IN THE MATTER OF:

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ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE
UNITED STATES-CANADA FREE-TRADE AGREEMENT

In the Matter of **REPLACEMENT PARTS FOR SELF-PROPELLED BITUMINOUS PAVING EQUIPMENT FROM CANADA**	Secretariat File No. USA-90-1904-01

Before: Donald J. M. Brown, Chairman
Harry B. Endsley
Simeon M. Kriesberg
Gerald A. Lacoste
Wilhelmina K. Tyler

May 24, 1991

BLAW KNOX CONSTRUCTION EQUIPMENT CORPORATION
and NORTHERN FORTRESS, LTD.,
Complainants

- versus -

INTERNATIONAL TRADE ADMINISTRATION,
U.S. DEPARTMENT OF COMMERCE,
Respondent

Robert E. Burke, Barnes, Richardson & Colburn, argued for Blaw Knox Construction Equipment Corporation. With him on the brief was Brian F. Walsh.

Michele C. Sherman, Cameron & Hornbostel, argued for Northern Fortress, Ltd. With her on the brief was William K. Ince.

Craig R. Giesse and John D. McInerney, Office of the Chief Counsel for Import Administration, argued for the Department of Commerce. With them on the brief was Stephen J. Powell.

OPINION AND ORDER OF THE PANEL

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OPINION AND ORDER OF THE PANEL

I. INTRODUCTION

This Panel was constituted pursuant to Article 1904.2 of the United States-Canada Free-Trade Agreement ("FTA") to review the final determination of the International Trade Administration, U.S. Department of Commerce ("ITA"), in the administrative review of the antidumping order on replacement parts for self-propelled bituminous paving equipment from Canada for the period September 1, 1987 through December 31, 1988. Both the Canadian manufacturer, Northern Fortress, Ltd. ("Northern Fortress"), and the U.S. petitioner in the original antidumping investigation, Blaw Knox Construction Equipment Corporation ("Blaw Knox"), requested the administrative review; neither was satisfied with ITA's final determination, which was rendered on May 15, 1990. 55 Fed. Reg. 20175 (1990).

In this proceeding, Blaw Knox challenges ITA's final determination on the grounds that (a) ITA failed to compare contemporaneous sales and relied on insufficient home market sales, (b) ITA failed to verify Northern Fortress's payment of the Federal Sales Tax ("FST") and made an erroneous circumstance-of-sale ("COS") adjustment to account for the "multiplier effect" of the FST, (c) ITA failed to verify all other evidence on which it relied, and (d) ITA accepted submissions by Northern Fortress on March 7 and March 23, 1989 rather than resorting to "best information available" ("BIA"). For its part, Northern Fortress

challenges the ITA's final determination on the grounds that (a) ITA resorted to BIA rather than accepting a Northern Fortress submission on June 15, 1989 and (b) ITA used the 30.61 percent margin from the original antidumping investigation as the BIA rate rather than using any of the lower margins determined in recent administrative reviews. ITA responds to these challenges to its final determination by (a) requesting a remand to enable ITA to correct errors in its computations and to conduct verification of the FST payments and (b) requesting affirmance of its decision to use BIA and its selection of the 30.61 percent margin as the BIA rate.1/

On the basis of the administrative record, the applicable law, the written submissions of the parties, and the hearing held on March 14, 1991 at which all parties were heard, the Panel:

REMANDS to ITA for redetermination of the dumping margin on the approximately 75 percent of the sales as to which ITA accepted information, based on contemporaneous and sufficient home-market sales, verification of FST payments by Northern Fortress, and verification, if requested by Blaw Knox upon

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1/ In the course of this review, ITA also moved for an extension of time within which to file its brief, for leave to amend the administrative record, and for leave to file a surreply. The motions for extension of time and for leave to amend, which were unopposed, were granted by the Panel on January 24 and March 14, 1991. Pub. Doc. Nos. 63, 79. The motion for leave to file a surreply was denied on March 14, 1991. Pub. Doc. No. 80. (The Panel's forms of citation of the record are explained in footnote 3 infra.)

remand, of any information used to calculate third-country sales prices or constructed values for those home-market sales that are insufficient or non-contemporaneous;

REMANDS to ITA for redetermination of the appropriate BIA rate to use as a dumping margin for the remaining approximately 25 percent of the sales, based on the corrected and verified information on the record as revised upon remand;

DECLINES TO REACH the issue whether ITA erred in making a COS adjustment for the FST, pending the verification upon remand of FST payments; and

AFFIRMS the ITA's determination in all other respects.

II. THE ADMINISTRATIVE PROCEEDINGS AND DETERMINATIONS

This review is the third by a binational panel arising out of antidumping proceedings concerning replacement parts for self-propelled bituminous paving equipment from Canada.2/ The original antidumping investigation resulted in a finding that the domestic industry was suffering injury by reason of imports of the subject merchandise, which were being sold at a weighted-average margin of 30.61 percent below fair value. 42 Fed. Reg. 44811 (1977).

Five administrative reviews of the outstanding antidumping order were conducted in the years following the conclusion of the

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2/ The other two reviews were designated USA-89-1904-02 and USA-89-1904-03.

original investigation, resulting in weighted-average dumping margins ranging from 0.53 percent to 4.20 percent. See Pub. Doc. No. 61, at 8 n.8.3/

The sixth administrative review, which is the focus of this panel review, was originally requested by both Blaw Knox and Northern Fortress in September 1988. Admin. Rec. Doc. Nos. 2, 3.4/ ITA sent a standard questionnaire to Northern Fortress on October 11, 1988, requesting information on sales during the period September 1, 1987 through August 31, 1988. Admin. Rec. Doc. No. 4.5/ The deadline for response was stated as 45 days from receipt. Prior to that deadline, on November 22, 1988, Northern Fortress requested in writing that it be granted an extension of 15 days to submit a response, because of "a temporary manpower shortage and because of the labor-intensive task of 'inputting' each sale into a computer program." Admin. Rec. Doc. No. 6. The record reveals no evidence of a response by ITA to this request for an extension.

3/ References to documents in the public record of this panel review are designated "Pub. Doc. No. ___." References to documents in the public record of the administrative review are designated "Admin. Rec. Doc. No. ___."

4/ For the sake of simplicity, Northern Fortress and its various predecessor companies, including Fortress Allatt, Ltd. and Allatt Limited, are referred to as "Northern Fortress." See Pub. Doc. No. 47, at 6.

5/ The cover letter of the questionnaire stated that "[a]ny undue delays or lack of response may result in our proceeding with appraisements based on the best information otherwise available." Admin. Rec. Doc. No. 4.

About this time, ITA realized that it had failed to publish a notice of its initiation of the administrative review. ITA proceeded to publish the notice on December 5, 1988, 53 Fed. Reg. 48951 (1988), and then advised Northern Fortress by telephone that the response to the earlier questionnaire would be due 45 days after publication, on January 19, 1989. See Admin. Rec. Doc. No. 10. Evidently, telephone conversations between ITA and Northern Fortress between December 5, 1988 and January 4, 1989 resulted in an agreement to include in the administrative review the additional period from September 1, 1988 through December 31, 1988. The close of this extended period coincided with the sale of the bituminous paving equipment business by Northern Fortress to Ingersoll-Rand Canada, Inc.6/

On January 4, Northern Fortress requested in writing another extension of time, until February 15, to respond, "in order to obtain and report accurate sales and cost information through December 31, 1988." Admin. Rec. Doc. No. 10. ITA responded to this request in a letter dated January 4, in which it granted the extension until February 15 "only for the supplemental period September through December 1988." ITA further stated:

> You may not have an additional extension to file a response [for] the initial

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6/ The sale was closed on December 29, 1988, but by the terms of the sale Northern Fortress remains liable for any antidumping duties assessed against entries of replacement parts shipped to the United States through December 31, 1988. Pub. Doc. No. 47, at 1 n.1.

> period of review, September 1987 through August 1988. Any undue delays or lack of response will result in our proceeding with appraisements based on the best information available.

Admin. Rec. Doc. No. 11.

The February 15 deadline for Northern Fortress's response for the first 12-month period under administrative review came and went without any submission by Northern Fortress.7/ Therefore, on February 16 ITA sent Northern Fortress another letter, stating

> We have not received a response from [Northern Fortress]. [A] response is due 15 days after receipt of this letter. We will not consider any information from [Northern Fortress] after that date. . . . Lack of response will result in our proceeding with appraisements using the best information otherwise available.

Admin. Rec. Doc. No. 13.

According to the record, Northern Fortress failed to request another extension and failed again to respond by the deadline. On March 7, several days after the latest deadline, Northern Fortress made its first submission regarding sales during the initial 12-month period. Admin. Rec. Doc. No. 14. On March 23 it made a supplemental submission regarding sales during the

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7/ Northern Fortress attributes its tardiness to reductions in the size of the accounting staff, the resignation of the employee responsible for the relevant computer program, and the demands on staff occasioned by the transfer of ownership. Pub. Doc. No. 45, at Appendix W.

entire 16-month period. Admin. Rec. Doc. No. 16. These two submissions were slightly amended by a third Northern Fortress submission made on May 4, 1989. Admin. Rec. Doc. No. 20.

Meanwhile, on April 26, 1989, Blaw Knox made a written request that ITA verify the information received from Northern Fortress, Admin. Rec. Doc. No. 19, noting that ITA had not conducted a verification during the previous two administrative reviews.8/ The record reveals no response by ITA to this request, and ITA never did conduct a verification of the Northern Fortress submissions. Pub. Doc. No. 61, at 14 n.17.

On April 27, 1989, new antidumping regulations took effect, following their publication in the Federal Register on March 28. 54 Fed. Reg. 12742 (1989). These new regulations included modified provisions concerning ITA's acceptance of late questionnaire responses and its use of "best information available." In particular, the prior regulations had provided that submissions, although late, would be considered "in situations where it would be manifestly unjust" to disregard them and that an "opportunity to correct inadequate submissions [would] be provided if the corrected submission [were] received in time to permit proper analysis and verification of the information concerned." 19 C.F.R. §§ 353.46(a)(1), 353.51(b)

8/ The antidumping laws entitle a requesting party to a verification if no verification has been conducted in the previous two administrative reviews. 19 U.S.C. § 1677e(b)(3)(A), (B) (1988).

(1988). The new regulations omitted these two provisions and instead stated that ITA would, in its questionnaires, "specify the time limit for response" and would "return to the submitter, with written notice stating the reasons for return of the document, any untimely . . . questionnaire responses rejected by the Department." 19 C.F.R. § 353.31(b)(2) (1989). With respect to extensions of time, the new regulations provided:

> Ordinarily, the Secretary [of Commerce] will not extend the time limit stated in the questionnaire or request for other factual information. Before the time limit expires, the recipient of the Secretary's request may request an extension. The request must be in writing and state the reasons for the request. Only the following employees of the Department may approve an extension: the Assistant Secretary for Import Administration, the Deputy Assistant Secretary for Import Administration, the Deputy Assistant Secretary for Investigations, the Deputy Assistant Secretary for Compliance, and the office or division director responsible for the proceeding. An extension must be approved in writing.

Id. at § 353.31(b)(3).9/

On May 22, 1989, ITA wrote to Northern Fortress, stating that the "response dated March 23, 1989 is incomplete" because it omitted foreign market value information for some of the equipment parts sold in the United States. ITA included a constructed value questionnaire to solicit information needed to

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9/ More generally, the new regulations stated that ITA would "not consider . . . or retain in the record . . . any factual information submitted after the applicable time limit." 19 C.F.R. § 353.31(a)(3) (1989).

construct a value "for those parts that have no similar home market sales." ITA set a 15-day deadline for Northern Fortress's response. Admin. Rec. Doc. No. 22.10/

According to Northern Fortress, financial statements for the relevant period had not yet been completed and the accounting staff was overburdened, rendering submission of the requested constructed value information quite difficult. Pub. Doc. No. 45, at Appendix X. Northern Fortress so informed the ITA case analyst by telephone, on or before June 15.11/ According to Northern Fortress, the ITA case analyst advised that "a new policy made it impossible for him to formally grant an extension of time." Admin. Rec. Doc. No. 41, at 9. According to ITA, the case analyst advised Northern Fortress that "pursuant to the new antidumping regulations which took effect on April 27, 1989, the case analyst did not have the legal authority to grant Northern Fortress an extension of time." Pub. Doc. No. 61, at 16-17. Whatever the precise date and terms of the telephone

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10/ ITA's letter did not expressly refer to the possible use of BIA. It did state that "[a]ll other requirements remain as stated in the questionnaire letter," Admin. Rec. Doc. No. 22, perhaps a reference to the letter accompanying the original questionnaire, which did refer to BIA being used in case of "undue delays or lack of response." See Admin. Rec. Doc. No. 4.

11/ Neither Northern Fortress nor ITA states clearly on the record the date of this telephone conversation, so the Panel cannot determine whether the conversation occurred before the June 6 deadline. See Pub. Doc. No. 45, at Appendix W, at 9-10; Pub. Doc. No. 61, at 16.

conversation, Northern Fortress did not submit a written request for an extension of time.

On June 15, nine days after the latest deadline, Northern Fortress submitted a response. The submission was rejected and returned by ITA on the same date, accompanied by an ITA letter stating,

> Section 353.31 of our regulations (which became effective April 27, 1989) has codified our practice and stipulates that questionnaire responses will normally not be considered if they are filed beyond the date due for filing the response, and that such untimely responses will be returned to the submitter. We therefore will not consider [Northern Fortress's] 1987-88 deficiency response, and are returning that submission in its entirety . . . .

Admin. Rec. Doc. No. 23. Northern Fortress's request for reconsideration of the rejection, Admin. Rec. Doc. No. 24, was unavailing.

On August 14, 1989, ITA published its preliminary determination in the administrative review. 54 Fed. Reg. 33260 (1989). Finding that Northern Fortress "provided inadequate and untimely responses to the Department's requests for information," id. at 33260, ITA decided to use BIA in lieu of all the information submitted by Northern Fortress. After considering the dumping margins determined in the preceding administrative reviews, ITA selected as the BIA rate the margin found during the original antidumping investigation in 1977 -- 30.61 percent.

After receiving written comments on the preliminary determination from both Northern Fortress and Blaw Knox and after holding a hearing on the subject, ITA published its final determination on May 15, 1990. 55 Fed. Reg. 20175 (1990).12/ In its final determination, ITA accepted the information included in Northern Fortress's submissions of March 7 and March 23, 1989, because through these submissions Northern Fortress "provided the Department with adequate and timely information for three-fourths of the relevant sales and ha[d] been extremely cooperative throughout the administrative review." Id. at 20177.

ITA did maintain its rejection of the Northern Fortress submission of June 15, 1989, however, and used BIA in lieu of the rejected information. ITA cited in support of its decision to use BIA the lateness of Northern Fortress's several submissions despite repeated extensions granted by ITA and the failure of Northern Fortress to request an extension in writing before the June 6 deadline. "Based on these facts," ITA stated,

> we have determined that the use of BIA in this case is appropriate. First, [Northern Fortress's] questionnaire and supplemental responses were incomplete. [Northern

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12/ The record does not reveal why ITA, having initially announced its intention to complete the administrative review by November 30, 1989, see 53 Fed. Reg. 48951 (1988), and having rendered a preliminary determination on August 14, 1989, and having received the parties' written and oral comments on that preliminary determination by October 5, 1989, see Admin. Rec. Doc. Nos. 36, 37, 39, 40, 41, nevertheless did not render its final determination until May 15, 1990.

Fortress] had failed to provide approximately one-fourth of the information pertaining to [Foreign Market Value ("FMV")]. Second, the Department's deficiency letter, dated May 22, 1989, adequately notified [Northern Fortress] to provide the deficient FMV information. Third, [Northern Fortress's] response to our May 22, 1989, deficiency letter was untimely.

Additionally, we made every effort to accommodate [Northern Fortress] in its attempt to respond to the questionnaire. We granted [Northern Fortress] three extensions of time to file its questionnaire response and even accepted its untimely questionnaire and supplemental responses. We did so, in part, because our previous practice of rejecting responses pursuant to our prior regulation, 19 [C.F.R. §] 353.46 (1987) was, admittedly, inconsistent.

By the time [Northern Fortress's] deficiency response was due in this administrative review, however, the Department's current regulation governing time limits for written submissions, 19 [C.F.R. §] 353.31(b) (1989), was in effect. Pursuant to that regulation, the Department established June 6, 1989, as the time limit for the deficiency response in this case. Because [Northern Fortress] submitted its response after that date, we determined that the response was untimely and returned the document to respondent in accordance with 19 [C.F.R. §] 353.31(b)(2).

Furthermore, [Northern Fortress] failed to make a written request for another extension of time or direct such a request to the appropriate Department official (e.g., division director) in accordance with the regulation. See 19 [C.F.R. §] 353.31(b)(3).

We also disagree with the respondent that a lack of manpower constitutes an exception to the use of BIA. As correctly noted by Blaw Knox, the [Court of International Trade] already has rejected this argument. See Tai Yang Metal, 712 [F. Supp. 973,] 977. Finally, [Northern Fortress's] argument that the Department is not required to adhere to time

> deadlines conflicts with 19 [C.F.R. §] 353.31 (1989).

Id. at 20176-77. The final antidumping margin of 9.47 percent was the weighted-average of the 30.61 percent BIA rate applicable to some 25 percent of the sales under review and the actual 2.58 percent margin calculated on approximately 75 percent of the sales, as to which ITA had home-market sales information.

Northern Fortress timely filed a request for panel review of ITA's final determination. Pub. Doc. No. 1. Both Blaw Knox and Northern Fortress then filed complaints raising the issues that are before this Panel. Pub. Doc. Nos. 13, 11.

III. THE STANDARD OF REVIEW

Under the FTA, an Article 1904 binational panel review of a U.S. antidumping determination is to be conducted in accordance with United States law. FTA Article 1902.1. The applicable United States law includes not only the U.S. antidumping laws -- the "relevant statutes, legislative history, regulations, administrative practice, and judicial precedents," FTA Article 1904.2 -- but also the "standard of review . . . and the general legal principles that a court of the [United States] otherwise would apply to a review of a determination of the competent investigating authority," FTA Article 1904.3. The "general legal principles" applied by a U.S. court include "standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." FTA Article 1911. The

"standard of review" requires the Panel to hold unlawful the antidumping determination under review if it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988) (incorporated by reference in FTA Article 1911).

This "substantial evidence" standard is widely applied in the United States to judicial review of administrative agency decisions, and therefore its contours have been extensively surveyed by the courts. The United States Supreme Court has observed that the "substantial evidence" standard "frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute." Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966).

"Substantial evidence" is "more than a mere scintilla," Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), but is "something less than the weight of the evidence," Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966). It is, in brief, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); accord Federal Trade Comm'n v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986). Thus, it is not within this Panel's domain "either to weigh the adequate quality or quantity of the evidence for sufficiency or

to reject a finding on grounds of a differing interpretation of the record." Marsuda-Rodgers Int'l v. United States, 719 F. Supp. 1092, 1098 (CIT 1989).

Where the determination under review rests on the agency's interpretation and implementation of the statute that the agency is responsible for administering, that interpretation and implementation must be accorded deference. The United States Supreme Court has declared that a reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the . . . agency." Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984). To satisfy the "substantial evidence" standard, "it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Federal Election Comm'n v. Democratic Sen. Camp. Comm., 454 U.S. 27, 39 (1981). This principle has been applied repeatedly in reviews of ITA's antidumping determinations. See, e.g., ICC Indus. v. United States, 812 F.2d 694, 699 (Fed. Cir. 1987).

Deference to ITA's statutory interpretation "also applies to the methodology that the agency employs in fulfilling its lawfully delegated mission." Ceramica Regiomontana v. United States, 636 F. Supp. 961, 966 (CIT 1986), aff'd per curiam, 810 F.2d 1137 (Fed. Cir. 1987); see Consumer Prod. Div. v. Silver

Reed America, 753 F.2d 1033, 1038-39 (Fed. Cir. 1985); Melamine Chemicals v. United States, 732 F.2d 924, 928 (Fed. Cir. 1984). Deference has specifically been given to ITA's interpretation and implementation of the BIA provision of the antidumping laws, a provision central to this panel review. See Rhone Poulenc v. United States, 899 F.2d 1185, 1190 (Fed. Cir. 1990); Rhone Poulenc v. United States, 710 F. Supp. 348, 350 (CIT 1989), aff'd, 899 F.2d 1185 (Fed. Cir. 1990) (ITA's "discretion to fashion its own rules of administrative procedure includes the authority to set and enforce time limits on the submission of data"). See generally Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524-25, 541-44 (1978) (discussing limited judicial review of agency procedures).

Deference to ITA's interpretation and implementation of the antidumping laws is grounded in express congressional intent. Congress has stressed that in the antidumping field it has "entrusted the decision-making authority in a specialized, complex economic situation to administrative agencies." S. Rep. No. 249, 96th Cong., 1st Sess. 248 (1979). Accordingly, reviewing courts have acknowledged that "the enforcement of the antidumping law is a difficult and supremely delicate endeavor. The Secretary of Commerce . . . has broad discretion in executing the law." Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984); see

id. at 1582; Consumer Prod. Div. v. Silver Reed America, 753 F.2d 1033, 1038-39 (Fed. Cir. 1985).

All of the reasons and considerations underlying an ITA decision need not be fully stated on the record. In the larger context of judicial review of administrative actions, the United States Supreme Court has required only that an agency articulate a "rational connection between the facts found and the choice made," Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962), and has stated that "we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281, 286 (1974).

The "substantial evidence" standard mandated by the FTA refers specifically to the evidence "on the record," and the FTA expressly limits the Panel's review to the "administrative record" duly filed by ITA with the Binational Secretariat. FTA Article 1904.2. Thus, in considering whether the determination under review is supported by "substantial evidence," the Panel must consider only the information set forth in the record, and assess the reasonableness of ITA's decision based upon that record "as a whole." Carlisle Tire & Rubber Co. v. United States, 622 F. Supp. 1071, 1075 (CIT 1985).13/

13/ The "record" on which ITA bases its decisions is defined by regulation. 19 C.F.R. § 353.3(a) (1989).

The Rules of Procedure for Article 1904 Binational Panel Reviews, 53 Fed. Reg. 53212 (1988) ("Rule" or "Rules"), further limit this Panel's scope of review. Under Rule 7 this Panel may only consider the "allegations of error of fact or law . . . that are set out in the Complaints filed in the panel review" and any "[p]rocedural and substantive defenses raised in the panel review." Id. at 53214. Objections to ITA's determination that the parties failed to articulate in their complaints are beyond the Panel's authority to adjudicate.

IV. THE ISSUES AND HOLDINGS

The Panel divides the issues presented for review in three categories: (A) those pertaining to ITA's calculation of a dumping margin on approximately 75 percent of the Northern Fortress sales, as to which it received information on March 7 and March 23, 1989; (B) those pertaining to ITA's decision to resort to BIA in determining a dumping margin on approximately 25 percent of the Northern Fortress sales, as to which it rejected information submitted on June 15, 1989, and not to resort to BIA in determining a dumping margin on the balance of the sales, as to which it received information in March; and (C) those pertaining to ITA's selection of the margin from the original antidumping investigation -- 30.61 percent -- as the BIA rate. Each of the categories of issues will be addressed in turn.

A. Whether the International Trade Administration's Failure to Compare Contemporaneous Sales, Treatment of the Federal Sales Tax, and Failure to Conduct Verification were Supported by Substantial Evidence on the Record and were Otherwise in Accordance with Law

Blaw Knox objects to a number of aspects of ITA's calculation of the dumping margin on approximately 75 percent of the Northern Fortress sales -- the 2.58 percent margin that was averaged with the 30.61 percent BIA rate to yield the weighted-average margin of 9.47 percent. Blaw Knox's principal objections, whose validity is conceded in part by ITA, are: (1) that ITA failed to compare contemporaneous sales; (2) that ITA failed to verify, and incorrectly made a COS adjustment for, Northern Fortress's payment of the FST; and (3) that ITA failed to verify other Northern Fortress information.

1. Comparison of Contemporaneous Sales

Blaw Knox claims that ITA failed to modify its computer program when it extended the period of administrative review to include the last four months of 1988. Pub. Doc. No. 48, at 12-13. As a result, as ITA concedes, Pub. Doc. No. 61, at 6, ITA's calculation of the dumping margin on those Northern Fortress sales as to which price-to-price comparisons were made may have been based, in part, on comparisons of sales that were not contemporaneous and on home-market sales that were insufficient.14/

14/ Sufficiency of home-market sales is required by ITA's regulations. 19 C.F.R. § 353.4(a) (1988) (superseded (Cont'd)

Blaw Knox therefore requests a remand to ITA for correction of these errors, and ITA concurs. Pub. Doc. No. 48, at 17; Pub. Doc. No. 61, at 80. The Panel agrees that a remand is appropriate under these circumstances.15/

2. Treatment of the Federal Sales Tax: Verification of Northern Fortress's Payment and Circumstance-of-Sale Adjustment

Based on Northern Fortress's submissions of March 7 and March 23, 1989, ITA made an adjustment to the "United States Price" of Northern Fortress's sales for the amount of the FST purportedly rebated or not collected by reason of exportation. Pub. Doc. No. 36. This adjustment was made pursuant to the statutory requirement that the "United States Price" be increased by:

> the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or

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regulation); 19 C.F.R. § 353.48(a) (1989) (current regulation). See Antifriction Bearings from Federal Republic of Germany, Appendix B, 54 Fed. Reg. 18992, 18998, 19020-21 (1989). ITA's standard practice is also to require that compared home-market and U.S. market sales be contemporaneous within a "window" of a few months. Pub. Doc. No. 48, at 12; Pub. Doc. No. 82, at 67. See Codfish from Canada, 54 Fed. Reg. 13211, 13212-13 (1989).

15/ Northern Fortress argues that a remand for correction of these errors is inappropriate because ITA did not concede these errors in its Notice of Appearance, Pub. Doc. No. 26, as Rule 40(b) "requires." Pub. Doc. No. 67, at 15. To read Rule 40(b) as foreclosing ITA from ever conceding error in the course of a panel review unless it makes the concession in its notice of appearance would ill serve the larger interest in resolving U.S.-Canada trade disputes. Northern Fortress will have ample opportunity during the remand proceeding to comment on ITA's calculations.

> which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such similar merchandise when sold in the country of exportation.

19 U.S.C. § 1677a(d)(1)(C) (1988).

Thus, the United States Price is to be increased by the amount of taxes imposed in the country of exportation directly on the exported merchandise, which have been rebated or not collected by reason of the exportation. The adjustment is limited, however, to the amount of such taxes that are added to or included in the price of such or similar merchandise when sold in the country of exportation. See Atcor v. United States, 658 F. Supp. 295, 298 (CIT 1987).

Blaw Knox contends that ITA erred by failing to verify the amount of the FST actually paid by Northern Fortress on its home-market sales. Pub. Doc. No. 48, at 13-17. ITA concedes its failure to verify and requests a remand to enable it to conduct verification of FST payments. Pub. Doc. No. 61, at 6.16/ The Panel concurs that a remand is appropriate for verification of FST payments by Northern Fortress.17/

16/ The antidumping laws require that ITA conduct verification of at least every third administrative review if a party to the proceeding so requests. 19 U.S.C. § 1677e(b) (1988). ITA concedes that no verification had been conducted during the preceding two administrative reviews and that Blaw Knox timely requested verification during the instant administrative review. Pub. Doc. No. 61, at 14 n.17.

17/ Blaw Knox notes in its brief the existence of at least two (Cont'd)

Northern Fortress objects that it is now "too late" to conduct a verification that should have been undertaken in 1989 and that Northern Fortress may not have the documentation necessary to verify its prior submissions. The Panel believes that the balance of the equities favors the limited scope of the verification for which a remand is ordered. Given that Northern Fortress itself requested the administrative review, Admin. Doc. No. 3, and also initiated this panel review, Pub. Doc. No. 1, Northern Fortress had a continuing responsibility to retain all relevant documentation. Blaw Knox preserved its right to verification of FST payments by raising the issue in its Complaint, Pub. Doc. No. 13, sixth page, see Rule 7, and a remand to ITA to conduct the statutorily mandatory verification on the FST payment issue is in order.

Blaw Knox also contends that ITA compounded its erroneous failure to verify FST payments by making an erroneous COS adjustment for the "multiplier effect" of the FST. Pub. Doc. No. 48, at 15, 17.18/ ITA argues, Pub. Doc. No. 61, at 3 n.3, and the Panel agrees, that this issue is not "ripe" for review. The Panel is remanding to ITA for verification that Northern

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exemptions from the FST that may have been applicable to Northern Fortress's products. Pub. Doc. No. 48, at 14. A remand would enable ITA to verify the application of these exemptions to Northern Fortress.

18/ For a description of the "multiplier effect," see the panel decision in Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA-89-1904-03, at 21 n.9.

Fortress actually paid the FST. If, upon such verification, ITA should determine that Northern Fortress did not pay the FST, then ITA would have no authority to make a COS adjustment for that tax.

On remand, following verification by ITA of payment or nonpayment by Northern Fortress of the FST, ITA should reconsider the appropriateness of making a COS adjustment and, if it makes such an adjustment, it should state its reasons for doing so on the record. If such an adjustment is made and the issue returns to this Panel, the matter may then be "ripe" for binational panel review. See Cementos Guadalajara v. United States, 686 F. Supp. 335, 352-53 (CIT 1988), aff'd per curiam, 879 F.2d 847 (Fed. Cir. 1989), cert. denied, 110 S. Ct. 1318 (1990); see generally U.S. Constitution, art. III, § 2.

3. Verification of Other Evidence

The Panel notes that, during the administrative review, Blaw Knox requested a verification of all information relied on by ITA. Admin. Rec. Doc. No. 19. In its complaint and brief before this Panel, however, Blaw Knox called for verification only of the FST payments. Pub. Doc. No. 13, sixth page; Pub. Doc. No. 48, at 13-15. Under Rule 7, therefore, the Panel is constrained from ordering a remand for complete verification because Blaw Knox did not preserve the issue.

Although Blaw Knox did not preserve its right to verification of evidence currently on the record, other than

payment of the FST, none of the parties addressed the issue of verification of new evidence gathered upon remand. In reconsidering, during remand, the price-to-price comparisons for selected sales, ITA will likely have to request and receive from Northern Fortress third-country-sales or constructed-value information for those home-market sales that are determined not to be contemporaneous or sufficient in accordance with ITA's regulations and administrative practice. Blaw Knox's entitlement to verification of this new evidence has not been waived.

Therefore, if upon remand Blaw Knox requests verification, ITA is obligated to verify any third-country-sales or constructed-value information used upon remand. Verification upon remand need only address the FST payments and any third-country-sales or constructed-value information used to determine a margin for those sales as to which information was received on March 7 and March 23, 1989. Upon a failure of verification, ITA is authorized to use BIA, in accordance with the statute and regulations. See 19 U.S.C. § 1677e(b) (1988); 19 C.F.R. § 353.37(a)(2) (1989).

4. **Conclusions**

The Panel remands to ITA for recalculation of the dumping margin on the approximately 75 percent of the sales as to which ITA received information on March 7 and March 23, 1989 in light of (a) a comparison of U.S. sales with sufficient and contemporaneous home-market sales or, in the absence of such

home-market sales, third-country sales or constructed values; (b) a verification of FST payments by Northern Fortress; and (c) a verification, if requested by Blaw Know upon remand, of any third-country sales or constructed values used to calculate the dumping margin on the referenced 75 percent of Northern Fortress sales. The Panel declines to remand for a full verification of all Northern Fortress information. The Panel declines to reach the issue of the lawfulness of the COS adjustment for the "multiplier effect" of the FST.

B. Whether the International Trade Administration's Decision to Use "Best Information Available" was Supported by Substantial Evidence on the Record and was Otherwise in Accordance with Law

ITA's decision to use BIA in the instant administrative review is challenged by both Blaw Knox and Northern Fortress. Blaw Knox challenges the acceptance by ITA of Northern Fortress's March 7 and March 23, 1989 questionnaire responses, both of which were submitted late. Pub. Doc. No. 48, at 3. Blaw Knox argues that the foreign market value information submitted in March by Northern Fortress, since it was filed after the deadlines set by ITA and without an extension, simply could not be accepted by ITA under the applicable law. Id. at 6. In Blaw Knox's view, acceptance of such data by ITA, and the resulting failure by it

to use BIA for 100 percent of Northern Fortress's sales, amounted to an "abuse[] of discretion." Id. at 7.

For its part, Northern Fortress also challenges an aspect of ITA's decision to use BIA -- specifically, ITA's rejection of Northern Fortress's June 15, 1989 deficiency response as untimely and ITA's use of BIA in lieu of the information then submitted. Northern Fortress argues that ITA should not have rejected the untimely deficiency response and, therefore, should not have resorted to BIA at all. Pub. Doc. No. 47, passim.

