ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

In the Matter of:	)	
BRASS SHEET AND STRIP FROM CANADA	)	Secretariat File No: USA-CDA-98-1904-03

DECISION OF THE PANEL
July 16, 1999

Appearances:

David A. Harquist, Jeffrey S. Beckington, and Mary T. Staley,
Collier, Shannon, Rill & Scott, P.C., on behalf of Hussey Copper, Ltd. et al.

Ryan Trainer and Carrie A. Simon,
Rogers & Wells, on behalf of Wolverine Tube (Canada) Inc.

Steven J. Powell, Berniece A. Browne, Linda Chang, and Mildred Stewart
Office of the Chief Counsel for Import Administration, on behalf of the Investigating Authority, the United States Department of Commerce.

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I. INTRODUCTION

This Panel has been constituted pursuant to Article 1904(2) of the North American Free Trade Agreement. The Panel was appointed to review the final results of the administrative review issued by the U.S. Department of Commerce's International Trade Administration [hereinafter the "ITA"] in *Certain Brass Sheet and Strip from Canada.*[1]

In those final results, which covered U.S. imports of the subject merchandise during 1996, the ITA determined that the weighted average dumping margin was 0.67%. Because the margin was more than *de minimis* (*i.e.*, more than 0.50%), the ITA also decided not to revoke the antidumping order on the subject merchandise.

On August 14, 1998, Wolverine Tube (Canada) Inc. [hereinafter "Wolverine"], a Canadian producer and exporter of the subject merchandise, and a coalition representing the United States brass industry [hereinafter the "U.S. Industry"] filed separate complaints regarding the final results.

The only issue raised by Wolverine[2] to be decided is whether the ITA, in calculating a dumping margin above the *de minimis* level, erred in using a simple average annual cost of production ("COP") rather than a weighted average COP. This will be referred to as the "calculation issue".

Wolverine's calculation issue raises a number of questions which may be subsumed under the broad heading of whether the ITA, in conducting its administrative review, fulfilled its duty of fairness. Wolverine

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1 *Final Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke in Part*, 64 Fed. Reg. 33,037 (June 17, 1998).

2 Wolverine initially alleged two errors by the ITA. During the Panel proceedings, it later abandoned one issue: whether the ITA erred in excluding the grain size and purity of its brass products from the product comparison criteria.

alleges in this regard that the ITA breached three procedural requirements mandated by the Tariff Act. These issues are:

> Did the ITA breach U.S.C. §1677(m)(d) by failing to inform Wolverine of perceived deficiencies in its submitted data, and failing to allow Wolverine to remedy or explain the deficiency?
>
> Did the ITA breach U.S.C. §1677(e)(b) by making an inference adverse to the interests of Wolverine without first finding that Wolverine had failed to cooperate by not acting to the best of its ability to comply with a request for information from the ITA?
>
> Did the ITA breach U.S.C. §1677(m)(e) by declining to consider information submitted by Wolverine that was timely, verified, and could be used without undue difficulty?

The U.S. Industry has raised the following issues related to the calculation issue:

> Was it proper for the ITA to have used a "simple" average COP, rather than one weighted by production quantities?
>
> Did Wolverine fail to exhaust its administrative remedies by not having objected to the simple average COP after it was used in the preliminary results?
>
> Is the ITA precluded by the doctrine of administrative finality from now asserting that it had committed an error in using a simple average COP?

The ITA, as will be explained further, has now before this Panel taken the position that its calculation of COP on a simple average basis is not supported by substantial evidence or is not in accordance with law.

The U.S. Industry also raises the following alleged errors by the ITA:[3]

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[3] The U.S. Industry also raised, and briefed, an argument that the ITA erred in making an adjustment to normal value for Wolverine's "quantity adder". The U.S. Industry dropped

Did the ITA improperly fail to add Wolverine's Canadian indirect selling expenses to the COP?

Did the ITA improperly allow Wolverine to decrease its per unit COP for "nontoll" sales by allowing an offset to its costs based on toll sales (which are nonsubject merchandise).

For the reasons more fully set forth below, and on the basis of the administrative record, the applicable law, the written submission of the ITA, Wolverine, and the U.S. Industry, and the Panel hearing held in Washington, D.C. on April 16, 1999, the Panel remands in part, and affirms in part, the ITA's Final Results.

II. BACKGROUND

On January 12, 1987, the ITA published an antidumping order on brass sheet and strip from Canada. On March 3, 1997, the ITA initiated its tenth annual review of the underlying dumping order.[4] The period under review was January 1 through December 31, 1996. Wolverine was the sole manufacturer or exporter involved in the review. Wolverine had requested the review and had requested revocation of the antidumping order.

On March 7, 1997, the ITA transmitted its first questionnaire to Wolverine. Wolverine responded on April 28, 1997, including sales and cost of production ("COP") data. It also distinguished between product made from "roll" and "as cast" material. For quarters when certain product was not produced, Wolverine reported the production quantity as "zero", although it did report costs for those quarters.

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this issue at the Panel hearing and, accordingly, it is no longer part of this review and will not be addressed by the Panel.

[4] *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 62 Fed. Reg. 9413, 9414 (1997).

Wolverine also reported Canadian sales for the "window" periods (the last quarter of 1995 and the first quarter of 1997).

On July 15, 1997, the ITA issued a supplemental questionnaire to Wolverine.[5] Question 15 instructed Wolverine to:

> Delete source as an element of the product control numbering system and submit a single weighted average cost for each unique product as represented by a specific matching control number. Adjust the cost of unit production.

The ITA never specifically stated that it required Wolverine to report an average annual COP as opposed to quarterly COP data. Wolverine apparently did not interpret Question 15 as requiring the calculation of average *annual* COP and continued to provide quarterly data in response to Commerce's request.

Questions 5 and 15 of the supplemental questionnaire also asked Wolverine to either eliminate the roll/as-cast distinction or re-classify its product categories using physical characteristics of the finished merchandise. Wolverine re-classified its products according to brass purity and relative grain size: the net effect of which was the same as the previous roll/as-cast distinction.

During December 1997, the ITA conducted sales and cost verifications at Wolverine's facilities. As part of the verification, the ITA verified the quarterly costs for one product that was not produced in some quarters and for which Wolverine had reported "zero" production in those quarters.

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[5] *Letter from Tom Futtner to Carrie Simon,* 1-3 (July 15, 1997)(document does not appear in the administrative record given to this Panel; attached as Exhibit 1 to Wolverine's Reply Brief).

The ITA published its preliminary results of the review on February 9, 1998.[6] The ITA preliminarily determined that Wolverine's margin of dumping for the 1996 period was 0.42% and therefore was *de minimis*. The ITA, based, in part, on this *de minimis* dumping margin, tentatively determined to revoke the antidumping order.

Shortly afterwards, the ITA released its analysis memorandum and computer calculations underlying the Preliminary Results. In the Preliminary Results, the ITA had stated that it disagreed with Wolverine's distinction between relative grain sizes. However a review of the computer program language showed that Commerce failed to eliminate this distinction from its calculations. The ITA had not merged or "collapsed" the COPs for ultra fine grain and other products. With the "uncollapsed" data, the ITA had averaged together the separately reported COPs for each of the product codes. In calculating this average, the ITA used a simple average annual COP for the four quarters of data.

In April 1998, Wolverine and the U.S. Industry provided written submissions to the ITA on the Preliminary Results and a public hearing was held shortly thereafter. Both Wolverine and the U.S. Industry noted that Commerce in its calculations had, contrary to its stated intention, failed to ignore the ultra fine grain distinction.

On June 9, 1998 the ITA released its analysis memorandum and computer calculations underlying the Final Results. These documents reveal that the ITA had now eliminated the distinction by "collapsing" the COPs for ultra fine grain and other products. However, in the Final Results, the ITA did not weight average the COPs of the collapsed data; it again used a simple average.

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[6] *Brass Sheet and Strip from Canada, Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Revoke Order,* 63 Fed. Reg. 6519 (1998).

The final results of the tenth review were published on June 17, 1998.[7] The ITA determined that Wolverine's dumping margin was 0.67% - above *de minimis* - and, accordingly, did not revoke the order with respect to imports of the subject merchandise from Wolverine.

On June 18, 1998 Wolverine submitted a request that the ITA correct what it described as a clerical error by the ITA. One week later, the U.S. Industry responded to Wolverine's request. On July 14, 1998, the ITA issued a memorandum (dated June 24, 1998) responding to Wolverine's request for a correction. In that memorandum, the ITA purported to explain what it had done.

Wolverine and the U.S. Industry submitted separate Complaints before this Panel. On August 28, 1998, the ITA submitted its Notice of Appearance in which it admitted no errors had been committed in the Final Results. Nearly two months later, the ITA amended the "Admission" portion of that Notice of Appearance as follows:

> With respect to Count Two of the Complaint submitted by Wolverine Tube (Canada), Inc., the Department erred in utilizing a *simple* average cost of production, rather than a *weighted* average cost of production, in calculating its Final Results of Administrative Review.[8]

The U.S. Industry moved for leave to add the following allegation to its Complaint: That the ITA committed an error in "admitting" that it had improperly relied on a "simple", rather than "weighted", average in calculating Wolverine's normal value. On January 28, 1999, the Panel denied the U.S. Industry's motion

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7 *Brass Sheet and Strip from Canada: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Order in Part*, 63 Fed. Reg. 33,037 (1998).

