination, the ITA allegedly violated restrictions on the use of BIA, and fundamental principles of due process and administrative fairness.

The record reflects that there was a great deal of confusion on these factual questions prior to the verification, for which the ITA and Algoma were both responsible. However, from the time the ITA issued its cost questionnaire on March 3, 1989, Algoma was on notice that it was required to produce cost data which reflected its actual costs during the period of investigation, and which could be verified as such.[13/] Algoma was also made aware that if its data did not conform to these requests, the ITA would resort to BIA.

First, the cost questionnaire issued by the ITA expressly required Algoma to provide data which reflected Algoma's actual costs. The cost questionnaire requested Algoma's "cost of manufacturing (materials and fabrication) for each particular product sold in the home market." P.R. 72 at 1. "Cost of manufacturing" was defined as "those costs actually incurred by your company for the manufacture of the products, quantified and valued in accordance with the 'generally accepted accounting principles' ('GAAP')." Id. at 2.

Second, the ITA clearly advised Algoma that the reported costs would have to reconcile with the company's financial statements. The cost questionnaire stated that "[t]hese costs

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13/ The petitioner's inclusion of cost of production estimates in the petition, dated September 28, 1988, served as a warning that there might be an allegation of below cost sales. Additionally, Algoma has not alleged that it was provided inadequate time to prepare its cost response. Algoma received a ten-day extension for the response, and six weeks passed between the petitioner's first cost allegation and the issuance of the cost questionnaire.

should reconcile with fiscal year 1988 financial statements." P.R. 72 at 3. Algoma provided conflicting information on this issue. It described its standard accounting system in reply to the ITA's questions regarding cost accounting, implying that this was standard costs were part of Algoma's normal cost accounting system. Id. at 5-6. Algoma explained that its financial statements were based upon inventory, not standard, costs:

> Algoma does not use its standard costs for purposes of financial statement presentation. For its audited financial statements, finished inventories are valued at the lesser of actual direct manufacturing cost (excluding depreciation, etc.) or net realizable value. Inventory value is established by means of a monthly "first-in/first-out" average cost method. The cost of sales reported for financial statement purposes is equal to the inventory cost of all products sold, plus certain shipping and indirect manufacturing expenses.

P.R. 89 at 12. However, Algoma assured the ITA that its standard costs plus variance calculations were consistent with Canadian GAAP; reflected the cost of goods sold in the financial statements, for prime and secondary sales of steel rails; and reflected "Algoma's full production cost for prime and secondary rails (with a credit for scrap and secondary product)." Id. at 8-9; 12-13; 16.

Algoma claimed even during the investigation that the ITA in effect misled the company into using standard cost data, by "expressing a preference for standard costs." P.R. 97 at 2. This argument is disingenuous, particularly in light of the ITA's instructions that the cost data must be reflective of actual

costs. There is no "preference" for standard costs expressed by the ITA in its cost questionnaire.

Indeed, the following excerpt from the cost questionnaire makes clear that standard costs are to be used only if they are adjusted to fully reflect actual costs: "If your company uses a standard (budget) cost accounting system, the standards must be adjusted by variances or otherwise to fully reflect the total costs incurred for such manufacturing." P.R. 72 at 2. It was not Algoma's use of standard cost methodology which led to the rejection of the data, but the fact that the data did not verify:

> Indeed, complainant's decision to report standard costs with a variance would have been acceptable if the data were verifiable. It is entirely appropriate for a company to report standard costs plus variances <u>if</u> the company can establish that the standard costs accurately reflect the actual costs of producing the individual products under investigation.
>
> * * *
>
> Indeed, if Commerce had concluded that the submission of standard costs instead of actual costs was improper, Commerce never would have conducted a verification of the data.

ITA Memorandum at 29 n.11, 30.

Finally, the cost questionnaire specifically requested Algoma to provide information regarding its costs of producing new steel rails "on a quarterly basis from January 1988 through September 1988." P.R. 72 at 3. Algoma failed to state that it had used November 1988 standard costs until its response to the first deficiency letter. P.R. 97 at 2. Even then, the November 1988 standard costs might have been acceptable, if Algoma could have demonstrated at verification that these were the same

standards in effect during the POI. See P.R. 105 at 1. As Algoma could not so demonstrate, and no complete standards existed for the POI, Algoma risked an unsuccessful verification by failing to point out these facts prior to verification, and failing to obtain guidance from the ITA as to what period of costs would be acceptable.