The Panel addresses these contentions -- and ITA's defense of its BIA decision -- by first examining the legal standard applicable to ITA's resort to BIA, and then applying the law to ITA's decision to accept the March submissions and to reject the June submission.

1. The Resort to "Best Information Available": The Legal Standard

ITA's authority to resort to BIA rests on the following statutory provision, which was enacted in 1979:

> In making [antidumping] determinations [ITA] 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.

19 U.S.C. § 1677e(c) (1988). Neither the statute nor its legislative history, see S. Rep. No. 249, 96th Cong., 1st Sess. 98 (1979), defines the relevant terms, but extensive judicial interpretation exists.

Recognizing the difficulty and delicacy of ITA's task of administering the antidumping laws, see Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984), the courts have repeatedly affirmed ITA's broad discretion to decide whether to use BIA. That discretion stems not only from the variety of statutory grounds for the use of BIA -- refusal to produce information, inability to produce information in a timely manner, inability to produce information in the required form, significantly impeding an investigation19/ -- but also from the need for ITA to control the fact-gathering process. The courts have viewed ITA's authority to resort to BIA as an instrument essential to the fulfillment of ITA's responsibility to determine in a timely manner an accurate dumping margin, both in antidumping investigations and in administrative reviews.20/

19/ The cited grounds for the use of BIA are set forth in 19 U.S.C. § 1677e(c) (1988). Another independent ground is the unverifiability of information. Id. at § 1677e(b).

20/ Northern Fortress claims, Pub. Doc. No. 47, at 6, that ITA's resort to BIA is constrained by the General Agreement on Tariffs and Trade ("GATT"), which calls for antidumping duties not to exceed the actual margins of dumping. Although the Panel concurs with the desirability of construing U.S. antidumping laws to be consistent with the international obligations of the United States, including the GATT, we note that under United States law any conflicts between the GATT Antidumping Code and United States law must be resolved in favor of the latter. 19 U.S.C. § 2504(a) (1988); id. at § 2503(a), (c)(6).

Fortunately, the conflict that Northern Fortress perceives is chimerical. The GATT Antidumping Code expressly
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The BIA authority enables ITA to do the job Congress has instructed it to do, notwithstanding respondents that are uncooperative or unable to submit timely, accurate, and complete information. As the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit" or "CAFC") has observed, "ITA cannot be left merely to the largesse of the parties at their discretion to supply [ITA] with information. . . . Otherwise, alleged unfair traders would be able to control the amount of antidumping duties by selectively providing the ITA with information." Olympic Adhesives v. United States, 899 F.2d 1565, 1571-72 (Fed. Cir. 1990). See N.A.R. v. United States, 741 F. Supp. 936, 941 (CIT 1990) (party's production of cost data by classes of colors rather than, as requested by ITA, by length of tape rolls, justified ITA resort to BIA: "It is for ITA to conduct its antidumping investigations the way it sees fit, not the way an interested party seeks to have it conducted."); Rhone Poulenc v. United States, 710 F. Supp. 341, 346-47 (CIT 1989),

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recognizes the appropriateness of the "best information available" rule. Agreement on Implementation of Article VI of the GATT, Article 6:8, 31 UST 4919, TIAS No. 9650, GATT, BISD 26th Supp. 171 (1980) ("In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings, affirmative or negative, may be made on the basis of the facts available."); see Recommendation Concerning Best Information Available in Terms of Article 6:8 Adopted by the Committee on Anti-Dumping Practices on 8 May 1984, BISD 31st Supp. 283 (1985) (the "authorities of the importing country have a right and an obligation to make decisions on the basis of the best information available").

aff'd, 899 F.2d 1185 (Fed. Cir. 1990) (party's failure to provide information on computer tape justified ITA resort to BIA: the BIA rule "is designed to prevent a respondent from controlling the results of an administrative review").

Given the varied statutory grounds -- and the vital administrative needs -- for agency discretion in the implementation of BIA authority, the courts have almost never overturned ITA's decisions to resort to BIA. Indeed, the Panel is aware of only three cases in which ITA's decision to use BIA has been remanded for reconsideration.21/ In U.H.F.C. Co. v. United States, 916 F.2d 689, 701 (Fed. Cir. 1990), and in Olympic Adhesives v. United States, 899 F.2d 1565, 1572 (Fed. Cir. 1990), the Federal Circuit held that ITA may not resort to BIA where a party has failed to provide information that does not exist. In Daewoo Electronics Co. v. United States, 712 F. Supp. 931, 944-45 (CIT 1989), the Court of International Trade held that ITA may not resort to BIA where ITA has requested information without using its normal questionnaire procedure and without providing the respondent appropriate instructions needed to compile the information. The unusual circumstances of these three cases only

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21/ In several other cases, ITA's decision to use BIA has not been questioned by the courts but its selection of particular information as BIA has been remanded. The Panel views the decision to use BIA and the selection of a BIA rate as legally separate issues and addresses the latter in Part IV.C of this Opinion.

underscore the rarity of a judicial remand of ITA's decision to use BIA.

Perhaps the most common ground on which ITA resorts to BIA is the untimeliness of a party's submission -- the issue presented by the instant administrative review. The courts have consistently upheld ITA's authority in that regard. See, e.g., Rhone Poulenc v. United States, 710 F. Supp. 348, 350 (CIT 1989), aff'd on other grounds, 899 F.2d 1185 (Fed. Cir. 1990); Seattle Marine Fishing Supply Co. v. United States, 679 F. Supp. 1119, 1126-28 (CIT 1988); Ansaldo Componenti v. United States, 628 F. Supp. 198, 204-06 (CIT 1986); Carlisle Tire & Rubber Co. v. United States, 622 F. Supp. 1071, 1081 (CIT 1985); UST v. United States, 9 CIT 352 (1985).22/

22/ Northern Fortress argues that the statute authorizes resort to BIA only when untimeliness "significantly impedes" an administrative review, and that the tardy June 15 submission was not such an impediment. Pub. Doc. No. 47, at 30. The Panel notes, however, that the agency and the courts have always construed untimeliness as an independent ground for the use of BIA, unqualified by any requirement that the untimeliness pose a "significant impediment" to ITA's investigation. See, e.g., Seattle Marine Fishing Supply Co. v. United States, 679 F. Supp. 1119, 1128 (CIT 1988) (rejecting party's argument that, because tardy submission was filed "in time" for ITA to conduct investigation, resort to BIA was unlawful). This construction is a reasonable interpretation of the statutory language, see 19 U.S.C. § 1677e(c) (1988), and comports with the corresponding provision of the GATT, see footnote 20 supra. Furthermore, Congress appears satisfied with this construction of the statute, stating five years after its enactment: "[ITA] is authorized to use [BIA] as the basis for its action if it does not receive timely, complete, or accurate responses." H.R. Rep. No. 1156, 98th Cong., 2d Sess. 177 (1984). Under the foregoing circumstances, the agency's statutory
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ITA's authority to use BIA is shaped not only by the statute and the judicial decisions but also by ITA's regulations.23/ As Part II of this Opinion notes, this case is complicated by the fact that new regulations were promulgated between the March and the June responses by Northern Fortress to requests for information by ITA. See 54 Fed. Reg. 12742 (1989). The regulations addressed the related issues of timeliness and BIA. Compare 19 C.F.R. § 353.31 (1989) with 19 C.F.R. § 353.46 (1988) (timeliness regulations); compare 19 C.F.R. § 353.37 (1989) with 19 C.F.R. § 353.51 (1988) (BIA regulations). Because the differences between these successive regulations influenced ITA's different responses to the March and June submissions, the regulations and the corresponding ITA response will be analyzed in turn.

2. The International Trade Administration's Acceptance of the Northern Fortress Submissions of March 7 and March 23, 1989

On March 28, 1989, ITA published a Federal Register notice announcing the promulgation of new regulations to implement the antidumping laws. 54 Fed. Reg. 12742 (1989). The

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interpretation must be upheld. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984).

23/ ITA's crafting of these regulations to implement its statutory authority to resort to BIA is well within ITA's inherent discretion to "fashion [its] own rules of procedure." See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 544-45, (1978) (It is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.")

general effective date of the new regulations was established in the notice as April 27, 1989, which was also the effective date for ITA's new timeliness and BIA regulations.

Because of the effective date established in the Federal Register notice, there is no dispute that Northern Fortress's March 7 and March 23, 1989 questionnaire responses, and ITA's decision to accept those responses, were governed by ITA's prior regulations. The pertinent regulation on timeliness, codified at 19 C.F.R. § 353.46(a)(1) (1988), read:

> Except in situations where it would be manifestly unjust, any information or written views submitted in connection with a proceeding shall be considered only if received within the time established by these regulations or by specific instructions applicable to such submission; any submission received after such time shall not be considered in the proceeding.

The regulation required that information be submitted "within the time established by these regulations or by specific instructions," absent which the information "shall not be considered." The regulation permitted a measure of flexibility, however, in situations in which the application of the general rule would be "manifestly unjust." Thus, contrary to the contentions of Blaw Knox, Pub. Doc. Nos. 48, 68, ITA clearly did have discretion under its own regulations to consider, and not automatically to reject, tardy submissions of information.24/

24/ That discretion is underscored by the complementary BIA (Cont'd)

Furthermore, no cases have been brought to the Panel's attention in which the courts have ever reversed an ITA decision to accept late information rather than to use BIA. Finally, the statute leaves to the agency the discretion to determine whether information has been submitted "in a timely manner." 19 U.S.C. § 1677e(c) (1988).25/

ITA's exercise of that discretion with respect to the March submissions by Northern Fortress was described in ITA's

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regulation in effect at the time, which stated:

> Whenever information cannot be satisfactorily verified, or is not submitted in a timely fashion or in the form required, the submitter of the information will be notified [and] the affected determination will be made on the basis of the best information then otherwise available which may include the information submitted in support of the petition. An opportunity to correct inadequate submissions will be provided if the corrected submission is received in time to permit proper analysis and verification of the information concerned; otherwise no corrected submission will be taken into account. Where a party to the proceeding refused to provide requested information, that fact may be taken into account in determining what is the best available information.

19 C.F.R § 353.51(b) (1988) (emphasis supplied).

25/ Blaw Knox stresses, Pub. Doc. No. 68, at 2-4, that the statute uses the mandatory "shall" in directing that ITA "shall, whenever a party . . . is unable to produce information requested in a timely manner . . . use [BIA]." 19 U.S.C. § 1677e(c) (1988). The statutory mandate is premised, however, on the agency determining whether the party has produced the requested information "in a timely manner." That determination lies within the discretion of ITA.

notice of its final determination. Pub. Doc. No. 36. ITA specifically considered Northern Fortress's contentions that it had always put forth its best efforts to respond, that it suffered from a lack of manpower and from the disruption occasioned by a change of ownership, and that ITA had previously accepted untimely responses. These contentions were raised by Northern Fortress during the hearing that followed the publication of ITA's preliminary determination. Admin. Rec. Doc. No. 41, at 4-11. In addition, ITA noted in its final determination that its "previous practice of rejecting responses pursuant to our prior regulation, 19 CFR [§] 353.46 (1987) was, admittedly, inconsistent." Pub. Doc. No. 36.26/

Although not conceding that any of these factors constituted, as a matter of law, an exception to the requirement of filing timely submissions, Pub. Doc. No. 36 (citing Tai Yang Metal Industrial Co. v. United States, 712 F. Supp. 973 (CIT 1989)), ITA clearly took these factors into account in its final determination to accept the tardy March submissions. We note that ITA has done so in comparable situations as well. See, e.g., Miniature Carnations from Colombia, 52 Fed. Reg. 32037, 32038 (1987) (ITA accepted technically untimely questionnaire response because "financial difficult[ies]" delayed preparation

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26/ ITA's admission may refer to its permissiveness in accepting late filings in past administrative reviews of Northern Fortress's sales. See Pub. Doc. No. 47, at 54-59.

of response); Brass Sheet and Strip from Canada, 51 Fed. Reg. 44319, 44322 (1986) (ITA accepted late submissions).27/

The Panel regards ITA's decision to accept the March 7, 1989 and March 23, 1989 questionnaire responses as supported by substantial evidence on the record and in accordance with applicable law. We thus reject Blaw Knox's assertion that ITA abused its discretion in accepting those late filings.

3. The International Trade Administration's Rejection of the Northern Fortress Submission of June 15, 1989

As noted above, ITA's new regulations were promulgated to take effect on April 27, 1989, nearly a month prior to ITA's issuance on May 22, 1989 of its deficiency notice to Northern Fortress. 54 Fed. Reg. 12742 (1989). That deficiency notice included the supplemental questionnaire requesting constructed value information for the remaining 25 percent of sales for which home-market price data had not been submitted. The response date for the deficiency notice was set for 15 days after receipt of ITA's letter, or about June 6,

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27/ In its brief to the Panel, ITA also argues that ITA's final decision to accept the March 7, 1989 and March 23, 1989 questionnaire responses, notwithstanding their lateness, "balanced the agency's statutory duty to complete administrative reviews in a timely manner, UST v. United States, 9 CIT 352, 357 (1985), against the draconian effect that would have resulted from the wholesale rejection of the relevant submissions (i.e., increase in assessment rate from one to thirty percent)." Pub. Doc. No. 61, at 31 (footnote omitted).

1989. Admin. Rec. Doc. No. 22. The response was submitted on June 15.

The text of the new regulations, and the course of events between May 22 and June 15, are stated in Part II of this Opinion and will not be repeated here.

In brief, the new regulations expressly required that parties seeking an extension of time do so in writing, expressly required that any extension be authorized in writing by specified ITA officials, and expressly required that ITA "return to the submitter" any "untimely" questionnaire responses. 19 C.F.R. § 353.31(b)(2), (3) (1989). Nevertheless, Northern Fortress failed to request an extension in writing, failed to obtain authorization for a late filing, and submitted its deficiency response after the deadline established by ITA. Under these circumstances, the plain language of the regulations seems not only to permit, but perhaps even to mandate, ITA's rejection of the tardy June 15 submission by Northern Fortress and resort to BIA.28/

Northern Fortress argues, to the contrary, that ITA's rejection was unlawful. In particular, Northern Fortress contends that ITA's rejection of the June 15 response was

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28/ Notably, the new BIA regulations, codified at 19 C.F.R § 353.37 (1989), omitted the prior regulatory provision giving parties an opportunity to "correct inadequate submissions" if the correction "is received in time to permit proper analysis." 19 C.F.R. § 353.51(b) (1988) (superseded regulation).

inconsistent with ITA's past practice in other administrative reviews, with judicial decisions on ITA's timeliness regulations, and with Northern Fortress's own experience in having tardy submissions accepted in previous administrative reviews. Pub. Doc. No. 47, at 36-60. The short answer to these contentions is that they apply to ITA practice under the timeliness regulations in effect prior to April 27, 1989, not to the regulations that ITA applied to the June 15 response. The Panel shares Northern Fortress's concern for consistency in the application of ITA's regulations, and ITA has conceded that its prior practices were sometimes inconsistent, Pub. Doc. No. 36. The objective of administrative consistency is most likely to be achieved if ITA actions that comply with the express terms of its new regulations are upheld upon review.

Northern Fortress's most fundamental challenge to ITA's rejection of the June 15 submission is its contention that the old timeliness regulation still applied to that submission and that ITA's application of the new regulation to the June 15 response was unlawfully retroactive. Pub. Doc. No. 47, at 34-36. The Panel finds this argument untenable for two reasons.

First, although ITA made clear in its June 15 rejection letter, Admin. Rec. Doc. No. 23, that it was invoking the new regulation as its grounds for rejection, Northern Fortress never in the course of the administrative review objected to the rejection on the grounds of retroactivity.

Having failed to exhaust its administrative remedies, Northern Fortress cannot bring this new argument before the Panel. Both the FTA and the pertinent caselaw foreclose the Panel from overlooking the requirement that parties exhaust their administrative remedies before seeking panel review of an issue. See FTA Article 1911 (including "exhaustion of administrative remedies" among general principles of law to be applied by panels); United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37 (1952) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action."); accord Rhone Poulenc v. United States, 710 F. Supp. 348, 359 (CIT 1989), aff'd, 899 F.2d 1185 (Fed. Cir. 1990). The limited exceptions to the exhaustion requirement, see, e.g., McKart v. United States, 395 U.S. 185 (1969), do not apply to the circumstances at hand.

Second, even if an exception to the exhaustion requirement did apply here, and the Panel were bound to address the retroactivity claim on its merits, Northern Fortress's arguments would fail. Simply put, the application of procedural regulations published in the Federal Register on March 26, 1989 and stated to be effective on April 27, are not applied "retroactively" when applied to a request for information made on May 22 and to a response made on June 15. Northern Fortress

suggests that no ITA regulation can be effective as to administrative reviews "begun before its promulgation," citing Rhone Poulenc v. United States, 738 F. Supp. 541 (CIT 1990). Pub. Doc. No. 47, at 35. But this Rhone Poulenc ruling focused on whether the definition of the term "party to the proceeding" could be altered after the proceeding had commenced and be applied to exclude a party that had intervened in accordance with the regulations in effect at the time of its intervention. In the instant administrative review, ITA's new regulation was applied only to submissions requested and received after the effective date of the regulation. The application of the new regulation was entirely prospective. We do not find Rhone Poulenc to be apposite.

Under the facts on the record, ITA's decision to reject Northern Fortress's June 15 submission was a reasonable exercise of its regulatory mandate and discretion.29/ ITA is

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29/ Panel members Brown and Lacoste express some concern as to the role ITA must assume in deciding whether or not to reject untimely filed submissions and as to which standards should be applied in ITA's appreciation of what constitutes a "timely" response. They take note that both the language and purpose of the applicable statute and regulation apparently grant to the agency a discretion, albeit perhaps limited, to accept untimely submitted data and that such latitude is confirmed by ITA's administrative practice. Indeed, ITA admitted both in its rejection letter of June 15, 1989 and at the Panel hearing that it is entrusted with a limited discretion to accept late responses.

While acknowledging that the agency has considerable discretion in the interpretation of its regulations and that the Panel should not interfere with such construction, Panel (Cont'd)

responsible for performing a delicate balancing act, both in enforcing time limits and in resorting to best information available. Various concerns compete, including the need to complete administrative reviews within the time allotted by Congress; the need to calculate dumping margins as accurately as possible; the need to motivate respondents to supply their own (presumably accurate) information, particularly in the absence of ITA subpoena power; the need to remain in control of the agency's

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members Brown and Lacoste are worried that a radical and automatic "by-the-clock" refusal may betray an absence of thorough analysis of timeliness perspectives in context. Saying that a submission is untimely because it is late, and finding it is late because it is 9 days past the filing date, may not establish that ITA fully exercised its discretion and that an act of judgment actually took place. This would be particularly true where there is no substantial evidence on the record indicating that the agency somehow pondered its decision to reject in light of overriding FTA and statutory purposes or with any consideration, inter alia, for potential consequences to the just, speedy, and inexpensive resolution of the determination process.

Given that the word "timely" is not clearly defined in the implementing regulations nor by Congress or the case law, Panel members Brown and Lacoste submit that one may consider the appropriateness of construing the term in accordance with the governing statutory requirements. In fact, considering the revised wording of the new regulation, see 19 C.F.R. § 353.31(b) (1989), which is allegedly intended to codify ITA's willingness to enforce deadlines more stringently, where else than in the statute could the agency find justification for its discretion to accept technically late data. In this respect, Panel members Brown and Lacoste wonder how ITA could exercise its discretion to accept or reject a late submission without assessing whether such deficient response was "otherwise significantly imped[ing]" the process. See 19 U.S.C. § 1677e(c) (1988).

own procedures; and the need to do justice, and render due process, in individual cases.

Congress and the courts have made it abundantly clear that this balancing is primarily the responsibility of ITA and that courts of review or binational panels cannot substitute their judgment for that of the agency. To hold, in the instant case, that ITA could not, as a matter of law, reject the June 15, 1989 questionnaire response on timeliness grounds would effectively substitute our judgment for that of the agency and utterly eviscerate the regulation.30/

ITA's new regulation is stringent, but fair. The procedure for obtaining an extension of time is explicit; Northern Fortress chose not to follow it. In the Panel's judgment, ITA's decision to reject the untimely deficiency response was neither unreasonable nor in violation of law. The requisite "rational connection" does exist between the facts found and the choice made by the agency. See Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962). We thus reject Northern Fortress's assertion that ITA acted unlawfully in rejecting this untimely filing and resorting to BIA.

30/ Notably, all the reported judicial decisions known to the Panel that address ITA's authority to use BIA -- all but three of which, as previously noted, uphold ITA's exercise of that authority -- have considered ITA's resort to BIA under the regulations in effect prior to April 27, 1989. The requirements of timeliness under the new regulations are, if anything, more stringent than before.

4. Conclusions

The Panel affirms ITA's decision to use BIA. ITA struck a reasonable balance between acknowledging the particular difficulties confronting Northern Fortress and enforcing the terms of its regulations. Both ITA's acceptance of Northern Fortress's submissions of March 7 and March 23, 1989 and its rejection of Northern Fortress's submission of June 15, 1989 were supported by substantial evidence on the record and were in accordance with law.

C. Whether the International Trade Administration's Selection of the 30.61 Percent Margin from the Original Antidumping Investigation as "Best Information Available" was Supported by Substantial Evidence on the Record and was Otherwise in Accordance with Law

Since the Panel affirms ITA's decision to use BIA in lieu of the information submitted by Northern Fortress on June 15, 1989, we must address the separate issue whether ITA's choice of the 30.61 percent margin from the original antidumping investigation as "the best information otherwise available" was lawful. Blaw Knox and ITA defend ITA's selection of 30.61 percent as the BIA rate because no other available rate, when averaged with the 2.58 percent margin calculated for the sales as to which Northern Fortress submitted information in March 1989, would have yielded a final margin sufficiently high to "ensure future compliance" by Northern Fortress. Pub. Doc. No. 68, at 11; see Pub. Doc. No. 61, at 73. Northern Fortress objects to

the choice of the 30.61 percent as "punitive" and unreasonable given the availability of lower rates calculated in recent administrative reviews. Pub. Doc. No. 47, at 63.

The Panel considers these contentions by first reviewing the legal standard for choosing BIA and then examining the reasons by which ITA justifies its BIA choice in the instant administrative review.31/

1. **The Choice of "Best Information Available": The Legal Standard**

The statutory provision authorizing ITA to use the "best information otherwise available" does not define the term. See 19 U.S.C. § 1677e(c) (1988). Nor do ITA's regulations render a precise definition of BIA: they state only that BIA "may include the factual information submitted in support of the [original antidumping] petition or subsequently submitted by interested parties" and that a party's refusal to provide information or its impediment of the proceeding "may [be taken] into account in determining what is the best information available." 19 C.F.R. § 353.37(b) (1989).32/

31/ The Panel ultimately decides to remand to ITA for reconsideration of its choice of BIA in light of the corrections and verification to be conducted upon remand pursuant to Part IV.A of this Opinion. Thus, we do not reach the merits of ITA's choice of the 30.61 percent margin as the BIA rate. Our discussion of the applicable legal standard will, we hope, prove useful to ITA and the parties in the remand proceeding.

32/ The regulations quoted are those which took effect on April 27, 1989 and therefore applied to ITA's choice of BIA upon (Cont'd)

In the absence of detailed statutory or regulatory guidance, the legal standard for choosing BIA has developed largely through judicial review of ITA practice. The courts have accorded ITA considerable deference in selecting BIA, cognizant of the authority that any agency has in administering the statute and regulations for which it is responsible. See, e.g., Rhone Poulenc v. United States, 899 F.2d 1185, 1190 (Fed. Cir. 1990); New Steel Rail, Except Light Rail, From Canada, USA-89-1904-08, at 31 ("The U.S. courts have consistently affirmed the discretion of the administering agencies to choose what is the 'best' information available.").33/

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its decision to reject the Northern Fortress submission of June 15, 1989.

33/ BIA choices upheld as lawful have included: a proxy rate (another exporter's rate), Florex v. United States, 705 F. Supp. 582 (CIT 1989); the petitioner's data or rate, Chinsung Indust. Co. v. United States, 705 F. Supp. 598 (CIT 1989); Hercules v. United States, 673 F. Supp. 454 (CIT 1987); Pistachio Group of the Ass'n of Food Indus. v. United States, 671 F. Supp. 31 (CIT 1987); publicly available import statistics or other statistics, Marsuda-Rodgers Int'l v. United States, 719 F. Supp. 1092 (CIT 1989); Ceramica Regiomontana v. United States, 636 F. Supp. 961 (CIT 1986), aff'd per curiam, 810 F.2d 1137 (Fed. Cir. 1987); third-country sales, Seattle Marine Fishing Supply Co. v. United States, 679 F. Supp. 1119 (CIT 1988); constructed values, Chemical Products Corp. v. United States, 645 F. Supp. 289 (CIT), vacated on other grounds, 651 F. Supp. 1449 (CIT 1986); the respondent's data, Timken Co. v. United States, 673 F. Supp. 495 (CIT 1987); Hercules v. United States, 673 F. Supp. 454 (CIT 1987); another manufacturer's publicly available cost data, N.A.R. v. United States, 741 F. Supp. 936 (CIT 1990); Uddeholm Corp. v. United States, 676 F. Supp. 1234 (CIT 1987); and the original dumping margin, Rhone Poulenc v. United States, 899 F.2d 1185 (Fed. Cir. 1990); Tai Yang Metal Indus. Co. v. United States, 712 F. Supp. 973 (CIT 1989); Rhone Poulenc v. United States, 710 F. (Cont'd)

The courts have declined to require that ITA prove that its selected BIA is the "best" in any absolute sense, and instead have applied the substantial evidence test. See U.H.F.C. Co. v. United States, 706 F. Supp. 914, 922 (CIT 1989), modified on other grounds, 916 F.2d 689 (Fed. Cir. 1990) (concurring with view that "the issue is not which, of all the information ITA has to choose from, is the best information available, but rather, whether the information chosen by ITA is supported by substantial evidence on the record"); Chinsung Indus. Co. v. United States, 705 F. Supp. 598, 601 (CIT 1989) (rejecting view that ITA must use information that can "reasonably be considered best"); Seattle Marine Fishing Supply Co. v. United States, 679 F. Supp. 1119, 1128 (CIT 1988) (holding that issue is not "whose information becomes the best" but "whether or not the evidence on the record supports the ITA's decision").

In determining whether ITA's choice of BIA is supported by substantial evidence on the record, the courts have acknowledged that BIA is unlikely to be the most accurate information, because the most accurate information is presumably in the possession of the very party whose refusal or inability to produce the information has made ITA resort to BIA. See, e.g., Asociacion Colombiana de Exportadores de Flores v. United States,

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Supp. 348 (CIT 1989), aff'd, 899 F.2d 1185 (Fed. Cir. 1990); Rhone Poulenc v. United States, 710 F. Supp. 341 (CIT 1989), aff'd, 899 F.2d 1185 (Fed. Cir. 1990); see Olympic Adhesives v. United States, 708 F. Supp. 344 (CIT 1989), rev'd on other grounds, 899 F.2d 1565 (Fed. Cir. 1990).

704 F. Supp. 1114, 1126 (CIT), reversed in part upon remand, 717 F. Supp. 834 (CIT 1989), aff'd on other grounds, 901 F.2d 1089 (Fed. Cir.), cert. denied, 111 S. Ct. 136 (1990) (BIA is "not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information"); Uddeholm v. United States, 676 F. Supp. 1234, 1236 (CIT 1987) (BIA "may actually be less accurate" than information submitted by uncooperative respondent). Nevertheless, reasonable accuracy is one of the criteria that ITA should seek to satisfy in selecting BIA. See, e.g., N.A.R. v. United States, 741 F. Supp. 936, 942-43 (CIT 1990) (remanding to ITA for reconsideration of BIA in light of allegations that chosen BIA related to different product than the product under investigation); Alberta Pork Producers' Marketing Board v. United States, 669 F. Supp. 445, 457 (CIT 1987), aff'd upon remand on other grounds, 683 F. Supp. 1398 (CIT 1988) (holding that information used as BIA must be "reasonably accurate").

At the same time, the courts have repeatedly affirmed ITA's practice of choosing BIA that is adverse to the interests of the party whose response has been inadequate or untimely, because this practice serves to induce cooperation by not "rewarding" a respondent for failing to produce information. See, e.g., Florex v. United States, 705 F. Supp. 582, 588-89 (CIT 1989); Pistachio Group of Ass'n of Food Indus. v. United States, 671 F. Supp. 31, 40 (CIT 1987); Ansaldo Componenti v.

United States, 628 F. Supp. 198, 205-06 (CIT 1986). ITA's practice in this regard is consistent with its regulatory provision that it "may" consider a party's refusal to provide information, or a party's impediment to the proceeding, in determining "what is best information available." 19 C.F.R. § 353.37(b) (1989).34/

ITA's choice of BIA, then, must strike a balance between the ideal of an accurate dumping margin and the practical need to induce the timely cooperation of those parties in possession of relevant information. The currently most authoritative judicial pronouncement on how ITA should strike that balance is the Federal Circuit decision in Rhone Poulenc v. United States, 899 F.2d 1185 (Fed. Cir. 1990). The facts and the issues presented in that case are similar in many respects to those before this Panel.

The original antidumping investigation of Rhone Poulenc found that anhydrous sodium metasilicate ("ASM") was being sold in the United States at a dumping margin of 60 percent. A cash deposit rate of 60 percent ad valorem was therefore established. During the third and fourth administrative reviews, the 60 percent cash deposit rate was reduced to zero percent, upon ITA finding that the single sale of ASM during the relevant period had been made at fair value.

34/ A similar regulatory provision predated April 27, 1989. See 19 C.F.R. § 353.51(b) (1988).

During the fifth and sixth administrative reviews of ASM sales, ITA found that Rhone Poulenc's responses to the standard antidumping duty questionnaire were inadequate, because they were submitted on paper rather than on computer tape, and because the sales dates, freight costs, and sales expenses were not stated in sufficient detail. ITA then decided to reject the questionnaire responses in their entirety, and resorted to BIA, which it determined to be the 60 percent margin from the original antidumping investigation.

Rhone Poulenc "vigorously defended" its questionnaire responses, stating that they contained enough data; that the data were similar to those accepted previously by ITA; that ITA could not totally ignore the responses and rely upon "stale" data; and that the zero percent margin from the most recent administrative review was the "best information" of Rhone Poulenc's current margin. 899 F.2d at 1187-88.

Rhone Poulenc's challenges were rejected by the Court of International Trade in two decisions, Rhone Poulenc v. United States, 710 F. Supp. 341 (CIT 1989), and Rhone Poulenc v. United States, 710 F. Supp. 348 (CIT 1989). Although both decisions were appealed, Rhone Poulenc dropped its challenge to ITA's total rejection of the questionnaire responses for the fifth and sixth administrative reviews, and raised a single issue for review by the Federal Circuit -- whether the Court of International Trade had erred as a matter of law in upholding

ITA's use of the 60 percent margin from the original investigation as the best information available.

Rhone Poulenc argued that ITA must always use as BIA the information from the most recent administrative reviews, an argument grounded on the CAFC's earlier decision in Freeport Minerals v. United States, 776 F.2d 1029 (Fed. Cir. 1985). The CAFC disagreed:

> [I]t does not follow, as Rhone Poulenc suggests, that the ITA must equate "best information" with "most recent information." What is required is that the ITA obtain and consider the most recent information in its determination of what is best information.
>
> * * *
>
> [In Freeport Minerals,] [w]e did not require the agency to consider only the most recent information--as Rhone Poulenc would have us do here.
>
> Here the 1982 and 1983 margins were clearly within the pool of information considered by the ITA in determining which data were the "best information" of Rhone Poulenc's current margins.

899 F.2d at 1190 (emphases in original).

As for Rhone Poulenc's claim that ITA had deliberately used the most punitive information, as opposed to the "best" information, the CAFC stated:

> We need not and do not decide the difficult question of whether the agency may use the best information rule to "penalize" a party which submits deficient questionnaire responses. That is not what the agency did in this case. In order for the agency's application of the best information rule to be properly characterized as "punitive," the

> agency would have had to reject low margin information in favor of high margin information that was demonstrably less probative of current conditions. Here, the agency only presumed that the highest prior margin was the best information of current margins. Since Rhone Poulenc offered no evidence showing that recent margins were more probative of current conditions than the highest prior margin, the agency found the highest prior margin to be the best information otherwise available.