8 *Letter to James R. Holbein from Linda S. Chang, Esq.*, ¶5 (October 16, 1998)(emphasis in original).

to amend.

Wolverine filed a *Notice of Motion For Remand* on November 2, 1998. Wolverine sought an immediate remand, without a hearing, of the contested determination back to the ITA for correction of the admitted error and for consideration of its request for revocation. Wolverine also asserted that, once the ITA's simple averaging error is corrected, its margin would be 0.42% - below the *de minimis* level. In its Order of January 28, 1999, the Panel denied Wolverine's motion for an immediate remand and set a briefing and hearing schedule.

Briefs were submitted and oral arguments were heard at the public hearing on April 16, 1999.

III. **STANDARD OF REVIEW**

Both Wolverine and the U.S. Industry, as well as the ITA, agree that the applicable standard of review is specified by NAFTA Articles 1904(2)–(3) and Annex 1911 of the NAFTA. Chapter 19 review panels are directed by Article 1904(3) to apply:

> the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

These provisions therefore require that an Chapter 19 panel apply the standard of review and "general legal principles" which a federal court in the United States would otherwise apply in reviewing an ITA antidumping determination.[9]

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[9] Annex 1911 defines such "general legal principles" as, for example, "standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies."

Annex 1911 defines the standard of review to be applied in a Panel review as "the standard set forth in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended." Section 516A(b)(1)(B), in turn, defines that standard of review as:

> The court shall hold unlawful any determination, finding, or conclusion found...to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C.A. §1516a(b)(1)(B).

Accordingly, the standard of review for the instant proceeding includes the "substantial evidence" test as set out in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended (19 U.S.C. §1516a(b)(1)(B)).

The Panel must, therefore, affirm the ITA's Final Results "unless we conclude that the ITA determination is not supported by substantial evidence or is otherwise not in accordance with law." *PPG Industries, Inc. v. United States,* 978 F.2d 1232, 1236 (Fed. Cir. 1992).

The U.S. Supreme Court has interpreted "substantial evidence" as follows:

> Substantial evidence is more than a mere scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"...and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from is one of fact for the jury.[10]

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10 *NLRB v. Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300 (1939) *quoting from Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938). *See, also,* the Supreme Court's decisions in *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951); and *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938).

The Court of Appeals for the Federal Circuit has applied the same interpretation of "substantial evidence" in reviewing antidumping determinations.[11]

Furthermore, substantial evidence constitutes "something less than the weight of the evidence." *Consolo v. Federal Maritime Commission,* 383 U.S. at 619-20 (1966). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."*Matsushita Electric Industrial Co., Ltd. v. United States,* 750 F.2d at 933 (Fed. Cir. 1984)(*quoting Consolo v. Federal Maritime Commission,* 383 U.S. at 619-20); and *PPG Industries, Inc. v. United States,* 978 F.2d at 1237 (Fed. Cir. 1992).[12]

It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence

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11 *E.g., Matsushita Electric Industrial Co., Ltd. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) and *Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556, 1562 (Fed. Cir. 1984).

The U.S. Court of International Trade employs this definition as well. *E.g., Koyo Seiko Co., Ltd, v. United States,* 810 F.Supp. 1287, 1289 (CIT 1993); *Tianjin Machinery Import & Export Corp. v. United States,* 806 F.Supp. 1008, 1013 (CIT 1992); *Tehnoimportexport, UCF America Inc. v. United States,* 783 F.Supp. 1401, 1404 (CIT 1992); *Minebea Co., Ltd. v. United States,* 782 F.Supp. 117, 119 (CIT 1992) *aff'd.* 984 F.2d 1178 (Fed. Cir. 1993); and *Armco. Inc. v. United States,* 733 F.Supp. 1514, 1518 (CIT 1990).

12 *Also, Zenith Electronics Corp. v. United States,* 812 F. Supp. 228, 231 (CIT 1993); *Minebea Co. Ltd. v. United States,* 782 F. Supp. at 119 (CIT 1992); *Torrington Co. v. United States,* 745 F. Supp. 718, 723 (CIT 1990) *aff'd.* 938 F.2d 1276 (Fed. Cir. 1991); and *American Spring Wire Co. v. United States,* 590 F Supp. 1273, 1276 (CIT 1984) *aff'd sub nom. Armco, Inc. v. United States,* 760 F.2d 249 (Fed. Cir. 1985).

for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Koyo Seiko Co. Ltd. v. United States,* 810 F. Supp. 1287, 1289 (CIT 1993) *quoting Timken Co. v. United States,* 699 F.Supp. 300, 306 (1988) aff'd, 894 F.2d 385 (Fed. Cir. 1990); and *Can-Am Corp. v. United States,* 664 F.Supp. 1444, 1450 (CIT 1987).

Panel review of an anti-dumping determination is to be conducted "upon the administrative record." Article 1904(2).[13] Therefore, the Panel is not to review the agency determination *de novo. Cabot Corp. v. United States,* 694 F. Supp. 949, 952-53 (CIT 1988); *Ceramica Regiomontana, S.A. v. United States,* 636 F. Supp. 961, 966 (CIT 1986) *aff'd.* 810 F.2d 1137 (Fed. Cir. 1987); *Luciano Pisoni Fabbrica Accessori v. United States,* 640 F. Supp. 255, 256 (CIT 1986).

The requirement that a review be "on the record" means that a Panel's review must be limited to only "information presented to or obtained by [the ITA]...during the course of an administrative proceeding...." 19 U.S.C. §1516a(b)(2)(A)(i). Consideration of information which was not presented to, or obtained by, the ITA during the course of an administrative review would be beyond the jurisdiction of this Panel. As will later become clear, this requirement is of some real significance to the disposition of this matter.

Neither the Court of Appeals for the Federal Circuit or the Court of International Trade ("CIT") "may ... substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it

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[13] Section 516A(b)(1)(B) of the Tariff Act of 1930 *as amended,* 19 U.S.C. §1516a(b)(1)(B), similarly limits the Panel's review to information placed on the record during the administrative proceeding.

de novo.'" Tehnoimportexport, UCF America Inc. v. United States, 783 F. Sup. 1401, 1404 (CIT 1992) *quoting Universal Camera Co. v. NLRB,* 340 U.S. 474, 488 (1951) and *American Spring Wire Corp. v. United States,* 590 F. Supp. 1273, 1276 (CIT 1984) *aff'd sub nom., Armco, Inc. v. United States,* 760 F.2d 249 (Fed. Cir. 1985). Accordingly, this Panel is similarly constrained. This deference to the agency has its limits. As the CIT has held:

> [T]he substantial evidence standard requires courts generally to defer to the methods and findings of an agency's investigation .... [T]he Court must not permit an agency in the exercise of that discretion to ignore or frustrate the intent of Congress as expressed in substantive legislation that the agency is charged with administering....Were the scope of the discretion accorded to the agency unlimited, there would be no point in the (statutorily mandated) judicial review here undertaken.

Armco, Inc. v. United States, 733 F.Supp. 1514, 1519 (CIT 1990)(citations omitted); *Cabot Corp. v. United States,* 694 F.Supp. 949, 953 (CIT 1988)(and cases cited therein).

The other element of the standard of review (whether the determination is "in accordance with law")[14] applies to questions of statutory interpretation by the agency. Section 516A(b)(1)CB) of the Tariff Act of 1930, *as amended,* 19 U.S.C.A. §l516a(b)(1)(B).

In determining whether the ITA's interpretation of the statute is "in accordance with law", the Panel is to afford deference to the agency's reasonable interpretation of the statute which it administers. "The Supreme Court has instructed that the courts must defer to an agency's interpretation of the statute an

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[14] NAFTA Article 1904(2) states that the "law" to be considered shall consist of "relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials." Decisions of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit are binding on this panel.

agency has been charged with administering provided its interpretation is a reasonable one." *PPG Industries, Inc. v. United States,* 928 F.2d 1568, 1571, *rehearing denied and rehearing en banc declined* (Fed. Cir. 1991).[15] *Also, Zenith Radio Corp. v. United States,* 437 U.S. 443, 450-51 (1978); *Georgetown Steel Corp. v. United States,* 801 F.2d 1308, 1318 (Fed. Cir. 1986); *American Lamb Co. v. United States,* 785 F.2d 994, 1001 (Fed. Cir. 1986); *Consumer Product Division, SCM Corp. v. Silver Reed America. Inc.,* 753 F.2d 1033, 1039 (Fed. Cir. 1985); and *Smith Corona Group v. United States,* 713 F.2d 1568, 1571 (Fed. Cir. 1983) *cert. denied* 465 U.S. 1022 (1984).[16] This deference extends to the administering authority's interpretation of its own regulations as well.[17]

In accordance with this principle of administrative law, the ITA has been granted great discretion in administering the anti-dumping duty laws. "Given these circumstances, appellant's burden on appeal is a difficult one, for it must convince us that the interpretation ... adopted by the ITA is effectively precluded

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15 *Citing Chevron. U.S.A.. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 844 (1984); *Udall v. Tallman,* 380 U.S. 1, 16, *rehearing denied,* 380 U.S. 989 (1965); *K Mart v. Cartier, Inc.,* 486 U.S. 281, 291 (1988); and *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 131 (1985).