The record demonstrates that there was sufficient warning that BIA might be used if Algoma did not report complete and accurate information. The ITA warned in its March 3, 1989 cost questionnaire that "[i]f a complete response is not received . . ., we may have to use the best information available for our final determination." P.R. 72 at Cover Letter. In each of the three requests for supplemental information issued to Algoma during April 1989, the ITA warned of the possibility that it might have to use the best information available if Algoma failed to provide the requested information. P.R. 92, 98, 105.

In addition, Algoma was aware that the ITA might reject its cost data, prior to the issuance of the final determination. The cost verification report, which contained a detailed discussion of the ITA's inability to verify the accuracy of Algoma's standard costs, was released on June 7, 1989, six weeks prior to the issuance of the final determination. Petitioner Bethlehem argued extensively in its briefs before the ITA that the data should be rejected, and Algoma itself responded to these arguments. See P.R. 118, 121, 122.

We, therefore, reject Algoma's claim that the ITA failed to provide Algoma with adequate notice of its decision to reject Algoma's standard cost data as the basis of COP.

Equally unpersuasive is Algoma's contention that the ITA determination must be rejected because the ITA failed to provide Algoma with an opportunity to correct the data submitted. Algoma criticizes the ITA for its failure to provide such an opportunity, yet Algoma itself conceded there was insufficient time for analysis and verification of new data, in its June 26, 1989 Rebuttal Brief before the ITA. In that brief, Algoma expressly stated that:

> Cost investigations routinely involve substantial volumes of complex data that require adequate time for Commerce to analyze and verify. Obviously, such analysis and verification cannot be conducted in the limited time remaining in this investigation.

P.R. 122 at 20.

Algoma, therefore, cannot now claim that the ITA erred in refusing to allow Algoma to resubmit its cost data on a secondary basis, since Algoma itself conceded that verification of a second cost submission would have been impossible.[14/]

[14/] We note that Section 353.37(a) of the antidumping regulations does not expressly require the ITA to provide respondents with an opportunity to correct deficiencies in a submission, and that its predecessor, Section 353.51(b), limited the ITA's allowance of new submissions to those situations in which "the correct submission is received in time to permit proper analysis and verification of the information concerned." Algoma's express concession that reverification would have been impossible "in the limited time remaining in this investigation" renders these regulations inapplicable to the instant determination.

Algoma also asserts that due process concerns dictate that notification and an opportunity to submit corrected responses must be afforded. Algoma relies on what it characterizes as "a fundamental tenet of due process and U.S. administrative law," namely, that "interested parties must be given a reasonable opportunity to address major issues that are in contention." Algoma Memorandum at 29.

Algoma cites UST, Inc. v. United States, 8 CIT 82, 596 F. Supp. 463 (1984) to support its argument that an opportunity to correct submitted data must be recognized. But this decision was later reversed, and the factual findings "discounted." UST, Inc. v. United States, 9 CIT 352, 353 (1985). Moreover, UST involved the ITA's refusal to consider certain information proferred by a respondent. In contrast, in this case, the ITA reviewed all data submitted by Algoma, but rejected such data because Algoma was unable to provide supporting documentation, and the data could not be reconciled, on a product-by-product basis, to costs maintained by Algoma for financial accounting purposes.

Algoma relies on the cases Daewoo Electronics Co., Ltd. v. United States, 712 F. Supp. 931 (Ct. Int'l Trade 1989) and Mitsubishi Electric Corp. v. United States, 700 F. Supp. 538 (Ct. Int'l Trade 1988) to support its due process argument. Algoma, however, misinterprets the holding of each case. Although both decisions recognize a limitation on the ITA (and the ITC) to resort to best information available, the basic limitation placed on the power of the agencies is that they cannot arbitrarily use

best information when there has been a lack of clear and adequate communication requesting the information. Daewoo, 712 F. Supp. at 945.