Id. (emphasis in original).35/

Thus, the Rhone Poulenc court refused to agree that the selection by ITA of the original dumping margin as BIA, despite its apparent staleness, was itself "punitive" or involved a punitive process. The CAFC found that ITA had merely established a rebuttable presumption that the original dumping margin was BIA, which presumption could be rebutted by the respondent from evidence on the record. Absent "probative

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35/ The court went on to state:

> We believe a permissible interpretation of the best information statute allows the agency to make such a presumption and that the presumption is not "punitive." Rather, it reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less. The agency's approach fairly places the burden of production on the importer, which has in its possession the information capable of rebutting the agency's inference.

899 F.2d at 1190-91 (emphasis in original; footnote omitted).

evidence of current margins," however, ITA's presumption was sustained. Id.36/

According to the Rhone Poulenc analysis, then, ITA's choice of a BIA rate for an administrative review must include consideration, but not necessarily selection, of rates in

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36/ Panel members Brown and Lacoste are of the view that the CAFC contemplated that a deficient response could be resorted to as "probative evidence" to rebut the agency's adverse inference, when the court stated:

> [T]he implementing regulations allow the ITA to take into account an importer's deficient response in determining what is "best information." See 19 C.F.R. § 353.51 (1988) ("Where a party . . . refuses to provide requested information, that fact may be taken into account in determining what is the best available information.").

Id. at 1191. Although the cited regulation has been superseded, the new regulation is essentially the same in this respect. See 19 C.F.R. § 353.37 (1989).

Panel members Brown and Lacoste note, however, that another new regulation now prohibits untimely information from becoming part of the administrative record. 19 C.F.R. § 353.3 (1989). If literally applied, this will result in the following conundrum, sometimes colloquially referred to as a "Catch 22":

(i) the agency's selection of a particular BIA rate is a rebuttable presumption;

(ii) that presumption can be rebutted by "an importer's deficient response";

(iii) as recognized by the CAFC, the best evidence of such current information may be the untimely response;

(iv) however, the new regulation prohibits such evidence from becoming part of the

(Cont'd)

recent administrative reviews. Whether such recent rates constitute "probative evidence of current margins" so as to overcome the adverse presumption that ITA can lawfully make is an issue for decision on the record of each case. In weighing how "probative" recent alternative rates are of "current margins," ITA might consider such factors as: how recent the alternative rates are; how representative are the sales on which the alternative rates are based, see Rhone Poulenc v. United States, 710 F. Supp. 341, 347 (CIT 1989), aff'd, 899 F.2d 1185 (Fed. Cir. 1990) (affirming ITA's use of original dumping margin rather than recent administrative review rates as BIA where latter rates were "not representative" because they were based on single sale);37/ whether the alternative rates have been verified, see Asociacion Colombiana de Exportadores de Flores v. United States, 717 F. Supp. 834, 836-37 (CIT 1989), aff'd on other grounds, 901 F.2d 1089 (Fed. Cir.), cert. denied, 111 S. Ct. 136 (1990) (remanding BIA choice on grounds that verified information would be more appropriate BIA); whether the alternative rates relate to the same product as the unavailable or untimely information for which BIA is to be used, see N.A.R. v. United States, 741 F. Supp. 936,

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administrative record, thereby precluding its use to rebut the agency's presumption that its BIA is the best information of current margins.

37/ According to Northern Fortress, the margins in the administrative reviews for 1977-86 were calculated "on the basis of a hypothetical sale." Pub. Doc. No. 47, at 8.

942-43 (CIT 1990) (remanding BIA choice to ITA for determination of comparability of product); and whether the alternative rates were calculated using the same method -- price-to-price, third-country sales, or constructed value -- as would have been applied to the unavailable or inadequate information, see id. at 941-42 (upholding ITA's refusal to use price information as BIA when cost-of-production information was requested but not submitted); cf. Chemical Products Corp. v. United States, 645 F. Supp. 289, 294-96 (CIT), vacated on other grounds, 651 F. Supp. 1449 (CIT 1986) (upholding ITA's refusal to use U.S. cost data as BIA in calculation of constructed value for Chinese product, in light of regulation requiring valuation based on market economy "reasonably comparable in economic development" to China). If consideration of these and other relevant factors do not, on balance, demonstrate that the recent rates are "probative evidence of current margins," then ITA's adverse presumption stands.

2. The International Trade Administration's Universe of BIA Rates and Its Grounds for Selection

In stating its reasons for the selection of 30.61 percent as the BIA rate, ITA explains in its brief that the 30.61 weighted-average dumping margin from the original antidumping investigation was used as a "reasonable adverse inference" in the absence of complete, accurate, and timely information on approximately 25 percent of Northern Fortress's sales. Pub. Doc.

No. 61, at 69, 70. Use of any of the margins more recently calculated in annual administrative reviews would have "reward[ed] Northern Fortress for its consistent pattern of unresponsive behavior." Id. at 73. ITA notes that the margin calculated for the 75 percent of the sales as to which complete and timely information was available was 2.58 percent, while the margins calculated in prior administrative reviews were no greater than 4.20 percent; had the latter margin been used as the BIA rate for 25 percent of Northern Fortress's sales, it would have yielded a weighted-average margin in the instant administrative review of no more than 3.0 percent. Id. at 74-75.

Whatever the legal validity of these reasons for selecting the 30.61 percent margin as the BIA rate, they depend heavily on the size of the prior administrative review margins relative to the size of the margin calculated for 75 percent of the sales in the instant administrative review. Yet the latter margin may well be revised upon remand due to ITA's correction and verification of the underlying information.38/ Furthermore, upon remand ITA may calculate another margin that may be "probative evidence of current margins" and therefore relevant to the consideration of possible BIA rates -- the margin based on

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38/ As noted in Part IV.A of this Opinion, the Panel is remanding this case to ITA for correction of price-to-price comparisons, for verification of payment of the FST, and for verification, if Blaw Knox so requests, of new third-country-sales or constructed-value information received from Northern Fortress.

any third-country sales or constructed values that are used in lieu of those home-market sales found to be insufficient or non-contemporaneous.

Thus, for example, if the 2.58 percent margin were reduced as a result of the corrections and verification required upon remand, then a 4.20 percent rate might be sufficient not to "reward" Northern Fortress. Alternatively, an increase in the 2.58 percent margin might reinforce ITA's judgment that the 30.61 percent rate is required to induce cooperation. Or, if a margin based on certain constructed values were calculated upon remand and if that margin exceeded the 2.58 percent margin as revised, then use of that constructed-value margin might be viewed by ITA both as a sufficient inducement for cooperation and as a "reasonable adverse inference" of the margin on the 25 percent of the sales for which BIA is being used. In any event, ITA's reconsideration of the BIA rate should be informed by the Federal Circuit's analysis in Rhone Poulenc, which was decided shortly before ITA's final determination in the instant administrative review.

3. **Conclusions**

Because the administrative record will necessarily be expanded to include the information obtained during the remand proceeding, and because the universe of available BIA rates may be expanded due to the correction of the margin on sale-to-sale comparisons, the development of new third-country-sales or

constructed-value information, and the possible resort to BIA for a failure of verification, the Panel instructs ITA to reconsider the BIA rate applicable to the approximately 25 percent of Northern Fortress's sales for which adequate price data were not supplied before June 15, 1989. In its remand determination, ITA should set forth the universe of rates from which it made its BIA rate selection and the legal reasoning by which it made its selection.39/

V. ORDER

For the foregoing reasons, the final determination of ITA is remanded in part and affirmed in part.

A. We remand ITA's calculation of the dumping margin on the approximately 75 percent of the Northern Fortress sales as to

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39/ ITA's reasoning process in arriving at the 30.61 percent BIA rate is described more fully in ITA's brief, Pub. Doc. No. 61, at 69-75, than in the administrative record under review. In particular, ITA's statement of reasons for selection of the BIA rate as presented in its notice of final determination is more conclusory than explanatory. See Pub. Doc. No. 36 (55 Fed. Reg. 20175, 20177 (1990)). Furthermore, certain statements in ITA's notice (e.g., that Northern Fortress was "extremely cooperative throughout the administrative review," id.) contradict statements in ITA's brief (e.g., that Northern Fortress engaged in a "consistent pattern of unresponsive behavior," Pub. Doc. No. 61, at 73). Nevertheless, because we are remanding ITA's determination of the appropriate BIA rate, we need not -- and do not -- reach the issue whether the present record as a whole is such as to make ITA's choice-of-BIA-rate "path" reasonably discernible. Cf. Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281, 286 (1974) (agency decision of "less than ideal clarity" will be upheld if "agency's path may reasonably be discerned").

which it received information on March 7 and March 23, 1989. Upon remand, ITA shall (1) correct its comparison of Northern Fortress's home-market and U.S. sales to comport with its own requirements that the home-market sales be sufficient in number and that the compared sales be contemporaneous, (2) verify whether Northern Fortress paid the FST on its home-market sales so that ITA can determine whether an adjustment on the comparable U.S. sales should be made for the rebate or non-payment of FST on export sales,40/ and (3) if sufficient or contemporaneous home-market sales are lacking for comparison with certain U.S. sales as a result of the correction referred to in (1) above, and if Blaw Knox so requests, verify any constructed values or third-country sales prices used by ITA to make the appropriate dumping margin recalculations.41/

B. We also remand to ITA for the redetermination of the appropriate BIA rate to use as the dumping margin for the remaining approximately 25 percent of the Northern Fortress sales, based on the entire record developed on remand, including the corrected and verified sales information. Upon remand, ITA

40/ We decline to reach the issue whether ITA's COS adjustment for the "multiplier effect" of the FST was in accordance with law. We consider the issue not ripe until, upon remand, ITA verifies FST payments by Northern Fortress and makes a COS adjustment.

41/ In lieu of information that cannot be verified, ITA is authorized, by statute and regulation, to resort to BIA. See 19 U.S.C. § 1677e(b) (1988); 19 C.F.R. § 353.37(a)(2) (1989).

shall consider the appropriate BIA rate in light of any revision of the initial margin used by ITA and any additional margins calculated in the course of the remand proceeding. ITA's selection of the BIA rate shall be explained on the record.

C. We affirm ITA's determination in all other respects.

D. In order to afford ITA sufficient time to correct and verify the information on which it relies, to recalculate the weighted-average margin on the approximately 75 percent of the sales as to which it will have information, and to redetermine the appropriate BIA rate for the remaining 25 percent of the sales, the Panel directs that ITA submit a reasoned determination consistent with this opinion no later than 90 days from the date of this opinion. During that 90-day period, ITA shall:

1. request such additional information from Northern Fortress as is necessary to resolve the outstanding factual questions concerning sufficiency and contemporaneity of sales, payment of taxes, and accuracy of any third-country-sales or constructed-value information used;

2. disclose to both Northern Fortress and Blaw Knox a preliminary revised determination;

3. afford both parties the opportunity to submit briefs on the preliminary determination and, if either party requests, to present oral argument; and

4. render a final revised determination in light of the comments rendered by the parties.

Donald J. M. Brown **Chairman**	May 24, 1991 **Date**
Harry B. Endsley	May 24, 1991 **Date**
Simeon M. Kriesberg	May 24, 1991 **Date**
Gerald A. Lacoste	May 24, 1991 **Date**
Wilhelmina K. Tyler	May 24, 1991 **Date**

IN THE MATTER OF:

Replacement Parts for Self-Propelled
Bituminous Paving Equipment from Canada

USA-90-1904-01

ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE
UNITED STATES-CANADA FREE-TRADE AGREEMENT

In the Matter of	
REPLACEMENT PARTS FOR SELF-PROPELLED BITUMINOUS PAVING EQUIPMENT FROM CANADA	Secretariat File No. USA-90-1904-01

Before: Donald J. M. Brown, Chairman
Harry B. Endsley
Simeon M. Kriesberg
Gerald A. Lacoste
Wilhelmina K. Tyler

May 15, 1992

BLAW KNOX CONSTRUCTION EQUIPMENT CORPORATION
and NORTHERN FORTRESS, LTD.,
Complainants

- versus -

INTERNATIONAL TRADE ADMINISTRATION,
U.S. DEPARTMENT OF COMMERCE,
Respondent

Brian F. Walsh, Barnes, Richardson & Colburn, argued for Blaw Knox Construction Equipment Corporation. With him on the briefs was Robert E. Burke.

William K. Ince and Michele C. Sherman, Cameron & Hornbostel, argued and filed briefs for Northern Fortress, Ltd.

Craig R. Giesze and John D. McInerney, Office of the Chief Counsel for Import Administration, argued for the Department of Commerce. With Mr. Giesze on the brief were Stephen J. Powell and Berniece A. Browne.

OPINION AND ORDER OF THE PANEL

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OPINION AND ORDER OF THE PANEL

I. INTRODUCTION

This Panel was constituted pursuant to Article 1904.2 of the United States-Canada Free-Trade Agreement ("FTA") to review the final determination of the International Trade Administration, U.S. Department of Commerce ("ITA"), in the administrative review of the antidumping order on replacement parts for self-propelled bituminous paving equipment from Canada for the period September 1, 1987 through December 31, 1988. ITA's original determination in this administrative review, rendered on May 15, 1990, 55 Fed. Reg. 20175 (1990), was challenged both by the Canadian manufacturer, Northern Fortress, Ltd. ("Northern Fortress"), and by the U.S. petitioner in the original antidumping investigation, Blaw Knox Construction Equipment Corporation ("Blaw Knox"). Upon review, this Panel affirmed ITA's determination in part and remanded it in part. Panel Opinion and Order of May 24, 1991 ("Panel Opinion"), Remand Rec. Doc. No. 1.[1] ITA's determination upon remand, rendered on December 15, 1991, Pub. Doc. No. 119, satisfied neither Northern Fortress nor Blaw Knox.

Northern Fortress challenges ITA's remand determination on the grounds that: (a) ITA exceeded its authority by correcting errors that were not "ministerial" and were not included in the

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[1] References to documents in the public record of this Panel's review of ITA's original and remand determinations are designated "Pub. Doc. No. __." References to documents in the public record of the original administrative review are designated "Admin. Rec. Doc. No. __." References to documents in the public record of the administrative review upon remand are designated "Remand Rec. Doc. No. __."

Panel's remand order; (b) ITA erroneously included goods of non-Canadian origin in its calculation of the antidumping margin; (c) ITA improperly resorted to "best information available" ("BIA") after concluding that Northern Fortress had home-market sales of merchandise similar to that which it sold in the United States and after further concluding that Northern Fortress failed to provide requested information on such sales; (d) ITA improperly resorted to BIA after concluding that ITA could not verify Northern Fortress's constructed-value information; and (e) ITA improperly selected as BIA the 30.61 percent margin from the original antidumping determination rather than using one of the lower margins determined in intervening administrative reviews.[2]

For its part, Blaw Knox challenges ITA's remand determination on the grounds that: (a) ITA improperly added to the U.S. price the full amount of Northern Fortress's payments of the Federal Sales Tax ("FST") without proof that the tax was passed through to Northern Fortress's customers and improperly made a

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[2] During the remand proceeding, Northern Fortress filed two motions with the Panel that were the subject of responsive pleadings, one to expand the administrative record to include an auditor letter submitted to ITA by Northern Fortress and rejected by ITA, Pub. Doc. No. 132, and another to extend the time for completion of the remand investigation, Pub. Doc. No. 100. The Panel denied the former motion, Pub. Doc. No. 147. In response to the latter motion, the Panel twice extended the time for completion of the remand investigation, first for 15 days (to September 6, 1991), Pub. Doc. No. 107, and then for up to another 75 days (to December 20, 1991), Pub. Doc. No. 117. The Panel also granted a non-controversial motion to expand the administrative record to include the constructed value questionnaire sent to Northern Fortress on May 22, 1989, and disposed of several procedural motions concerning oral argument, filing of surreplies and surrebuttals, and briefing schedules. Pub. Doc. Nos. 117, 153, 170.

circumstances-of-sale ("COS") adjustment to foreign market value ("FMV") to account for the "multiplier effect" of the FST; and (b) ITA erroneously selected as BIA the original 30.61 percent antidumping margin rather than using the higher margin alleged in the antidumping petition.

ITA responds to these challenges by urging the Panel to affirm ITA's remand determination in all respects.

On the basis of the administrative record (both in the original administrative review and on remand), the applicable law, the written submissions of the parties, and the hearing held on March 26, 1992 at which all parties were heard, the Panel:

REMANDS to ITA for reconsideration of its inclusion of Northern Fortress sales of allegedly non-Canadian goods, including verification of the information on which ITA relies in this regard, if verification is promptly requested by Blaw Knox; and

AFFIRMS ITA's determination in all other respects.

II. THE ADMINISTRATIVE PROCEEDINGS AND DETERMINATIONS

This review is the third by a binational panel arising out of antidumping proceedings concerning replacement parts for self-propelled bituminous paving equipment from Canada.[3] The original antidumping investigation resulted in a finding that the domestic industry was suffering injury by reason of imports of the subject merchandise, which were being sold at a weighted-

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[3] The other two reviews were designated USA-89-1904-02 and USA-89-1904-03.

average margin of 30.61 percent below fair value. 42 Fed. Reg. 44811 (1977).

Five administrative reviews of the outstanding antidumping order were conducted in the years following the conclusion of the original investigation, resulting in weighted-average dumping margins ranging from 0.53 percent to 4.20 percent. See Pub. Doc. No. 61, at 8 n.8.

The sixth administrative review, which is the focus of this panel review, was originally requested by both Blaw Knox and Northern Fortress in September 1988. Admin. Rec. Doc. Nos. 2, 3.[4] After fits and starts by both ITA and Northern Fortress, see Remand Rec. Doc. No. 1, at 4-10, Northern Fortress eventually submitted three tardy responses to ITA questionnaires. The first two responses, dated March 7 and March 23, 1989, Admin. Rec. Doc. Nos. 14, 16, were accepted by ITA; the third, dated June 15, 1989, was rejected as untimely under revised ITA regulations effective April 27, 1989, Admin. Rec. Doc. No. 23. In the Panel Opinion, this Panel affirmed ITA's decisions to accept the two March submissions and to resort to BIA in place of the June submission. Remand Rec. Doc. No. 1.

Several other aspects of ITA's determination, however, were remanded. First, the Panel remanded ITA's determination of the dumping margin on the approximately 75 percent of the sales as to

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[4] For the sake of simplicity, Northern Fortress and its various predecessor companies, including Fortress Allatt, Ltd. and Allatt Limited, are referred to as "Northern Fortress." See Pub. Doc. No. 47, at 6.

which ITA accepted information, in order for ITA (a) to correct certain calculations that ITA conceded were based on home-market sales that were not contemporaneous or sufficient in number, (b) to verify FST payments by Northern Fortress, and (c) to verify, if requested by Blaw Knox, any information used by ITA to calculate third-country sales prices or constructed values for those home-market sales found to be insufficient or non-contemporaneous. Second, the Panel remanded ITA's selection of the 30.61 percent antidumping duty as the BIA dumping margin for the remaining 25 percent of Northern Fortress's sales, in order for ITA to reconsider the appropriate BIA after redetermining the actual dumping margin on the 75 percent of the sales as to which ITA had record evidence. The Panel declined to reach the issue whether ITA erred in making adjustments for the FST payments, pending verification that the payments had been made by Northern Fortress. Id.

Upon remand, ITA assigned a new case analyst to the investigation, identified the errors it perceived in the original home-market sales comparisons, and issued a new questionnaire, dated June 14, 1991, calling for FMV information on an additional 233 parts sold by Northern Fortress in the United States. Remand Rec. Doc. No. 3. Like the questionnaires originally issued in the administrative review, the June 14 questionnaire specifically requested FMV information on "home market sales of merchandise similar to that" sold in the United States and on cost data relevant to constructed value. Compare id. at 1, with Admin.

Rec. Doc. No. 4, at B-1, and Admin. Rec. Doc. No. 22, at 1.[5] Following a Northern Fortress request for additional response time, ITA set the deadline for Northern Fortress's response at July 2. Remand Rec. Doc. No. 5.

Within two weeks after issuing the questionnaire, however, ITA decided to convert the language of the computer program used to analyze the Northern Fortress data from FORTRAN to SAS.[6] The conversion revealed that ITA's administrative review determination, which had been 19 months in the making -- from September 1988 to May 1990 -- and which ITA had largely defended before the Panel, rested on arithmetic quicksand. Fully 888 home-market sales had been inadvertently excluded from consideration during the administrative review, Pub. Doc. No. 159, at 11 n.12, substantially changing the universe of contemporaneous sales.[7]

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[5] ITA reiterated its interest in information on similar merchandise in a telephone conversation with counsel for Northern Fortress on June 17. Remand Rec. Doc. No. 6.

[6] Ironically, Northern Fortress's two responses in March of 1989 had originally been submitted on computer tapes in SAS. Because ITA's then case analyst was not familiar with SAS, however, ITA converted the tapes into FORTRAN. Pub. Doc. No. 162, at 116 (Mr. Giesze). The conversion back into SAS was deemed necessary because FORTRAN was not the new case analyst's forte. Pub. Doc. No. 159, at 11 n.12.

[7] ITA also discovered -- and corrected -- several other errors in the administrative review, which it considered "ministerial." These errors were: (a) use of a 10.71-percent FST rate in the calculation of tax adjustments, rather than the correct 12-percent rate; (b) failure to make tax adjustments for certain sales; (c) use of data from another administrative review period to make adjustments for U.S. and home-market credit, warranty, and sales commission expenses; (d) deduction from FMV of amounts for home-market inland freight and home-market indirect selling expenses despite the absence of record evidence of such freight

(continued...)

Consequently, although 58 of the 233 U.S. parts of which ITA had inquired in its remand questionnaire now appeared to be already matched with contemporaneous home-market sales, 132 other U.S. parts not addressed in the questionnaire now required FMV data. Id. To gather information on these 132 parts, ITA issued a second questionnaire, dated July 3, one day after Northern Fortress timely submitted its response to the now apparently inaccurate first questionnaire. The same questions about similar merchandise and constructed value were posed, and the deadline of July 17 was imposed. Remand Rec. Doc. No. 9.[8]

In its response to the first questionnaire, Northern Fortress explained that it was "not providing data on home market . . . sales of [similar] merchandise," because Northern Fortress did not believe "that there are 'similar' replacement parts within the statutory meaning of the term." Remand Rec. Doc. No. 7, at 1.[9] The balance of Northern Fortress's questionnaire response was devoted to constructed-value issues. The response therefore failed to clarify the home-market sales information

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[7](...continued)
and expenses; and (e) exclusion of 312 U.S. sales with a final selling price of U.S.$2.00 or less. Pub. Doc. No. 119, at 10.

[8] The record is silent as to the rationale for ITA's decision not to withdraw the first remand questionnaire and issue an accurate new one. Instead, by insisting on a response to its first questionnaire, ITA forced Northern Fortress to compile further information on 58 U.S. parts for which, it turned out, no such information was needed.

[9] In its two March 1989 responses to the initial ITA questionnaire, Northern Fortress had not responded to ITA's request for information on sales of similar merchandise. See Admin. Rec. Doc. Nos. 4, 22.

submitted by Northern Fortress on March 7 and 23, 1989, including the information on home-market inland freight and home-market indirect selling expenses.[10]

Rather than await responses to its second questionnaire, due on July 17, ITA proceeded with its scheduled verification on July 10-12.[11] Less than 48 hours before verification was to begin in Canada, ITA issued its verification outline to Northern Fortress, a five-page, single-spaced document calling for Northern Fortress to produce, at verification, extensive information about its operations and about specific parts and transactions. Remand Rec. Doc. No. 10.

It does not appear from the record, however, that ITA actually insisted that the documentation requested in the verification outline be presented at the outset of the verification.

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[10] In its March 7, 1989 questionnaire response, Northern Fortress answered "N/A (F.O.B. Downsview, Ontario)" to ITA's question about home-market inland freight, Admin. Rec. Doc. No. 14, Section B, and "N/A" to ITA's question about home-market selling expenses, id. Northern Fortress's March 7 transmittal letter refers to a "schedule of indirect home market expenses" being "provided under separate cover," id., but no such schedule appears on the record. In its March 23, 1989 questionnaire response, Northern Fortress gave identical answers to the freight and selling expenses questions, Admin. Rec. Doc. No. 16, Section B, but made no reference to further schedules.

[11] By proceeding with its verification before the response to its second questionnaire was due, ITA risked having to conduct a separate verification once the response was submitted or having to assume that the verifiability vel non of the first questionnaire response applied equally to the second questionnaire response. This awkward administrative posture was eased when Northern Fortress failed to submit a response to the second questionnaire. Northern Fortress sought an extension of time within which to respond, Remand Rec. Doc. No. 12, but the extension was denied by ITA, Remand Rec. Doc. No. 13. No response to the second questionnaire was ever submitted.

In the course of the three-day verification, ITA focused on three questions: whether Northern Fortress had paid the FST, whether Northern Fortress had made home-market sales of similar merchandise, and whether the constructed-value information in Northern Fortress's July 2 questionnaire response was accurate. Remand Rec. Doc. No. 14. Lack of Northern Fortress documentation appears to have been an issue only with regard to the verification of constructed value.

With respect to FST payments, ITA examined several randomly selected transactions and determined to its satisfaction that, with few exceptions, the FST payments were made on Northern Fortress's home-market sales and that Northern Fortress's export sales were exempt from the FST. In the absence of certain documents, such as the FST payable ledger, bank statements, and cancelled checks, ITA examined alternative documents, such as tax returns, copies of checks, and general ledgers. ITA did not seek to verify whether Northern Fortress's payments of the FST had been passed through to its customers.

With respect to similar merchandise, ITA selected four parts sold in the United States by Northern Fortress and found identically named parts sold in Canada for three of those four -- the main auger, the screed plate, and the floor plate. ITA determined that for each of the three pairs of parts with identical names, the cost of manufacture of the part sold in the United States was within 20 percent of the cost of manufacture of the part sold in Canada, the range within which ITA typically con-

siders otherwise comparable parts to be "similar." Although the pairs of parts were not interchangeable because of differences in configuration or material composition, ITA concluded that the pairs of parts were reasonably comparable in these respects. ITA also concluded that the corresponding U.S. and Canadian parts served the same purpose -- distributing asphalt (main augers), spreading asphalt evenly (screed plates), and preventing asphalt from falling through the floor of the paving machine (floor plates).

With respect to constructed value, ITA encountered a number of difficulties at verification. According to Northern Fortress's questionnaire response of July 2, Remand Rec. Doc. No. 7, at 8, the cost of each product was calculated "by taking the standard cost and adding [a manufacturing variance percentage] arrived at by expressing actual manufacturing variances as a percentage of total cost of sales." ITA was unable at verification, however, to obtain any documentation of "actual manufacturing variances" or to substantiate the reported percentage by examination of Northern Fortress's financial records. ITA also was unable to verify Northern Fortress's labor variances, adjustments of selling expenses, non-adjustment of administrative expenses, exclusion of certain warehouse expenses, exclusion of interest expenses, inventory values, and costs of goods sold. ITA did verify certain elements of Northern Fortress's constructed-value information, including landed materials costs and

average wage rate; it also verified Northern Fortress's exclusion of certain non-Canadian parts.

Both Northern Fortress and Blaw Knox criticized ITA's verification. Northern Fortress argued, in comments on the verification report, that the pairs of parts compared by ITA in its verification of similar merchandise were not sufficiently comparable in configuration and material composition to be deemed "similar" and that ITA's customary cost-of-production test for similarity was inappropriate for replacement parts. Northern Fortress also objected to ITA's consideration of the constructed-value information, claiming that ITA did not request or examine available information that could have answered its various questions. Remand Rec. Doc. No. 17. Blaw Knox argued that ITA failed to verify that Northern Fortress had actually paid the FST due to the unavailability of the FST payable ledger, cancelled checks, and bank statements. Remand Rec. Doc. No. 15.

On August 9, in response to a motion by Northern Fortress for an order extending the time for completion of the remand investigation and, in particular, directing ITA to extend the time for response to the second questionnaire, the Panel issued an order extending for up to 75 days -- to December 20, 1991 -- the deadline for rendering a remand determination. The Panel left to ITA's discretion the establishment of the schedule and completion date. Pub. Doc. No. 117. Later on August 9, ITA

issued its preliminary determination. Remand Rec. Doc. No. 19.[12]

In the preliminary determination, ITA announced a weighted-average dumping margin of 19.47 percent. ITA stated that, as a result of its correction of various ministerial errors, the proportion of U.S. sales as to which actual dumping margins could be calculated by comparison with contemporaneous sales of identical merchandise had declined from the 75-percent level found in the original administrative review determination to 56 percent. As to these sales, ITA preliminarily determined a margin of 10.77 percent, after adjusting for Northern Fortress's FST payments. Id. at 2-3.

As to the remaining 44 percent of U.S. sales, ITA preliminarily determined to resort to BIA, on two grounds. First, according to ITA, Northern Fortress had failed to provide information on its sales of similar merchandise, thereby justifying

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[12] Northern Fortress's uncontroverted statement on the record is that the preliminary determination was rendered at "approximately 5 p.m." on August 9, Remand Rec. Doc. No. 21, after the Panel's August 9 order was disseminated. The record does not disclose whether ITA's issuance of the preliminary determination within hours after the Panel extended the time for completion of the remand investigation represents a sheer coincidence or an administrative decision effectively to foreclose further fact-gathering. Cf. 19 C.F.R. § 353.31(b)(2) (1991) ("in no event will [ITA] consider unsolicited questionnaire responses submitted after the date of publication of [ITA's] preliminary determination"); id. at § 353.31(a)(1)(ii) (for a final determination in an administrative review, "factual information for [ITA's] consideration shall be submitted not later than . . . the date of publication of [ITA's] preliminary results"). Following its preliminary determination, ITA denied Northern Fortress's request that verification be reopened and that the then-elapsed time for submitting a response to the July 3 questionnaire be extended. Remand Rec. Doc. No. 25.

ITA's use of BIA with respect to all remaining sales. Second, ITA determined, even if similar merchandise did not exist, much of Northern Fortress's constructed-value information could not be verified, and BIA was therefore the appropriate substitute for all constructed-value information. Id. at 16-17.

As its BIA rate, ITA selected the 30.61 percent margin from the original antidumping investigation. ITA rejected all administrative review margins that were below 10.77 percent because choice of any such margin would have "'rewarded' Northern Fortress for its noncompliance." Id. at 18. ITA also rejected the 14.43 percent margin calculated for the exporter's sales price ("ESP") transactions of Northern Fortress in the second administrative review, on the grounds that this margin was based on only 29 percent of the respondent's sales and therefore was not a "final dumping margin." Id.[13] ITA also rejected the previous administrative review margins and the 14.43 percent margin because Northern Fortress's actions had "significantly impeded the completion" of the administrative review initially and upon remand. Id. Finally, ITA rejected the 57.13 percent margin alleged in the original antidumping petition because Northern Fortress had never "deliberately refuse[d] to submit data" and therefore "selection of the most adverse BIA rate" was not warranted. Id. at 19.

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[13] Unaccountably, ITA refers to this margin throughout the record as "14.30" percent, although the Federal Register notice in which the margin was announced refers to 14.43 percent. 51 Fed. Reg. 7601, 7602 (1986).

After consideration of written and oral comments by both Blaw Knox and Northern Fortress, Remand Rec. Doc. Nos. 28, 34, 35, 36, 37, ITA invited Northern Fortress to clarify its claim that certain U.S. sales included in ITA's margin calculations were outside the scope of the investigation. Remand Rec. Doc. No. 38. Northern Fortress timely submitted information on parts that it considered beyond the scope of the investigation because they fell into one of three categories: (a) "nuts and bolts" (Northern Fortress's characterization of items priced at U.S.$2.00 or less), (b) parts of non-Canadian origin, and (c) attachments inadvertently included in Northern Fortress's questionnaire response. Remand Rec. Doc. No. 39. The record does not indicate ITA's disposition of this information; the final determination states simply that ITA excluded from its calculations "only those parts that we could specifically identify as nuts, bolts, attachments, OEM parts, and parts not of Canadian origin." Pub. Doc. No. 119, at 18.

In the final determination, ITA essentially affirmed its preliminary determination. ITA defended its correction of two "ministerial errors" against Northern Fortress objections that the "errors" were not ministerial but rather changes in ITA policy and that their correction in any event was not within the scope of the remand. The disputed corrections involved, ITA stated, unintentional errors -- the deduction from FMV of home-market inland freight and home-market indirect selling expenses in the absence of evidence of such freight and expenses, and the

exclusion of 312 U.S. sales with a final selling price of U.S.$2.00 or less. Id. at 13-18. ITA also maintained its preliminary positions on the FST adjustments, despite Blaw Knox's objections, id. at 18-25, and on the resort to BIA due to the lack of information on similar merchandise and due to the failure of verification of the information on constructed value, despite Northern Fortress's objections, id. at 26-45.