16 The Court of International Trade has often applied this principle. *See, e.g., Tianjin Machinery Import & Export Corp, v. United States,* 806 F.Supp. 1008, 1013 (CIT 1992); *PPG Industries, Inc. v. United States,* 712 F. Supp. 195, 197-98 (CIT 1989) *aff'd.* 978 F.2d 1232 (Fed. Cir. 1992); and *Cabot Corp. v. United States,* 694 F.Supp. 949, 953 (CIT 1988).

17 "Since Commerce administers the trade laws and its implementing regulations, it is entitled to deference in its reasonable interpretations of those laws and regulations." *PPG Industries, Inc. v. United States,* 712 F.Supp. at 198 (CIT 1989) *aff'd* 978 F.2d 1232 (Fed. Cir. 1992).

by the statute." *PPG Industries, Inc. v. United States,* 928 F.2d at 1571, *rehearing denied, and rehearing en banc declined* (Fed. Cir. 1991)[18]

Nonetheless, this discretion and deference is not unfettered. "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Saudi Iron and Steel Co. (Hadeed) v. United States,* 675 F. Supp. 1362, 1365 (CIT 1987).

In the instant review, the standard of review is not affected by the fact that the ITA itself, in addition to Wolverine, is requesting a remand. The ITA would like to change the final margin calculation program to use a fully weighted average in calculating the cost of production for Wolverine, in accordance with its standard practice.

IV. **OPINION**

A. **THE ISSUE OF WHETHER COMMERCE PROPERLY USED A SIMPLE AVERAGE COP IS PROPERLY BEFORE THIS PANEL**

The U.S. Industry has raised two procedural objections to Wolverine's and the ITA's argument that the simple average calculation constitutes grounds for remand. The first is that Wolverine failed to exhaust its administrative remedies regarding this issue during the ITA administrative review.[19] The second

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[18] Prior to the passage of the Trade Agreements Act of 1979, the Treasury Department, which administered the antidumping law, also enjoyed such discretion. *United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1216 (C.C.P.A. 1977) *aff'd* 437 U.S. 443 (1978).

[19] *Case Brief of the U.S. Industry* at 26 *et seq.*

is that the Department itself, at this point, is precluded by the doctrine of administrative finality from revisiting the COP calculation issue and seeking to revise it.[20]

(1) Wolverine Has Not Waived its Administrative Remedies

The U.S. Industry asserts that the methodology employed by Commerce in its Preliminary Results was identical to that used in the Final Results. It argues that Wolverine, not having raised any objection to that methodology before the agency, is therefore precluded from raising it here before this Panel for the first time.

Wolverine presents several points in response: It argues that it had been given no notice by the ITA Preliminary Results as to why a simple average COP was being calculated. The ITA had only announced that it had deleted the grain size characteristic (which it then failed to do in the Preliminary Results' computer program). Based on the prior 1995 review, which had used a weighted average COP, Wolverine claims it had no reason to expect a different approach once the grain size characteristic was deleted. Accordingly, Wolverine specifically noted, in its comments on the Preliminary, only that the ITA program had not deleted the grain size characteristic. Wolverine also claims that it called for a weighted average by having given the ITA computer command language which provided for a weighted average COP.

Wolverine further claims that the ITA never mentioned until *after* its Final Results that the ITA had concerns with Wolverine's data and, therefore, had to resort to a simple average, thereby depriving Wolverine of an opportunity to respond. Wolverine argues that the exhaustion doctrine does not apply where the agency has not disclosed to the parties what it intended to do. It also argues that where another party made a similar argument before the agency, the exhaustion requirements have been met. It claims

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[20] *Id.* at 32-33.

that the U.S. Industry, in its comments on the Preliminary Results to calculate, had urged the ITA to use a weighted average COP calculation, thus preserving the issue for Panel review. Lastly, it claims that the exhaustion defense can be waived by the agency, which the ITA has done so in this case by now agreeing with Wolverine that it erred using a simple average COP.

The ITA supports Wolverine's position.[21] It disputes the U.S. industry's claim that the COP averaging methodology was the same as in the preliminary's. It agrees that the issue had been raised by the U.S. Industry before the agency, as Wolverine did in its reply brief to the agency, yet the ITA still did not address the issue in its Final Results. The ITA asserts as well that it, as the agency, is not bound by the exhaustion doctrine and can raise this issue here.

The Panel agrees that the issue is properly before it for review. It is true, as the U.S. Industry claims, that Wolverine was aware at the time of the Preliminary that a simple average had been used by the ITA. Wolverine seems to admit as much.[22] Wolverine claims that it did not object because a simple average of the "uncollapsed" products would produce the same *de minimis* margin as a weighted average of the same products. Implicit in this is that Wolverine would have objected had the simple average been used with the "collapsed" products. However, Wolverine was on notice that the ITA fully intended to drop the grain size characteristic, even though it failed to implement that change in its preliminary computer calculations. Wolverine knew that a simple average COP calculation of the "collapsed" products would

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21 *Rule 57(2) Response Brief of the Administering Authority* at 41-45.

22 "The only modification that the Department made to Wolverine's COP data was that it converted the Company's submitted quarterly COPs (for the 'uncollapsed' products) into simple (or arithmatic) [sic] average annual COPs." *Canadian Complainant's Brief* at 10. *See, also, the Department's Preliminary Disclosure Documents* which clearly identified that a simple average had been made. *See Memorandum from Paul Stolz to the File* (Undated)(Non. Pub. Admin. Rec. 36/01/35).

not be correct and would distort the costs.[23]

Nonetheless, we believe that Wolverine's submission to the ITA, before the Final Results, of computer language calculating a weighted average has preserved the issue. More importantly, Wolverine also told the ITA in its Reply Brief, "If the Department nevertheless determines in the final results to follow the course taken in the Preliminary Results...certain modifications to the program will be needed...to calculate a weighted-average cost of production."[24] While Wolverine now states that it had not really "objected" to the Preliminary Results (although the ITA asserts that it had), the Panel believes that its statement in the Reply put the ITA on notice and preserved the issue.

While the U.S. Industry may be correct that the only relevant difference between the preliminary and final computer methodology was the product "collapsing" in the final, the fact remains that Wolverine proposed a weighted average before the final results. That the ITA failed to follow Wolverine's approach is beside the point.

The exhaustion of administrative remedies doctrine ("exhaustion doctrine") is a fundamental principle of U.S. administrative law. *See, e.g.*, Schwartz, *Timing of Judicial Review: A Survey of Recent Cases*, 8 Admin. L.J. 261 (Summer 1994) ("Exhaustion of administrative remedies and its twin doctrine of primary jurisdiction are vital both to the operation of the administrative process and the effective judicial review of agency action").

In accordance with the doctrine, "[w]here Congress specifically mandates, exhaustion is

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23 *Canadian Complainant's Brief*, 11 n.38.

24 *Wolverine Reply Brief*, at 36 (Admin. Rec. Non-Pub 34/39/30).

required."[25] Moreover, there is a specific statutory obligation for the CIT to require the exhaustion of administrative remedies. "[I]n any civil action not specified in this section, the CIT shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C.§2637(d).

Where Congress is silent, exhaustion is still "the general rule" because it "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 146 (1992).

One rationale, of course, for the exhaustion doctrine is that an agency should have notice of an issue while it is still deliberating the matter so that it can resolve it at that point. *Myers v. Bethlehem Shipbuilding Corp.*, 33 U.S. 41, 50-51 (1938); *Hormel v. Helvering*, 312 U. S. 552, 557 (1940). In *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975), the Supreme Court explained that:

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

See, also, Davis, K. & Pierce, R., II Administrative Law Treatise, §15.2 at 309 (3d ed. 1994).

The U.S. Court of Appeals for the Federal Circuit, whose decisions this Panel is bound to recognize and follow, has stated that "judicial review is inappropriate unless and until the person seeking to challenge the action has utilized the prescribed administrative procedure for raising the point." *Sharp Corp. v. United States,* 837 F.2d 1058, 1062 (Fed. Cir. 1988).

The CIT has often refused to consider arguments on issues which the parties failed to bring to the

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[25] *McCarthy v. Madigan*, 503 U.S. 146 (1992).

ITA's attention during underlying antidumping or countervailing duty investigation. *See, e.g., Borden, Inc. v. United States*, 4 F. Supp.2d 1221, 1232 (CIT 1998)(plaintiff not permitted to challenge certain calculations to offset the difference in commissions between the U.S. and foreign markets when it had not challenged the methodology during the antidumping investigation); *Saarstahl, A.G. v. United States,* 949 F. Supp. 863, 866 (CIT 1996) (alleged use of improper period for allocating the benefit of nonrecurring subsidies); *Aramide Maatschappij V.o.F. v. U.S.*, 901 F. Supp. 353 (CIT 1995) (partly precluded from raising argument about exclusion of certain sales from the profit calculation included in constructed value because sales had been excluded in preliminary determination and had not been objected to); *Budd Co., Wheel and Brake Division v. United States,* 15 C.I.T. 446, 773 F.Supp. 1549, 1555-1556 (1991) (alleged flaws in methodology used for compensating for Brazilian hyperinflation in calculating cost factors, with court noting that plaintiff "declined to raise its contentions at the administrative level as an apparent tactical decision"); *Rhone-Poulenc, Inc. v. United States*, 13 C.I.T. 218, 226-227, 710 F. Supp. 341 (1989), *aff'd* 899 F.2d 1185 (Fed. Cir. 1990) (plaintiff precluded from raising new argument that Commerce should have accounted for exchange and interest rate fluctuations since the entry of the original antidumping order).