In Daewoo, the court rejected the ITA's resort to BIA because: (1) the ITA did not resort to the best information rule in order to insure compliance with the deadlines "allotted by Congress;" (2) respondents' "noncompliance consisted of providing too much information, rather than failing to provide adequate information;" and (3) the ITA refused to use respondents' data, "which was verified," because the data included certain components which "could not be included in such calculations." In contrast, in the instant proceeding: (1) the ITA was operating within its allotted time frame; (2) Algoma did not provide adequate information to verify the accuracy of its standard costs; and (3) the ITA concluded that Algoma's standard cost data could not be verified, a conclusion supported by substantial evidence in the record.

In Mitsubishi, the court admonished the International Trade Commission for precluding itself from receiving certain data, and for defining what is the best information available before requesting available information. 700 F. Supp. at 563. In contrast, in the instant proceeding the ITA did not limit the information which Algoma was allowed to present in support of its claim that COP should be based on adjusted standard costs. Rather, the ITA analyzed the data submitted and found that Algoma had not established the veracity of its proffered costs.

The preceding cases are further distinguishable in another important manner. Daewoo and Mitsubishi involve the addition or alteration of certain aspects of the COP submissions -- not a complete resubmission of COP data. The final determination at issue does not involve a relatively minor shortcoming that could have been reworked in a reasonably short period of time. Instead, the ITA was forced to reject Algoma's COP data in toto, as it could not verify the data as required by the statute.

"While Commerce has followed the set pattern of correcting inadequate responses where it could, where deficiencies were either too numerous or too serious to remedy in time, the best information available rule has been employed." Chinsung Indust. Co., Ltd., v. United States, 705 F. Supp. 598, 600 (Ct. Int'l Trade 1989). Accordingly, this Panel declines to find that Algoma was denied its procedural rights. As the CIT stated in Monsanto Co. v. United States:

> The real question here in this case is whether ITA has fulfilled Congressional intent, including providing whatever process the statute defines. Plaintiff here is concerned with the adequacy of the core investigation. ITA must be allowed to conduct the investigation so as to fully comply with the statute, whether or not the parties request it. In doing this it must have some latitude not to comply with all requests to investigate. Further, Congress has afforded ITA considerable latitude and discretion in implementing the antidumping laws, especially during the investigative fair value phase.

Monsanto Co. v. United States, 698 F. Supp. 275, 283 (Ct. Int'l Trade 1988) (footnote omitted; emphasis in original).

C. The Selection Of The Best Information Available

Algoma contends that after the ITA rejected Algoma's cost accounting data on the grounds, at least in part, that these figures did not correlate to the inventory values supplied at verification, and further noting that there is no evidence in the record of intentional noncompliance or bad faith on the part of Algoma, the ITA should be required to use the inventory values as the most reasonable form of BIA. Algoma has submitted an amendment to its complaint, to contest the ITA's use of the petitioner's data as the best information available. The ITA and Bethlehem assert that because this issue was not explicitly raised in Algoma's original complaint, this issue is not properly before this Panel, and Algoma's amendment should be rejected as untimely.

Panel Rule 7(a) limits a panel review to "[t]he allegations of error of fact or law, including the jurisdiction of the investigating authority, that are set out in the complaints. . ." Panel Rule 39(2)(d) requires the parties to state "the precise nature of the Complaint, including the applicable standard of review and the allegations of error of fact or law . . ."

It is a well accepted proposition in the U.S. legal system that an opportunity to amend a complaint is within the sound discretion of the trial court. As the Supreme Court stated in Foman v. Davis, 371 U.S. 178 (1982), "[i]f the underlying facts or circumstances relied upon by plaintiff may be a proper subject of relief [the party] ought to be afforded an opportunity to test

[the] claim on the merits." The Court warned, however, of the danger of "undue prejudice to the opposing party." 371 U.S. at 230. See also Intrepid v. United States, No. 89-1468 (Fed. Cir. June 29, 1990).