As for the selection of the BIA rate, ITA defended its choice of the 30.61 percent margin. Id. at 45-53. ITA stated that it made a "rebuttable adverse presumption" that the margin from the original antidumping determination was a reasonably accurate reflection of current margins. Id. at 47. It then considered as alternative BIA rates the margins determined in subsequent administrative reviews, the 14.43 percent margin on ESP sales in the second administrative review, and the 57.13 percent margin alleged in the antidumping petition. ITA rejected the administrative review rates because they would have "'rewarded' [Northern Fortress] for its failed verification and repeated noncompliance with information requests." Id. at 49. ITA rejected the 14.43 percent ESP margin because (a) it was not a final margin, id., (b) Northern Fortress had "significantly impeded" the investigation, id. at 50, and (c) "[i]n the absence of current information," the presumption that the highest prior margin was probative of current margins was not rebutted, id. at 52. Finally, ITA rejected the 57.13 percent margin because

Northern Fortress had not "deliberately refuse[d]" to submit information. Id. at 51.

In reaching its final determination, then, ITA modified its preliminary findings only to the extent necessary to correct errors in the calculation of adjustments for the FST and for home-market credit expenses. Id. at 13. These minor corrections resulted in a revised dumping margin of 10.84 percent on the 56 percent of U.S. sales as to which contemporaneous home-market sales of identical merchandise were identified. When this margin was weighted with the BIA rate of 30.61 percent applied to the remaining 44 percent of U.S. sales, the final weighted-average margin on remand was 19.57 percent. Id.

Both Blaw Knox and Northern Fortress timely requested panel review of ITA's final remand determination. Pub. Doc. Nos. 126, 127.

III. THE STANDARD OF REVIEW

Under the FTA, an Article 1904 binational panel review of a U.S. antidumping determination is to be conducted in accordance with United States law. FTA Article 1902.1. The applicable United States law includes not only the U.S. antidumping laws -- the "relevant statutes, legislative history, regulations, administrative practice, and judicial precedents," FTA Article 1904.2 -- but also the "standard of review . . . and the general legal principles that a court of the [United States] otherwise would apply to a review of a determination of the competent investigat-

ing authority," FTA Article 1904.3. The "general legal principles" applied by a U.S. court include "standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." FTA Article 1911.

The "standard of review" requires the Panel to hold unlawful the ITA determination under review if it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988) (incorporated by reference in FTA Article 1911). In the Panel Opinion, this Panel surveyed the contours of the "substantial evidence" standard. Remand Rec. Doc. No. 1, at 14-17. Rather than repeating that survey here, the Panel incorporates it by reference.[14]

One element of our previous discussion of the standard of review bears restating here. A recurrent issue in this remand review is the lawfulness of ITA's interpretation of one or another provision of the antidumping laws. Where the determination under review rests on the agency's interpretation and

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[14] Among the cases cited in the Panel Opinion's discussion of the standard of review -- as well as in its discussion of the selection of a BIA rate -- was Marsuda-Rodgers Int'l v. United States, 719 F. Supp. 1092 (CIT 1989). See Remand Rec. Doc. No. 1, at 14-15, 44 n.33. After the Panel Opinion was issued, the Panel learned that the decision in Marsuda-Rodgers had been reversed without published opinion by the U.S. Court of Appeals for the Federal Circuit. See 923 F.2d 871 (Fed. Cir. 1990). The unofficially published version of the two-paragraph opinion indicates that the reversal did not relate to either of the points for which the Panel cited Marsuda-Rodgers. See 1990 U.S. App. LEXIS 20703. In any event, the substance of the Panel Opinion would not have been altered by the deletion of citations to Marsuda-Rodgers.

implementation of the statute that the agency is responsible for administering, that interpretation and implementation must be accorded deference. The United States Supreme Court has declared that a reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the . . . agency." Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984). To satisfy the "substantial evidence" standard, "it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Federal Election Comm'n v. Democratic Sen. Camp. Comm., 454 U.S. 27, 39 (1981). This principle has been applied repeatedly in reviews of ITA's anti-dumping determinations. See, e.g., U.H.F.C. Co. v. United States, 916 F.2d 689, 698 (Fed. Cir. 1990); Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 n.9 (Fed. Cir. 1990); ICC Indus., Inc. v. United States, 812 F.2d 694, 699 (Fed. Cir. 1987). Consistently with this standard of review, the Panel upholds ITA's interpretation of the antidumping laws unless that interpretation is unreasonable.

IV. THE ISSUES AND HOLDINGS

The Panel divides the issues presented for review in three categories: (A) those pertaining to ITA's calculation of a dumping margin on approximately 56 percent of Northern Fortress's U.S. sales, as to which it received information on contempora-

neous home-market sales of identical merchandise; (B) those pertaining to ITA's decision to resort to BIA in determining a dumping margin on approximately 44 percent of Northern Fortress's U.S. sales, as to which it considered information on sales of similar merchandise and information on constructed value; and (C) those pertaining to ITA's selection of the margin from the original antidumping investigation -- 30.61 percent -- as the BIA rate. Each of the categories of issues will be addressed in turn.

A. Whether the International Trade Administration's Calculation of the Dumping Margin on 56 Percent of the Sales to the United States was Supported by Substantial Evidence on the Record and was Otherwise in Accordance with Law

ITA's calculation of the dumping margin on the 56 percent of U.S. sales as to which ITA had information of home-market sales of identical merchandise is challenged in three respects. First, Northern Fortress contends that ITA exceeded its authority in correcting two "ministerial" errors. Second, Blaw Knox contends that ITA unlawfully adjusted the dumping margin to offset Northern Fortress's payment of the FST. Third, Northern Fortress contends that ITA erroneously included sales of goods of non-Canadian origin. The Panel considers these three contentions seriatim. We sustain ITA's actions in the first and second respects; we remand for reconsideration of the third.

1. The Correction of Ministerial Errors[15]

In its remand determination, ITA corrected five errors made during the original administrative review that ITA considered "ministerial." First, ITA had used a 10.71-percent FST rate in the calculation of tax adjustments, rather than the correct 12-percent rate. Second, ITA had failed to make tax adjustments for certain sales. Third, ITA had used data from another administrative review period to make adjustments for U.S. and home-market credit, warranty, and sales commission expenses. Fourth, ITA had deducted from FMV amounts for home-market inland freight and home-market indirect selling expenses despite the absence of record evidence of such freight and expenses. Fifth, ITA had excluded 312 U.S. sales with a final selling price of U.S.$2.00 or less. Pub. Doc. No. 119, at 10.

The first three of these corrections are not disputed, and the Panel therefore does not disturb them. The fourth and fifth corrections are challenged by Northern Fortress, on the grounds that these are not corrections of "ministerial" errors but "substantive changes in . . . policy." Remand Rec. Doc. No. 36, at 26. As such, Northern Fortress argues, these revisions in the original administrative review determination are beyond ITA's authority and beyond the scope of the remand order. Id. at 26-30.

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[15] Panelists Brown and Lacoste present Separate Dissenting Views on the correction of ministerial errors at Part V of this Opinion, infra.

The Panel first reviews the legal standard for the correction of ministerial errors and then examines each of the two disputed corrections in turn. We conclude that ITA's interpretation of the statutory provision for correction of "ministerial errors" was not unreasonable and that its correction of the two disputed errors was supported by substantial evidence on the record.

a. The Legal Standard

The crux of the dispute over ITA's correction of "ministerial errors" is whether ITA reasonably interpreted the statutory provision that authorizes such corrections. The provision, enacted as part of the Omnibus Trade and Competitiveness Act of 1988, reads as follows:

> **Correction of Ministerial Errors.**
>
> The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section. Such procedures shall ensure opportunity for interested parties to present their views regarding any such errors. As used in this subsection, the term "ministerial error" includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.

19 U.S.C. § 1675(f) (1988).[16]

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[16] The corresponding ITA regulation defines "ministerial error" by tracking the statutory language:

(continued...)

In essence, Northern Fortress urges a narrow interpretation of this provision, one that would bar ITA from construing as "ministerial errors" the deduction from FMV of amounts not on the record and the failure to include 312 U.S. sales with a selling price of U.S.$2.00 or less. ITA prefers a more expansive reading of the statute, one that would permit ITA to characterize these actions as "ministerial errors" and, thereby, to justify taking remedial steps. The Panel considers the Northern Fortress interpretation not unreasonable, but neither do we find ITA's interpretation unreasonable. In reaching the latter conclusion, the Panel examines the statutory language, the common meaning of "ministerial," the legislative history, the relevant case law both before and after the enactment of the provision, and the purpose of the antidumping laws.

First, the statutory language permits an interpretation of the term "ministerial error" that goes beyond arithmetic and clerical mishaps. The provision divides "ministerial errors" into three categories: (a) "errors in addition, subtraction, or other arithmetic function," (b) "clerical errors resulting from inaccurate copying, duplication, or the like," and (c) "any other

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[16](...continued)
> For purposes of this section, "ministerial error" means an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the Secretary considers ministerial.

19 C.F.R. § 353.28(d) (1991).

type of unintentional error which the administering authority considers ministerial." The phrase "or the like" at the end of the "clerical errors" category suggests the inclusion in that category of all errors of a clerical type. The third category, then, can reasonably be understood to encompass errors other than arithmetic or clerical ones.

Notably, with respect to this third category, Congress declined to provide examples or guidelines. Congress granted to ITA -- the "administering authority" -- the authority to correct "any other type of unintentional error [it] considers ministerial." Thus, the statutory language is certainly open to -- indeed, it expressly contemplates -- ITA's discretionary interpretation of the phrase "other type[s]" of errors. In light of this explicit statutory grant of administrative discretion, ITA's expansive interpretation of the "miscellaneous errors" provision is due considerable deference.

Second, the common meaning of the word "ministerial" is consistent with ITA's expansive statutory interpretation. "Ministerial" is defined in standard dictionaries as "an act or duty belonging to the administration of the executive function in government," Webster's Third New International Dictionary 1439 (1986), or "an act that a person after ascertaining the existence of a specified state of facts performs in obedience to a mandate of legal authority without the exercise of personal judgment upon the propriety of the act and [usually] without discretion in its performance," id., or "an administrative act carried out in a

prescribed manner not allowing for personal discretion," Webster's New World Dictionary 905 (1980). These definitions indicate that the term "ministerial" denotes a non-discretionary act taken in the administration of legal authority. A "ministerial error," then, encompasses not solely arithmetic and clerical errors but also more generally those errors arising from ITA's administration of the antidumping laws. By this definition, ITA may not invoke the statutory provision to alter its discretionary exercise of authority -- by adopting new administrative policies or methodologies -- but it may correct its erroneous implementation of existing policies and methodologies.

Third, the legislative history provides no basis for a restrictive interpretation of the statute. The legislative history is sparse. The Conference Report on the 1988 trade legislation makes only the following brief comment on the "ministerial errors" provision:

> [The provision] requires Commerce to establish procedures for the correction of ministerial errors (i.e., mathematical or clerical or other unintentional errors), within a reasonable time after final determinations, or review of such determinations, and to ensure that interested parties have an opportunity to present their views regarding such errors.

H.R. Rep. No. 576, 100th Cong., 2d Sess. 624 (1988). An accompanying summary of the conference agreement omits any reference whatsoever to the provision. See Conf. Comm. Print 84-119, 100th Cong., 2d Sess. 12-13 (1988).

A reasonable inference from this lack of congressional discussion is that Congress did not consider this provision to be of great significance. Congressional attention seems to have been on the procedural framework for correction of ministerial errors -- the establishment of a reasonable time after final determinations, the opportunity for interested parties to present their views -- rather than on the scope of the errors themselves. Certainly there is nothing in the legislative history that suggests a congressional intention to impose a newly stringent substantive limitation on the types of errors that ITA could correct.

Fourth, the case law regarding the correction of ITA errors, both before and after the 1988 provision was enacted, supports a broad interpretation of "ministerial error." The courts have consistently encouraged ITA to correct errors, whether its own or those of others, and whether with or without judicial direction. See, e.g., Brother Indus., Ltd. v. United States, 771 F. Supp. 374, 384 (CIT 1991) (noting that ITA's "own errors can call for correction without judicial intrusion"); Serampore Indus. Pvt. Ltd. v. United States Dept. of Commerce, 696 F. Supp. 665, 673 (CIT 1988) (remanding for correction of errors although such correction was not within scope of earlier remand); Sonco Steel Tube Div. v. United States, 694 F. Supp. 959, 965 (CIT 1988) (approving correction of error in which ITA overlooked its own precedent; rejecting claim that such correction represented "policy changes"); Badger-Powhatan v. United States, 633 F. Supp.

1364, 1368 (CIT 1986) ("amendment [by ITA], before or after remand, is appropriate when the agency has utilized a legally improper method in making a determination or when the original determination contains an error of inadvertence or mistake"); Gilmore Steel Corp. v. United States, 585 F. Supp. 670, 674 (CIT 1984) (noting ITA's authority to correct, sua sponte, judgments based on clerical errors, inadvertence, or mistake). Indeed, the Court of International Trade recently observed that "failure to reopen a determination which is known to be based on erroneous factual information that would clearly mandate a change in result would itself be arbitrary and capricious." Koyo Seiko Co. v. United States, 746 F. Supp. 1108, 1111 (CIT 1990). This same court cited the newly enacted "ministerial errors" provision as a sign of congressional intention not to restrict, but rather to encourage, correction of errors by ITA. Id.

Consistently with this judicial support of ITA's correction of errors, the courts have remanded ITA determinations for the correction of a wide range of errors both before and after the "ministerial errors" provision was enacted. Before the passage of the provision, the courts remanded for correction of such errors as: failure to adjust for fluctuating yearly costs, Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1114, 1118 (CIT 1989); double-counting of payments received by a foreign manufacturer from a foreign government, failure to take into account physical differences in merchandise, failure to delete a reported sale that had been cancelled,

incorrect classification of a sale as heavy casting as opposed to light casting, failure to adjust freight charges for the cost difference between gross and net weight, and failure to adjust for bank charges, Alhambra Foundry Co. v. United States, 701 F. Supp. 221, 222-23 (CIT 1988); failure to make adjustment for differences in credit costs between the U.S. and home markets, mistaken comparison of constructed value with a home-market sale to determine the dumping margin, and omission of certain home-market sales in calculation of FMV, Washington Red Raspberry Comm'n v. United States, 11 CIT 463, 8 ITRD 2559, 2559 nn. 4-6 (CIT June 26, 1987); and failure to recalculate the antidumping duty deposit rate in light of an amended dumping margin, Badger-Powhatan v. United States, 633 F. Supp. 1364, 1373 (CIT 1986).

Since the passage of the "ministerial errors" provision, the courts have ordered the correction of an equally broad range of errors. Such errors include: failure to adjust for start-up costs in determining constructed value, Floral Trade Council v. United States, 775 F. Supp. 1492, 1505 (CIT 1991); failure to adjust for appreciation in the value of Japanese yen in 1985-86, failure to adjust for the full amount of a claimed rebate in computing FMV, double-counting of corporate advertising expenses in computing ESP, failure to make a COS adjustment for certain direct expenses and deduction of an incorrect amount of indirect expenses in the ESP offset adjustment, double-counting of packing expenses in determining constructed value, deduction of an incorrect ESP offset adjustment as a result of a computer

programming error, double-counting of certain export sales, use of incorrect sales dates, exchange rates, and FMV in calculating dumping margins, failure to delete erroneous home-market sales information from the computer database, and failure to adjust for a home-market commission in computing FMV, Brother Indus., Ltd. v. United States, 771 F. Supp. 374, 384-89 (CIT 1991); and incorrect treatment of certain expenses as indirect selling expenses, Daewoo Electronics Co. v. United States, 760 F. Supp. 200, 210 (CIT 1991). These cases reveal no judicial reluctance to direct or approve correction of ITA errors, even if not strictly arithmetic or clerical. The consistency of this judicial approach to the correction of errors supports an expansive reading of the "ministerial errors" provision.[17]

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[17] In their Separate Dissenting Views, infra, Panelists Brown and Lacoste question the relevance of the cited cases in which the courts have remanded ITA determinations for correction of various errors, errors that Panelists Brown and Lacoste would not consider "ministerial" because the errors are not merely arithmetic or clerical mistakes. In their view, the Court of International Trade has authority to order the correction of a broader range of errors than ITA has authority to correct on its own initiative.

Apart from one exceptional circumstance, the Panel majority considers the authority of ITA and that of the Court of International Trade to be essentially co-extensive in this regard. The exception is addressed in Zenith Electronics Corp. v. United States, 884 F.2d 556, 562 (Fed. Cir. 1989). There the Federal Circuit held that ITA cannot, without prior judicial approval, make corrections pursuant to the "ministerial errors" provision if the determination to be corrected is already on appeal to the Court of International Trade and therefore is under the court's exclusive jurisdiction. In Zenith, the Federal Circuit took pains to note the exceptional circumstances underlying its limitation on ITA's authority to make corrections, strongly suggesting that ITA's correction of errors need not ordinarily await judicial approval. The Panel majority also notes than in

(continued...)

Fifth and finally, the purpose of the antidumping laws is best served by an interpretation of the "ministerial errors" provision that promotes rather than precludes the correction of errors. The "determination of margins as accurately as possible is a fundamental concern" in antidumping cases. Brother Indus., Ltd. v. United States, 771 F. Supp. 374, 388 (CIT 1991) (ordering correction of even insignificant errors where remand is otherwise necessary). Accord, Koyo Seiko Co. v. United States, 746 F. Supp. 1108, 1110 (CIT 1990) ("fair and accurate determinations are fundamental to the proper administration of our dumping laws"); see Tehnoimportexport v. United States, 766 F. Supp. 1169, 1179 (CIT 1991) (correction of errors ordered even though correct information was submitted late and error was not fault of ITA, because correction would "advance the interests of justice and yield a more accurate result"). Particularly where, as in the instant case, an ITA determination has been remanded for

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[17](...continued)
none of the judicial decisions upholding or directing ITA's corrections of errors has there been any suggestion that the agency's authority to make corrections is narrower than the judicial authority.

Panelists Brown and Lacoste also attempt to distinguish Koyo Seiko Co. v. United States, 746 F. Supp. 1108 (CIT 1990), though they concede that the Koyo Seiko court specifically cited the "ministerial errors" provision and held that "affirming a final determination known to be based on incorrect data would . . . be contrary to legislative intent." Id. at 1111 (emphasis deleted). This holding is directly applicable to the case at hand, where the data used by ITA in the original administrative review to make inland-freight and indirect-selling-expenses adjustments were not only incorrect but non-existent and where the exclusion of 312 U.S. sales with final selling prices of U.S.$2.00 or less made that original determination manifestly "based on incorrect data."

reconsideration, and where the interests in finality are thus not impaired by the correction of errors in the course of the remand proceeding, achieving an accurate margin is an overriding objective. We share the courts' rejection of the suggestion that "once an error initially evades detection, the ITA is thereafter powerless to take remedial steps." Gilmore Steel Corp. v. United States, 585 F. Supp. 670, 674 (CIT 1984).

In sum, we find that ITA's interpretation of the "ministerial errors" provision is not unreasonable in light of the statutory language, the common meaning of "ministerial," the legislative history, the relevant case law, and the purpose of the antidumping laws. The Panel, therefore, consistently with the applicable standard of review, declines to substitute for ITA's reasonable interpretation a competing interpretation, however reasonable the latter may be.[18]

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[18] In their Separate Dissenting Views, infra, Panelists Brown and Lacoste make much of the adjective "unintentional" in the "ministerial errors" provision's description of the third category of correctable errors: "any other type of unintentional error which the administering authority considers ministerial." 19 U.S.C. § 1675(f) (1988). Panelists Brown and Lacoste proceed to analyze the two "ministerial errors" that ITA corrected and as to which correction Northern Fortress objects. They conclude that the errors involved "conscious judgment," not "inadvertent" actions, and therefore could not have been "unintentional errors."

Although this interpretation of the adjective "unintentional" is not unreasonable, to the majority of the Panel it appears to overlook the noun that the adjective is modifying. An "unintentional error" need not be only an unintentional act that happens to be erroneous, such as a slip of the pen. It may also be an intentional act with unintentionally erroneous consequences or one based on unintentionally erroneous premises. The issue, in short, is not whether the action giving rise to error was

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b. The Specific Errors Corrected

In the context of ITA's permissible interpretation of the "ministerial errors" provision, we now turn to the two corrections that Northern Fortress disputes. First, ITA corrected its deduction from FMV of home-market inland freight and home-market indirect selling expenses, on the grounds that there was no evidence on the record of such freight and indirect selling expenses. Pub. Doc. No. 119, at 15. Northern Fortress does not dispute that it failed to furnish information on these items in response to ITA's questionnaires. See Admin. Rec. Doc. Nos. 14, 16 (in both responses, answering "N/A (F.O.B. Downsview, Ontario)" and "N/A" to ITA questions about home-market freight and selling expenses, respectively).

Northern Fortress's position, rather, is that the deduction of unsubstantiated expenses from FMV is not an "unintentional error" and therefore not "ministerial." Remand Rec. Doc. No. 36, at 28-29. Northern Fortress claims that the deductions in question were made deliberately, consistently with ITA practice in the previous administrative review. Id.

This claim is not substantiated on the record of this administrative review: there is no contemporaneous document authored by ITA or Northern Fortress that refers to a consistent

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[18](...continued)
"unintentional" but whether the error itself was "unintentional." This latter interpretation of the "ministerial errors" provision is consistent with the statutory language, consistent with ITA's practices, and consistent with the approach that the courts have taken in ordering or upholding the correction of errors.

administrative practice. Indeed, an earlier binational panel reviewed ITA's final determination in the preceding administrative review specifically on the issue of the adjustment for inland freight and upheld the adjustment because Northern Fortress had supplemented its "N/A" response on home-market inland freight with a schedule identifying freight costs. Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA-89-1904-03, Memorandum Opinion and Order, March 7, 1990, at 25-27 ("Panel Opinion-03"). In the instant case, Northern Fortress did not supplement its March 1989 questionnaire responses with a schedule of freight costs and, although it apparently once intended to submit a schedule of "indirect home-market expenses," Admin. Rec. Doc. No. 14, it never did.

The evidentiary obligations of a party claiming an adjustment to FMV are explicit in ITA's regulations, 19 C.F.R. § 353.54 (1991) (requiring that claims for adjustments be established to satisfaction of ITA), and are established by recognized administrative practices, see Asociacion Colombiana de Exportadores de Flores v. United States, 901 F.2d 1089, 1093 (Fed. Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 136 (1990) (claimant for adjustment bears burden of establishing entitlement to it). Complying with those regulations and practices is a ministerial action; violating them is a ministerial error. Cf. Brother Indus., Ltd. v. United States, 771 F. Supp. 374, 387-88 (CIT 1991) (remanding determination for correction by ITA of deduction of incorrect

amount of indirect expenses). The Panel sustains ITA's correction of this error on remand.

The second correction made by ITA was the inclusion in the margin calculations of 312 U.S. sales with a final selling price of U.S.$2.00 or less. Pub. Doc. No. 119, at 10. Northern Fortress again argues that the exclusion of these sales was not a ministerial error because it was in accordance with ITA practice established in prior administrative reviews. Remand Rec. Doc. No. 36, at 27-28.

On the record, there is no exemption from the antidumping duty order for replacement parts with a final selling price of U.S.$2.00 or less, 42 Fed. Reg. 44811 (1977), nor is there evidence that all such parts are "nuts and bolts," as Northern Fortress characterizes them, Remand Rec. Doc. No. 36, at 27. Although the circumstances surrounding the original exclusion are unclear -- again, no contemporaneous documentation on the issue is on the record -- the Panel considers ITA to be acting within its statutory discretion in considering as ministerial error the failure to include all sales of the subject merchandise in calculating dumping margins. Cf. Washington Red Raspberry Comm'n v. United States, 11 CIT 463, 8 ITRD 2559, 2559 n.6, 2560 (CIT June 26, 1987) (remanding determination for correction by ITA of its omission of all home-market sales of raspberries in pails from its calculation of respondent's FMV: "Any suggestion . . . that this court has no choice but to knowingly affirm a determination which the ITA has conceded still contains mistakes is

summarily rejected . . . ."). Correction of this error was not, on the record before us, a change of ITA policy or practice; rather, it constituted compliance with that policy and practice. We sustain ITA's correction on remand.[19]

2. The Adjustment of the Dumping Margin to Offset the Canadian Federal Sales Tax

In the original administrative review, ITA made an adjustment to the United States Price ("USP") of Northern Fortress's sales of replacement parts for the amount of the FST purportedly rebated or not collected by reason of their exportation. Pub. Doc. No. 36. In its subsequent request for panel review, Blaw Knox contended, and ITA conceded, that ITA erred in failing to

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[19] In their Separate Dissenting Views, infra, Panelists Brown and Lacoste advance a restrictive interpretation of the "ministerial errors" provision that would bar ITA from making the two corrections that Northern Fortress disputes. They justify their restrictive interpretation, in part, on the grounds that an interpretation permitting ITA, "acting on its own motion," to find "errors" and correct them, would have a "chilling effect" on parties seeking to have ITA determinations reviewed under the FTA. To the contrary, the Panel majority believes that it is the interpretation of Panelists Brown and Lacoste that would be chilling.

The expansive interpretation that ITA endorses -- and that the Panel majority deems reasonable -- holds that ITA should correct errors made in its non-discretionary implementation of the antidumping laws' policies, methodologies, and procedures. In the Panel majority's view, ITA's errors here were "ministerial" and therefore correctable, precisely because it is not within ITA's discretion to make FMV adjustments without record evidence nor to exclude a whole category of subject merchandise from its dumping-margin calculations. If such ITA actions were considered non-ministerial and therefore not correctable by ITA in the absence of judicial intervention, then parties would have to bear the burden of both discovering and litigating many of the errors made by ITA -- even if there were no dispute that errors were made. Those parties that overlook ITA errors -- and those that simply cannot afford to challenge them on appeal -- would be left out in the cold.

verify these FST payments. Pub. Doc. No. 48, at 13-17; Pub. Doc. No. 61, at 6. Although Northern Fortress objected to the proposed verification on the ground of lateness, the Panel determined that Blaw Knox had preserved its right to verification on this issue. Accordingly, the Panel remanded to permit such verification. Remand Rec. Doc. No. 1, at 57.

Blaw Knox also contended in the underlying review that ITA had made an erroneous COS adjustment for the "multiplier effect" of the FST. Pub. Doc. No. 48, at 15.[20] Considering this issue not yet "ripe" for panel review, the Panel simply directed ITA, if it did verify Northern Fortress's payment of the FST, to "reconsider the appropriateness of making a COS adjustment and, if it [made] such an adjustment, [to] state its reason for doing so on the record." Remand Rec. Doc. No. 1, at 23.

In the course of the remand investigation, ITA verified payment of the FST by Northern Fortress, made a COS adjustment for the difference between the actual FST applied to home-market sales and the hypothetical FST forgiven on export sales, and explained its reasons for so doing. Pub. Doc. No. 119, at 18-25. Blaw Knox now challenges ITA's treatment of the FST adjustment in two respects: first, that ITA improperly added to the USP the full amount of Northern Fortress's payments of the FST without proof that the tax was passed through to Northern Fortress's customers; and second, that ITA improperly made the COS

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[20] The "multiplier effect" is explained in notes 25 and 38, infra.

adjustment to account for the "multiplier effect" of the FST.[21] After examining the legal framework within which consumption taxes are considered under the antidumping laws, the Panel takes up each of these two issues in turn.[22]

a. Consumption Taxes and Dumping-Margin Calculations: The Legal Framework

Most free-market countries levy a consumption tax like the FST on goods sold in the home market but refund or forgive (i.e., do not collect) such consumption tax on exports.[23] The Government of Canada, during the period under review, levied the

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[21] Although at one stage in the remand proceeding Blaw Knox also challenged ITA's verification of Northern Fortress's FST payments, Remand Rec. Doc. No. 15, at 5-6, Blaw Knox did not raise the issue in comments on ITA's preliminary determination, Remand Rec. Doc. No. 28, nor in its brief to the Panel, Pub. Doc. No. 145. At the Panel hearing, Blaw Knox expressly abandoned its challenge to the verification of Northern Fortress's FST payments, Pub. Doc. No. 162, at 111. Therefore, the Panel does not address this verification issue.

[22] The Panel notes that Blaw Knox objected in the underlying review only to ITA's allegedly incorrect COS adjustment for the "multiplier effect." No objection was raised with respect to the pass-through issue. See Remand Rec. Doc. No. 1, at 19. Blaw Knox's first objection on that ground appears in its remand case brief. Pub. Doc. No. 145, at 10. ITA therefore properly observed that Blaw Knox failed to preserve this issue. Pub. Doc. No. 119, at 19-20. Nevertheless, the Panel now considers the pass-through issue on its merits because the pass-through and COS issues are intertwined and it is difficult, if not impossible, to deal effectively with the COS issue without having first addressed the pass-through issue.

[23] An early, but still informative, report prepared by the Executive Branch, noted that "virtually all countries have a general consumption tax system with the inevitable levy on imports and rebate or exemption on exports." "Tax Adjustments in International Trade: GATT Provisions and EEC Practice," Executive Branch GATT Studies, Study No. 1, Senate Committee on Finance, 93d Cong., 2d Sess. 13 (1974). See John H. Jackson, The World Trading System 194-97 (1989); John H. Jackson, World Trade and the Law of GATT 294-303 (1969).

FST at the rate of 12 percent on all non-exempt home-market sales of the subject merchandise, but did not collect the FST on export sales of that merchandise. See Remand Rec. Doc. No. 14, at 10.

The antidumping laws include a specific provision that addresses the adjustment to be made in the dumping-margin calculations for taxes, such as the FST, that are not collected on exports.[24] The current version of the adjustment provision was enacted as part of the Trade Act of 1974. This provision, which the Panel shall refer to as the "Tax Clause," directs ITA to add to USP an adjustment in the amount of the tax forgiven on export. Specifically, the USP is to be increased by:

> the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.

19 U.S.C. § 1677a(d)(1)(C) (1988).

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[24] In the absence of an adjustment applied during the dumping-margin calculations, a tax exemption on exports would arguably create an artificial dumping margin. The initial price determinations made by ITA under the antidumping laws (prior to calculation of various adjustments) are measured inclusive of indirect taxes assessed on the manufacture or sale of the subject merchandise. Thus, if exports are exempt from consumption taxes, the initial FMV determination is made inclusive of any consumption tax on sales for domestic consumption and the initial USP determination is made exclusive of any consumption tax waived on export sales. For those exporters operating in countries that impose such consumption taxes, therefore, U.S. dumping margins will be created by virtue of the tax system itself, irrespective of price decisions made by the individual exporter. In this sense, the dumping margins may be considered to be artificial; in any event, they are clearly beyond the control of the exporter.

By its terms, the Tax Clause has three elements. First, it is the USP (whether measured by "purchase price" or by "exporter's sales price") that is to be increased by the amount of foreign taxes which have been forgiven (i.e., rebated or not collected) because the merchandise was exported to the United States. Second, the taxes forgiven upon exportation must be "directly related" to the subject merchandise exported to the United States. Third, the adjustment (i.e., the addition to USP) must be limited to those taxes that are considered to be "added to or included in" the price of the comparable merchandise sold in the home market.

Insofar as the first element is concerned, prior to the landmark case of Zenith Electronics Corp. v. United States, 633 F. Supp. 1382 (CIT 1986), appeal dismissed, 875 F.2d 291 (Fed. Cir. 1989) ("Zenith I"), ITA followed the practice of deducting actual home-market consumption taxes directly from FMV, as opposed to adding an offsetting adjustment to USP. See Color Television Receivers From Korea, 49 Fed. Reg. 7620 (1984); Color Television Receivers From Taiwan, id. at 7628; Color Television Receivers From Korea, id. at 50420. See also U.S. Department of Commerce, Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change 21 (Nov. 1985) ("Adjustment Study"). This practice, despite its obvious conflict with the Tax Clause, had the virtue of eliminating the tax from the dumping equation altogether, thus best achieving the Tax Clause's ostensible goal of "tax neutrality," and avoiding manifest

technical problems that arise in connection with making an adjustment to the USP side of the equation. Zenith I, 633 F. Supp. at 1386-91.[25]

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[25] The following example, which is cast in the vernacular of the current case and which postulates the existence of (pre-tax) dumping, illustrates the problems that arise in calculating the tax-offset adjustment.