It is thus clear that this Panel may not consider an argument that the CIT would be constrained from hearing by virtue of the fact that a party had failed to exhaust its administrative remedies with respect to that argument.

While Wolverine could certainly have been more expansive in its "objection" to the simple average, its submission to the ITA was sufficient to preserve the issue.

Even if Wolverine had made no such submission between the Preliminary and Final Results, the fact

that the ITA failed at every opportunity to reveal to the parties the basis for simple averaging (*viz.*, that it had problems with Wolverine's data) provides another basis to allow this issue to be heard. It is not fair to penalize a party for not exhausting its remedies where the party "could not attack a policy they could not be aware existed." *Bowen v. New York,* 476 U.S. 467, 476 (1986)(*quoting Heckler v. New York,* 578 F. Supp. 1109, 1118 (E.D.N.Y. 1984)).

Moreover, the Panel finds that the U. S. Industry's submission to the Department was also sufficient to put the Department on notice and preserve the issue. The U.S. Industry did state that "the different costs reported by Wolverine should be collapsed to calculate a single weighted-average cost or products classified under each unique product control number."[26] This placed the issue in play and the Department failed to respond or explain why it did not address the point.[27]

Where one party to an agency proceeding raises a point before an agency, another party to the proceeding - who did not raise the issue - may argue the same point on appeal. In *National Resources Defense Council v. EPA,* 824 F.2d 1146 (D.C. Cir. 1987)(Bork, J.), in an unanimous en banc decision, the D.C. Circuit permitted NRDC, which had not even participated in the agency proceeding, to appeal

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[26] *Administrative Case Brief,* CD 25 at 10.

[27] The U.S. Industry claims that it never intended to urge the Department to collapse the data *using the numbers submitted by Wolverine. U.S. Industry's Reply to the U.S. Government's and Wolverine's Reply Briefs,* 16 n. 5. That may well be, but the fact remains that the basic issue of using a weighted average *was* raised.

In addition, the CIT has also noted that "[a] party may be excused from failure to raise an argument before the administrative agency as long as the agency in fact considered the issue." *Holmes Products Corp. v. United States,* 16 C.I.T. 1101, 1992 Ct. Intl. Trade LEXIS 258, *7-8 (citing cases).

an issue raised by other parties. "Courts have waived exhaustion if the agency 'has had an opportunity to consider the identical issue [presented to the court]....but which were raised by other parties'...The EPA, therefore, had notice of his issue and could, or should have, taken it into account in reaching a final decision...." 824 F.2d at 1151 (citing *Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948, 951 (6th Cir. 1971) and *Office of Communication of the United Church of Christ v. FCC,* 465 F.2d 519, 523 (D.C. Cir. 1972)**.** We find here that the ITA was on notice and should have addressed the weighted average issue raised before it by the U.S. Industry.

Moreover, regardless of whether either party in fact raised the weighted average issue before the ITA, we find that the ITA may, in fact, waive the exhaustion issue. *E.g., Mathews v. Diaz,* 426 U.S. 67, 76-77 (1976), *Mathews v. Elridge*, 424 U.S. 319 (1976); *Dugan v. Ramsay,* 727 F.2d. 192 (1st Cir. 1983). "The power of an agency to waive exhaustion of any administrative remedy except a remedy that Congress has made jurisdictional seems well established. It also makes a great deal of sense." Davis, K. & Pierce, R., II Administrative Law Treatise, §15.6 at 335 (3d ed. 1994). The ITA has now waived the exhaustion rule by adopting, in essence, Wolverine's position that using the simple average was in error and that it failed to provide a proper reason for selecting that methodology.[28]

For all of the above reasons, we hold that the issue of whether the ITA reasonably calculated a simple average COP has not been waived and is properly before this Panel for review.

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[28] *Letter from Linda Chang, Esq. to James Holbein, NAFTA Secretariat, U.S. Section,* 2 (October 16, 1998).

(2) The ITA is Not Barred by the Doctrine of Administrative Finality from Correcting the COP

The U.S. Industry argues that the ITA is barred by the doctrine of administrative finality from "revisiting" on remand the COP calculation issue. The premise for the U.S. Industry's position is that the COP methodology used by the ITA is supported by substantial evidence and in accordance with law. It argues that the ITA should not be permitted to simply choose a different methodology on remand. As Judge Restani of the CIT stated in *Badger-Powhatan v. United States*, 10 CIT 241, 633 F. Supp. 1364, 1369 (1986): "There is no indication anywhere in the statutory scheme that the agency, for policy or similar reasons, may simply change a final determination after an antidumping order is issued....If the agency could amend determinations endlessly, it would be difficult to answer the question as to when a *final* determination could ever be made."(Emphasis in original).

The U.S. Industry relies on *Borden, Inc. v. U.S.,* 4 F. Supp. 2d 1221, 1242 (CIT 1998). However, Judge Restani also held there that "An agency cannot disturb the finality of its determinations...,except where a mistake has been shown." Here we determine *infra,* that a mistake by the ITA has been shown: the agency's use of the simple average is not in accordance with law. Moreover, in *Borden,* the court went on to say:

> Here, neither the opposing parties nor the government made any specific representation that Commerce erred in its original CEP calculation; Commerce merely seeks an additional review of the calculation to rethink and revise. On remand, Commerce may not revisit the question of the CEP calculation.

Borden, 4 F.Supp.2d at 1242. In the instant review, of course, both Wolverine and the ITA itself have specifically stated that the ITA erred. There is no remand "to rethink and revise", only to correct an identified error.

In *Borden* Judge Restani cited her earlier decision in *Badger-Powhatan*.[29] In *Badger-Powhatan* she had held that:

> The statute contains no exceptions to the general rule that these adjudicatory-type decision, which are relied upon may later be changed for policy reasons....That this principle may give way when errors are committed does not give the agency authority to upset final decisions *where no errors have occurred*. Therefore, in order to determine if remand is appropriate, the court must rule on plaintiff's motion for judgment on the agency record.

633 F. Supp. at 1369 (Emphasis added). Therefore, we hold that where one interested person as well as the ITA assert that an error was committed by the agency below, and we concur, then the agency is not necessarily barred by the doctrine of administrative finality from correcting that error.

We now turn to the merits of Wolverine's calculation issue argument.

B. THE CALCULATION OF WOLVERINE'S COST OF PRODUCTION

Wolverine's calculation issue raises a number of questions which can be subsumed under the broad heading of whether the ITA, in conducting its administrative review, fulfilled its duty of fairness. Wolverine alleges that the ITA breached three procedural requirements mandated by the Tariff Act:

> Did the ITA breach 19 U.S.C. §1677(m)(d) by failing to inform Wolverine of perceived deficiencies in its submitted data, and failing to allow Wolverine to remedy or explain the deficiency?

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29 The court also cited, in both cases, Supreme Court precedent supporting the point that in federal regulatory licensing cases, adjudicatory-type decisions, which are relied upon, cannot be changed for policy reasons. *Citing American Trucking Assoc. v. Frisco Transportation Co.,* 358 U.S. 133 (1958). Also, *United States v. Seatrain Lines,* 329 U.S. 424 (1947) and *Hirschey v. Federal Energy Regulatory Commission,* 701 F.2d 215 (D.C.Cir. 1983).

> Did the ITA breach 19 U.S.C. §1677(e)(b) by making an inference adverse adverse to the interests of Wolverine without first finding that Wolverine had failed to co-operate by not acting to the best of its ability to comply with a request for information from the ITA?
>
> Did the ITA breach 19 U.S.C. §1677(m)(e) by declining to consider information submitted by Wolverine that was timely, verified, and could be used without undue difficulty?

As a preliminary matter, it is useful to note, as set out in *Borden, Inc. v. U.S.*, 4 F. Supp. 2d 1221 (CIT 1998), that the Tariff Act was amended in 1994 to comply with the United States' obligations under the Uruguay Round GATT Agreements. The general object was to foster more fairness and transparency in administrative proceedings, a goal already articulated in the applicable jurisprudence (*e.g., National Steel Corp. v. United States,* 870 F. Supp. 1130).

Behind these statute-based issues lie related questions which are dealt with separately. One important matter is whether the ITA is required to explain the methodology it uses to calculate cost of production, something that was not done specifically in this case. In addition, there is the related or parallel question of whether the ITA is required to explain and notify parties when it decides to depart from long-standing agency practice. More specifically, the question arises as to whether the ITA is required to give notice to parties, and explain its decision, when it decides to depart from its longstanding practice of calculating weighted averages in determining cost of production.

The Relevant Facts

In order to decide these issues, it is helpful to review the more relevant facts.

In the 1996 review, Commerce issued its standard questionnaire seeking information, among other things, necessary to calculate costs of production.

Pursuant to instructions, Wolverine, in responding, assigned codes to various products by control numbers ("CONNUMs") for purposes of comparison. For each product code Wolverine provided quarterly material costs per unit, a weighted average fabrication cost, and the quantity of each CONNUM which was produced in each quarter.

Significantly, there were quarters in which a given CONNUM was not produced. In this instance, Wolverine nonetheless calculated, and supplied, a quarterly Cost of Production. This figure was arrived at by using the materials cost encountered in producing other products (a standard cost), and the annual fabrication cost for that CONNUM. The production quantity was indicated as "zero".

The U.S. Industry asserts, and it seems not to be disputed, that the quarterly materials cost for all CONNUMS was the same for each quarter, and that the fabrication costs were the same for each CONNUM for all quarters. Thus a constructed COP calculation was possible in spite of the fact that some CONNUMS were not actually produced in some quarters.