Although Algoma did not specifically set forth the ITA's selection of BIA as an individual count in its complaint, the main issue of the complaint was the ITA's resort to BIA, and the selection of BIA was subsumed in that issue.[15/] Moreover, there is no undue prejudice to the parties from allowing Algoma to pursue this issue, since the Panel provided an opportunity for comment when it issued an order on May 31, 1990, requesting that the BIA issue be fully briefed.[16/]

Reaching the merits of this issue, however, we find no basis for reversing the ITA's selection of the petitioner's data as the best information available. Algoma's assertion that the ITA is required to use the inventory costs as the "most probative" data is misguided. Contrary to Algoma's position, it is well settled that best information need not be the "'best' of all available information" but need only be "supported by substantial evidence on the record."

[15/] The complaint, filed September 29, 1989, sets forth the question presented as follows: "Specifically, Algoma contends that ITA's rejection of Algoma's cost of production data and ITA's use of best information available to calculate foreign market value is unsupported by substantial evidence on the record and is otherwise not in accordance with law." Complaint at 3-4.

[16/] Although the Panel was able to reach its decision on the record before it, the Panel would have been better served had the ITA and Bethlehem fully addressed this issue as requested.

The U.S. courts have consistently affirmed the discretion of the administering agencies to choose what is the "best" information available. "When [the] use of best information is challenged, the question is not whether the ITA has chosen the 'best' of all available information, but rather whether the information chosen by the ITA is supported by substantial evidence on the record." N.A.R., S.p.A. v. United States, No. 90-60, (Ct. Int'l Trade June 26, 1990), Slip Op. at 15 (citing Chinsung Indus. Co. v. United States, 705 F. Supp. at 601.

"'[B]est information available' may include all information that is accessible or may be obtained, whatever its source." Timken Co. v. United States, 11 CIT 786, 788, 673 F. Supp. 495, 500 (1987) (citing Budd Co. v. United States, 1 CIT 67, 75, 507 F. Supp. 997, 1003-04 (1980)). Moreover, nothing in 19 U.S.C. § 1677e "precludes reliance on a respondent's data." Timken, 673 F. Supp. at 500. Information utilized by the ITA as BIA "is not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information." N.A.R., S.p.A. v. United States, Slip Op. at 15 (quoting Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1114, 1126 (Ct. Int'l Trade 1989), aff'd, 901 F.2d 1089 (Fed. Cir. 1990)).

In N.A.R. v. United States, the CIT remanded the issue of whether the use of petitioner's data was "reasonable and justified" when considering the "potential for significant differences" in a factor of the COP calculation. Slip Op. at 18.

The Court specifically requested that the ITA "explain its reasons" for using one type of the best information as opposed to another. Id. The foreign respondent raised a significant question about the reliability of the data used as BIA, explaining that the product, from which the COP data was collected, was not the same type of product produced by the respondent for sales in the United States. Id. at 17-18.

In Associacion Columbiana de Exportadores v. United States, 717 F. Supp. 834 (Ct. Int'l Trade 1989), the CIT held that where cooperative respondents are unable to supply certain data, the ITA should not penalize them by picking a least favorable alternative as BIA. In that case, however, the alternative data rejected by the ITA had been fully verified, while the data accepted as BIA was not.

In the present case, Algoma has presented no evidence which casts doubt on the reliability of petitioner's data, and it has not alleged that either of the bases for reversal in the two preceding cases applies here. As Bethlehem notes, the data used by the ITA was not an unqualified adoption of the data submitted in the petition. P.R. 1 at 18; Post-Hearing Memorandum of Bethlehem Steel Corporation at 13. The ITA requested cost data from Bethlehem which included production cost figures from Bethlehem's records, and made several adjustments. P.R. 45, 53 and 59; C.R. 5, 8 and 11. The petitioner's production costs for new steel rail were reduced to account for the fact that Bethlehem uses scrap to produce steel in an electric-arc furnace,

whereas Algoma uses iron ore and coal to produce steel in a basic oxygen furnace. Id. Publicly available industry data was also used to adjust other cost differences between the United States and Canada. P.R. 70.

Rather, Algoma claims that when the ITA rejected the adjusted standard cost data because it was inconsistent with the inventory costs, it "implicitly concluded that . . . Algoma's rail inventory costs were reliable." Supplemental Brief On The Principles That Should Govern The Selection Of "Best Information Available", Algoma Steel Corporation Limited, at 7 (emphasis in original). Thus, the ITA should use the inventory costs as BIA, according to Algoma. "ITA cannot have it both ways." Id.