Assume that the pre-tax home-market price of a replacement part for paving equipment manufactured by Northern Fortress is $100, while the purchase price for the same merchandise when sold for export to the United States is $90. In the pre-tax (or a tax-free) comparison, the absolute dumping margin would be $10 ($100-$90) and the ad valorem margin would be 11.1 percent ($10/$90). (The "absolute dumping margin," which is used to assess an entry covered by an administrative review, is the amount by which the FMV of the subject merchandise exceeds its USP; the "ad valorem margin," which is used to establish the estimated cash-deposit rate for future entries of the subject merchandise, is the ratio of the absolute dumping margin to the USP; the "ad valorem weighted-average margin" for sales during a particular review period is the aggregate amount of the absolute dumping margins on all individual sales divided by the total USP for all entries.)

Since the FST is assessed at the rate of 12 percent, the tax on Northern Fortress's Canadian sales of the subject merchandise would be $12 (12 percent of $100). Assuming this tax were fully shifted forward (i.e., "passed through") to the home-market purchaser, the after-tax home-market price would therefore equal $112 and the after-tax absolute dumping margin would be $22 ($112-$90), $12 more than the pre-tax absolute dumping margin. By contrast, the amount of the imputed or hypothetical tax rebated or not collected on the subject item by virtue of its exportation to the United States would equal only $10.80 (12 percent of $90).

The Tax Clause requires that an offsetting adjustment be made to account for this difference in method of taxation. The question is the manner in which this adjustment is to be calculated. Three methods are available.

First, if the home-market price (FMV) of the subject merchandise were reduced by the amount of the tax actually assessed on the home-market sale, then the adjusted home-market price would be $100 ($112-$12). Both the absolute dumping margin, $10 ($100-$90), and the ad valorem margin, 11.1 percent ($10/$90),

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In Zenith I, the Court of International Trade rendered three holdings that overturned ITA's practice of adjusting FMV and redirected the treatment of consumption taxes under the anti-dumping laws. First, ITA was required to follow the express dictates of the Tax Clause, restoring the consumption tax to FMV

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[25](...continued)
would then be equivalent to their respective levels in the pre-tax comparison. If the goal of the Tax Clause is indeed to achieve strict tax neutrality, it is clear that this method of adjustment would most effectively accomplish that goal. This was the method utilized by ITA prior to Zenith I.

Second, if the adjustment were made by increasing USP by the amount of the FST actually collected on home-market sales, the adjusted USP would then be $102 ($90+$12). Under this approach, the absolute dumping margin would be equivalent to the margin found in the pre-tax comparison, $10 ($112-$102), but the ad valorem margin would be reduced to 9.8 percent ($10/$102).

Third, if the adjustment were made by increasing USP by the amount of the hypothetical tax rebated or not collected on the subject merchandise because it was exported to the United States (i.e., by multiplying the home-market tax rate by the USP tax base), the adjusted USP would then be $100.80 ($90+$10.80). Under this approach, the absolute dumping margin, determined by subtracting the adjusted USP from the after-tax home-market price, would be $11.20 ($112.00-$100.80), an amount greater than the $10 absolute dumping margin calculated in the pre-tax comparison. The ad valorem margins, however, would be identical at 11.1 percent ($11.20/$100.80). This latter method of adjustment achieves tax neutrality only with respect to the ad valorem margins, and operates to increase the absolute dumping margins in cases where dumping margins would be present in the absence of taxes. This is the method insisted upon in Zenith I and currently followed by ITA.

Thus, where pre-tax dumping margins exist (i.e., dumping is actually taking place), neither of the latter two methods, standing alone, can achieve tax neutrality. The two methods result in disparities between the pre-tax and after-tax margin calculations, in either absolute or ad valorem terms. Recognizing this fact, ITA has resorted, and continues to resort, to the use of a COS adjustment to refine the tax offset, thereby permitting it to achieve what it perceives to be the statutory goal of tax neutrality. Such additional COS adjustments were expressly disapproved in Zenith I.

and adding any offsetting adjustment to USP. Second, ITA was required to calculate the adjustment by multiplying the home-market consumption tax rate by the USP tax base, without any further COS or other adjustment.[26] Third, ITA was required to measure the degree to which the home-market consumption tax, through the interaction of supply and demand, had an impact on the home-market price, and limit the addition to USP to that proportion of the tax actually found to be "passed through" to home-market customers.

Following Zenith I, ITA has accepted the first holding -- adopting the standard practice of adding an imputed or hypothetical tax to USP, rather than subtracting the actual home-market tax from FMV -- but it has refused, as a matter of policy, to apply the second and third holdings beyond the Zenith line of cases.[27] Thus, despite Zenith I and its progeny,[28] ITA continues to read the Tax Clause -- and related provisions that we discuss below -- as requiring or permitting it (a) to assume a

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[26] In Zenith I, instead of adding to USP the tax amount that would have been imposed on the export merchandise had it been sold in the home market, ITA had added to USP the amount of the commodity tax actually imposed on the home-market merchandise.

[27] ITA accepts the second holding insofar as it requires the adjustment to be calculated by multiplying the home-market consumption tax rate by the USP tax base; ITA rejects the second holding only insofar as it bars an additional COS adjustment to eliminate the "multiplier effect."

[28] See Daewoo Electronics Co. v. United States, 712 F. Supp. 931 (CIT 1989); Zenith Electronics Corp. v. United States, 755 F. Supp. 397 (CIT 1990); Daewoo Electronics Co. v. United States, 760 F. Supp. 200 (CIT 1991); Zenith Electronics Corp. v. United States, 770 F. Supp. 648 (CIT 1991). All of these cases have been decided by Judge Watson, the author of Zenith I.

full pass-through, rather than measure the actual economic incidence, of the consumption tax on the price of the subject merchandise in the home market and (b) to perform a COS adjustment to eliminate the "multiplier effect" of the consumption tax and thereby achieve the goal of tax neutrality.[29]

b. The Specific Adjustments Made

In its final remand determination in this case, ITA acted consistently with its recent practice and inconsistently with the rulings of the Zenith court. Specifically, ITA "made an addition to [USP] in the [full] amount of the FST forgiven upon exportation and granted Northern Fortress a [COS] adjustment in part for the approximately [56] percent of total U.S. sales for which the Canadian respondent had provided contemporaneous home-market sales of identical merchandise." Pub. Doc. No. 119, at 11.

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[29] ITA contends that it is not bound by decisions of the Court of International Trade, at least until they are affirmed by the U.S. Court of Appeals for the Federal Circuit. Pub. Doc. No. 119, at 20. Nonacquiescence by ITA or other government agencies in the decisions of their reviewing courts (in the case of the ITA, the Court of International Trade) has been described as a "growing trend," and is a practice that clearly raises significant, indeed constitutional, issues. See David A. Hartquist, Jeffrey S. Beckington, and Kathleen W. Cannon, "Toward a Fuller Appreciation of Nonacquiescence, Collateral Estoppel, and Stare Decisis in the U.S. Court of International Trade," 14 Fordham Int'l L. J. 114, 123-24 (1990-91). The Panel is attentive to these concerns but is not prepared to rule that ITA is prevented, as a matter of law, from adopting a practice or policy on an issue not yet addressed by the U.S. Court of Appeals for the Federal Circuit which conflicts, in whole or in part, with decisions rendered by a single member of the Court of International Trade.

In reviewing ITA's two FST adjustments, this Panel necessarily must consider whether we are bound by the Zenith court's decisions. Binational panels under the FTA are required to apply "the general legal principles that a court of the [United States] otherwise would apply." FTA Article 1904.3. As the Court of International Trade stated in Rhone Poulenc, Inc. v. United States, 583 F. Supp. 607, 612 (CIT 1984), "[a]lthough a nonfinal decision of the Court of International Trade is not a Supreme Court decision . . . or even a Court of Appeals decision . . . , it is nonetheless valuable, though non-binding, precedent unless and until it is reversed." Accord, Algoma Steel Corp. v. United States, 865 F.2d 240, 243 (Fed. Cir.), cert. denied, 492 U.S. 919 (1989). When faced with the very issue which we are now confronting, another binational panel agreed that it would consider Zenith I, as well as another Court of International Trade ruling,[30] with "great respect, but treat neither as binding." Panel Opinion-03, at 5. We take the same approach.

i. The Addition to the U.S. Price of the Full Amount of the Sales Tax Without Proof of the Actual "Pass-Through"

In the case at hand ITA verified that the FST forgiven upon exportation was "directly related" to the subject merchandise exported to the United States, Remand Rec. Doc. No. 14, at 10-13; verified that the FST was "added to or included in the price" of

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[30] See Atcor, Inc. v. United States, 658 F. Supp. 295 (CIT 1987) (Carman, J.). Atcor did not reach the merits of the pass-through and COS adjustment issues because the tax matters were remanded for verification of the rebated amount of the taxes paid.

all non-exempt, home-market sales of the subject merchandise, id. at 12-13; but specifically declined to measure the economic incidence of the FST in the home market, Pub. Doc. No. 119, at 18-22.[31] By making the addition to USP without proof that the full FST was actually passed through, or shifted forward, to home-market customers of the subject merchandise, ITA contravened the requirements established by Zenith I.

The pass-through issue arises because the Tax Clause provides that the amount of the adjustment may be made "only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation." 19 U.S.C. § 1677a(d)(1)(C) (1988). In the Zenith court's opinion, this provision was enacted because

> Congress had become aware that indirect taxes, including taxes imposed directly on merchandise, often were not fully shifted forward to purchasers; and Congress did not want the adjustment for such a tax to increase United States price calculations by an amount greater than the price increase which the tax generated in comparison home market sales.

Zenith I, 633 F. Supp. at 1396.

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[31] ITA stated in the final remand determination that "we have not attempted in this remand proceeding to measure the amount of the Canadian FST 'passed through' to home-market customers. . . . Rather, we have added to USP the full amount of the tax that we conclude the Canadian tax authorities would have collected on exports of the subject merchandise to the United States had such sales been subject to the Canadian FST. This adjustment is supported by our verification findings which demonstrate that the full amount of the Canadian FST was 'added to or included in' the price of the home-market merchandise." Pub. Doc. No. 119, at 20-21.

The Zenith court's conclusion that the pass-through of a consumption tax must be proven, not simply assumed, rested heavily on the court's reading of a report by the House Ways and Means Committee discussing the proposed Tax Clause:

> Further, an adjustment for such tax rebates would be permitted only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation. This is to insure that the rebate of such taxes confers no special benefit upon the exporter of the merchandise that he does not enjoy in sales in his home market. To the extent that the exporter absorbs indirect taxes in his home market sales, no adjustment to purchase price will be made and the likelihood or size of dumping margins will be increased.

H.R. Rep. No. 571, 93d Cong., 1st Sess. 69 (1973) (emphasis supplied). After considering other legislative history and rejecting the arguments of ITA, the Zenith court determined that the Tax Clause requires "ITA to measure actual tax absorption," but leaves "the precise method of performing this measurement to the discretion of the agency." Zenith I, 633 F. Supp. at 1400.

ITA disagrees fundamentally with the Zenith court's reading of the Tax Clause. In ITA's view the Tax Clause does not incorporate any language specifically contemplating a "pass-through," "tax shifting," or "tax incidence" analysis. Moreover, "[n]owhere does this statutory provision even hint, suggest, or imply that Congress intended Commerce to perform such burdensome, complex, and time-consuming econometric analyses to implement the

[T]ax [C]lause." Pub. Doc. No. 159, at 109.[32] Requiring ITA to perform a complex econometric analysis of even one of many possible adjustments would ensure "that the agency will be unable to complete administrative proceedings within the time limits established by Congress." Id. at 111.

ITA also reads the legislative history of the Tax Clause differently than does the Zenith court. ITA finds the word "absorbs" in the relevant House Report to be an "isolated term," id. at 113, whose ambiguity makes it impossible to "divine the intent of Congress." Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 26 (1977). Indeed, the word "absorbs" may have been intended by Congress to be used in a cost-accounting sense, as opposed to an economic sense requiring the measurement of tax incidence or absorption. Pub. Doc. No. 159, at 114. In any event, ITA finds "[t]he legislative history . . . astonishingly meager for an amendment that, according to the [Zenith I] analysis, radically changed the course of the [T]ax [C]lause." Id. at 115.

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[32] The difficulties posed by the Zenith-mandated measurement of tax incidence were the subject of 1987 testimony by Gilbert B. Kaplan, Deputy Assistant Secretary for Import Administration, before the Subcommittee on Trade, U.S. House of Representatives on H.R. 3, the ancestor of the Omnibus Trade and Competitiveness Act of 1988: "This calculation can only be done theoretically, using econometric analysis. It is an onerous task and the resulting estimates may be completely arbitrary. Since it is not an absolute figure, there will be endless wrangling by all parties in every case. This does not lead to increased administrability or predictable results. It does not make the law work." H.R. Rep. No. 10, 100th Cong., 1st Sess. 3 (1987). In this testimony, ITA proposed that the full amount of the home-market consumption taxes be deducted from FMV, thus eliminating the tax from the antidumping equation and achieving strict tax neutrality. However, this proposal by ITA was not incorporated into the 1988 legislation.

ITA cites with approval an earlier binational panel, which agreed with ITA that

> the 1973 House Report's use of the single term "absorbs" does not compel Commerce to measure tax incidence in an economic sense. If Congress had contemplated such a burdensome requirement -- one that could not readily be performed with confidence or within the statutory framework for investigations -- the Senate as well as the House surely would have been more explicit about their intent. We doubt that this methodology was ever considered, much less agreed upon, by the drafters of the legislation.

Panel Opinion-03, at 17-18.

Although ITA has stressed the burden of conducting an econometric analysis of the impact on price in the domestic market of the applicable consumption tax, the Panel finds this consideration alone not compelling. The Zenith court correctly noted that "it is well established that an administrative agency lacks the authority to disregard a statutory obligation merely because the tasks required are difficult or complicated." Zenith I, 633 F. Supp. at 1400. Furthermore, undertaking an econometric analysis is ITA's choice, not the Zenith court's command. See id. (ITA has discretion to "find a methodology for measuring absorption"). Nevertheless, we are not persuaded that the Tax Clause requires the measurement of actual tax incidence and, for the following reasons, we sustain ITA's position that assumption of a full pass-through of verified tax payments is consistent with the Tax Clause.

First, we believe that a reasonable, plain meaning of the Tax Clause is available, a meaning that does not require any

measurement of the actual tax pass-through. We approve the following language of an earlier binational panel:

> The specific clause in question speaks of the tax "added to or included in" the price of such or similar merchandise in the home market. The most reasonable, "plain meaning" interpretation of this language is that a seller in fact charges its customers for the tax on its sales: it "adds" or "includes" the tax in its invoice price. In its investigation, Commerce can verify that such charges are made. . . . Further, absent evidence to the contrary, it is reasonable to assume that when a manufacturer is selling merchandise at a profit, it is recovering all of its costs, including the taxes, and, therefore, all costs are "included" in the customer's price.
>
> Blaw Knox argues that Commerce's interpretation reads the tax clause out of the statute because Commerce assumes in every instance that the tax is passed on to customers. We read the statute as requiring substantial evidence that the taxes are paid on sales within the home market. Commerce indeed insists that it requires respondents to provide evidence that the manufacturer has actually paid the tax and that the sales receipts reflect that the manufacturer "added [the tax] to or included [it] in" the price paid by home market purchasers. Where Commerce fails to conduct such an inquiry, its determination is subject to remand. See Atcor[, Inc. v. United States], 658 F. Supp. [196,] 296 [(CIT 1987)] (case remanded to Commerce to "verify" full extent of taxes incurred).

Panel Opinion-03, at 16-17.

Second, we do not believe that the legislative history of the Tax Clause, particularly the cited House Report, is of such clarity that it mandates the conclusion reached by the Zenith court. The terms "absorbs," "to the extent that," and "added to or included in," as used in the House Report and in the Tax

Clause, are inherently ambiguous and do not compel an interpretation that would alter so dramatically ITA's adjustment and verification methodologies.

Third, while it is not determinative that a value-based adjustment scheme may entail burdensome and extensive econometric analyses of a foreign market, the Panel nevertheless cannot disregard the effect of requiring such analyses on the timeliness of antidumping determinations. We note that ITA issued its final remand determination in Zenith I nearly a year after the remand order, largely as a result of the econometric analysis required.[33] Since most free-market countries impose consumption taxes, delays of this sort might well become the rule, rather than the exception, a result we believe would be inconsistent with the expressed congressional concern for timely antidumping determinations. See, e.g., S. Rep. No. 249, 96th Cong., 1st Sess. 75 (1979) ("a major objective of [the 1979] revision of the antidumping duty law is to reduce the length of an investigation"); Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556,

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[33] In the remand required by Zenith I, ITA selected an econometric study as offering the best hope of accurately measuring the pass-through. Sales information covering a 10-year period was requested of the respondents and the final determination on remand was reached approximately one year after the order of remand. According to an ITA official, the results were generally consistent with the original results found by ITA, based on an assumption of full pass-through. See John D. McInerney, "Treatment of Border Tax Rebates of Consumption Taxes Under the Antidumping Law," 10 Northwestern J. of Int'l Law & Bus. 213, 217-18 (1989). Reportedly, id. at 219, the remand in Daewoo Electronic Co. v. United States, 712 F. Supp. 931 (CIT 1989) resulted in similarly prolonged calculations and similarly consistent results.

1560 (Fed. Cir. 1984) (noting "extremely short statutory deadlines which the Congress built into the [1979] antidumping law").

Fourth, we note that ITA is required to make its determinations on the basis of verified information, 19 U.S.C. § 1677e(b) (1988), and that estimates of hypothetical prices in the home market are "virtually impossible to verify in any meaningful sense." Adjustment Study at 11. The verification of cost-based adjustments, while clearly not free from difficulty, simply does not present the same complications. It seems improbable that Congress would institute by statute a procedure that would seriously undermine the verification process and its role in enhancing the accuracy of antidumping determinations.

Fifth, the logical implication of Zenith I and its progeny is that consumption taxes are integral to dumping and that foreign exporters must answer not only for their own pricing decisions, but also for the form of taxation, and rates of taxation, adopted by their respective home countries. If ITA is provided no means of equalizing or eliminating the impact of consumption taxes, foreign exporters that have made the exact same pricing decisions but are resident in different countries will find that each has become subject to a different dumping margin, depending on the consumption tax rate and the method of calculating the consumption tax base chosen by the exporter's home country. While Congress can adopt this approach if it chooses, it is not a result to be assumed absent clear evidence of congressional intent. Cf. Melamine Chemicals, Inc. v. United

States, 732 F.2d 924, 933 (Fed. Cir. 1984) (emphasis in original) (dumping margin "resulting solely from a factor beyond the control of the exporter would be unreal, unreasonable, and unfair").

Sixth, we are also reluctant to assume that Congress intended to single out adjustments under the Tax Clause for special value-based, econometric analyses, while most of the remaining 20 or so adjustments to USP and FMV, 19 U.S.C. §§ 1677a(d), (e), 1677b(a)(4) (1988), are being conducted by ITA on a cost basis. See McInerney, supra note 33, at 222-23; Smith-Corona Group v. United States, 713 F.2d 1568, 1574-77 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984). Again, such a conclusion would require, in our view, clear evidence of congressional intent which, for our part, we do not find.

Seventh, we believe that the ITA view is more consistent than that of the Zenith court with those provisions of the General Agreement on Tariffs and Trade ("GATT") that pertain to the question of "border tax adjustments."[34] As noted above, ITA views U.S. antidumping law as intended to be "tax neutral"; therefore, adjustment for a full pass-through of the consumption tax is both permissible and appropriate. This viewpoint is

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[34] General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, A18, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (effective Jan. 1, 1948). The GATT provisions relevant to the broad issue of border tax adjustments include Article II, paragraph 2(a), Article III, paragraph 2, Article VI, paragraph 4, Article XVI, Article XX, and Interpretative Notes in Annex I relating to Articles II, III, and XVI. See John H. Jackson, World Trade and the Law of GATT 295 (1989).

implicit in the GATT provisions themselves.[35] Binational panels must be particularly mindful of GATT consistency since the Governments of Canada and the United States made such consistency a desideratum of the FTA itself.[36]

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[35] The Executive Branch's GATT Study No. 1, supra note 23, at 13 (emphases supplied), states as follows:

> There is no record of any discussion by the drafters of the GATT of the economic assumptions underlying the differing treatment accorded to direct and indirect taxes on exports and imports. However, the GATT provisions were written as if increases in indirect taxes were fully reflected in the price of goods (i.e., fully shifted forward) while increases in direct taxes were fully absorbed by producers (or shifted back to factors of production), having no effect on price. If these assumptions are correct, the GATT provisions would equalize the amount of indirect taxes levied on competing domestic and imported goods, would avoid granting an incentive to exports by the rebate of (or credit for) taxes not reflected in prices, and would avoid distortions arising from differing direct tax systems. Under such circumstances, the GATT provisions would be trade neutral.

[36] The Panel approves the following statement by an earlier binational panel regarding the desirability of achieving consistency with the GATT:

> In its preamble, the FTA states that one of the significant reasons why the governments of Canada and the United States reached the agreement was "to build on their mutual rights and obligations under the [GATT]." In addition, Article 1902 of the FTA provides that each party reserves the right to amend its antidumping law, provided that "such amendment . . . is not inconsistent with [the GATT or the GATT Antidumping Code]." FTA Article 1902(2)(d)(i). We believe that these provisions in the FTA compel Binational Panels to be as consistent with the GATT as

(continued...)

For the foregoing reasons, we affirm ITA's assumption of a full pass-through, provided that the fact of payment is verified. ITA did not err in declining to measure the economic incidence of the FST in the home market.

ii. The Circumstances-of-Sale Adjustment to the Foreign Market Value to Account for the "Multiplier Effect"

Blaw Knox has argued that ITA unlawfully made a COS adjustment to FMV to account for the "multiplier effect" of the FST. Remand Rec. Doc. No. 28, at 6. Blaw Knox supports its argument by citing the Zenith line of cases, which rejected ITA's use of a COS adjustment to counteract the "multiplier effect": "The antidumping law does not support the proposition that a tax differential generated by actual dumping constitutes an adjustable difference in the circumstances of sale under § 1677b(a)(4)(B)." Zenith I, 633 F. Supp. at 1393.[37]

The cited provision, which the Panel shall refer to as the "COS Clause," reads as follows:

> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any

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[36](...continued)
possible when construing either U.S. or Canadian antidumping law.

Panel Opinion-03, at 18-19.

[37] The Zenith court's conclusion was based on its view that a COS adjustment for tax differentials would undercut the operation of the Tax Clause. In addition, in the court's view, the legislative history of the antidumping laws showed that only "differences in the terms of sale, credit terms, and advertising and selling costs" would be eligible for COS adjustments. Zenith I, 633 F. Supp. at 1393.

> difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to
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> * * *
>
> (B) other differences in circumstances of sale;
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> * * *
>
> then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4)(B) (1988).

In the final remand results, ITA made a COS adjustment, pursuant to the COS Clause, "for the difference between the Canadian FST and the hypothetical FST forgiven on exportation." Pub. Doc. No. 119, at 22. The stated reason for making this COS adjustment was "to avoid artificially inflating Northern Fortress's dumping margins," id., that is, to avoid the "multiplier effect."[38]

ITA contends that it was entitled to make such a COS adjustment on three grounds. Id. at 23-25. First, the contrary Zenith line of cases is not binding upon ITA, and those cases conflict with the decision of the U.S. Court of Appeals for the Federal Circuit in Smith-Corona Group v. United States, 713 F.2d 1568 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984). The Smith-

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[38] The "multiplier effect" was created by virtue of the fact that the hypothetical FST added to USP was lower than the actual FST added to FMV and thus the former was not sufficient fully to offset the latter. Absent a COS adjustment, Northern Fortress's dumping margins would have been artificially inflated (or "multiplied") by the amount of this difference. The COS adjustment thus enabled ITA to make a tax-neutral comparison of FMV and USP. See note 25 supra.

Corona court upheld a COS deduction from FMV of indirect selling expenses to achieve an "apples-to-apples" comparison.

Second, ITA argues, the express language of the COS Clause and of the corresponding regulation, 19 C.F.R. § 353.56 (1991), requires ITA to make "due allowance" for any price difference between FMV and USP that is "wholly or partly due to" circumstances of sale that are directly related to the sale of the subject merchandise. ITA contends that the price difference between the FMV and the USP of the subject merchandise was "partly due" to differences in taxation (because only home-market merchandise was subject to the FST). Furthermore, the imposition of the sales tax was directly related to the sale of the subject merchandise. Thus, "the statute mandated that [ITA] make the contested adjustment." Pub. Doc. No. 119, at 24-25.

Third, ITA cites in support of its position Article VI of the GATT, id. at 25, which provides that "[d]ue allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability." Thus, the GATT antidumping rules specifically contemplate the adjustment for "differences in taxation" in order to achieve "price comparability."

In considering these ITA arguments, the Panel is mindful that, as the Federal Circuit has noted, ITA "is required by statute to make a 'fair comparison,' between United States price and foreign market value." Smith-Corona Group v. United States, 713 F.2d 1568, 1578 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022

(1984). To that end, "[b]oth the United States price and the foreign market value are subject to cost adjustments in an attempt to derive values at a common point in the chain of commerce, so that the values reasonably can be compared on an equivalent basis." Washington Red Raspberry Comm'n v. United States, 859 F.2d 898, 904 (Fed. Cir. 1988).

COS adjustments are essential to that process of comparison, and the courts have accorded ITA "broad discretion" in making COS adjustments. Budd Co. v. United States, 746 F. Supp. 1093, 1098 (CIT 1990). Absent a specific statutory definition of the term "circumstances of sale," or the prescription of a specific method for determining allowances, Congress "has deferred to [ITA's] expertise in this matter." Smith-Corona Group, 713 F.2d at 1575. See Budd Co., 746 F. Supp. at 1100-01 (upholding COS adjustment for effects of Brazilian hyperinflation).[39]

Under the applicable standard of review, this Panel may not substitute its judgment for that of ITA when the choice is "between two fairly conflicting views, even though [we] would justifiably have made a different choice had the matter been before [us] de novo." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see American Spring Wire Corp. v. United States,

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[39] ITA's broad discretion in achieving this statutory purpose does not, however, relieve it of the responsibility to determine reasonably -- and to explain adequately -- its COS adjustments. Sonco Steel Tube Div. v. United States, 694 F. Supp. 959, 963 (CIT 1988) ("While Congress has given ITA broad discretion to determine whether a factor or condition of sale warrants an adjustment in foreign market value for circumstances of sale . . ., that discretion must be exercised reasonably and in a non-arbitrary manner.")

590 F. Supp. 1273, 1276 (CIT 1984), aff'd sub nom. Armco Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985). Applying this standard of review, the Panel concludes that ITA has reasonably interpreted the COS Clause so as to work hand-in-hand with the Tax Clause to eliminate the "multiplier effect." ITA perceives this interpretation as accomplishing the statutory goal of tax neutrality and the additional goal of consistency with the GATT. We do not find such an interpretation of the COS Clause to be unreasonable, either in substance or in purpose.

Moreover, the legislative history cited by the Zenith I court is insufficient, in our view, to require that the COS Clause be so narrowly drawn as to be incapable of addressing anomalies created by the Tax Clause. The Panel therefore upholds ITA's interpretation of the COS Clause and its application in this case of the specific COS adjustment designed and necessary to eliminate the "multiplier effect" of the FST. We reject Blaw Knox's argument that ITA has erred in this regard.

3. The Inclusion of Sales of Goods Allegedly of Non-Canadian Origin

Shortly before issuing its final determination, ITA requested, Remand Rec. Doc. No. 38, and on October 16, 1991 Northern Fortress timely submitted, Remand Rec. Doc. No. 39, information concerning the allegedly erroneous inclusion by ITA of Northern Fortress sales of nuts and bolts, attachments, and non-Canadian parts. Neither the ITA case analyst's memorandum on the final margin calculations, Remand Rec. Doc. No. 40, nor the

final remand determination itself, Pub. Doc. No. 119, states how ITA treated this Northern Fortress submission.[40]

The Panel can reasonably infer that ITA discounted Northern Fortress's claim that all parts with prices of U.S.$2.00 or less should be excluded as "nuts and bolts." That same argument was raised by Northern Fortress with regard to one of the "ministerial errors" corrected by ITA upon remand, and ITA rejected the argument. Pub. Doc. No. 119, at 16-18. For reasons already stated, the Panel affirms ITA's position with regard to the inclusion of parts with prices of U.S.$2.00 or less.

As for the information submitted by Northern Fortress regarding ITA's exclusion of certain attachments, whatever ITA's treatment of the information was, Northern Fortress has not challenged it before this Panel. Therefore, the Panel does not disturb the remand determination in this regard.

But there was a third category of parts whose inclusion Northern Fortress challenged in its October 16 submission: 64 parts allegedly of non-Canadian origin. Remand Rec. Doc. No. 39, at 2; see Pub. Doc. No. 141, at 74-75. ITA stated in its brief to the Panel that ITA included all such parts in its final calculations because a spot-check of nine of the parts revealed that Northern Fortress had reported Canadian labor costs for all

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[40] The final determination says no more than that ITA excluded "only those parts that we could specifically identify as nuts, bolts, attachments, OEM parts, and parts not of Canadian origin." Pub. Doc. No. 119, at 18.

nine. From such costs, ITA inferred that the parts were of Canadian origin. Pub. Doc. No. 159, at 23 n.29.

Northern Fortress replied at the Panel hearing that these Canadian labor costs were attributable to assembly in Canada, not manufacture, just as was the case with certain other parts that Northern Fortress had brought to ITA's attention. Pub. Doc. No. 162, at 42-44. Because ITA did not disclose its treatment of Northern Fortress's October 16 submission until the remand determination was under review by the Panel, Northern Fortress had no opportunity during the remand investigation to offer this explanation of the labor costs on which ITA had relied in discounting the Northern Fortress submission.

In light of the absence of any explanation on the administrative record for ITA's decision to consider as Canadian all 64 parts listed in the Northern Fortress submission of October 16, the Panel cannot find that decision to be supported by substantial evidence on the record. The Panel remands that decision to ITA for reconsideration of the October 16 submission and of the explanation proffered by Northern Fortress regarding the reported labor costs. Because this information was submitted in the course of the remand investigation but subsequent to verification, the information remains subject to Blaw Knox's right to verification of new information on which ITA's determination rests. See Remand Rec. Doc. No. 1, at 23-24. If, promptly after remand, Blaw Knox requests verification of the record evidence on the origin of the 64 parts in question, then ITA shall conduct a

verification specifically with respect to the information on which it relies in determining the origin of those 64 parts.

4. Conclusions

The Panel remands to ITA for reconsideration and explanation of its decision to include in its margin calculations the 64 parts alleged to be of non-Canadian origin in Northern Fortress's submission of October 16, 1991. Verification of any information on which ITA relies in this regard shall be undertaken if requested by Blaw Knox promptly after remand. The Panel affirms ITA's correction of ministerial errors and its adjustment of the dumping margin to offset the FST.

B. Whether the International Trade Administration's Decision to Use "Best Information Available" with Respect to the Balance of the Sales to the United States was Supported by Substantial Evidence on the Record and was Otherwise in Accordance with Law

In its remand determination, ITA used BIA for the 44 percent of U.S. sales for which it had requested additional FMV information on similar merchandise and constructed value. ITA resorted to BIA on the grounds that Northern Fortress failed to supply information on its home-market sales of similar merchandise and that the information Northern Fortress provided to establish constructed value could not be verified. Pub. Doc. No. 119, at 43-45.

Northern Fortress challenges ITA's decision to use BIA in three respects. First, Northern Fortress argues that ITA exceeded its authority when it considered the issue of similar merchandise on remand rather than focusing solely on constructed

value. In Northern Fortress's view, ITA had determined in the original administrative review that sales of similar merchandise did not exist; accordingly, ITA could not properly raise the issue during the remand proceedings. Remand Rec. Doc. No. 36, at 3-6.

Second, Northern Fortress argues that, even if inquiry into the issue of similar merchandise was appropriate, ITA's determination that sales of similar merchandise did occur in the home market is not supported by substantial evidence on the record. Id. at 6-12.

Third, Northern Fortress argues that ITA acted unreasonably in determining that Northern Fortress's constructed-value data failed verification. Id. at 12-19.

In addressing these contentions -- and ITA's defense of its BIA decision -- the Panel first examines the lawfulness of ITA's decisions (a) that Northern Fortress should submit information on similar merchandise and (b) that sales of similar merchandise had in fact occurred. The Panel concludes that ITA's decisions regarding similar merchandise were supported by substantial evidence on the record and were in accordance with law. Then the Panel considers the legal standard applicable to ITA's resort to BIA. The Panel concludes that, in the absence of requested information on similar merchandise, ITA was authorized to resort to BIA with respect to all U.S. sales as to which it did not have reliable information. Consequently, the Panel need not -- and does not -- address whether ITA could have resorted to BIA on the

grounds of failure of verification of Northern Fortress's constructed-value information.