Pursuant to the ITA request, Wolverine also reported Canadian sales for the "window" periods, the last quarter of 1995 and the first quarter of 1997.

The ITA, in a second questionnaire, asked Wolverine to:

> Delete source as an element of the product control numbering system and submit a single weighted average cost for each unique product as represented by a specific matching control number. Adjust the unit cost of production accordingly.

The ITA did not otherwise request that Wolverine supplement its responses to the original questionnaire as to its cost of production calculations. Subsequently, ITA verified the submitted data, and, in its

verification report[30] reported no discrepancies in the data which Wolverine had submitted.

During the course of determining the dumping margins, the ITA attempted to calculate a weighted average COP using the quarterly data which had been furnished. Error messages were allegedly encountered when Wolverine's data was inserted in the ITA's computer program. In a post-Final Determination memorandum which this Panel does not believe shoud be part of the administrative record, the ITA purported to explain that it could not reconcile the existence of a computed COP for certain CONNUMS which were not actually produced in certain quarters. The ITA believed that Wolverine had neglected to report the amount of production for those periods. Consequently, it deleted the product quantity (PRODQTY) variable from the program.[31] The result was that the program produced a "simple" average COP (giving equal weight to each quarter), rather than associating the costs to the amounts actually produced (a "fully" weighted average).[32]

In the Preliminary Results, the ITA found Wolverine's margins to be *de minimis*. The consequences of deleting the PRODQTY line of the program do not seem to have been realized at this time by the parties.

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30 ITA Sales Verification Outline/Report, 3 (undated)(Admin. Rec. Non-Pub. 32/66/24) and *Cost Verification Report*, 5-6 (undated)(Admin. Rec. 32/54/23).

31 *Memorandum from Paul Stolz to Holly Kuga*, 3 (dated June 24, 1998)(Admin. Rec. Non-Pub. 35/36/34).

32 What the ITA calls a "simple" average, the U.S. Industry calls a "hybrid weighted average cost". This is because, as they both admit, the "simple" average taken by the ITA was, more precisely, a straight average taken of Wolverine's weighted average quarterly cost data. Some element of weighting was therefore included, but not to the degree the ITA has traditionally done in calculating a weighted average.

(1) **Did the ITA violate 19 USC §1677(m)(d)?**

Wolverine states that it did not interpret the supplemental questionnaire as asking it to revise its reported data on a period of review (*i.e.*, annual) COP basis. There is nothing in the record to gainsay this. The question does not refer to an "annual" weighted average cost. The question is too vague to infer that Wolverine should reasonably have known that an annual weighted average cost was being requested. While the ITA believes that it had asked for an annual COP figure, it admits that it did not request further information, nor did it identify Wolverine's quarterly COPs as being deficient in any manner. Further, the "simple" average calculated by the ITA comprised a period of six quarters, not four quarters as would be expected in an annual average COP.

Wolverine has submitted that there was only one finding of an insufficient response by the ITA, and that came during the final stages of the revocation proceeding. The ITA claims that when it initially ran its margin calculation program, it noted certain error messages in the resulting output which were due to the content and format of the data submitted by Wolverine. The ITA concluded that the production quantities of zero represented flaws in Wolverine's response since a cost of production was reported for these same products. Accordingly, the initial ITA rationale was that it had to use a simple (or arithmetic) average to calculate the revised COP's for the new CONNUMs. During this Review, the ITA admitted that it had made an error in not properly weighing the collapsed COP's, and consequently requested an opportunity to correct this error.

The U.S. Industry's submissions on these facts are that Wolverine failed to follow the ITA's instructions to submit a single weighted average cost for each unique product as represented by a specific matching control number. The U.S. Industry states that Wolverine deliberately chose to ignore the ITA's

instruction in two important respects when it first submitted its sales and costs data. First, Wolverine inserted a physical characteristic of its own choosing into the CONNUM system, claiming that the ITA should rely on a matching characteristic that would distinguish between products identified by Wolverine as non-reroll and reroll. Second, Wolverine submitted *quarterly* weighted average costs for each control number rather than a single weighted average cost for each control number. Despite what the U.S. Industry argues were clear and repeated requests, the U.S. Industry suggests that Wolverine chose to ignore the ITA's instructions, and refused to submit a single weighted average cost that would not distinguish between reroll and non-reroll.

It is acknowledged that the ITA originally intended to weight the cost figures by the production quantities provided by Wolverine. However, as noted, when the ITA attempted to weight these data, it encountered error messages in the resulting output which were due to the content and format of the data. The problem was that the cost data contained a significant number of zero production quantities throughout the cost response, which the ITA decided to ignore in its calculation. The U.S. Industry has taken the position that, given the problems with the production quantity data submitted by Wolverine, the ITA correctly disregarded Wolverine's reported zero production quantities and employed a simple average COP for the collapsed CONNUMs.

Wolverine says that the only notification it received that suggested its response was insufficient was in the June 24, 1998 Memorandum it received after the Final Determination was made and after Wolverine had brought the "clerical" error to the ITA's attention. However, Wolverine points out that "the June 24 Memorandum cites to no specific supplemental question that Wolverine allegedly did not answer." (*Canadian Complainant's Brief* at 25).

In determining when, if ever, the ITA realized that there was an insufficient response from Wolverine, the ITA's submissions on this point are important. At page 34 of its Response Brief, the ITA states:

> The presence of zero production values with respect to some quarterly data did not compromise the results of the cost values calculated for Wolverine. These so-called missing values corresponded solely to CONNUM-specific quarterly data for quarters for which Commerce used no home market sales as matches. Furthermore, Commerce verified that the POR zero production values represent actual periods of non-production. Thus, although the presence of what the computer perceived as missing values was disconcerting, it did not, in fact, prevent the cost test function from running or compromise the results of the cost test....*Because all the facts needed to calculate an accurate weighted average cost for the home market matches were, in fact, on the record, Commerce's resort to a simple average was a "solution" for which there was no real underlying problem*.

(Emphasis added).

As well, the ITA states that resorting to a simple average is not called for by the "facts available" provision.[33] The ITA notes:

> [E]ven if one assumes, *arguendo,* that Commerce's request that Wolverine submit a "single" weighted average was sufficiently clear that Wolverine's failure to calculate its own annual average for its COP data constituted refusal to provide requested information, the absence of such an annual average database on the record also did not create a "need" to use a simple average. It simply created a need for Commerce itself to perform the weight-averaging function on the data of record, which was adequate for that purpose.

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[33] *Id.* at 39.

For the following reasons, the Panel holds that the ITA did not violate 19 USC §1677(m)(d). The codified Tariff Act provision, 19 USC §1677(m), deals with conduct of investigations and administrative reviews. More specifically, §1677(m)(d) deals with deficient submissions and states:

> If the administering authority...determines that a response to a request for information under this subtitle does not comply with the request, the administering authority...shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—
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> (1) the administering authority...finds that such response is not satisfactory, or
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> (2) such response is not submitted within the applicable time limits,
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> then the administering authority...may, subject to subsection (e) of this section, disregard all or part of the original or subsequent responses.

Thus, §1677(m)(d) allows the ITA to disregard all or part of the original or subsequent responses of Wolverine only if it has already informed Wolverine of the nature of the deficiency and, to the extent practicable, provided Wolverine with an opportunity to remedy or explain the deficiency. If the further information is not satisfactory, or provided outside the specified time limits, the ITA may disregard the information provided by Wolverine (subject to the requirements of §1677(m)(e)). In sum, §1677(m)(d) clearly requires notification of a deficient response, and a reasonable opportunity to correct the response, before the ITA is allowed to disregard information submitted by Wolverine. Thus, the question to be

answered is whether the ITA determined that there was an insufficient response from Wolverine and, if so, did it allow Wolverine to clarify its submissions.

While Wolverine is correct that the ITA was wrong in failing to notify it of its claimed justification for calculating a simple average COP, Wolverine cannot rely on the provisions of §1677(m)(d) to secure a remand. This provision is meant to address the actual filing of submissions by Wolverine, and not the ITA's incorrect use of submitted and verified data. Moreover, there is no clear evidence that at the relevant time the ITA failed to inform Wolverine of perceived deficiencies in its submitted data. More importantly, there does not appear to be any record in the course of proceedings which shows that the data submitted by Wolverine was considered by the ITA, prior to June 24, to be deficient.

Furthermore, the June 24 memorandum, even if it could form part of the record of this proceeding (which the Panel does not believe it can), by Wolverine's own admission, does not explicitly state that any of Wolverine's submitted data was wrong. The ITA, in these proceedings, has taken the position that Wolverine's submitted data were sufficient to prepare a weighted average, and thus were not deficient in any manner. The result is that it is unclear, at best, that there has been a failure on the part of the ITA to fulfill the applicable statutory requirements.

In summary, the action of the ITA might have been brought within the criteria of 19 USC §1677(m)(d) had the assumed defect in Wolverine's submitted information ever been brought to Wolverine's attention. It was not. The ITA simply operated on the basis that there had been an inadvertent error in Wolverine's data. Nor did the ITA explain what it had done. At no stage, until the threshold of these proceedings, was Wolverine informed of what steps were taken by the ITA.