However, Algoma itself has identified problems with using the inventory values as the basis of foreign market value. Algoma stated in its reply brief that its "inventory cost system is used to calculate aggregate cost data for financial statement presentation and has limited usefulness in product-specific cost analysis." Algoma Reply Brief at 21. Algoma further explained:

> Under this system, Algoma calculates monthly average inventory figures based on the beginning inventory (if any) and the amount of materials, labor, and overhead expended during the month to produce new inventory. Thus, if Algoma were to produce in one month a given quality and size of rail, all direct manufacturing costs incurred in rail-production activities during that period would be allocated directly to the inventory cost of that rail type.
>
> Algoma's inventory cost system is not useful for calculating precise product-specific costs because certain aberrational expenses that logically affect one or more groups of products are actually allocated to the individual product that was produced at the time that expense was incurred. For example, the cost of

> any breakdown in rail production equipment would be attributed exclusively to the specific type of rail being produced at the time of the breakdown. These costs, however, should be distributed over all rail production because they affect Algoma's overall production efficiency, and not its efficiency to produce only a specific quality and size of rail.14/
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> ---
>
> 14/ Other types of cost allocation problems that can arise using Algoma's inventory cost system include defective material problems. For example, assume that several heats (or batches) of raw steel are necessary to produce a quantity of a particular type of rail and that one of these heats had a defective metallurgy. Under the inventory cost system, the cost of that defective heat would be charged against the individual rail type then being produced. This cost, however, should be borne by all of Algoma's steel products because it reflects an overall cost of doing business, rather than a product-specific cost.

Id. at 22-23 (emphasis in original).

In light of the fact that Algoma has not demonstrated that the information selected as BIA is inaccurate, and has itself detailed problems with using the inventory costs for foreign market value, this Panel does not believe it appropriate to direct the ITA to select the inventory costs in preference to the petitioner's data as the basis for foreign market value.

VI. DECISION

The final affirmative determination of sales at less than fair value by the U.S. Department of Commerce, International Trade Administration in the antidumping investigation of New Steel Rail, Except Light Rail, From Canada, as challenged by Complainant Algoma Steel Corporation, is hereby affirmed.

Lawrence R. Walders, Esq., Chairman

Professor William P. Alford, Panelist

A. L. Bissonnette, Q.C., Panelist

Gail T. Cumins, Esq., Panelist

E. David Tavender, Q.C., Panelist

UNITED STATES-CANADA BINATIONAL PANEL REVIEW

IN THE MATTER OF NEW STEEL RAIL EXCEPT LIGHT RAIL, FROM CANADA	)	USA 89-1904-08

ALGOMA STEEL CORPORATION, LIMITED
Complainant

v.

UNITED STATES DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION,
Respondent

AND

BETHLEHEM STEEL CORPORATION
Respondent-Intervenor

DISSENTING OPINION OF E.D.D. TAVENDER, Q.C.

I have had the benefit of reviewing the memorandum of opinion reflecting the majority decision of the Review Panel in these proceedings. With respect, I must dissent from that opinion and would remand the final affirmative determination by the ITA.

In my view, the ITA committed an error of law in resorting to the use of best information available on the facts of this case.

The employment of the best information available to establish costs of production can have punitive consequences. This is particularly so when, as in the present case, the administering authority rejects entirely the information supplied by a party under

investigation but rather constructs cost of production figures from data presented by a competitor which is not subjected to verification. Without in any way restricting the statutory authority necessarily vested in an administering authority to use best information available, careful regard to statutory requirements and considerations of fairness and due process of law must in my opinion be adhered to.

The statute requires the administering authority to use best information available if it is "unable to verify the accuracy of the information submitted" (Section 1677e(b)). This broad authority is however qualified by Section 1677e(c) which states:

> "In making their determinations under this sub-title, the administering authority and the commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available."

The use of best information available has been the subject of judicial comment in a number of recent cases.