1. The Lack of Responsive Information on Similar Merchandise

ITA's decision to use BIA with respect to the balance of sales to the United States is sustainable if (a) ITA acted within its authority in requesting information as to home-market sales of similar merchandise and (b) ITA's determination that Northern Fortress had such information and failed to provide it is supported by the record.

a. The Application of the Similar Merchandise Test on Remand

There is no dispute that the antidumping laws require ITA to determine FMV for each U.S. sale by the first of the following means possible: (a) by considering home-market sales of merchandise identical to that sold in the United States; (b) by considering home-market sales of similar merchandise; and (c) either by considering sales to third countries or by calculating constructed value. 19 U.S.C. §§ 1677b(a), 1677(16) (1988); 19 C.F.R. §§ 353.46, 353.48, 353.49, 353.50 (1991). Nor is there any dispute that in the instant case the FMV of U.S. sales of replacement parts could not be completely determined from consideration of Canadian sales of identical merchandise.

The dispute, rather, is over ITA's application of the hierarchy of FMV-determination methods during the remand investigation. Northern Fortress contends that ITA made a "decision" in the original administrative review "not to require data on

similar merchandise," and therefore is foreclosed from using that method of FMV determination upon remand. Pub. Doc. No. 141, at 25. Northern Fortress further notes that ITA had considered the similar-merchandise issue in the immediately preceding administrative review and had concluded that no sales of similar merchandise occurred. Id. at 25-26. Northern Fortress also states that in no previous administrative review had ITA determined that sales of similar merchandise occurred. Id. at 26.

ITA's determinations in the immediately preceding administrative review and in earlier administrative reviews are not the subject of this Panel's review. We do not have the authority, nor the record, to determine whether ITA's FMV calculations in those proceedings were supported by substantial evidence on the record and were otherwise in accordance with law. In any event, ITA's past determinations, whether lawful or otherwise, are surely not dispositive of the lawfulness of its determination in the instant administrative review: a determination whether sales of similar merchandise occurred is largely a factual conclusion, not a legal precedent binding on all subsequent reviews of the subject merchandise.

Nor can the Panel find record evidence that ITA "decided" the issue of similar merchandise in the original administrative review. ITA requested information on sales of similar merchandise in both its initial questionnaire and its deficiency ques-

tionnaire. Admin. Rec. Doc. Nos. 4, 22.[41] Northern Fortress's two March 1989 responses to the initial questionnaire, Admin. Rec. Doc. Nos. 14, 16, were silent on similar merchandise, and its June 1989 response to the deficiency questionnaire was rejected as untimely, Admin. Rec. Doc. No. 23. ITA conducted no verification of any of the questionnaire responses.

Thus, at the conclusion of the original administrative review, ITA had no basis for determining whether sales of similar merchandise had occurred. ITA's willingness to accept Northern Fortress's tardy March 1989 submissions was not tantamount to a determination that the information submitted was accurate nor that the information omitted was irrelevant. The untimely June 1989 response by Northern Fortress led ITA to use BIA for the FMV of those U.S. sales for which there were no identical-merchandise sales in Canada, preempting any final resolution of the issue of similar merchandise.

The issues of timeliness and resort to BIA were the focus of this Panel's review of ITA's original administrative review determination. Because the issue of similar merchandise was not raised by any of the parties, it was not addressed in the Panel

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[41] The initial questionnaire, issued October 11, 1988, stated: "When you do not sell identical merchandise, or the quantities of identical merchandise are insufficient, you must report sales of all types of similar merchandise sold in the home market." Admin. Rec. Doc. No. 4, at B-1. The deficiency questionnaire of May 22, 1989 noted that Northern Fortress's previous responses were "incomplete" and stated, inter alia, "If in the home market [Northern Fortress] does not sell merchandise that is identical to that sold in the United States, identify the most similar types of merchandise sold in Canada and provide adjustments for similar merchandise." Admin. Rec. Doc. No. 22, at 1.

Opinion. Remand Rec. Doc. No. 1. We do not consider the Panel Opinion to have foreclosed ITA's continued inquiry into the similar-merchandise question. The Court of International Trade has upheld ITA's reopening of the administrative record on remand to gather additional information even in the absence of specific instructions to do so. See PPG Indus., Inc. v. United States, 780 F. Supp. 1389, 1393 (CIT 1991). In the instant case, the Panel specifically directed that ITA verify, if Blaw Knox so requested, any "constructed values" used by ITA "to make the appropriate dumping margin calculations." Remand Rec. Doc. No. 1, at 57. We believe that, given the statutory hierarchy of methods for FMV determination, ITA could not have fulfilled the Panel's mandate on remand without first verifying the information on sales of "such or similar merchandise." 19 U.S.C. §§ 1677b(a), 1677(16) (1988).

Indeed, given the statutory requirement that constructed value only be used in the absence of sufficient sales of identical or similar merchandise, had ITA failed to revisit the similar-merchandise question its remand determination would have been vulnerable to attack. The Court of International Trade has stressed the "particular importance" of ITA itself making the determination of similar merchandise "rather than delegating that responsibility to an interested party." Timken Co. v. United States, 630 F. Supp. 1327, 1338 (CIT 1986) (remanding ITA determination because ITA did not collect data on merchandise other than that characterized as similar by respondent); cf. Koyo Seiko

Co. v. United States, 746 F.Supp 1108, 1111 (CIT 1990) ("failure to reopen a determination which is known to be based on erroneous factual information that would clearly mandate a change in result would itself be arbitrary and capricious"). The Panel therefore finds that ITA's consideration of similar merchandise on remand was in accordance with law.

b. The Determination of Similarity

Apart from Northern Fortress's challenge to ITA's reconsideration of the similar-merchandise issue on remand, Northern Fortress also challenges ITA's conclusion that sales of similar merchandise occurred. Essentially, Northern Fortress argues that none of the replacement parts sold in Canada was "similar" to the replacement parts sold in the United States. Pub. Doc. No. 141, at 35-43.

The term "similar" is defined by statute, so the Panel's task is to determine whether ITA's application of the statutory definition to the merchandise in question was "sufficiently reasonable." Zenith Radio Corp. v. United States, 437 U.S. 443, 450-51 (1978); American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986). ITA is required by law to use in its FMV calculations "such or similar merchandise" in the first of the following categories that is applicable:

> (A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise --

(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,

(ii) like that merchandise in component material or materials and in the purposes for which used, and

(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise --

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,

(ii) like that merchandise in the purposes for which used, and

(iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16) (1988).

ITA's determination that similar merchandise existed in the home market was based on Section 1677(16)(C) -- the final and most general definition of "such or similar merchandise." Pub.

Doc. No. 119, at 33.[42] This definition sets a three-part test for finding "similar merchandise."

The first part of the test requires that the merchandise be "produced in the same country and by the same person and be of the same general class or kind as the merchandise which is the subject of the investigation." 19 U.S.C. § 1677(16)(C)(i) (1988). At verification ITA selected four parts sold by Northern Fortress in the U.S. market, and looked for parts sold by Northern Fortress in Canada that were identical or similar to the U.S. parts in name, material composition, and configuration. Pub. Doc. No. 119, at 31. For three of the U.S. parts -- the main auger, the screed plate, and the floor plate -- ITA found corresponding parts sold in Canada that, it concluded, had identical descriptions, similar or identical material compositions, and similar configurations. ITA verified that Northern Fortress had manufactured each of the three parts in Canada, and that the manufacturing costs of the pairs of parts were within 20 percent of each other. Remand Rec. Doc. No. 19, at 11.[43] Based on

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[42] Neither during the remand proceeding nor in its briefs to the Panel did Northern Fortress dispute ITA's use of Section 1677(16)(C), as opposed to Section 1677(16)(B). Indeed, Northern Fortress at times seemed to focus on whether ITA had met the similarity criteria of the latter section. See, e.g., Remand Rec. Doc. No. 36, at 7, 8; Pub. Doc. No. 141, at 35, 37. In response to a question at the hearing, Northern Fortress stated that it was "not sure Commerce has really explained why they are using 'C' and not 'B'." Pub. Doc. No. 162, at 39.

[43] The Panel notes that in comparing the manufacturing costs of the U.S. and Canadian parts to ascertain whether they were within 20 percent of each other, ITA used the "factory cost" data provided by Northern Fortress in its July 2, 1991 questionnaire (continued...)

these findings, ITA concluded that the first test of Section 1677(16)(C) was satisfied. Id.; Pub. Doc. No. 119, at 31-32.

Northern Fortress argues that the parts examined at verification were not similar in their material composition and configuration. Specifically, it alleges, first, that the Canadian auger, unlike its U.S. counterpart, did not have segments bolted onto it, and that its flights were one-third again as large as the U.S. auger. Remand Rec. Doc. No. 36, at 10. Second, Northern Fortress contends that the U.S. screed plate is bent along one side, has a "bull nose" along its length, and has two lines of studs, while the Canadian part is flat, has no "bull nose," and has three lines of studs. Id. at 10-11. Finally, Northern Fortress contends that ITA did not sufficiently take into account differences in the lengths, material composition, and location of holes on the two floor plates compared. Id. at 11-12.

The record, however, demonstrates that ITA considered all of these differences. Remand Rec. Doc. No. 14, at 4; Pub. Doc. No. 119, at 33-34. Notwithstanding these differences, ITA was of the view that each pair of parts was of the same "general class or kind" of merchandise. The Panel concludes that there is

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[43](...continued)
response. Remand Rec. Doc. No. 14, at 3. Thus, it appears that ITA did not rely on costs derived from the manufacturing-variance data, which ITA ultimately rejected in its verification of Northern Fortress's constructed-value information. Pub. Doc. No. 119, at 36.

substantial evidence to support ITA's determination and that ITA did not act unreasonably.

The second part of the Section 1677(16)(C) test requires that the merchandise be "like" the merchandise which is the subject of the investigation in the "purposes" for which it is used. 19 U.S.C. § 1677(16)(C)(ii) (1988). Northern Fortress maintains that replacement parts by their nature cannot be used for like or similar purposes. Remand Rec. Doc. No. 7, at 3-4; Remand Rec. Doc. No. 36, at 7. Since each replacement part is designed to perform a particular function on a particular machine, there is no common usage among non-identical replacement parts. Northern Fortress challenges as overly broad ITA's determination, Pub. Doc. No. 119, at 32, that each of the parts it examined had the same "primary use," namely, that of a replacement part for self-propelled bituminous paving equipment.

ITA did not, however, end its inquiry with this determination. Rather, ITA concluded that each pair of parts performed the same particular function in a paving machine. Thus, ITA determined that main augers distribute asphalt from the paver onto the road surface, screed plates spread asphalt in a flat layer over the road surface, and floor plates prevent the asphalt from falling through the bottom of the paving machine. Remand Rec. Doc. No. 14, at 4; Pub. Doc. No. 119, at 34.

The Panel finds that ITA's determination was not unreasonable. Requiring identical purpose, rather than "like" purpose, would conflict with the terms of the statutory test and

would, indeed, collapse all of Section 1677(16)(C) into Section 1677(16)(A). The second part of the statutory test is satisfied.

The third and final part of the test is that the merchandise be merchandise which the administering authority determines "may reasonably be compared" with that which is the subject of the investigation. 19 U.S.C. § 1677(16)(C)(iii) (1988). Northern Fortress argues that comparative criteria based entirely on physical characteristics and cost of production do not fulfill this statutory requirement. It contends that the pricing practices of the replacement parts suppliers reflect the pricing practices of original equipment manufacturers, which, in turn, are based primarily on price competition and volume of sales rather than on cost. Accordingly, replacement parts that are similar in physical characteristics and even in cost may be quite dissimilar in price. Remand Rec. Doc. No. 36, at 8.

As with the other two parts of the "similar merchandise" test, the Panel recognizes that whether different merchandise can "reasonably be compared" is a "complex" issue on which "reasonable minds could differ." Timken Co. v. United States, 630 F. Supp. 1327, 1338 (CIT 1986). Unless ITA's conclusions are unreasonable based on the record evidence, however, the Panel cannot displace ITA's judgment with its own. The courts have consistently upheld ITA's determinations regarding similar merchandise, in the face of the very same objections raised by Northern Fortress. See, e.g., U.H.F.C. Co. v. United States, 916 F.2d 689, 691, 697 (Fed. Cir. 1990) (upholding ITA determination

that grades of animal glue "in widely varying applications" could nevertheless "reasonably be compared"); United Engineering & Forging v. United States, 779 F. Supp. 1375, 1381-82 (CIT 1991) (upholding ITA determination of similarity despite differences in end use and commercial value); NTN Bearing Corp. of America v. United States, 747 F. Supp. 726, 735-36 (CIT 1990) (upholding ITA determination of criteria for assessing similarity of merchandise under Section 1677(16)(C) where comparability of commercial value not possible); Kerr-McGee Chemical Corp. v. United States, 741 F. Supp. 947, 951-52 (CIT 1990) (upholding ITA determination of similarity of chemicals with different characteristics and uses).[44]

On balance, the Panel finds ITA's application of the three-part test for similar merchandise under Section 1677(16)(C) to be supported by substantial evidence and otherwise in accordance with law. Thus, ITA correctly concluded that Northern Fortress had made home-market sales of similar merchandise.

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[44] The Panel notes that many of the differences in merchandise highlighted by Northern Fortress might have supported adjustments for differences in physical characteristics. See 19 C.F.R. § 353.57 (1991); U.H.F.C. Co. v. United States, 916 F.2d 689, 699 (Fed. Cir. 1990) (ITA's refusal to make adjustments for differences in physical characteristics simply because the differences were not reflected in differences in costs of production "cannot stand"). But these adjustments would be made only after an ITA determination of similar merchandise. By failing to place evidence on the record concerning the merchandise deemed by ITA to be "similar," Northern Fortress lost the opportunity to substantiate possible claims for such adjustments. See id. at § 353.54 (claims for adjustments must be established to satisfaction of ITA); Asociacion Colombiana de Exportadores de Flores v. United States, 901 F.2d 1089, 1093 (Fed. Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 136 (1990) (claimant for adjustment bears burden of establishing entitlement to it).

2. The Resort to "Best Information Available": The Legal Standard

If ITA had authority to resort to BIA as a result of Northern Fortress's failure to furnish information on its sales of similar merchandise, that authority rests on the following statutory provision, which was enacted in 1979:

> In making [antidumping] determinations [ITA] 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.

19 U.S.C. § 1677e(c) (1988). Neither the statute nor its legislative history, see S. Rep. No. 249, 96th Cong., 1st Sess. 98 (1979), defines the relevant terms, but extensive judicial interpretation exists.

Recognizing the difficulty and delicacy of ITA's task of administering the antidumping laws, see Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984), the courts have repeatedly affirmed ITA's broad discretion to decide whether to use BIA. See, e.g., Chinsung Indus. Co. v. United States, 705 F. Supp. 598, 601 (CIT 1989); Florex v. United States, 705 F. Supp. 582, 588 (CIT 1989); Seattle Marine Fishing Supply Co. v. United States, 679 F. Supp. 1119, 1126-28 (CIT 1988); Pistachio Group of Ass'n of Food Indus. v. United States, 671 F. Supp. 31, 40 (CIT 1987).[45]

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[45] The courts have almost never overturned ITA's decisions to resort to BIA. Indeed, the Panel is aware of only four cases in which ITA's decision to use BIA has been remanded for recon- (continued...)

ITA's discretion to resort to BIA stems not only from the variety of statutory grounds for the use of BIA -- refusal to produce information, inability to produce information in a timely manner, inability to produce information in the required form, significantly impeding an investigation[46] -- but also from the need for ITA to control the fact-gathering process. The courts have viewed ITA's authority to resort to BIA as essential to the fulfillment of ITA's responsibility to determine in a timely manner an accurate dumping margin, both in antidumping investigations and in administrative reviews.

Respondents that withhold information requested by ITA, on the grounds that the information is irrelevant to the antidumping

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[45](...continued)
sideration. (In several other cases, ITA's decision to use BIA has not been questioned by the courts but its selection of particular information as BIA has been remanded. The Panel views the decision to use BIA and the selection of a BIA rate as legally separate issues and addresses the latter in Part IV.C of this Opinion.) In U.H.F.C. Co. v. United States, 916 F.2d 689, 701 (Fed. Cir. 1990), and in Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1572 (Fed. Cir. 1990), the Federal Circuit held that ITA may not resort to BIA where a party has failed to provide information that does not exist. In Floral Trade Council v. United States, 775 F. Supp. 1492, 1498 (CIT 1991), the Court of International Trade held that ITA may not resort to BIA in the absence of an information request. In Daewoo Electronics Co. v. United States, 712 F. Supp. 931, 944-45 (CIT 1989), the Court of International Trade held that ITA may not resort to BIA where ITA has requested information without using its normal questionnaire procedure and without providing the respondent appropriate instructions needed to compile the information. The unusual circumstances of these four cases only underscore the rarity of a judicial remand of ITA's decision to use BIA.

[46] The cited grounds for the use of BIA are set forth in 19 U.S.C. § 1677e(c) (1988). Another independent ground is the unverifiability of information. Id. at § 1677e(b). The corresponding regulatory provisions are at 19 C.F.R. § 353.37(a)(1), (2) (1991).

determination, have found little judicial sympathy. The Court of International Trade, for example, commented thusly on the behavior of the recalcitrant respondent in Ansaldo Componenti, S.p.A. v. United States, 628 F. Supp. 198, 205 (CIT 1986):

> The administrative record discloses several instances in which Ansaldo chose not to submit the information requested because Ansaldo had concluded that such information could not serve as a basis for Commerce's administrative review. . . . It is Commerce, not the respondent, that determines what information is to be provided for an administrative review.

Accord, Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1571-72 (Fed. Cir. 1990) ("ITA cannot be left merely to the largesse of the parties at their discretion to supply [ITA] with information. . . . Otherwise, alleged unfair traders would be able to control the amount of antidumping duties by selectively providing the ITA with information"); N.A.R., S.p.A. v. United States, 741 F. Supp. 936, 941 (CIT 1990) (party's production of cost data by classes of colors rather than, as requested by ITA, by length of tape rolls, justified ITA resort to BIA: "It is for ITA to conduct its antidumping investigations the way it sees fit, not the way an interested party seeks to have it conducted."); Rhone Poulenc, Inc. v. United States, 710 F. Supp. 341, 346-47 (CIT 1989) (party's failure to provide information on computer tape justified ITA resort to BIA: the BIA rule "is designed to prevent a respondent from controlling the results of an administrative review"), aff'd, 899 F.2d 1185 (Fed. Cir. 1990).

A corollary of ITA's discretion to resort to BIA in order to control the investigative process is ITA's discretion to use BIA in place of all or part of the information furnished to it. The courts have expressly recognized that to permit ITA to use BIA only to replace that information which is unavailable or untimely or unverifiable would be to encourage respondents to supply only self-serving information, confident in the knowledge that whatever is supplied cannot be discarded in favor of BIA. Such a restricted BIA authority on the part of ITA would surrender to respondents control over the determination of dumping margins -- the very control whose exercise by ITA it is a purpose of the BIA rule to protect. See, e.g., Brother Indus., Ltd. v. United States, 771 F. Supp. 374, 383 (CIT 1991) (upholding use of BIA: "The law does not permit a party to pick and choose information it wishes to present to the agency, and a deficient response may lead to an undesired result."). Thus, ITA has the authority to substitute BIA even for verified information if the use of that information would, in ITA's judgment, invalidate the margin calculations. Chinsung Indus. Co. v. United States, 705 F. Supp. 598, 601 (CIT 1989) (upholding ITA's refusal to use verified information from partial response that was timely submitted: requiring ITA to weigh available information to determine which is "best" would be to "undermine the administrative process and shift the burden of creating an adequate record from respondents to ITA").

Since Northern Fortress, by insisting on the absence of any similar merchandise, failed to present information necessary for ITA to calculate the FMV of the sales of similar merchandise, ITA properly exercised its authority to resort to BIA.[47] That authority includes the discretion to use BIA in place of part or all of the information ITA has collected. ITA's decision that, in the absence of information on sales of similar merchandise, it should not rely on Northern Fortress's proffered information on constructed value -- even if verifiable -- was not unreasonable

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[47] In reaching this conclusion, the Panel distinguishes the circumstances of the instant case from those addressed in U.H.F.C. Co. v. United States, 916 F.2d 689 (Fed. Cir. 1990) and Olympic Adhesives, Inc. v. United States, 899 F.2d 1565 (Fed. Cir. 1990). In U.H.F.C., the Federal Circuit ruled that ITA erroneously resorted to BIA where the respondent failed to supply requested information on the cost of production for individual grades of glue; the court found that such information could not possibly be supplied because cost information could only be determined for batches of glue. 916 F.2d at 700-01. Northern Fortress's failure to furnish information on similar merchandise, by contrast, was not attributable to the impossibility of obtaining the information but rather to the respondent's disagreement with ITA's interpretation of the term "similar." In Olympic Adhesives, the Federal Circuit ruled that ITA erroneously used BIA where the respondent's refusal to furnish requested sales information was attributable to the non-existence of such sales and where ITA failed to notify the respondent of the deficiencies in its response. 899 F.2d at 1573-74. By contrast, sales of similar merchandise did exist in the case of Northern Fortress. Nor does the record permit the conclusion that Northern Fortress was uninformed of ITA's interest in information on similar merchandise: requests were made in ITA's October 11, 1988 questionnaire, Admin. Rec. Doc. No. 4; in its May 22, 1989 deficiency questionnaire, Admin. Rec. Doc. No. 22; in its June 14, 1991 questionnaire, Remand Rec. Doc. No. 3; in its July 3, 1991 questionnaire, Remand Rec. Doc. No. 9; in its verification outline, Remand Rec. Doc. No. 10; and at verification, Remand Rec. Doc. No. 14. On this record, then, Olympic Adhesives is inapposite. Cf. Toshiba Corp. v. United States, ___ F. Supp. ___, ___, 13 ITRD 2097, 2101 (CIT Nov. 26, 1991) (distinguishing Olympic Adhesives).

under the circumstances and in light of legal precedents. Therefore, the Panel upholds ITA's resort to BIA without consideration of the verifiability of the constructed value information submitted by Northern Fortress.

3. Conclusions

The Panel affirms ITA's decisions to request information on similar merchandise and to resort to BIA when such information was not forthcoming. The Panel declines to reach the issue whether ITA, independently of its resolution of the similar-merchandise issue, could have resorted to BIA on the grounds that Northern Fortress's constructed-value information could not be verified.

C. Whether the International Trade Administration's Selection of the 30.61 Percent Margin from the Original Antidumping Determination as "Best Information Available" was Supported by Substantial Evidence on the Record and was Otherwise in Accordance with Law[48]

Since the Panel affirms ITA's decision to use BIA in lieu of the unavailable information on similar merchandise, we must address the separate issue whether ITA's choice of the 30.61 percent margin from the original antidumping investigation as "the best information otherwise available" was lawful. During the remand proceeding, Blaw Knox argued that ITA should have selected the 57.13 percent dumping margin alleged in the antidumping petition, because Northern Fortress's unresponsiveness to

[48] Panelists Brown and Lacoste present Separate Dissenting Views on ITA's selection of the 30.61 percent margin as BIA at Part V of this Opinion, infra.

ITA's information requests was tantamount to a refusal to cooperate, warranting a highly adverse BIA rate. Remand Rec. Doc. Nos. 28, 34.

Northern Fortress contended that both the 30.61 percent BIA rate chosen by ITA and the 57.13 percent alternative urged by Blaw Knox are unsustainable, because Northern Fortress had attempted to respond to ITA's requests for information and had not significantly impeded the investigation. Remand Rec. Doc. No. 36, at 33-34; Remand Rec. Doc. No. 35, at 3. Northern Fortress declined to suggest any alternative BIA rates during the remand investigation, however, stating that it would be "premature" to discuss specific BIA rates until the issues surrounding the decision to resort to BIA were resolved. Remand Rec. Doc. No. 36, at 34.[49]

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[49] Northern Fortress's failure to present its arguments in favor of alternative BIA rates during the remand investigation precludes the Panel's consideration of such arguments in this remand review. Both the FTA and the pertinent case law foreclose the Panel from overlooking the requirement that parties exhaust their administrative remedies before seeking panel review of an issue. See FTA Article 1911 (including "exhaustion of administrative remedies" among general principles of law to be applied by panels); United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37 (1952) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action."); accord, Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990); Budd Co. v. United States, 773 F. Supp. 1549, 1555-56 (CIT 1991). The limited exceptions to the exhaustion requirement, see, e.g., McKart v. United States, 395 U.S. 185 (1969), do not apply to the circumstances at hand.

Therefore, the Panel cannot now consider, for example, the appropriateness as BIA of the 20.12 percent margin determined for (continued...)

ITA defended its selection of 30.61 percent as the BIA rate on two grounds. First, Northern Fortress "significantly impeded the completion of th[e] administrative proceeding," and no other available rate, when averaged with the 10.84 percent margin calculated for the sales as to which Northern Fortress submitted information in March 1989, would have yielded a final margin sufficiently adverse. Pub. Doc. No. 119, at 50. Second, there was no evidence that any alternative rates were a more accurate reflection of current margins. Id. at 52-53.[50]

The Panel considers these contentions by first reviewing the legal standard for choosing BIA and then examining the reasons by which ITA justified its BIA choice in the remand determination. We conclude that ITA's selection of BIA must be sustained.

1. The Choice of "Best Information Available": The Legal Standard

In the Panel Opinion, this Panel reviewed the legal standard for choosing BIA, particularly as it has developed through judicial review of ITA practice. Remand Rec. Doc. No. 1, at 43-

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[49](...continued)
Parker Hannifin and for Anvil Manufacturing Co. in the administrative review for the period September 1, 1980 through August 31, 1981, 49 Fed. Reg. 1263, 1264 (1984), an alternative rate first suggested by Northern Fortress in its brief to this Panel. Pub. Doc. No. 141, at 86. Nor can the Panel consider arguments, raised by Northern Fortress for the first time in its brief, in favor of the 14.43 percent rate considered by ITA, id. at 83, except insofar as ITA expressly considered those arguments on its own initiative in its determination.

[50] ITA also cited a third reason applicable to its rejection as BIA of the 14.43 percent margin determined on ESP sales in the second administrative review. In ITA's view this 14.43 percent margin was not a "final" margin and therefore ineligible for BIA consideration. Pub. Doc. No. 119, at 49-50.

53. Rather than repeating that segment of the Panel Opinion here, the Panel incorporates it by reference. As the Panel noted, "ITA's choice of BIA . . . must strike a balance between the ideal of an accurate dumping margin and the practical need to induce the timely cooperation of those parties in possession of relevant information." Id. at 47. The Panel discussed at length the Federal Circuit decision in Rhone Poulenc, Inc. v. United States, 899 F.2d 1185 (Fed. Cir. 1990), which remains the most authoritative judicial pronouncement on how ITA should strike that balance.

The Rhone Poulenc court addressed specifically the lawfulness of ITA's decision to choose as BIA not one of the margins found in recent administrative reviews but rather the much higher margin determined in the original antidumping investigation. Rhone Poulenc argued that ITA had deliberately chosen a punitive rate -- the 60 percent margin from the original antidumping investigation -- rather than the "best information available." The Federal Circuit rejected this argument and upheld ITA's choice of BIA, stating:

> We need not and do not decide the difficult question of whether the agency may use the best information rule to "penalize" a party which submits deficient questionnaire responses. That is not what the agency did in this case. In order for the agency's application of the best information rule to be properly characterized as "punitive," the agency would have had to reject low margin information in favor of high margin information that was demonstrably less probative of current conditions. Here, the agency only presumed that the highest prior margin was the best information of current margins.

> Since Rhone Poulenc offered no evidence showing that recent margins were more probative of current conditions than the highest prior margin, the agency found the highest prior margin to be the best information otherwise available.

Id. at 1190 (emphasis in original).[51]

Thus, the Rhone Poulenc court refused to agree that the selection by ITA of the original dumping margin as BIA, despite its apparent staleness, was itself "punitive" or involved a punitive process. The Federal Circuit found that ITA had merely established a rebuttable presumption that the original dumping margin was BIA, which presumption could be rebutted by the respondent from evidence on the record. Absent "probative evidence of current margins," however, ITA's presumption was sustained. Id.[52]

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[51] The court went on to state:

> We believe a permissible interpretation of the best information statute allows the agency to make such a presumption and that the presumption is not "punitive." Rather, it reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less. The agency's approach fairly places the burden of production on the importer, which has in its possession the information capable of rebutting the agency's inference.

899 F.2d at 1190-91 (emphasis in original; footnote omitted).

[52] ITA's statement in its final determination, Pub. Doc. No. 119, at 52, that "Rhone Poulenc teaches that [ITA] is required . . . to draw an adverse presumption or inference against a noncomplying respondent" suggests that ITA needs to do its

(continued...)

In the Panel Opinion, the Panel specified a number of factors that ITA might consider to determine how "probative" recent alternative rates are of "current margins." Remand Rec. Doc. No. 1, at 52-53. Ultimately, however, it is on the record of each case that ITA must base its determination whether there is such "probative evidence of current margins" as to overcome the adverse presumption that ITA can lawfully make in choosing BIA.

2. The International Trade Administration's Universe of "Best Information Available" Rates and Its Grounds for Selection

In its final remand determination, ITA identified the universe of possible BIA rates that it considered as: (a) "all of the dumping margins calculated for [Northern Fortress] in the [five] previous administrative reviews, including the [14.43] percent rate calculated for [ESP] transactions in the second administrative review," (b) the original dumping margin of 30.61 percent, and (c) the 57.13 percent margin alleged in the anti-dumping petition. Pub. Doc. No. 119, at 48-49. Neither Blaw Knox nor Northern Fortress suggested any other BIA candidates during the course of the remand investigation, so the Panel finds ITA's universe of BIA rates to be reasonable.

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[52](...continued)
homework again. The Federal Circuit's decision carefully states only that "a permissible interpretation of the [antidumping] statute allows [ITA] to make such a presumption." 899 F.2d at 1190 (emphasis supplied). The adverse presumption is thus a permissible, not a mandatory, element of ITA's exercise of its BIA authority.

vant unless there is probative evidence on the record that the partial margin is in fact indicative of current margins. On the record before this Panel, there is no such probative evidence. The 14.43 percent rate dates from the period September 1, 1979 through August 31, 1981, id. at 7601-02, hardly proximate to the period of the instant administrative review. Moreover, neither ITA nor the two parties to this proceeding attempted to place on the record any evidence suggesting that the 14.43 percent rate is indicative of the margins on the sales as to which Northern Fortress failed to provide current information. The Panel cannot, therefore, find that the evidence of the current accuracy of a 14.43 BIA rate is so compelling as to overcome the adverse presumption made by ITA in favor of the highest prior margin -- 30.61 percent. To the contrary, the evidence is non-existent.

In addition to citing the partiality of the 14.43 percent margin and the lack of "current information" on Northern Fortress's margins, ITA rejected the 14.43 percent rate on the grounds that it was not sufficiently adverse to Northern Fortress. Pub. Doc. No. 119, at 50. Specifically, ITA stated that Northern Fortress had "significantly impeded" the administrative review and the remand by failing to comply with "all four deadlines" for questionnaire and deficiency responses during the administrative review, failing to provide similar-merchandise information, failing verification of the July 2 questionnaire response, and failing to submit accurate and complete information on 44 percent of its U.S. sales. Id.

As a matter of law, it is questionable whether ITA needs to find that a respondent has "significantly impeded" an investigation in order to resort to BIA. Compare Remand Rec. Doc. No. 1, at 30 n.22, with id. at 39 n.39. Having resorted to BIA, however, ITA is well within its authority to consider the conduct of a respondent in selecting a BIA rate. See 19 C.F.R. § 353.37(b) (1991) ("If an interested party refuses to provide factual information requested by [ITA] or otherwise impedes the proceeding, [ITA] may take that into account in determining what is the best information available.").

In light of Northern Fortress's failure to submit similar-merchandise information in response to repeated ITA requests, the Panel cannot find unreasonable ITA's decision to use the more adverse 30.61 percent margin rather than the 14.43 percent margin as its presumptive BIA rate.[53] The Federal Circuit has upheld ITA's use of an adverse rate from the original antidumping determination under circumstances in which the respondent was

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[53] ITA does engage in historical revisionism, however, when it includes in its bill of particulars against Northern Fortress the failure to comply with "all four deadlines" established during the administrative review. Pub. Doc. No. 119, at 50. After all, ITA did accept two of the three Northern Fortress submissions during the administrative review. Moreover, ITA stated in its final determination in the administrative review that Northern Fortress provided ITA with "timely information for three-fourths of the relevant sales" and that Northern Fortress was "extremely cooperative throughout the administrative review." Pub. Doc. No. 36.