It was argued by the U.S. Industry that knowledge of what the ITA did ought to be imputed to

Wolverine. This assertion was made on the sole basis that the computer program used by the ITA, if reviewed by a knowledgeable and alert programmer, would disclose what the ITA had done. It was suggested by the U.S. Industry that an independent review of the ITA's computer language by a programming expert is a normal step in conducting an antidumping case before the ITA. The concept of imputed knowledge, having particular regard to the general norm of procedural fairness, cannot be stretched so far as to include notice buried in computer programming language.

Chief Judge Carman's decision in *Sugiyama Chain Co., Ltd. v. United States*, 797 F. Supp. 989 (CIT 1992) is on point. In that case, the ITA had made a computer program error which skewed the dumping calculation. During the proceedings in that case, the ITA had incorrectly, as it did here as well, described its calculation methodology. After "rejecting out of hand" the ITA's exhaustion defense as "somewhat disingenuous in light of the circumstances", the Court held that the computer "methodology enunciated [by the ITA] cannot be sustained and a remand must issue." The Court agreed with he ITA that the proper course is for the agency to "examine [the calculation]; give the reason for its actions, and, if warranted, make any necessary corrections in the computer programming instructions." 797 F.Supp. at 997.

Finally, the actions of the ITA which form the underlying substance of Wolverine's complaint, namely, failing to provide Wolverine with a timely explanation of the basis on which it was dealing with the information received, serve to underpin the overarching allegation that Wolverine was not treated fairly. As noted, even if it were true that a computer expert might have discerned the change in the ITA's methodology by analyzing the programming language from the Preliminary Determination, this is not adequate to discharge the ITA's duty to advise Wolverine of how it was dealing with the information provided and, in particular,

that in its assessment it was departing from its normal method of calculation. *See* discussion *infra* at 39.

(2) Did the ITA violate 19 USC §1677(e)(b) and unlawfully make an adverse inference against Wolverine?

Wolverine also argued that the ITA unlawfully made an inference adverse to the interests of Wolverine. Specifically, section 776(b) of the Tariff Act of 1930, 19 U.S.C. §1677(e)(b), provides that:

> If the administering authority...finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority..., the administering authority..., in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from —
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> (1) the petition,
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> (2) a final determination in the investigation under this subtitle,
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> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
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> (4) any other information placed on the record."

Wolverine cites *Olympic Adhesives, Inc. v. United States*, a Federal Circuit decision, which holds that to avoid the threat of an adverse inference on the grounds of being non-responsive, a respondent "need only provide complete answers to the questions presented in an information request."

The U.S. Industry disputes Wolverine's submission that the ITA even made an adverse inference against Wolverine. In this case, the U.S. Industry submits, the ITA did not rely on information from any other source and therefore did not employ an adverse inference against Wolverine as described in the statute. In fact, the ITA used the very cost information submitted by Wolverine, despite Wolverine's failure

to submit its information in the form requested by the ITA. In summary, the U.S. Industry submits that there is no indication whatsoever that the ITA intended to rely on facts that would be adverse to Wolverine when collapsing the cost data.

For its part, the ITA states its position[34] as follows:

> [T]he Department may only use an adverse assumption in selecting from the facts available if it has made a finding that a party has failed to cooperate in a proceeding. Commerce made no such finding in this review. Thus, because Commerce had all the data it needed to calculate a weighted average COP and because there was no basis for disregarding Wolverine's reported production data, Commerce erred in calculating, instead, a simple average.

It is clear from a review of the record that the ITA did not make a finding, as required by §1677(e)(b), that Wolverine failed to co-operate by not acting to the best of its ability to comply with a request for information from the administering authority. However, this is presumably because the ITA did not intend to make a finding adverse to the interests of Wolverine and, in the view of the Panel, it did not do so. What it did do was employ a methodology which had an adverse *result* to Wolverine in this case, but in doing so it drew no inference adverse to the interests of Wolverine in selecting from among the facts otherwise available. There was no evidence that ITA intended this adverse result. Indeed, when the ITA employed this methodology the first time in the Preliminary Results, before it collapsed the data, the result was not adverse to Wolverine.

Therefore, the Panel finds that the ITA, since it did not make an inference adverse to the interests of Wolverine, did not violate 19 USC §1677(e)(b).

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[34] *Rule 57(2) Response Brief* at 40.

(3) **Did the ITA fail to use the COP data submitted by Wolverine in violation of 19 USC §1677(m)(e)?**

The Tariff Act (19 USC §1677(m)(e)) requires that the ITA shall not decline to consider information that is submitted by a party which is, *inter alia*, necessary to a determination, provided that the information is timely submitted, can be verified, and can be used without undue difficulty.

The statute states that:

> [i]n reaching a determination...the administering authority ...shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority... if —
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> (1) the information is submitted by the deadline established for its submission,
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> (2) the information can be verified;
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
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> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority...with respect to the information, and
>
> (5) the information can be used without undue difficulties.

19 USC §1677(m)(e).

The U.S. Industry argues that the ITA calculations, without weighing for production quantity, were reasonable under the circumstances and resulted in legally sustainable COPS. The U.S. Industry does not seriously dispute that using a weighted average COP would be proper, nor is there serious debate about whether the ITA set out to produce a weighted average. Nonetheless, it is argued that the data submitted by Wolverine were so flawed that ITA was justified in disregarding them.

First, it is contended that a value for a CONNUM which was not produced for a given period cannot be calculated because a zero denominator will always produce a zero COP. Second, the use of the "window" period sales produces unusable COPS. Lastly, there are several contentions regarding the accuracy of Wolverine's data supplied in response to the questionnaire. It follows, the U.S. Industry argues, that the ITA was justified in employing some other methodology, *e.g.*, not weighing the data. The U.S. Industry cites various examples where the ITA employed, and justified, a simple average COP, rather than a weighted average.

The ITA takes the position that its normal practice is to calculate a weighted average COP and that nothing in this case required a departure from that practice. Indeed, (as discussed *infra*), it was an error to use a simple average in the absence of some necessity requiring such a departure. Weighted averages smooth out the variations in product costs, which may vary from quarter to quarter, and thus give an accurate picture of the overall annual costs.[36] It is noted both that the ITA had requested a weighted average, and that during the proceeding, the U.S. Industry recognized that a weighted average should be calculated. Examples are given of the extraordinary circumstances which, in the past, have caused the ITA to use simple averages. It is argued, therefore, that the use of a simple average was not justified, as the data submitted in this case were adequate to compute a weighted average. Neither in its brief, nor at oral argument, did the ITA comment upon, or attempt to explain, the reasons why it computed a single "simple" average.

Wolverine contends that since its data were verified, the ITA was without justification in ignoring

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[36] *Fujitsu General Ltd. v. United States*, 883 F. Supp. 728 (CIT 1995).

its submitted COPs in computing a simple average. It asserts that during the verification process, the ITA had actually verified its claimed COP for at least one CONNUM which was not produced during the period for which verification was undertaken. Further, Wolverine disputes the contention that proper use of the computer program supplied results in error messages. In addition, under the case law[37], and as required by section 1677m(e), if the ITA encountered difficulties in running the program, it was obliged, before ignoring Wolverine's data, to inform Wolverine and offer an opportunity to clarify why error messages were encountered. Even if Wolverine erred in submitting quarterly data, Commerce had never made a point of objecting to it, and, in any event, could easily have calculated proper annual weighted averages.

One thing is clear in this case. A mistake was made. All of the interested persons had asked for a weighted average and assumed that one would be computed. The problem with the U.S. Industry's argument is that the ITA did not intentionally reject Wolverine's data, nor did it intentionally employ a different methodology. True, Wolverine could have avoided this problem by furnishing a weighted average in response to the ITA's request.

It is noted that the ITA's request was that Wolverine report a weighted average cost of production. Specifically, in rejecting Wolverine's roll-reroll product categories, the ITA instructed Wolverine to collapse the two into a single CONNUM, and report a single weighted average for the category. In this context, the ITA surmises that Wolverine may have continued to report quarterly information because it focused upon the first part of the request (*i.e.*, to collapse the two product codes), rather than the latter. Indeed (in contrast to its present position), the U.S. Industry after the preliminary determination, also asked ITA to require Wolverine to collapse the two product codes, and report an annual weighted average COP.

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[37] *Borden, Inc. v. United States*, 4 F. Supp. 2d at 1246 (CIT 1998).

Had the ITA consciously intended to depart from its normal practice of using weighted averages, the issue here would be different. In that case, the ITA would perhaps have articulated its rationale for doing so.

Whether there were deficiencies in Wolverine's submissions which might have justified the ITA's rejection of Wolverine's data is not the point. The record supports the conclusion that the ITA intended to use the submitted data, which it had verified to its satisfaction. The panel will not revisit the ITA's findings.

The Panel concludes that the ITA's actions were not reasonable. To the extent that the deletion of the PRODQTY line of programming was based upon a mistaken notion that Wolverine neglected to report sales, it was contrary to the verified evidence. In any event, the alleged "error messages" should have triggered an inquiry of Wolverine by the ITA as to the source of the errors, as required by section 1677m(e). The result was, therefore, not supported by substantial evidence. Section 1677m(e) dictates that the ITA use the information furnished by the respondent if it was timely submitted, it was verified, and if it can be used without undue difficulty. How much difficulty constitutes "undue difficulty", is, of course, a somewhat subjective standard. However, given that Wolverine's data was verified to the satisfaction of the ITA, the bar should be set at a high level to justify the failure to contact Wolverine.

