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.

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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 remand, of any information used to calculate third-country sales

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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.)

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 original investigation, resulting in weighted-average dumping

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

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 period of review, September 1987 through

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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.

> 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 entire 16-month period. Admin. Rec. Doc. No. 16. These two

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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.

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) (1988). The new regulations omitted these two provisions and

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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).

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 construct a value "for those parts that have no similar home

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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).

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

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.

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 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.

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.

> Third, [Northern Fortress's] response to our May 22, 1989, deficiency letter was untimely.
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> 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.
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> 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/

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

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

"[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 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).

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 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.

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.

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 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.

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 Fortress actually paid the FST. If, upon such verification, ITA should determine that Northern Fortress did not pay the FST, then

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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.

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 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
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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), aff'd, 899 F.2d 1185 (Fed. Cir. 1990) (party's failure to provide information on computer tape justified ITA resort to BIA: the

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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").

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

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.

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

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 general effective date of the new regulations was established in

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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.")

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 regulation in effect at the time, which stated:

> Whenever information cannot be

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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/

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> 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.

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

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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.

32038 (1987) (ITA accepted technically untimely questionnaire response because "financial difficult[ies]" delayed preparation 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

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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).

for 15 days after receipt of ITA's letter, or about June 6, 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

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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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construction, Panel 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]

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.

into account in determining what is the best information available." 19 C.F.R. § 353.37(b) (1989).32/

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/

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

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

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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. 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).

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, 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

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

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.

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.
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> * * *
>
> [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

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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).

respondent from evidence on the record. Absent "probative evidence of current margins," however, ITA's presumption was sustained. Id.36/

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

(continued...)

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 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

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(...continued)

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.

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, 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

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 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

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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").

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 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.

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).

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.