Because the Panel does not address the failure of verification of Northern Fortress's constructed-value information, the Panel also does not address whether that failure "significantly impeded" the remand investigation.

arguably more cooperative than was Northern Fortress: in Rhone Poulenc, for example, the questionnaire responses were deficient only in that they were submitted on paper rather than on computer tapes and in that sales dates, freight costs, and sales expenses were not stated in sufficient detail. 899 F.2d at 1187. By contrast, Northern Fortress failed to provide any information on similar merchandise. For this Panel to hold that ITA could not choose the 30.61 percent rate because of that rate's adversity to Northern Fortress would be incompatible with the Rhone Poulenc decision. In sum, the Panel finds nothing in the legal precedents nor in the record evidence that renders unsustainable ITA's decision to reject the 14.43 percent margin in favor of the 30.61 percent margin in its selection of BIA.[54]

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[54] Panelists Brown and Lacoste, in their Separate Dissenting Views, infra, rest the entire weight of their case against ITA's BIA selection on a single phrase in ITA's final determination: "the [14.43 percent] dumping margin calculated for ESP transactions in the second administrative review would not have rewarded [Northern Fortress]," Pub. Doc. No. 119, at 49 (emphasis supplied). From this statement, Panelists Brown and Lacoste infer that ITA made a finding that the actual dumping margin on the sales as to which ITA used BIA was below 14.43 percent. Therefore, the two Panelists conclude, selection of the 30.61 percent rate was unlawfully "punitive."

The majority of the Panel considers the quoted observation to be no more than an inartful way of stating the obvious: 14.43 percent is higher than the 10.84 percent dumping margin calculated for those sales as to which ITA did have actual information. The observation is plainly not a "finding" about the margin on those sales as to which ITA was unable to obtain information: no record evidence in support of such a "finding" is cited by ITA, and none exists. Indeed, if this observation were deemed by the Panel to be a finding, the "finding" would be reversible error, because it is not supported by substantial evidence on the record.

(continued...)

The Panel also sustains ITA's rejection of the 57.13 percent margin alleged in the antidumping petition. Blaw Knox argues that, since Northern Fortress was less responsive in the remand investigation than it was in the original administrative review, the BIA rate upon remand should be higher than the 30.61 percent margin used originally. Remand Rec. Doc. No. 28, at 2-5. Calibrating degrees of responsiveness are best left to ITA, which is thoroughly familiar with the circumstances, both aggravating and mitigating, of the particular investigation. On the record evidence, the Panel does not find unreasonable ITA's judgment that the choice of the 57.13 percent margin would have been unduly harsh. See Pub. Doc. No. 119, at 51.

Furthermore, the record is barren of any probative evidence that the 57.13 percent margin is indicative of current margins on the Northern Fortress sales as to which information is not available. Indeed, the 57.13 percent margin was simply the petitioner's alleged margin of dumping and, unlike the 30.61 percent margin, was never verified. The courts have counseled

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[54](...continued)
That the margin on those sales as to which information was available was 10.84 percent is in itself no basis for determining that 14.43 percent is a more accurate BIA rate for the balance of Northern Fortress's sales than is 30.61 percent. If the 10.84 percent margin were used as such "probative evidence" it would only invite the selective submission of information by Northern Fortress that the resort to BIA is intended to deter. Thus, the approach seemingly endorsed by Panelists Brown and Lacoste would remove control of the fact-gathering process from ITA and hand it to a respondent -- the very approach that has been rejected "out of hand" by the courts. Chinsung Indus. Co. v. United States, 705 F. Supp. 598, 601 (CIT 1989). See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190-91 (Fed. Cir. 1990).

caution in the use of unverified rates. See, e.g., Asociacion Colombiana de Exportadores de Flores v. United States, 717 F. Supp. 834, 837 (CIT 1989) (remanding ITA's use of unverified petitioner's rate in calculation of a rate to apply to "all others" where "the verified rates are so much lower than petitioner's rate"), aff'd on other grounds, 901 F.2d 1089 (Fed. Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 136 (1990). ITA's choice of a verified 30.61 percent margin in favor of an unverified 57.13 percent margin is therefore not unreasonable.

3. Conclusions

ITA's choice of the 30.61 percent margin from the original antidumping determination as BIA is supported by substantial evidence on the record and is in accordance with law. The choice is therefore affirmed.[55]

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[55] The Panel's affirmance of ITA's choice of BIA should not be construed as approval of all of its justifications for that choice. The Panel has already noted a number of justifications that are dubious. One further justification that falls into this unhappy category is ITA's defense of its 30.61 percent BIA rate on the grounds that such a rate is needed to induce cooperation by Ingersoll-Rand Canada, Inc. Pub. Doc. No. 119, at 51-52. That the administrative practice of selecting an adverse BIA rate may have the effect of encouraging respondents to cooperate with ITA's information requests has been well recognized by the courts. See, e.g., Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990); Pistachio Group of Ass'n of Food Indus. v. United States, 671 F. Supp. 31, 40 (CIT 1987); Ansaldo Componenti, S.p.A. v. United States, 628 F. Supp. 198, 205-06 (CIT 1986). The Panel finds neither judicial recognition nor approval, however, of the notion that a BIA rate applicable to a respondent in one proceeding should be determined in part on the basis of ITA's desire to induce cooperation by another respondent in another proceeding.

Ingersoll-Rand Canada is not an affiliate or alter ego of Northern Fortress. According to the record evidence, the only

(continued...)

V. SEPARATE DISSENTING VIEWS OF PANELISTS BROWN AND LACOSTE

We agree with the decision of the majority of the Panel in all but the following two respects:

a. the majority's acceptance of ITA's categorization of the mistakes which it corrected, sua sponte, as "ministerial errors" within the meaning of Section 751(f) of the Tariff Act of 1930, 19 U.S.C. § 1675(f) (1988); and

b. the majority's acceptance of ITA's selection of 30.61 percent as BIA for the 44 percent of the goods for which insufficient information was obtained.

A. The Correction of Ministerial Errors

The two "ministerial errors" whose correction by ITA in the course of the remand proceeding was challenged by Northern Fortress were (a) the deduction from FMV of home-market indirect selling and inland freight expenses, and (b) the exclusion of sales of parts sold for U.S.$2.00 or less.

In the initial administrative review determination, ITA capped the home-market indirect selling expense and inland freight expense deductions at the level of U.S. expenses, a level it established by BIA; ITA also disregarded all sales with prices of U.S.$2.00 or less. During the course of the remand proceedings, ITA, on its own motion, disallowed the inland

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[55](...continued)
relation between the two companies is that the former purchased the bituminous paving equipment business of the latter in 1988. Pub. Doc. No. 47, at 1 n.1. For ITA to select a BIA rate that effectively visits the speculative future sins of Ingersoll-Rand Canada on Northern Fortress not only finds no support in judicial precedent but also raises serious questions of due process.

freight and indirect selling expense deductions from FMV, and it eliminated the exclusion of the under-U.S.$2.00 parts.

ITA sought to justify its actions on the basis of Section 751(f) of the Tariff Act of 1930, which provides:

> **Correction of Ministerial Errors.**
>
> The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section. Such procedure shall ensure opportunity for interested parties to present their views regarding any such errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.

19 U.S.C. § 1675(f) (1988).

In accordance with the explicit language of this provision, ITA has contended that the actions of the case analyst in deducting indirect selling and inland freight expenses and excluding U.S.$2.00 parts were both erroneous and unintentional within the meaning of the statute. Pub. Doc. No. 159, at 35.

Notwithstanding the cases to which the Panel has been referred wherein ITA has been authorized to correct various errors it discovered, there is no jurisprudence which assists us in determining what constitutes an unintentional error within the meaning of Section 751(f). Nor is there any jurisprudence which directly addresses the scope of authority conferred by Section 751(f) on ITA to correct errors sua sponte. Those cases which were decided before the provision was enacted in 1988 have little

bearing on its interpretation and application. Rather, they establish that the court may order the correction of errors that may affect the accuracy of a determination. See Alhambra Foundry Co. v. United States, 701 F. Supp. 221 (CIT 1988); Serampore Indus. Pvt. Ltd. v. United States Dept. of Commerce, 696 F. Supp. 665, 673 (CIT 1988). The cases establish that, prior to the enactment of Section 751(f), amendment of a final determination was appropriate when ITA had utilized "a legally improper method in making a determination or when the original determination contains an error of inadvertence or mistake." Badger-Powhatan v. United States, 633 F. Supp. 1364, 1368 (CIT 1986) (emphases supplied).

Since the enactment of Section 751(f), ITA has typically relied on it to correct errors which could be described as "inadvertent slips": Television Receivers, Monochrome and Color from Japan, 56 Fed. Reg. 32403 (1991) (parentheses in wrong position and "+" sign substituted for "=" sign); Certain Iron Construction Castings from Brazil, 55 Fed. Reg. 41262 (1990) (publication of final results contained wrong rate for new exporters); Cyanuric Acid and its Chlorinated Derivatives from Japan, 55 Fed. Reg. 9478 (1990) (numbers were incorrectly copied onto charts used to graph price movements in home-market sales of subject merchandise).

Furthermore, none of the cases decided since the "ministerial errors" provision was enacted have dealt with the issue before us, namely, whether actions deemed by ITA to be

erroneous and unintentional properly fall within the scope of Section 751(f). In Brother Indus., Ltd. v. United States, 771 F. Supp. 374, 376 (CIT 1991), Floral Trade Council v. United States, 775 F. Supp. 1492 (CIT 1991), and Daewoo Electronics Co. v. United States, 760 F. Supp. 200 (CIT 1991), the court did not consider the proper interpretation and application of the statute in terms of its limitation of the authority of ITA to correct errors, as it was the court, not ITA, which was ordering the correction of errors. In Koyo Seiko Co. v. United States, 746 F. Supp. 1108, 1111 (CIT 1990), the court did refer to Section 751(f), although it was not directly in issue. The court formulated, from the relevant provision, the proposition that affirming a final determination known to be based on incorrect data would be contrary to legislative intent. That is not the issue in this case. Rather, in the present circumstances, in our view, there is insufficient evidence to know whether the case analyst's actions were unintentionally incorrect or whether they were the result of an intentional exercise of discretion.

The issue Northern Fortress has raised is whether the errors in question were "unintentional errors." No evidence was put on the record by ITA explaining the "mistakes" or elaborating upon the cause of the "mistakes."

"Unintentional" used in its ordinary sense means "inadvertent" or "accidental." Thus, "unintentional errors" would not include mistakes that are the result of a deliberate decision or an exercise of discretion. Indeed, mistakes that are neither

"unintentional" nor "clerical" would not be open to correction by ITA on a plain reading of the statute. The statute does not give ITA a general power to correct mistakes, and ITA relied only upon the statute as empowering it to make the changes in question. Our interpretation also accords with the legislative history, which indicates an intention to establish a procedure whereby ITA could correct unintentional or clerical errors without resort to judicial review. The Conference Report states,

> [Section 751(f)] requires Commerce to establish procedures for the correction of ministerial errors (i.e., mathematical or clerical errors or other unintentional errors), within a reasonable time after final determinations, or review of such determinations, and to ensure that interested parties have an opportunity to present their views regarding such errors.

H.R. Rep. No. 576, 100th Cong., 2d Sess. 624 (1988).

ITA does not claim that the errors in question were "errors in addition, subtraction, or other arithmetic function," nor "clerical errors resulting from inaccurate copying, duplication, or the like." Nor does it expressly address the language of the statute that provides for "any other type of unintentional error which the administering authority considers ministerial." Rather, it simply states that the corrections it made were "ministerial or clerical" and, in relation to the indirect selling and freight expenses, simply states that they were "inadvertently deducted."

If the statute were construed so that ITA were at liberty to correct "errors" as it finds them while performing the necessary

investigation pursuant to a remand order, parties would hesitate to seek the remedies provided under the FTA to have ITA's decisions reviewed. In that sense, ITA acting on its own motion in finding "errors" and correcting them would have a chilling effect on parties pursuing their rights to review ITA's decisions pursuant to Chapter 19 of the FTA. Furthermore, the need for certainty and finality supports an interpretation that is restrictive of the actions that can be taken by ITA sua sponte.

In any event, the plain language of the statute leads to the conclusion that only where ITA acts "unintentionally" in some way is review and correction authorized without judicial direction.

Northern Fortress submitted that the two errors, by their very nature, required a conscious judgment on the part of the analyst and accordingly were not of that inadvertent or unintentional character envisaged by the statute. Pub. Doc. No. 141, at 70. We agree.

In explaining its decision not to permit deductions from FMV for home-market inland freight and indirect selling expenses in the absence of record data, ITA points to the absence of an intention of the case analyst to make such deductions:

> In addition, the [case analyst's] May 15, 1990, Analysis Memorandum provides no evidence that the Department made a substantive policy determination to deduct such expenses from FMV in accordance with the BIA rule. In particular, the text of the Analysis Memorandum does not even state that the Department intended to deduct home-market freight expenses from FMV; such a deduction appears, without any explanation or reference to BIA, in a sample calculation.

> Similarly, the Analysis Memorandum does not provide any evidence that Commerce intended to deduct home-market indirect selling expenses from FMV pursuant to the BIA rule either.

Pub. Doc. No. 119, at 15 (citation omitted).

ITA argued before this Panel that the question should be viewed objectively, i.e., would a reasonable analyst have reached this conclusion on these facts. We do not agree that an "objective" test is appropriate either for ITA to apply in the first instance or on review, where it is open to ITA itself to present actual evidence of the motivations of the very person who made the decision.

In our view, the presence or absence of record evidence of intent was solely within the control of ITA. Only the case analyst knew whether his actions were "unintentional" or not. Accordingly, it is not open to ITA to point to a lack of evidence of intention to support the position that the actions taken were "unintentional." An absence of evidence of intention does not necessarily mean that the actions were unintentional. It means that there is no proof as to whether they were either intentional or unintentional, and the normal requirement is that the party alleging some state of facts bears the evidentiary burden of proving them. Here it is ITA that is alleging that its earlier actions were "unintended," yet it produced no evidence in support of that statement. Thus, ITA has failed to discharge its burden of proof. In terms of the standard of review, ITA's conclusion that the error is one that falls within the scope of the statute

as "unintentional" is not supported by substantial evidence on the record.

Similarly, there is nothing in the record as to the intent of ITA in excluding sales of goods priced at U.S.$2.00 or less. Again, in the absence of such evidence, ITA's conclusion is equally unsupported by substantial evidence on the record and cannot stand.

B. The Selection of the "Best Information Available" Rate

In its final remand determination, ITA set out the universe of potential BIA rates as: (a) all of the dumping margins calculated in the previous administrative reviews, including the 14.43 percent rate, calculated for ESP transactions in the second administrative review; (b) the original dumping margin of 30.61 percent; and (c) the margin of 57.13 percent alleged in the petition. Id. at 49.

We concur with ITA's rejection of all the dumping margins that were below the 10.84 percent margin determined by ITA to apply to the 56 percent of the sales for which information was available. However, we do not agree that ITA's rejection of the 14.43 percent rate was either reasonable or in accordance with law.

In its determination, id. at 50, ITA stated that its choice of BIA was in accordance with the Federal Circuit decision in Rhone Poulenc, Inc. v. United States, 899 F.2d 1185 (Fed. Cir. 1990). In that case, Rhone Poulenc challenged ITA's selection of a 60 percent margin from the original antidumping investigation,

rather than dumping margins of zero percent from more recent administrative reviews. Specifically, Rhone Poulenc had contended that ITA was compelled to use the most up-to-date sales information as the "best information" and that ITA's resort to the highest prior margin was a punitive measure and was therefore unsustainable. The Court of International Trade affirmed ITA's use of the 60 percent margin as BIA, 610 F. Supp. 341 (CIT 1989), and Rhone Poulenc appealed.

On appeal, the Federal Circuit held that ITA was required only to consider the most recent information in its determination of BIA. Further, the court held that ITA had not been punitive in its selection of BIA, but had only presumed that the highest prior margin was the best information of current margins. The court stated:

> In order for the agency's application of the best information rule to be properly characterized as "punitive," the agency would have had to reject low margin information in favor of high margin information that was demonstratively less probative of current conditions.

899 F.2d at 1190. In our opinion, that is precisely what ITA has done in this case.

ITA's position is that it was permitted to select the 30.61 percent rate, the highest prior margin, not because it was the most probative of current margins, but rather, as it said, "to avoid rewarding Northern Fortress for its repeated noncompliance with information requests and to induce Ingersoll-Rand, the current exporter of the subject merchandise, to comply with

information requests in future administrative reviews." Pub. Doc. No. 119, at 49. As ITA explained, a respondent is "rewarded" if it finds itself in a better position than if it had provided ITA with complete and accurate data. Id. at 47-48.

Consistent with its policy not to "reward" noncomplying respondents, ITA stated that it rejected all of the margins lower than 10.84 because they would have "rewarded" Northern Fortress. Then, in considering the 14.43 percent rate, ITA stated:

> Although the [14.43] dumping margin calculated for ESP transactions in the second administrative review would not have rewarded the Canadian respondent, Commerce did not select this dumping margin because it was not the respondent's final dumping margin in that review.

Id. at 49 (emphasis supplied). ITA did not reject the 14.43 percent margin because it was not the most probative of current margins. Rather, it did so because 14.43 percent was not "the respondent's final dumping margin in that review." Id.

It is clear from ITA's rejection as BIA of all rates below 10.84 percent, because they would have "rewarded" Northern Fortress, that ITA viewed the 10.84 percent rate as the most probative of current dumping margins. ITA's statement that a margin of 14.43 percent would not have "rewarded" Northern Fortress corroborates that conclusion. Accordingly, in our opinion, ITA had evidence that a margin lower than that of the original antidumping investigation was more probative of current margins. In the language of Rhone Poulenc, the "presumption" was rebutted. Thus, the selection of BIA was properly made by

reference to the 10.84 percent margin calculated for 56 percent of the goods.

It therefore follows that if the 14.43 percent rate, being the closest to the rate that ITA viewed as most indicative of current margins, was available to ITA, then in rejecting it in favor of the higher rate of 30.61 percent ITA "penalized" the Canadian respondent within the meaning of Rhone Poulenc. The first issue, then, is whether ITA's decision to reject the 14.43 percent margin on the basis that it was not a "final or overall" margin, id., was either "unsupported by substantial evidence" or "otherwise contrary to law."

ITA's determination that the 14.43 percent rate was not a "final" margin of dumping, ITA's decision is not supported by substantial evidence on the record. There is no doubt that in its second review, ITA concluded as a final determination that the margin on all of the goods it found to be dumped was 14.43 percent. There was no dumping of the remaining 71 percent of the goods. Further, in selecting a BIA rate, there is no purpose to averaging the margin of 14.43 percent on 29 percent of the goods with the zero percent margin on the balance of the goods, so as to arrive at an "overall" margin of 4.2 percent. There may be some administrative reason for doing so, but there is no purpose in referring to the average rate in the present context, other than to turn it into a margin that would fall below 10.84 percent and thereby make it low enough to reject as a rate that would "reward" Northern Fortress.

Nor does ITA's rationale for its policy withstand scrutiny. ITA stated: "The rationale for this policy is that a partial margin is analogous to a preliminary dumping margin, which usually is not indicative of a respondent's overall pricing practices." Id. That may or may not be so, depending upon the extent of the preliminary investigation. The unreliability of a preliminary dumping margin, however, is more often due to the fact that it has not been subject to the review and consideration that precedes a final determination. In any event, that rationale is not relevant to whether or not the margin can be selected as BIA. The only question in that context, apart from how closely it approximates current dumping margins, is whether the margin would "reward" a respondent for its failure to provide information. In this case, ITA has answered that question by stating that a margin of 14.43 percent would not reward Northern Fortress.

In sum, ITA was in error in stating that the 14.43 percent margin was not final, and its rationale for requiring that it be averaged with goods that were not dumped is arbitrary. Accordingly, in our view, its decision to reject the 14.43 percent margin as BIA, on that basis, is unsupported by substantial evidence on the record and contrary to law.

That raises the second question: can ITA "punish" a party which submits deficient questionnaire responses by selecting a rate as BIA that is higher than another option, both of which are viewed as sufficiently high so as not to amount to a reward?

Although the Federal Circuit in Rhone Poulenc left the question open, 899 F.2d at 1190, its reasons make it clear that the selection of a "punitive" rate as BIA would be inconsistent with the basic purpose of the statute, which it stated to be "determining current margins as accurately as possible." Id. at 1191. See Alberta Pork Producers' Marketing Bd. v. United States, 669 F. Supp. 445, 457 (CIT 1987) ("Commerce may use the best evidence rule only 'as long as the information utilized is reasonably accurate.'").

We note that ITA's regulation governing selection of BIA permits ITA to take into account, in selecting a BIA rate, when a respondent refuses to comply with requests for information or "otherwise impedes" an investigation. 19 C.F.R. § 353.37(b) (1991). However, in our opinion, that regulation ought not to be construed nor applied to subvert the basic purpose of the statute. The regulation should not be construed as authorizing ITA to use BIA to penalize a party. ITA may reject rates that it determines would "reward" a recalcitrant party. But faced with a range of margins that, to use ITA's terms, do not "reward" such a party, ITA exceeds its statutory authority if it rejects the lower margin in favor of a higher margin simply to "punish" a party. As was stated in Rhone Poulenc, the statutory purpose of using BIA is to determine "current margins as accurately as possible." 899 F.2d at 1191. That was also the principle underlying the corresponding GATT provisions on BIA. See Agreement on Implementation of Article VI of the General

Agreement on Tariffs and Trade, Preamble and Article 6:8, 31 UST 4919, TIAS No. 9650, GATT, BISD 26th Supp. 171 (1980). Finally, an interpretation that does not authorize ITA to penalize parties serves best the objectives of the FTA. Accordingly, we conclude that ITA's selection of the 30.61 percent margin as BIA in these circumstances is contrary to law.

Having reached the conclusion that it is contrary to law to have selected the "punitive" rate of 30.61 per cent, it is unnecessary to examine either Northern Fortress's non-compliance, which the ITA found to have significantly impeded the administrative review, or ITA's stated purpose to "induce Ingersoll-Rand, the current exporter of the subject merchandise, to comply with information requests in future administrative reviews." Pub. Doc. No. 119, at 49. Nevertheless, we add the following comments.

We agree with the Panel majority that seeking to induce cooperation by Ingersoll-Rand is a "dubious" justification for selection of a BIA rate. It is clear that Northern Fortress sold its business to Ingersoll-Rand, a completely separate corporation. In these circumstances, to seek to "penalize" Northern Fortress to make Ingersoll-Rand more responsive is wholly inappropriate and could be categorized as being arbitrary. Northern Fortress has no way of controlling the conduct of Ingersoll-Rand. And, if the target throughout was Ingersoll-Rand, that purpose could just as easily have been served by saying that such a penalty will be applied to Ingersoll-Rand in

the future for non-responsiveness, without applying it to Northern Fortress.

Furthermore, ITA's description of Northern Fortress's conduct is open to some question. Specifically, on remand, ITA cited the following conduct of Northern Fortress: (a) failure to comply with all four deadlines established for the questionnaire and deficiency responses during the underlying administrative review; (b) failure to provide sales data on similar merchandise during remand; (c) failure of the supplemental questionnaire responses to verify; and (d) failure to submit sufficiently accurate and complete FMV data. Id. at 50.

With respect to the first reason noted above, we adopt the comments of the Panel majority that this represents an exercise in "historical revisionism" on the part of ITA. Previously, ITA had stated that Northern Fortress provided "timely information on three-fourths of the relevant sales" and that Northern Fortress was "extremely co-operative throughout" the administrative review. Pub. Doc. No. 36, at 20177. With respect to the third reason, we again agree with the Panel majority that it is not necessary to address whether the failure of verification of Northern Fortress's constructed-value data significantly impeded ITA's investigation.

The fourth reason set out above is not a circumstance of "significantly impeding" the investigation. It is no more than stating that there was no information provided, which made it necessary to resort to BIA. That rationale would make the

regulation operative in every case and clearly it was not so intended. The regulation provides that:

> If an interested party refuses to provide factual information requested by the Secretary or otherwise impedes the proceeding, the Secretary may take that into account in determining what is the best information available.

19 C.F.R. § 353.37(b) (1991) (emphasis supplied).

The regulation is not aimed at every instance where data are not provided. It is directed to conduct in the nature of a "refusal" rather than a simple failure to provide information. ITA cannot resort to BIA, for example, where the party's failure to provide data is due to the fact that no data exist. Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1574 (Fed. Cir. 1990) ("The ITA may not properly conclude that resort to the best information rule is justified in circumstances where a questionnaire is sent and completely answered, just because the ITA concludes that the answers do not definitely resolve the overall issue presented.")

This leaves for comment the second of the four stated reasons for selecting a more adverse rate, namely, Northern Fortress's "failure to provide sales data on similar merchandise during the remand proceeding despite the existence of such data." In our opinion, the manner in which the "similar merchandise" issue arose and the position taken by Northern Fortress to the effect that there was no similar merchandise, ought not to be categorized as behavior in the nature of a "refusal" nor as "significantly impeding" the investigation.

Although the issue of whether similar merchandise existed arose in a timely manner as the Panel has decided, it was not resolved finally until it was too late for Northern Fortress to provide any such information. And, while this issue was being investigated and determined in the course of the verification proceeding, there was no suggestion that Northern Fortress's behavior had negatively affected the investigation.

Indeed, hours before the preliminary determination was made, this Panel extended the time for the remand determination, giving ITA the discretion to permit Northern Fortress to respond to ITA's requests. Yet, rather than exercise its discretion to permit that course to be taken, ITA issued the preliminary determination which of itself contained ITA's decision as to what constituted similar merchandise. At the same time, the issuance of the preliminary decision cut off the time for compliance. Although ITA had issued its usual questionnaire, which requested "similar merchandise" data as noted above, to classify Northern Fortress's conduct, in these circumstances, as a "refusal" or as "significantly impeding" the investigation is arbitrary and in our opinion not supported by substantial evidence on the record.

VI. ORDER

For the foregoing reasons, the final determination of ITA is remanded in part and affirmed in part.

A. We remand ITA's determination regarding the inclusion in its margin calculations of 64 parts allegedly of non-Canadian origin. Upon remand, ITA shall: (1) reconsider the evidence currently on record with respect to the origin of these parts; (2) if Blaw Knox promptly requests verification, conduct a verification of the information on which ITA relies in determining the origin of these parts; and (3) after affording the parties an opportunity for comment, render a revised final determination, including an explanation of its decision to include or exclude the parts in question, no later than 60 days from the date of this Opinion and Order.

B. We affirm ITA's determination in all other respects.[56]

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[56] Two matters remain for the Panel's disposition. First, Northern Fortress has requested that the Panel impose sanctions on ITA for certifying that ITA's final remand determination was served on Northern Fortress by hand, when in fact service was accomplished by requesting that counsel for Northern Fortress send a messenger to ITA to pick up a copy of the determination. Pub. Doc. No. 122. Without depreciating the importance of proper service of process, the Panel declines to impose sanctions in this instance. Northern Fortress may have been inconvenienced by this means of service, but it does not appear to have been prejudiced by it. Furthermore, flawed service of process is a commonplace of administrative practice. See, e.g., Remand Rec. Doc. No. 29 (Blaw Knox letter to ITA complaining of improper service by Northern Fortress).

Second, ITA moved, in the course of this Panel's hearing, that certain remarks by counsel for Northern Fortress be struck from the transcript on the grounds that the remarks constituted "testimony" on Northern Fortress's accounting practices. Pub. Doc. No. 162, at 181 (Mr. Giesze, referring to remarks by Mr. Ince at id. at 55-61). Unfortunately, in reviewing an administrative proceeding in which many of the principal participants were counsel, it is extremely difficult to separate the strands of factual presentation and legal argument. The Panel declines to attempt to do so here, particularly since the "testimony" concerned an issue -- the verification of constructed value -- which the Panel has determined it need not address. Therefore, the motion is denied.

Signed in the Original by:

Donald J. M. Brown
Donald J. M. Brown
Chairman

May 15, 1992
Date

Harry B. Endsley
Harry B. Endsley

May 15, 1992
Date

Simeon M. Kriesberg
Simeon M. Kriesberg

May 15, 1992
Date

Gerald A. Lacoste
Gerald A. Lacoste

May 15, 1992
Date

Wilhelmina K. Tyler
Wilhelmina K. Tyler

May 15, 1992
Date

IN THE MATTER OF:

Replacement Parts for Self-Propelled
Bituminous Paving Equipment from Canada

USA-90-1904-01

ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE
UNITED STATES-CANADA FREE-TRADE AGREEMENT

In the Matter of	
REPLACEMENT PARTS FOR SELF-PROPELLED BITUMINOUS PAVING EQUIPMENT FROM CANADA	Secretariat File No. USA-90-1904-01

Before: Donald J. M. Brown, Chairman
Harry B. Endsley
Simeon M. Kriesberg
Gerald A. Lacoste
Wilhelmina K. Tyler

October 28, 1992

BLAW KNOX CONSTRUCTION EQUIPMENT CORPORATION
and NORTHERN FORTRESS, LTD.,
Complainants

- versus -

INTERNATIONAL TRADE ADMINISTRATION,
U.S. DEPARTMENT OF COMMERCE,
Respondent

Brian F. Walsh, Barnes, Richardson & Colburn, argued for Blaw Knox Construction Equipment Corporation. With him on the brief was Robert E. Burke.

William K. Ince, Cameron & Hornbostel, argued for Northern Fortress, Ltd. With him on the brief was Michele C. Sherman.

Craig R. Giesze, Office of the Chief Counsel for Import Administration, argued for the Department of Commerce. With him on the brief were Stephen J. Powell and Berniece A. Browne.

OPINION AND ORDER OF THE PANEL

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OPINION AND ORDER OF THE PANEL

I. INTRODUCTION

This Panel was constituted pursuant to Article 1904.2 of the United States-Canada Free-Trade Agreement ("FTA") to review the final determination of the International Trade Administration, U.S. Department of Commerce ("ITA"), in the administrative review of the antidumping order on replacement parts for self-propelled bituminous paving equipment from Canada for the period September 1, 1987 through December 31, 1988. The present Opinion represents the third consideration by this Panel of aspects of that administrative review.

ITA's original determination in the administrative review, rendered on May 15, 1990, 55 Fed. Reg. 20175 (1990), was challenged both by the Canadian manufacturer, Northern Fortress, Ltd. ("Northern Fortress"), and by the U.S. petitioner in the original antidumping investigation, Blaw Knox Construction Equipment Corporation ("Blaw Knox"). Upon review, this Panel affirmed ITA's determination in part and remanded it in part. Panel Opinion and Order of May 24, 1991, Pub. Doc. No. 90 ("First Panel Opinion").[1]

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[1] References to documents in the public or proprietary record of this Panel's review of ITA's original and remand determinations are designated "Pub. Doc. No. __" or "Prop. Doc. No. __," respectively. References to documents in the public record of the original administrative review are designated "Admin. Rec. Doc. No. __." References to documents in the public record of the administrative review upon first remand are designated "First Remand Rec. Doc. No. __." References to documents in the public record of the administrative review upon second remand are designated "Second Remand Rec. Doc. No. __." The proprietary versions of certain public documents in the record of the administrative review upon second remand are designated "Prop. Second Remand Rec. Doc. No. __." Whenever proprietary documents are cited, no proprietary information is disclosed.

ITA's determination upon remand, rendered on December 15, 1991, Pub. Doc. No. 119, satisfied neither Northern Fortress nor Blaw Knox. Upon review, this Panel affirmed ITA's determination in part and remanded it in part. Specifically, the Panel directed ITA to reconsider its inclusion of Northern Fortress sales of allegedly non-Canadian goods, and to verify the information on which it relied in this regard. Panel Opinion and Order of May 15, 1992, Pub. Doc. No. 172 ("Second Panel Opinion"). Upon a subsequent motion by Northern Fortress, Pub. Doc. No. 176, the Panel further directed ITA to explain its freight-cost deductions from the United States price of exporter-sales-price ("ESP") sales and its resort to and choice of "best information available" ("BIA") for such deductions. Panel Opinion and Order on Northern Fortress Motion for Re-Examination of Panel Decision, June 19, 1992, Pub. Doc. No. 187.