If Wolverine's contention that it was able to run the program without any difficulty is accurate, seemingly it would have been a simple matter to rectify the problem.

The Panel concludes that the ITA did not comply with 19 USC §1677(m)(e) in that it declined to consider Wolverine's information which had been timely submitted, was verified and, could have been used without undue difficulty. Accordingly, the Final Results are not affirmed in this respect.

(4) By Calculating a Simple Average Cost of Production, the Investigating Authority Also Did Not Follow Its Established Administrative Practice

Wolverine also challenges the ITA's decision to calculate a simple average cost of production as violating the agency's established administrative practice.[38] The ITA agrees that it is the "normal practice" of the ITA to use annual weighted average costs to determine COP, and argues that it had originally intended to follow that practice in this review as well.[39]

The U.S. Industry argues that the ITA "could have resorted to any number of methodologies" other than a weighted average.[40] The U.S. Industry points to numerous other antidumping determinations where the ITA has, indeed, used a simple, rather than weighted average.[41]

The ITA and Wolverine argue that in the prior cases where the ITA had resorted to a simple average, it did so either because special circumstances made a simple average more accurate, or because the necessary data were unavailable.[42] The U.S. Industry claims that the data submitted by Wolverine in this case, including the production quantities for the window periods, rendered the data unusable for calculating an accurate weighted average. This, it is claimed, necessitated using another methodology, such as a simple average.

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38 *Canadian Complainant's Brief* at 34-35.

39 *Rule 57(2) Response Brief of the Investigating Authority* at 24-25.

40 *Case Brief of the U.S. Industry* at 37.

41 *Id.* at 37-39.

42 *Canadian Complainant's Brief,* nn 87 and 88 at 34; and *Rule 57(2) Response Brief of the Investigating Authority,* 22-34.

As already noted, the ITA and the U.S. Industry agree that the average ultimately used by the Department was neither a purely simple nor weighted average, but rather a "simple" average of weighted quarterly data.[43] The shipment quantity had already been used by Wolverine to weight the submitted costs. Also, the reported raw material costs had already been weighted by Wolverine.

It is hornbook law that an administrative agency must not depart from its established policy. "The dominant law clearly is that an agency must either follow its own precedents or explain why it departs from them." Davis, K. & Pierce, R., II Administrative Law Treatise, § 11.5 at 206-07 (3d ed. 1994)(and cases cited therein). See, e.g., *Atchison, Topeka & Sante Fe R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)(agency has a "duty to explain its departure from prior norms") and *Greater Boston Television Corp. v. FCC*, 44 F.2d 841, 852 (D.C. Cir.) *cert. denied*, 403 U.S. 923 (1971). In the antidumping context, the CIT has held that "Commerce has the flexibility to change its position providing that it explains the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence." *Cultivos Miramonte S.A. v. United States*, 980 F. Supp. 1268, 1274 & n. 6 (CIT, 1997)(footnotes omitted.)[44]

The ITA's established practice has been to calculate COP on a weighted average basis, rather than a simple average of costs. E.g., *Certain Welded Carbon Steel Pipe and Tube from Turkey*, 61 Fed. Reg. 69067, 69075 (December 31, 1996)("the Department's normal practice is to calculate weighted-average costs of production").

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[43] *Response Brief of the Investigating Authority*, n. 13 and *Case Brief of the U.S. Industry*, 9-10.

[44] See, also, *Citrosuco Paulista, S.A. v. United States*, 704 F. Supp. 1075, 1088 (CIT, 1998) and *Hussey Copper Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (CIT, 1993)(Purpose of this rule is to "insure consistency in an agency's administration of the statute.").

In addition, the weighted average is normally calculated over the relevant sales period which is normally the year under the administrative review. The rationale for using an annual weighted average is that use of a simple average tends to produce a distorted COP if there are fluctuations in cost. *See Fujitsu General Ltd. v. United States*, 883 F. Supp. 728, 735 (CIT, 1995)("[R]andom fluctuations in COP...are precisely the type of routine, random fluctuations that justify Commerce's preference of using annual weighted average COP.")

In the view of this Panel, the established practice of the ITA has been to employ a weighted average where possible in calculating COP. Where that is not possible, the ITA has on occasion used simple averages in lieu of a weighted average. However, where it has resorted to simple averages, as in the prior determinations cited by the U.S. Industry, it has done so with an appropriate explanation.

We agree with the ITA and Wolverine that the prior cases cited by the U.S. Industry constitute exceptions to the rule. In several of the cases, e.g., *Fresh and Chilled Atlantic Salmon from Norway*, 56 Fed. Reg. 7661, 7666, 7672 (February 25, 1991), a simple average was more accurate give the number of respondents or the conditions of the market. In a few of the other cases, it is true, as the U.S. Industry states, that sufficient data had not been submitted to enable the ITA to use a weighted average. E.g., *Silicon Metal from Brazil*, 62 Fed. Reg. 42759, 42761 (August 8, 1997).

However, a review of the determinations cited by the U.S. Industry does indicate that, even where the necessary data had not been submitted and the ITA resorted to a simple average, the ITA consistently explained the rationale for use of a simple average. Therefore, regardless of whether the ITA had reasonably resorted to a simple average in the face of allegedly unusable data in the instant case, the threshold question here is whether it explained its departure from its established prior practice. Even if the Wolverine data were truly unusable and, as in some of the prior cases, the necessary data had not been

submitted, the ITA has failed to provide any explanation in its final results for having deviated from its established practice.

Were this the only aspect of this case in issue, we would remand to the ITA only for an explanation of why it calculated COP on a "simple" rather than a weighted average in this case and, in doing so, failed to follow established agency practice. This threshold question of the vice of an unexplained departure from agency practice is, however, subsumed in the broader remand.

Consequently, anticipating this, it is more appropriate here to conclude that the proper course of action is to order a remand of the calculation issue to the ITA so that, as it proposed in *Sugiyama,* it can "examine it, give reasons for its actions, and, if warranted, make any necessary corrections in the computer programming instructions." Compare *Sugiyama Chain Co., Ltd. v. U.S.*, 797 F. Supp at 997 (CIT 1992).

C. THE U.S. INDUSTRY'S ALLEGATIONS OF ERROR BY THE ITA IN COMPUTING COP

As the ITA had disregarded home market sales made by Wolverine as below cost of production ("COP") in the prior administrative review, the agency had reasonable grounds to "believe or suspect that sales of the foreign like product...have been made at prices ...less than the cost of production...." 19 U.S.C. §1677b((b)(1). The ITA therefore conducted a COP investigation in the administrative review before us.

The U.S. Industry argues that the ITA incorrectly calculated Wolverine's cost of production in two respects: (1) the Agency failed to include an amount for the Canadian portion of Wolverine's indirect selling expenses ("ISE"); and (2) the Agency failed to adjust Wolverine's COP for an improper reduction to

material costs associated with non-subject merchandise.[45]

First, the U.S. Industry argues that ITA erred when it failed to include Canadian indirect selling expenses in Wolverine's COP despite the fact that such expenses were included in calculated net home market prices for the sales-below-cost test. In the U.S. Industry's view, this failure led to an understatement of the dumping margin when a COP not including Canadian ISE, was compared to net prices which did include Canadian ISE. See *U.S. Industry Case Brief* at 40-43.

Wolverine and Commerce both respond that the calculated COP did in fact include Canadian ISE, accomplished through an allocation of the verified selling, general and administrative expenses reported in the consolidated financial statements of Wolverine's U.S. parent company. Adding the indirect selling expenses again to COP would thus result in an impermissible double-counting. See *Rule 57(2) Response Brief of the Investigating Authority* at 48-56; *Canadian Complainant's Reply Brief* at 20-24. Wolverine also argued that the U.S. Industry had failed to exhaust its administrative remedies on this issue.

Second, the U.S. Industry argues that Commerce erred in not adjusting Wolverine's metal costs to disallow a credit for certain raw material inputs which result from the production of non-subject merchandise, and that this error caused Commerce to understate Wolverine's COP and thus the final dumping margin. *U.S. Industry Case Brief* at 43-46. This non-subject merchandise, known as toll sales, consists of metal inputs processed by Wolverine for outside parties into a finished product. These parties retain title to the material during processing. *Canadian Complainant's Reply Brief* at 24 n. 65. The U.S. Industry argues that "Wolverine reduced its cost of materials for the subject merchandise because of an offset due to nonsubject merchandise". *U.S. Industry Case Brief* at 45.

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[45] As noted, *supra*, a third issue was raised and subsequently dropped by the U.S. Industry.

(1) The U.S. Industry Has Exhausted Its Administrative Remedies

The ITA and Wolverine argue that the U.S. Industry failed to raise its toll sales argument during the administrative proceeding before the Agency, thereby precluding it from raising this argument before the Panel since it failed to exhaust its administrative remedies. Wolverine also argues that the U.S. Industry failed to raise its argument concerning Canadian ISE during the administrative proceeding.

For the reasons discussed below, the Panel finds that the U.S. Industry did raise both of these arguments before Commerce during the administrative proceedings in this case, and that reliance on the exhaustion of administrative remedies doctrine by both Wolverine and Commerce is misplaced.

As already discussed at length *supra*, this Panel may not consider an argument that the Court of International Trade would be constrained from hearing by virtue of the fact that a party had failed to exhaust its administrative remedies.