In Atlantic Sugar Limited v. United States 744 F.2d 1556 (Fed. Cir. 1984) the court stated at page 1560:

> "Before analyzing further the parties' and lower court's views, we examine the rule itself, set forth above. We note the use of the mandatory term 'shall,' indicating that the ITC must use the best information otherwise available in the enumerated circumstances. This is reflected in the legislative history:
>
> > [This section] would provide that whenever a party or any other person refuses or is unable to produce information in a timely manner and in the form required, or otherwise significantly impedes an investigation,...the ITC must use the best information otherwise available. [Emphasis supplied.]
>
> We also note the context of the best information rule: it is set within the extremely short statutory deadlines which the Congress built into the new antidumping law and the resultant lack of time which the ITC has to wield its little-used subpoena power. Thus cooperation by the parties to the investigation is essential, as well as diligence by the ITC staff,

> to gather the data needed for an accurate determination. Noncooperation by parties or other persons may, in the absence of ITC time to pursue judicial compliance, be penalized, at least in the eyes of those parties or persons, by the ITC's mandatory use of whatever other best information it may have available. In short, one may view the best information rule, as the ITC urges, as an investigative tool, which that agency may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest. One may as well view the rule, in light of the legislative history cited, as a club over the ITC's head, which Congress has brandished to force that agency to arrive at some determination within the time allotted. 'Impossible' is a word which Congress does not want to hear in these complex cases."

In Mitsubishi Electric Corporation v. United States 700 F. Supp. 538 (Ct. Int'l Trade 1988) it was stated at page 563:

> "The court also recognizes that using the best information available rests on the presumption that reasonably available information will be sought, collected, and considered before determining what is the best available information to use."

In Daewoo Electronics Company, Ltd. v. United States 712 F. Supp. 931 (Ct. Int'l Trade 1989) the court at page 944 stated:

> "It has been established that Section 776(b) of the Act, 19 U.S.C. 1677e(b), requires Commerce to use 'best information otherwise available', which can be detrimental to plaintiffs' interests, only when 'a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required', or otherwise significantly impedes an investigation."

The court quoted with approval from the Atlantic Sugar case and also stated at page 945:

> "Before the ITA may find any non-compliance on the part of the parties to the proceeding, there must be a clear and adequate communication requesting the information, which is absent in this case."

In Olympic Adhesives Inc. v. United States 899 F.2d 1565 (Fed. Cir. 1990) the court stated at page 1571:

> "The basic error we perceive arises from the ITA's overly sweeping view of the authority it is granted under section 1677e(b). In essence, the ITA interprets the phrase 'whenever a party... refuses or is unable to produce information requested' to cover, in the ITA's discretion, any inadequacy or insufficiency of a reply to a request for any type of information. Indeed, even where a reply is complete, the ITA may, as it did in this case, conclude that the information does not answer a question it wishes to resolve, and for that reason the party is deemed to 'refuse' or 'be unable to supply' information within the meaning of the statute. We cannot agree that the ITA's authorization under section 1677e(b) extends so far.
>
> [1] In Atlantic Sugar, 744 F.2d at 1560, this court recognized that one may view section 1677e(b) as giving an agency (there, the ITC) some leverage against recalcitrant or noncooperative parties because the agency is required to 'arrive at some determination.' We agree that the ITA cannot be left merely to the largesse of the parties at their discretion to supply the ITA with information. This is particularly the case when the ITA is attempting to obtain information to conduct statutorily mandated administrative reviews because unlike ITC, the ITA has no subpoena power. See, e.g., Pistachio Group of the Ass'n of Food Indus. v. United States, 671 F. Supp. 31 40 (Ct Int'l Trade 1987). Thus, if the responses provided to an information request are only partially complete in that not all questions requiring a response are answered or answers to questions not fully or accurately supply the information requested, partial completeness under section 1677e(b) may justify resort to the best information rule. See, e.g., Chinsung Indus. Co. v. United States, 705 F. Supp. 598, 600-01 (Ct. Int'l Trade 1989); Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 966-67 (Ct. Int'l Trade 1986) (resort to best information available justified in countervailing duty determination where requested information as supplied was inaccurate in significant and material respects); Ansaldo Componenti, S.P.A. v. United States, 628 F. Supp. 198, 205 (Ct. Int'l Trade 1986) (resort to best information available justified where submissions to requests for information consistently partially complete); Tai