In its determination upon this second remand, ITA concluded that it could verify the non-Canadian origin of 22 of the parts in question but that it could not verify the origin of the other 31 parts. Therefore, ITA resorted to BIA with respect to the origin of the latter parts, and determined that they were of Canadian origin. Consequently, the sales of these parts were, ITA determined, subject to the antidumping order. ITA noted in passing that, even if it had not resorted to BIA with respect to the 31 parts, seven of those parts were substantially transformed in -- and therefore the products of -- Canada. ITA also provided an explanation of its deductions of freight costs in ESP sales

and of its resort to and choice of BIA therefor. ITA's determination resulted in a weighted-average dumping margin of 19.50 percent. Pub. Doc. No. 198.

Northern Fortress challenges ITA's remand determination on the grounds that: (a) there was sufficient evidence on the record for ITA to verify the non-Canadian origin of the 31 parts; and (b) the seven parts specified by ITA were not substantially transformed in Canada. Therefore, Northern Fortress argues, all sales of the 31 parts should have been excluded from the scope of the antidumping order. ITA responds to these challenges by urging the Panel to affirm ITA's remand determination in all respects. Blaw Knox supports ITA's remand determination.

On the basis of the administrative record (both in the original administrative review and on remand), the applicable law, the written submissions of the parties, and the hearing held on October 9, 1992 at which all parties were heard, the Panel:

REMANDS to ITA for reconsideration of its application of the antidumping order to Northern Fortress's sales of the 31 allegedly non-Canadian parts; and

AFFIRMS ITA's determination in all other respects.

II. THE ADMINISTRATIVE PROCEEDINGS AND DETERMINATIONS

The administrative proceedings and determinations leading to this Panel's second remand are thoroughly described in the First Panel Opinion and the Second Panel Opinion, Pub. Doc. Nos. 90, 172, and will not be revisited here. Northern Fortress chal-

lenges only that aspect of ITA's second remand determination that pertains to the origin of 31 parts, so our review of the administrative proceedings and determinations upon the second remand will be likewise circumscribed.

Following the second remand by this Panel, Blaw Knox requested that ITA verify the information upon which it would base its determination concerning country of origin. Second Remand Rec. Doc. No. 2. Pursuant to the terms of the Second Panel Opinion, see Pub. Doc. No. 172, at 108, therefore, ITA proceeded to conduct a verification of the origin of the 64 parts that Northern Fortress had alleged, First Remand Rec. Doc. No. 39, at 2, to be non-Canadian. On June 5, 1992, ITA issued to Northern Fortress a verification questionnaire, requesting by June 18 information on elements of cost, production methods, manufacturing equipment used in Canada, capital expenditures, worker skills and training, and the role of any Canadian assembly process in the "ultimate functioning of the parts in question." Second Remand Rec. Doc. No. 3, at 2. On June 10, ITA added a question regarding which of the parts were "paver parts" at the time of importation into Canada; this question, too, was to be answered by June 18. Second Remand Rec. Doc. No. 4.

On June 18, Northern Fortress submitted its response to the ITA questions. Second Remand Rec. Doc. No. 6. On the same day, ITA began a two-day on-site verification of the Northern Fortress

information.[2] Following the on-site verification, ITA requested additional information to resolve certain outstanding factual questions. Second Remand Rec. Doc. Nos. 7, 12. Northern Fortress submitted further information on June 26 and July 7. Second Remand Rec. Doc. Nos. 9, 10, 13.[3]

Early in the verification, the 64 parts originally alleged to be of non-Canadian origin were winnowed down to 53: four of the parts were excluded as attachments, and seven more were dropped after Northern Fortress discovered typographical and other errors in its original list. Pub. Doc. No. 198, at 5. Of the 53 remaining parts, ITA eventually identified two categories: 22 parts as to which non-Canadian origin could be verified and 31 parts as to which non-Canadian origin could not be verified. The verifiability of the costs incurred by Northern Fortress in Canada, particularly the labor costs, marked the distinction between these two categories.

In reaching its determination that the non-Canadian origin of 22 parts could be verified and the non-Canadian origin of the other 31 parts could not be, ITA considered a body of evidence neither as complete nor as accurate as it wished. The principal form of cost documentation provided by Northern Fortress was its

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[2] For the sake of simplicity, Northern Fortress and its various predecessor companies, including Fortress Allatt, Ltd. and Allatt Limited, are referred to as "Northern Fortress." See Pub. Doc. No. 47, at 6.

[3] Upon ITA's motions, Pub. Doc. Nos. 189, 193, the Panel twice extended the time for completion of the second remand determination so that the post-verification information requests and responses could be accommodated. Pub. Doc. Nos. 191, 195.

standard "cost sheet" for each part. The cost sheet was an internal statement routinely prepared by Northern Fortress managers to track the costs of material and labor for each part. Prop. Doc. No. 207, at Exhibit A (containing sample cost sheets). The cost of materials stated in the cost sheet was based on invoices and other pricing information about the particular part. The labor cost stated in the cost sheet was based on the wage rate and assembly time required to assemble the part in Canada, plus a factory-overhead factor that was computed as a multiple of the direct labor cost. Both the assembly time and the factory-overhead factor were derived by Northern Fortress managers in consultation with the shop foreman and other employees familiar with the assembly process. Id. at Exhibit B.

The cost sheet for a particular part was revised from time to time as costs of materials changed and as assembly times and factory-overhead factors were updated. Prop. Doc. No. 223, at 10, 32. Because Northern Fortress was able to submit to ITA the most current cost sheets during the period under review, but not all of the cost sheets in use during that period, id. at 32, ITA could not determine whether the stated costs were representative of all parts sold during the period. Furthermore, Northern Fortress was unable to provide documentation of the aggregate costs of all the parts sold, so ITA could not compute an average cost for each part. Second Remand Rec. Doc. No. 14, at 6-7.

When ITA sought spot-check corroboration of the cost of materials stated in the cost sheets, Northern Fortress was able

to supply invoices that apparently satisfied ITA's verification needs. Id. at 20; Prop. Doc. No. 223, at 63. But with respect to labor costs, Northern Fortress's substantiation was not satisfactory to ITA. Northern Fortress did provide a detailed breakdown of the time required for each step of the assembly process with respect to sample parts, Prop. Doc. No. 207, at Exhibit B, as well as a written description of the assembly of each type of part, Prop. Second Remand Rec. Doc. No. 1, at Appendix A. But Northern Fortress had no time-and-motion studies to bolster the assembly-time estimates that had been made by its personnel and then entered on the cost sheets. Prop. Doc. No. 207, at Exhibit B. Furthermore, although Northern Fortress noted that the factory-overhead factor used by Northern Fortress during the period under review was little changed from the factor reported by it during a verification covering 1981-83, id.; Prop. Doc. No. 212, at 13, Northern Fortress conceded that it could no longer provide the monthly spreadsheets that Northern Fortress had available to corroborate factory overhead during the verification held in July 1991.[4]

In the absence of desired documentation on direct labor and factory overhead, ITA requested that Northern Fortress submit

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[4] Northern Fortress attributed its inability to submit certain documents requested by ITA to Northern Fortress's sale of its replacement parts business to Ingersoll-Rand Canada in December 1988 and Ingersoll-Rand's cessation of operations at the former Northern Fortress plant in late 1991. "As a practical matter," Northern Fortress advised ITA, "locating [certain requested] documents . . . at this time is impossible." Second Remand Rec. Doc. No. 9, at 3.

copies of the invoices presented to the U.S. Customs Service upon entry of certain of the parts into the United States, so that ITA could determine how Northern Fortress identified the country of origin on the invoices. ITA asked for the customs invoices pertaining to two of the 22 parts and two of the 31 parts. Second Remand Rec. Doc. No. 14, at 14. Northern Fortress was able to provide only one of the two customs invoices from the 22-part category, which invoice reported non-Canadian origin; no customs invoices from the 31-part category were provided. Id. at 8, 16-17.

Based on invoices for materials showing that the components of the 22 parts had been imported into Canada, photographs of the parts showing that the parts were imported into Canada in the same condition that they were exported to the United States, the constructed-value questionnaire response submitted on July 2, 1991 in which Northern Fortress reported no labor costs for any of the 22 parts, and the single corroborating customs invoice, ITA determined that the non-Canadian origin of the 22 parts was verified. Id. at 7-9. By contrast, ITA determined that, in the absence of time-and-motion studies substantiating the assembly-time estimates, in the absence of monthly spreadsheets substantiating the factory-overhead factor, and in the absence of any customs invoices pertaining to the 31 remaining parts, ITA could not verify the non-Canadian origin of those 31 parts. Id. at 14-19.

On July 15, ITA issued its preliminary remand determination. Second Remand Rec. Doc. No. 15. After considering comments by Blaw Knox and Northern Fortress, Second Remand Rec. Doc. Nos. 16, 17, ITA issued its final remand determination on July 30, with minor revisions from the preliminary version. Pub. Doc. No. 198. Northern Fortress timely requested panel review of ITA's final remand determination. Pub. Doc. No. 202.

III. THE STANDARD OF REVIEW

Under the FTA, an Article 1904 binational panel review of a U.S. antidumping determination is to be conducted in accordance with United States law. FTA Article 1902.1. The applicable United States law includes not only the U.S. antidumping laws -- the "relevant statutes, legislative history, regulations, administrative practice, and judicial precedents," FTA Article 1904.2 -- but also the "standard of review . . . and the general legal principles that a court of the [United States] otherwise would apply to a review of a determination of the competent investigating authority," FTA Article 1904.3. The "general legal principles" applied by a U.S. court include "standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." FTA Article 1911.

The "standard of review" requires the Panel to hold unlawful the ITA determination under review if it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988) (incor-

porated by reference in FTA Article 1911). In the First Panel Opinion, this Panel surveyed the contours of the "substantial evidence" standard. Pub. Doc. No. 90, at 14-17. Rather than repeating that survey here, the Panel incorporates it by reference.

In this remand review, the Panel applies the standard of review to the determination by ITA that it was unable to verify the origin of 31 parts that Northern Fortress alleged were not Canadian. For two reasons, a determination concerning the verifiability of information is especially difficult for a court or a panel to review. First, the process of verification is inherently fraught with the exercise of judgment: in the context of each particular investigation and with respect to each issue of fact, ITA must assess the accuracy and completeness of the body of evidence before it. Second, neither the antidumping statute nor ITA's regulations provide explicit rules for the conduct of a verification.[5] Thus, the courts have recognized that ITA has "broad discretion in verifying, scrutinizing, and interpreting the data in order to formulate its determination." Hercules, Inc. v. United States, 673 F. Supp. 454, 489 (CIT

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[5] The antidumping statute states only that ITA "shall verify all information relied upon in making [a determination in an administrative review]" and that ITA "shall use the best information available to it" if it is "unable to verify the accuracy of the information submitted." 19 U.S.C. § 1677e(b) (1988). The ITA regulations simply echo the statute: ITA "will verify all factual information [it] relies on in . . . the final results of an administrative review" and "will use the best information available whenever [it] is unable to verify the accuracy and completeness of the factual information submitted." 19 C.F.R. §§ 353.36(a)(1), 353.37(a) (1992).

1987). See PPG Indus., Inc. v. United States, 781 F. Supp. 781, 787 (CIT 1991).

Yet ITA's discretion in conducting a verification is not unbounded. As the U.S. Court of Appeals for the Federal Circuit has observed generally with respect to ITA's implementation of the antidumping laws, "[W]hile the law does not expressly limit the exercise of that discretion with precise standards or guidelines, some general standards are apparent and these must be followed." Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984).

Most importantly, ITA's determination that specific information cannot be verified must meet the test of reasonableness. See, e.g., PPG Indus., Inc. v. United States, 781 F. Supp. at 787; Hercules, Inc. v. United States, 673 F. Supp. at 485. This is not to say that this Panel may substitute its judgment for that of [ITA] when the "choice [is] between two fairly conflicting views, even though the [Panel] would justifiably have made a different choice had the matter been before [us] de novo." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Accord Mitsubishi Electric Corp. v. United States, 700 F. Supp. 538, 558 (CIT 1988), aff'd on other grounds, 898 F.2d 1577 (Fed. Cir. 1990). This Panel is required, however, if it finds that ITA's determination regarding verifiability overstepped the bounds of reasonableness, to remand that determination. See, e.g., Industrial Quimica del Nalon, S.A. v. United States, ___ F. Supp. ___, ___, 1991 WL 94273, *3, 13 ITRD 1476, 1481 (CIT May 24,

1991); Nakajima All Co., Ltd. v. United States, 744 F. Supp. 1168, 1177 (CIT 1990).

IV. THE ISSUE AND HOLDING

Whether the International Trade Administration's Decision to Use "Best Information Available" with Respect to the Origin of 31 Allegedly Non-Canadian Parts was Supported by Substantial Evidence on the Record and was Otherwise in Accordance with Law

In considering the single issue presented for review, the Panel first considers the legal standard applicable to ITA's resort to BIA and then applies that standard to ITA's consideration of the origin of the 31 parts in question.

A. The Resort to "Best Information Available": The Legal Standard

This Panel discussed the legal standard for ITA's resort to BIA in the Second Panel Opinion, Pub. Doc. No. 172, at 73-78, and in the First Panel Opinion, Pub. Doc. No. 90, at 26-31. Although those discussions focused on the resort to BIA where "a party . . . refuses or is unable to produce information required in a timely manner and in the form required, or otherwise significantly impedes an investigation," 19 U.S.C. § 1677e(c) (1988), the Panel noted that the unverifiability of information is an independent ground for using BIA. Pub. Doc. No. 172, at 74 n.46 (citing 19 U.S.C. § 1677e(b) (1988)). In its second remand determination, ITA based its use of BIA on its inability to verify certain information concerning the origin of the 31 parts

in question.[6] If ITA reasonably determined that information on which it needed to rely could not be verified, then its resort to BIA was lawful under the legal standards previously articulated by this Panel. We therefore turn to a consideration of the reasonableness of ITA's determination that the origin of the 31 allegedly non-Canadian parts could not be verified.

B. The Consideration of the Origin of the 31 Parts

The Panel reviews ITA's consideration of the origin of the 31 allegedly non-Canadian parts in four steps. First, we review ITA's stated criteria for determining the country of origin. Second, we review ITA's satisfaction with the information relevant to most of the stated criteria. Third, we analyze the application to the record evidence of the one criterion on which ITA principally focused: the value-added criterion. Fourth, we analyze the application to the record evidence of the additional criterion that ITA applied to seven of the 31 parts: the substantial transformation criterion.

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[6] ITA did note, as "additional evidence" supporting its resort to BIA, that Northern Fortress was "less than cooperative in supplying [the] requested information." Pub. Doc. No. 198, at 21-22. In its brief to the Panel, ITA expanded on this point, characterizing Northern Fortress's behavior as "imped[ing]" the investigation and therefore as "additional grounds" for resorting to BIA. Pub. Doc. No. 213, at 45, 47. At the hearing before this Panel, however, in response to specific questions by Panelist Lacoste, ITA declined to state that the conduct of Northern Fortress was an independent ground for ITA's resort to BIA, saying that if the determination regarding verifiability of the country of origin were remanded, ITA would have to consider whether the conduct of Northern Fortress would be "grounds on its own" for resorting to BIA. Prop. Doc. No. 223, at 94. Therefore, the Panel focuses solely on whether the verifiability of the information submitted by Northern Fortress supports ITA's use of BIA.

1. The Criteria for Determining Country of Origin

In its remand determination, ITA identified seven criteria by which it determines whether finishing or assembly operations, such as those performed by Northern Fortress on the 31 parts in question, are "sufficient to confer country-of-origin status upon the imported merchandise." Pub. Doc. No. 198, at 14-15 (footnote omitted). Northern Fortress did not dispute these criteria. Prop. Doc. No. 223, at 33. ITA's seven criteria are as follows:

> (1) whether the finishing or assembly operations are "extremely important to the technical performance" of the imported merchandise, (2) whether these operations are "sophisticated" and involve an "extremely high degree of technical precision," or whether such operations involve simple, rudimentary procedures, (3) whether the finishing or assembly operations require a "substantial capital outlay," (4) whether such operations add significant value to the imported merchandise, (5) whether the foreign exporter undertook the finishing or assembly operations to circumvent the relevant antidumping order or finding, (6) whether the assembly or finishing operations have changed the "essence" of the imported merchandise -- in other words, whether such operations have effected a "substantial transformation" of the merchandise at issue, and (7) whether the assembly or finishing operations have changed the end use of the imported merchandise.

Pub. Doc. No. 198, at 15-16 (footnotes omitted). For purposes of our analysis, this Panel considers the sixth and seventh criteria to be two aspects of the same "substantial transformation criterion": the substantial transformation test entails consideration of whether a processing operation alters the essential "character" or the ultimate "use" of the product in question. Anheuser-Busch Ass'n v. United States, 207 U.S. 556, 562 (1908);

Superior Wire Co. v. United States, 867 F.2d 1409-10 (Fed. Cir. 1989).

Significantly, ITA stated in its remand determination that no one of the seven specified criteria "is dispositive or determinative" of the country of origin. Pub. Doc. No. 198, at 16. Indeed, none of the four antidumping determinations chiefly cited by ITA to demonstrate its use of the seven criteria actually uses all seven criteria. Rather, each determination rests on only two, three, or four criteria. See Limousines from Canada, 55 Fed. Reg. 11036, 11040 (1990) (finding origin of limousines to be the country in which conversion of basic chassis occurs, because conversion is "sophisticated process" that "more than doubles the value" of the base vehicle and that transforms it into "a new and different article of merchandise"); Photo Albums and Filler Pages from Korea, 54 Fed. Reg. 13399, 13399-400 (1989) (finding origin of photo albums to be the country in which album pages are sourced, because pages are "essence" of album, assembling pages in binder is "simple" operation, and filler pages have no alternative use than to be assembled into photo albums); 3.5" Microdisks and Coated Media Thereof from Japan, 54 Fed. Reg. 6433, 6434-35 (1989) (finding origin of microdisks to be the country in which coated media are finished into microdisks, because finishing process is "extremely important to the technical performance" of the microdisks, the finishing process requires "a substantial capital outlay and an extremely high degree of technical precision," the finishing operations employ

"highly trained technical personnel," the value of the media represents "a small fraction of the value of the microdisk," and the finishing operations cannot be "set up and undertaken easily in any country"); EPROMs from Japan, 51 Fed. Reg. 39680, 39692 (1986) (finding origin of EPROMs to be the country in which wafers or dice are fabricated rather than where they are encapsulated or assembled into EPROMs, because processed wafer or dice is the "essential active component" of an EPROM, intended use of merchandise is not changed by the assembly process, encapsulation is "not a sophisticated process," and assembly "is the mechanical stage which can be accomplished relatively easily in any country").[7] In accordance with this consistent administrative practice, no one criterion should be dispositive of the country of origin of the 31 parts in question here.

2. The Satisfaction of Most of the Criteria

Of the seven criteria identified by ITA as relevant to its consideration of the origin of the allegedly non-Canadian parts, ITA concluded that, on most of the criteria, the record evidence supported non-Canadian origin. Specifically, ITA stated,

> The record does establish that Northern Fortress's finishing or assembly operations undertaken in Canada were not "extremely important to the technical performance" of the imported merchandise, did not involve an "extremely high degree of technical precision," but rather involved simple,

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[7] At the hearing, the Panel asked ITA, Northern Fortress, and Blaw Knox to supplement these citations with any other judicial or administrative rulings concerning ITA's country-of-origin criteria, Prop. Doc. No. 223, at 5-6, but no directly relevant rulings could be found. See Pub. Doc. Nos. 225, 226.

> rudimentary procedures, and did not require "substantial capital outlay."

Pub. Doc. No. 198, at 21 n.29. Thus, the first three of the seven criteria identified by ITA supported a determination that the 31 parts were not of Canadian origin.

Furthermore, there is no record evidence that the fifth of ITA's seven criteria -- whether the foreign exporter undertook the finishing or assembly operations to circumvent the relevant antidumping order or finding -- is applicable to the origin of the 31 parts. Indeed, after identifying this criterion as one that it ordinarily considers, ITA made no reference to this criterion in the balance of the remand determination.

In sum, with the exception of the fourth criterion -- the value-added criterion -- and the sixth and seventh criteria -- collectively, the substantial transformation criterion -- all of ITA's criteria supported Northern Fortress's allegation of non-Canadian origin. Given ITA's practice of relying on only a few of the criteria in each of its determinations of country of origin, ITA's seeming insistence on applying all but the fifth of the criteria in the instant case appears inconsistent with its past verifications. If it is ITA's policy that "[n]o one factor is dispositive or determinative," id. at 16, then ITA could reasonably have rested its country-of-origin determination solely on the four criteria satisfied by the record evidence. Perhaps if ITA had verified seriously adverse information with respect to one of the remaining criteria, it might reasonably have overridden the weight of verified evidence supporting non-

Canadian origin. But, as the next two sections of this Opinion conclude, the record evidence on the value-added and substantial transformation criteria was not seriously adverse to Northern Fortress's allegation of non-Canadian origin.

3. The Application of the Value-Added Criterion

The crux of the value-added criterion, as stated by ITA, is whether the Canadian operations of Northern Fortress added "significant value" to the components imported into Canada. In assessing whether the Canadian value-added was significant, ITA focused on two categories of value: the cost of the materials added in Canada, and the cost of the labor employed in Canada.

With respect to the cost of materials, Northern Fortress presented its standard cost sheets indicating the costs of materials associated with sales of each of the 31 parts during the period of investigation. Based on these cost sheets and on a spot-check of supporting invoices, ITA was able to corroborate the costs of materials stated in the cost sheets. Second Remand Rec. Doc. No. 14, at 20. Although ITA noted that it lacked the total cost of materials for all products sold during the period of investigation, Pub. Doc. No. 198, at 18, ITA did not seem to rely on deficiencies in the information on the cost of materials in ruling on the country-of-origin question, id. at 19-20. Indeed, at the hearing before the Panel, ITA stated in response to a question by Panel Chairman Brown that it had "[a]bsolutely" been able to verify Northern Fortress's costs of materials. Prop. Doc. No. 223, at 63.

With respect to labor costs, Northern Fortress presented its standard cost sheets indicating the labor costs associated with sales of each of the 31 parts during the period of investigation. Although ITA had verified the wage rate during the first remand determination, First Remand Rec. Doc. No. 14, at 10, and although Northern Fortress supplied certain information to supplement and substantiate the cost sheets, ITA found that Northern Fortress's explanation of the assembly time was "sketchy," and that its inability to provide factory-overhead documentation, such as monthly spreadsheets, rendered the labor costs unverifiable. Pub. Doc. No. 198, at 19-20.

The Panel does not doubt that additional corroborative evidence of labor costs would have been reassuring as to the accuracy of the cost sheets. But in evaluating the reasonableness of ITA's conclusion of non-verifiability, it is critical that the issue be framed properly. The purpose of the verification conducted by ITA was not to determine the cost of production of Northern Fortress's products, but rather to determine whether "significant" value was added in Canada. Although quite precise information may be required to establish a specific cost of production, the information required to verify whether "significant" value was added may be more relative and approximate.

In this regard, the Panel notes that the assembly-time estimates and the factory-overhead factor were computations made by experienced personnel in accordance with longstanding company practice and in the ordinary course of business, bolstering their

credibility as reasonably reliable, if not precise, financial records. Furthermore, even if ITA were to suspect -- though there was no record evidence to substantiate the suspicion -- that Northern Fortress systematically understated the Canadian labor costs, the cost sheets indicate that only a sizeable increase in the Canadian labor costs would have made them a significant portion of the final value of the products in question. The written descriptions of the assembly process of each type of part and the detailed time estimates regarding sample parts may have been "sketchy" in comparison with formal time-and-motion studies, but they imparted sufficient information to corroborate the essential point: whatever might have been the exact assembly-time requirements for a particular part, the labor component of the assembly process did not add "significant" value to the final product.

The latter conclusion is consistent with ITA's treatment of the 22 parts as to which it verified the information on the value-added criterion. Information on the assembly time and factory overhead associated with these 22 parts was no more precise or substantial than the corresponding information pertaining to the 31 other parts. Northern Fortress could no more "prove" that the labor costs were zero for all of the 22 parts than it could "prove" that the labor costs were -- to use hypothetical numbers -- exactly $12.20 or $15.40 for any particular one of the 31 parts. ITA itself noted that it was "unable to verify the total cost of any of the [22] parts." Pub. Doc.

No. 213, at 8. Nevertheless, ITA "was still able to verify that each of these [22] parts [was] of non-Canadian origin." Id.

ITA verified the Canadian labor costs -- or lack of Canadian labor costs -- of the 22 parts by looking beyond the cost sheets to other corroborating evidence: written descriptions of the assembly process, photographs of the parts, cost information submitted by Northern Fortress in prior verifications. Yet these same types of information were available with respect to the other 31 parts in question.[8]

Thus, in weighing the evidence on the Canadian labor costs of the 31 parts, ITA seemed to lose sight of the realities of verification, realities that it had taken into account in weighing the evidence concerning the other 22 parts. Verification is not intended to be an exacting or exhaustive process. Monsanto Co. v. United States, 698 F. Supp. 275, 281 (CIT 1988). Information is never as comprehensive nor data as readily reconciled as would be ideal, particularly with the passage of time. See Industrial Quimica del Nalon, S.A. v. United States, ___ F. Supp. ___, _____, 1991 WL 94273, *5-*6, 13 ITRD 1476, 1481 (CIT May 24, 1991) (ITA unreasonably disregarded data simply

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[8] Indeed, the only material distinction between the types of information available regarding the 22 parts and those available regarding the 31 parts is that, with respect to one of the 22 parts, Northern Fortress was able to provide, at ITA's request, an invoice submitted to the U.S. Customs Service in conjunction with one U.S. sale. Northern Fortress was unable to provide any customs invoices for the 31 parts. Since a customs invoice sheds no light on the labor costs associated with the Northern Fortress assembly process, the Panel finds the existence of this single invoice to be insufficient grounds for drawing the line between verifiability and non-verifiability.

because original calculations could not be exactly reproduced four years later). Invariably, the state of the record leaves some questions unanswered, some doubts unresolved.

ITA's task is to consider the entire record, and to determine whether there is substantial evidence supporting a determination of verifiability. See Smith Corona Corp. v. United States, 771 F. Supp. 389, 398 (CIT 1991) (ITA must consider the record as a whole, including the results of any prior administrative reviews that bear on a present issue); Nakajima All Co., Ltd. v. United States, 744 F. Supp. 1168, 1177 (CIT 1990) (ITA should not have concluded that sales were below cost given evidence verified in previous investigation); Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1114, 1116-17 (CIT 1989) (upholding ITA's discounting of invoice evidence in light of entire record); Agrexco, Agricultural Export Co., Ltd. v. United States, 604 F. Supp. 1238, 1244, 1245 (CIT 1985) (upholding ITA's reliance on oral statements). Considering the record as a whole, the Panel concludes that monthly spreadsheets, time-and-motion studies, and customs invoices should not have become "do-or-die" requirements of verification under the circumstances of this administrative review. See Industrial Quimica del Nalon, S.A. v. United States, ___ F. Supp. at ___, 1991 WL 94273 at *3, 13 ITRD at 1479 (ITA's "desire to obtain documentation should not fly in the face of established business practice, and should not be transformed into a do-or-die

requirement").[9] Despite the deficiencies in the information available from Northern Fortress, there was compelling evidence on the record that the Canadian operations of Northern Fortress did not add "significant" value to the final products. ITA's denial of verifiability, therefore, was unreasonable.

4. The Application of the Substantial Transformation Criterion

Apart from the value-added criterion, ITA found only one other criterion regarding country of origin that supported, in its view, a finding of Canadian origin. That criterion, which ITA stated applied to only seven of the 31 parts, was the substantial transformation criterion. Pub. Doc. No. 198, at 21 n.29. ITA stated that with respect to seven parts, the Canadian operations of Northern Fortress "changed the 'essence' of the parts imported into Canada . . . from that of constituent compo-

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[9] The Panel notes that the Court of International Trade has held repeatedly that a party subject to an administrative review discards relevant documents at its peril. See Sharp Corp. v. United States, _____ F. Supp. _____, _____, 1992 WL 175734, *8 (CIT July 13, 1992) (resort to BIA upheld where respondent discarded documents); Koyo Seiko Co., Ltd. v. United States, 796 F. Supp. 517, 525 (CIT 1992) (despite extraordinary delay by ITA in completing investigation, respondent's failure to retain documents was grounds for use of BIA); NSK Ltd. v. United States, 794 F. Supp. 1156, 1160 (CIT 1992) (respondent's inability to produce 10 years of cost records due to policy of discarding records after 5-6 years was proper basis for resort to BIA). The Panel is not prepared to rule that a company no longer in business should be exempted from the requirement that relevant documents be retained, particularly where, as in the instant case, the company -- Northern Fortress -- is the one requesting an administrative review. The Panel thus does not consider it unreasonable for ITA to have demanded documents of Northern Fortress; the Panel, rather, considers unreasonable ITA's weighing of the evidence -- documentary and otherwise -- that was submitted to it.

nents parts to a finished replacement part with an ultimate end use different from that of its constituent components." Id. Furthermore, ITA determined, the assembly operations "added significant value" to the seven parts. Id. These factors, ITA concluded, demonstrated that "a 'substantial transformation'" had occurred in Canada, resulting in a "'new and different article'" of commerce. Id.

After reviewing the entire record, the Panel determines that ITA's application of the substantial transformation criterion was unreasonable. The components imported into Canada for assembly into the seven parts in question were invariably the principal, or essential, components of the parts. Indeed, in the case of the parts for which the costs of Canadian materials were the highest, those costs were attributable not to principal components sourced in Canada but to numerous small components with nominal unit costs. Compare Prop. Second Remand Rec. Doc. No. 1 (schedule of parts) with id. at Appendix A, page 4 (description of assembly of type of part). It does not appear from the record that the principal components for these seven parts had any ultimate use other than as principal components of the parts themselves. See id. at Appendix A, page 4 (describing components); id. at Appendix B (photographs of part types G and H). Nor does the value added in Canada during the assembly of these seven parts appear to the Panel to be "significant" for purposes of determining the country of origin, even acknowledging that Northern Fortress's cost data are estimations. Compare Limou-

sines from Canada, 55 Fed. Reg. 11036, 11040 (1990) (conversion of base vehicle to limousine "more than doubles the value" of the base vehicle) with Second Remand Rec. Doc. No. 1 (schedule of parts, identifying the costs of Canadian materials and labor for each of the seven parts and total costs for each).

Finally, all of the other country-of-origin criteria cited by ITA -- the unimportance of the Canadian assembly operations to the technical performance of the parts, the "simple, rudimentary" procedures used in assembly, and the lack of a substantial capital investment in the operations -- militate against a finding of Canadian origin for the seven parts. For all of these reasons, the Panel cannot affirm ITA's suggestion that the country of origin of these seven parts is Canada.

5. Conclusions

ITA's determination that the country of origin of the 31 allegedly non-Canadian parts could not be verified is not supported by substantial evidence. Of the seven criteria identified as relevant by ITA, most supported a finding of non-Canadian origin. The value-added criterion, which alone should not have been dispositive, was relied on almost exclusively by ITA in reaching its conclusion of non-verifiability. Yet, even with respect to that single criterion, the record evidence cannot reasonably be said to preclude verification. As for the substantial transformation criterion, which ITA suggested would support the Canadian origin of seven parts, the record evidence falls well short of substantiating that conclusion. On the

record as a whole, therefore, the Panel considers ITA's determination of non-verifiability to be unreasonable.

V. ORDER

For the foregoing reasons, the final determination of ITA is remanded in part and affirmed in part.

A. We remand ITA's determination regarding the application of the antidumping order to Northern Fortress's sales of the 31 parts allegedly of non-Canadian origin. Within 30 days of the date of this Opinion, ITA shall render a revised final determination consistent with this Opinion.

B. We affirm ITA's determination in all other respects.[10]

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[10] One matter remains for the Panel's disposition. ITA moved to strike from the record of this remand review a document submitted by Northern Fortress. Pub. Doc. No. 220. In the course of the hearing, Northern Fortress agreed to withdraw the document. Prop. Doc. No. 223, at 104-05. Therefore, the Panel dismisses ITA's motion as moot. The Panel did not consider the withdrawn document in reaching its determination in this remand review.

Signed in the Original by:

Donald J. M. Brown
Donald J. M. Brown
Chairman

October 28, 1992
Date

Harry B. Endsley
Harry B. Endsley

October 28, 1992
Date

Simeon M. Kriesberg
Simeon M. Kriesberg

October 28, 1992
Date

Gerald A. Lacoste
Gerald A. Lacoste

October 28, 1992
Date

Wilhelmina K. Tyler
Wilhelmina K. Tyler

October 28, 1992
Date