It is also worth noting, however, that the Panel has found no authority, nor has any authority been cited to it, in which the CIT applied the exhaustion doctrine to prevent a party from merely buttressing its legal arguments concerning factual issues which it had previously raised before the ITA.

Thus, the question which this Panel must decide is whether the U.S. Industry raised indirect selling expense and toll sales arguments during the 1996 administrative review that were specific enough to permit it to escape the application of the exhaustion doctrine. After examining the administrative case brief filed by the U.S. Industry with the ITA on April 13, 1998 during the annual review, ("*Administrative Case Brief*"), the Panel concludes that it clearly has[46].

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[46] The U.S. Industry argued below that the ITA should add certain ISE's to COP. *Administrative Case Brief* at 11 (Admin. Rec. Non-Pub 33/01/25). Wolverine claims now that the U.S. Industry's current argument before this panel is different from that raised below. *Wolverine Reply Brief* at 21-23. We disagree: the issue had been raised by the U.S. Industry sufficiently before the agency to satisfy the purposes of the exhaustion

With respect to the toll sales issue, both Wolverine and the ITA claim that the U.S. Industry raised an argument regarding a mill loss adjustment in its administrative case brief, while it now raises an argument regarding a different adjustment for scrap relating to toll sales.[47]

An examination of the U.S. Industry's Administrative Case Brief, however, reveals that it clearly describes the issue complained of as a toll sales adjustment, just as in the brief submitted by the U.S. Industry to this Panel.[48] See *Administrative Case Brief* at 4-7.

In general, the Administrative Case Brief makes the same factual arguments on these two issues which the U.S. Industry had advanced in its briefs to this Panel, both with respect to improper adjustments to COP caused by the inclusion of toll sale material in the cost calculation, and with respect to the ITA's alleged error in failing to include the Canadian portion of Wolverine's ISE in its calculation of Wolverine's COP. *See Administrative Case Brief* at 4-7, 10-11. The only real difference between the U.S. Industry's Administrative Case Brief and its brief to this Panel is the addition of citations to the legal authorities which Commerce supposedly violated. Moreover, the Panel notes that Comments 3 and 4 of the Final Determination discuss the toll sales and ISE arguments in terms that are practically identical to those used by the U.S. Industry in its submissions to the Panel. *See Final Results of Antidumping Duty Administrative Review and Notice Not to Revoke Order in Part,* 63 Fed. Reg., 33,037, 33,039-40

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doctrine.

47 *Rule 57(2) Response Brief of ITA* at 59; *Wolverine Reply Brief* at 22-23. *Also, Transcript of Oral Argument* at 107-109 (ITA) and 148-150 (Wolverine).

48 The Panel notes that Commerce did not advance an exhaustion argument with respect to the ISE issue, and that Wolverine's argument in this respect was limited to the assertion in its brief described above that the U.S. Industry had failed to raise the issue in the underlying proceeding below.

(1998). Thus, it is clear that the agency itself in fact considered the issues.[49]

Under these circumstances, there is no question but that the U.S. Industry did raise the specific issues under review during the administrative procedure before Commerce. This Panel must thus proceed to consider the issues raised by the U.S. Industry on the merits.

(2) **Indirect Selling Expenses in the Home Market**

The Tariff Act, 19 U.S.C. §1677b((b)(3), directs the ITA to include in its calculation of COP an amount for selling, general, and administrative expenses ("SG&A").[50]

As noted, the U.S. Industry argues that the ITA intended to include in COP an SG&A amount for a portion of U.S. corporate expenses associated with the Canadian operations, in addition to the amounts already reported for general and selling expenses by Wolverine for its Canadian operations.

The ITA disagrees and states that to include Canadian ISE, in addition to the amounts allocated for consolidated SG&A, would result in a double-counting of these expenses, since the consolidated SG&A already includes the Canadian ISE.

In its *Preliminary Results*, the ITA described its allocation of SG&A expenses from the company's U.S. corporate headquarters:

> [W]e allocated a portion of the [SG&A] expenses for the corporate

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49 *See Holmes Products Corp. v. United States*, 16 C.I.T. 1101, 1992 Ct. Intl. Trade LEXIS 258, *7-8 (exception to exhaustion doctrine where agency had, in fact, considered the issue below.)

50 *The Statement of Administrative Action*, H.R. Doc. No. 103-316, vol. 1. at 809 *reprinted in* 1994 U.S.C.C.A.N. 4153 (Art. 2.4) specifies "a general requirement that comparisons be fair...[and] admonishes national authorities *not to double-count adjustments."* (Emphasis added).

headquarters in Huntsville/Decatur, Alabama to Wolverine's [COP]. This additional allocation was based on SG&A and cost of sales information taken from Wolverine's financial statements.

ITA's *Preliminary Analysis Memorandum* at 3 (January 20, 1998). In its *Final Results,* the ITA clarified its reasoning:

> Respondent's financial statements demonstrate that indirect selling expenses were included in general and administrative expenses. Adding an additional amount for indirect selling expenses to the COP would result in double-counting.

Final Results, 63 Fed. Reg. at 33,040.

As documented in its cost verification report[51], the ITA verified Wolverine's Fergus facility general expenses and ISE, verified that these ISE were included in the SG&A expenses that were traced to the Canadian financial statements, and verified that such expenses were included in the total SG&A expenses reported in the consolidated financial statements for Wolverine's U.S. parent company.

The ITA used a three-step process to allocate a portion of the total consolidated SG&A expenses to the reported COP.[52] First, the cost of sales ("COS") for the Fergus operations were converted into a U.S. dollar amount. Second, this COS amount was divided by the total consolidated company COS (a U.S. dollar amount) to calculate a ratio representing the portion of total costs attributable to the Fergus operations. Finally, this ratio was applied against the total SG&A expenses for the consolidated company to calculate the SG&A portion attributable to Fergus. The application of this ratio can be seen at line 2460 of the log of the ITA's final analysis computer program.

While the Panel can see that the ITA's treatment of the consolidated SG&A expenses is not as clear as

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51 *ITA Cost Verification Report* (undated) 5-6 (Admin. Rec. 32/54/23); PD-71 at 51, Fiche 18, Fr. 62.

52 *Final Results Analysis Memorandum* at 3.

it could be in the *Preliminary Results,* the fact that the Canadian companies' SG&A expenses (including indirect selling expenses) are included in the consolidated SG&A of the U.S. parent company headquartered in Huntsville/Decatur is supported by the record evidence. To add in an amount for reported Canadian indirect selling expenses would result in an unlawful

double-counting of these expenses.

Therefore, this Panel finds the ITA's conclusion that adding additional amounts for indirect selling expenses would have double-counted these expenses is supported by substantial evidence on the record and otherwise in accordance with law. The ITA's determination is hereby affirmed by the Panel in this regard.

(3) **The Toll Sales Handling Charge**

Wolverine's factory produces merchandise for sale in the home market. It also processes other companies' raw materials into similar merchandise for a fee, commonly referred to as "tolling". Wolverine argues here that such toll sales and their respective costs are not included in the ITA's normal value calculations. *Wolverine's Reply Brief* at 24.

The U.S. Industry argues that Wolverine artificially lowered its costs of materials for subject merchandise by an offset to costs realized from toll sales, *i.e.*, non-subject merchandise. The U.S. industry argues that, because the adjustment is derived from toll sales, such an adjustment is unlawful. *U.S. Industry Case Brief* at 43-46.

The Investigating Authority determined that the mill loss adjustment did not affect the cost of materials.

> The Department verified that the reported per-unit materials cost was accurate. Although a mill loss adjustment was made to the metal pools account which reflected decreased quantities, this adjustment does not affect the cost of materials account.

Final Results at 33,039.

The U.S. Industry cites no evidence of record to refute the ITA's determination that the mill loss adjustment has no effect on Wolverine's reported material costs. Nor does it demonstrate how the adjustment is anything more than an inventory accounting convenience. Moreover, the reasonableness of Wolverine's reporting of material costs is supported by the ITA's Commerce's verification report[53], its analysis memorandum[54], and the collected cost verification exhibits[55]. Therefore, this Panel concludes that the ITA's determination regarding this issue is supported by substantial evidence on the record and otherwise in accordance with law. The ITA's decision is hereby affirmed with regard to this issue.

V. **DISPOSITION**

For the reasons stated above, the Panel hereby *remands* as follows:

> That part of the ITA's determination where it calculated Wolverine's cost of production on a simple, rather than weighted average, basis. The ITA shall examine the COP calculation contained in the Final Results and determine whether a weighted average rather than a simple average should have been used in the calculation. If a weighted average should have been used, then the ITA shall make the necessary changes to the computer program. If a simple average should have been used, then the ITA shall provide reasons for why it has departed from the established practice of employing a weighted average in calculating COP.

The Panel affirms the Commerce Department's determination in all other respects.

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53 *ITA Cost Verification Report* at 10-11 (Admin. Rec. 32/54/23); PD-71 at 51, Fiche 18, Fr. 59-60.

54 *Memo to File from Paul M. Stolz* at 1-2 (June 6, 1998)(Fiche 18, fr. 64-65).

55 (Confidential Record, fiches 37-51).

The Panel hereby directs the Commerce Department to provide the results of this remand within sixty (60) days of the date of this Order. Any objections to the Investigating Authority's remand results shall be filed by an interested person within twenty (20) days after the filing of the remand. Any responses to the objections shall be filed by an interested person ten (10) days thereafter.

Signed in the original by:

Robert E. Ruggeri
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Issued on the 16th day of July, 1999