> Yang Metal Indus. Co. v. United States, 712 F. Supp. 973, 977 (Ct. Int'l Trade 1989) (resort to best information available justified where party served with questionnaire does not submit any answer even amidst assertion that party lacked financial capacity to assemble requested information). Otherwise, alleged unfair traders would be able to control the amount of antidumping duties by selectively providing the ITA with information. See, e.g., Pistachio Group, 671 F. Supp. at 40; Chinsung Indus.,705 F. Supp. at 601.
>
> [2] On the other hand, the ITA has not been given power that can be 'wielded' arbitrarily as an 'informal club'. Atlantic Sugar, 744 F.2d at 1560. For example, the ITA may not properly invoke section 1677e(b) by making repeated requests for information which a party has already submitted until the party becomes frustrated and refuses to comply. Nor may it characterize a party's failure to list and give details of sales as a 'refusal' or 'inability' to give an answer where, in fact, there are no sales."

The use of best information available by the administering authority should also, in my opinion, be viewed in the light of basic due process of law principles that are well recognized in the authorities, although they have not, to my knowledge, been applied specifically to a best information available case. As was stated in Zotos International Inc. v. Kennedy 460 F. Supp. 268 (D.D.C. 1978) at page 276 a party subject to an agency proceeding must be able to engage "in a reasonably focused dialogue with the agency concerning the major issues in contention".

As I interpret the statute in the light of the authorities, certain general principles emerge:

1. The administering authority has the statutory obligation of verifying information supplied to it but its ability to do this is circumscribed by the relatively short statutory timeframe available to it.

2. To effect the statutory results contemplated, the parties of necessity must work cooperatively and efficiently together. The party being investigated on its behalf must produce all information "requested" of it in a timely manner and in the form required and must give the administering authority all required assistance to permit the authority to verify information relied on. If the party being investigated acts unreasonably, is recalcitrant, noncooperative or submits false or misleading information, the authority would be entirely justified in threatening the use of best information available as an "informal club" to effect a cooperative response.

3. The administering authority must seek out, collect and consider all reasonably available information before it resorts to best information available.

4. Once the administering authority is considering the use of best information available there should be a "clear and adequate communication" or a "reasonably focused dialogue" between the parties in respect of shortcomings in the information submitted, the responses to information requested, or in the underlying data as uncovered at the verification stage. There should be, in other words, a specific warning of a problem and an opportunity to reply to that warning.

5. If, within the statutory timeframe, there is still a refusal or an inability of the party under investigation to produce information "requested" or that party otherwise significantly impedes an investigation, the administering authority may resort to best information otherwise available, but in doing so must act reasonably and on the basis of substantial evidence. In particular, while the statute permits use of the petitioner's data as best information otherwise available, that does not mean in my view that the agency should arbitrarily use a petitioner's data in all cases. Where for example, there is substantial data available from the company under investigation that has been or could be verified and that company has been cooperative, it would seem to me exclusive use of the petitioner's unverified data might result in the use of the worst information available, clearly a contradiction of the statutory language.

6. Special problems even within these guidelines may still arise. For example, as here, the party under investigation may have been cooperative and supplied all available information "requested" and yet the ITA acting reasonably finds during the verification stage that it cannot verify the cost of production figures supplied. It seems to me in those circumstances particular regard to the guidelines set out above are required, especially in the light of the short time left for the ITA to complete its mandate.

With these general principles in mind, I turn to the facts of the present dispute and the reasons expressed by the ITA in its final affirmative determination.

In the initial ITA Cost Questionnaire of March 3, 1989, Algoma was faced with a request to supply cost of production data based on "costs actually incurred" under a general warning that a failure to respond completely might lead to a best information available determination. While Algoma prepared its financial statements on the basis of actual costs, it elected not to supply actual cost data but rather attempted to establish its cost of production figures through an alternative system, namely the standard cost system. The ITA subsequently asked Algoma why actual costs were not used. Algoma responded that it believed its standard system was a better reflection of its cost of production. The record indicates that there is nothing wrong in principle by endeavouring to support the

In result, I would remand the final affirmative determination of the ITA for reconsideration employing proper principles of law and procedures consistent with this opinion.

August 30, 1990

E.D.D. TAVENDER, Q.C.