IN THE MATTER OF:

Final Determination of Dumping Made
by Revenue Canada, Customs and Excise,
Regarding Certain Machine Tufted Carpeting
Originating in or Exported from The
United States of America

CDA-92-1904-01

Available in Canada through

your local bookseller

or by mail from

Canada Communication Group--Publishing

Ottawa, Canada K1A 0S9

Catalogue No. E100-2/1-92-1904-01E

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

IN THE MATTER OF:	)	
FINAL DETERMINATION OF DUMPING MADE BY REVENUE CANADA, CUSTOMS AND EXCISE, REGARDING CERTAIN MACHINE TUFTED CARPETING ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA	)	Secretariat File CDA-92-1904-01

Before: Robert J. Pitt (Chairperson)
Gail T. Cumins
Timothy A. Harr
Mark D. Herlach
Ross Stinson

OPINION AND PANEL DECISION
MAY 19, 1993

Peter A. Magnus of Osler, Hoskin & Harcourt, Ottawa, Ontario, argued on behalf of the complainants the Carpet & Rug Institute (U.S.A.) and Shaw Industries, Inc. With him on the brief was Gregory O. Somers.

Robert P. Hynes of the Department of Justice of Canada, argued for the Minister of National Revenue for Customs and Excise.

Brian J. Barr, Barrister and Solicitor, of Ottawa, Ontario, argued on behalf of the Canadian Carpet Institute.

TABLE OF CONTENTS

INTRODUCTION

A Binational Panel Review in the matter of the Final Determination of Dumping made by Revenue Canada, Customs and Excise, regarding Certain Machine Tufted Carpeting Originating in or Exported from the United States of America was requested pursuant to Article 1904 of the *Canada-United States Free Trade Agreement*, and section 77.15 of the *Special Import Measures Act*, Revised Statutes of Canada 1985, Chapter S-15, as amended ("SIMA").

The Canadian Carpet Institute ("CCI"), a trade association comprised of domestic manufacturers of machine tufted carpet filed a complaint with Revenue Canada, Customs and Excise ("Revenue Canada") on June 21, 1991, alleging the harmful dumping into Canada of certain machine tufted carpeting originating in or exported from the United States of America ("the subject goods"). On December 19, 1991, the Deputy Minister made a Preliminary determination of dumping in respect of the subject goods in accordance with subsection 38(1) of SIMA. A final determination of dumping of the subject goods was made by the Deputy Minister on March 18, 1992. Following this finding, the Carpet & Rug Institute ("CRI") a trade association representing certain United States of America exporters of carpet, and Shaw Industries, Inc. ("Shaw") made a formal request for a Binational Panel Review.

CRI filed a motion, dated June 29, 1992 to deny the CCI leave to participate in the Binational Panel Review of the Revenue Canada Final Determination of Dumping. By order dated August 11, 1992, the Panel denied the motion of the CRI.

Panel hearings were suspended following the withdrawal of Mr. Christopher Thomas on December 8, 1992. Pursuant to Rule 78 of Article 1904 Panel Rules, Panel proceedings and computations of time were suspended pending the appointment of a substitute panelist. Mr. Ross Stinson was appointed to replace Mr. Christopher Thomas. Panel hearings were held in Ottawa on February 18 and 19, 1993 and the decision of the Panel was due by May 19, 1993.

I STANDARD OF REVIEW

Pursuant to the Canada - United States Free Trade Agreement, the standard of review to govern the proceedings before this Panel is the standard provided in section 28(1) of the *Federal Court Act* R.S.C. 1985, c. F-7[1]. According to section 77.11(4) of SIMA, request for review to a Panel "may be made only on a ground set forth in section 28(1)[2]. The full text of subsection 28(1) as it then was is as follows:

> Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, on the ground that the board, commission or tribunal:
>
> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

The complainants in the present case maintain that the standard of review applied to a review of the Deputy Minister's final determination is as follows[3]:

> (a) in respect of matters going to the Deputy Minister's jurisdiction, the Deputy Minister's decision must be set aside if it is wrong;
>
> (b) in respect of errors of law, the Deputy Minister's decision must be set aside and remanded for correction if it is clearly wrong or unreasonable; and

---

1 The reference in section 77.11(4) of SIMA to "subsection 28(a) of the *Federal Court Act*" refers to that Act as it stood at the time of the implementation of the Free Trade Agreement: SIMA section 77.29(c).

2 *Special Import Measures Act*, R.S. 1985, c. S-15, section 77.11(4).

3 Reply brief of the complainant Carpet and Rug Institute at page 6, paragraph 11; Reply brief of the complainant Shaw Industries, Inc., at page 9, paragraph 19.

(c) in respect of factual findings, the Deputy Minister's decisions are reviewable if they are without regard to the material before her, or are arbitrary or capricious.

The Deputy Minister submits that a recent Binational Panel in the matter of "Certain Beer originating in or exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Company, and Stroh Brewery Company for use or consumption in the Province of British Columbia"[4], dated August 6, 1992, rendered an opinion which is the correct approach for Panels to apply to matters before it[5]. The Deputy Minister states in her briefs that the following conclusions were reached by the Panel in the *Beer* decision:

(a) Under paragraph 28(1)(a) the administrative body must not exceed its jurisdictional limits and must be "correct" in its determination of those limits or boundaries. Also the proceedings under review must meet the fairness standard of the principles of natural justice or jurisdiction will be lost.

(b) Given there is no privative clause involved the Panel rejected a "patently unreasonable" test for this subsection and adopted the test of "reasonableness" when reviewing alleged errors of law.

(c) The Panel cited with approval the test outlined by the Supreme Court of Canada in the *National Corn Growers* case of a "patently unreasonable" review of the sufficiency of evidence or facts. They also adopted the jurisprudential test of reversal of a finding in the event there is no evidence on record to support a finding of fact.

The applicability of each of the three distinct grounds provided for in subsection 28(1) will now be considered[6].

---

4 Certain Beer originating in or exported from the United States of America by G. Heilemah Brewing Company, Inc., Pabst Company, and the Stroh Brewery Company for use or consumption in the Province of British Columbia, dated August 6, 1992, Canadian Secretariat File CSF CDA-91-1901-01 pages 41-44. ("*Beer*")

5 Briefs of the Deputy Minister of National Revenue, Customs & Excise: the Carpet and Rug Institute at pages 16-18; Shaw Industries, Inc. at pages 26-28.

6 For this portion of the Panel's decision, reference is made to the written decision of the panel in the Beer case at pages 9-20.

i) Paragraph 28(1)(a)

The complainants submit that in respect of matters going to the Deputy Minister's jurisdiction, the Deputy Minister's decision must be set aside if it is wrong. The Deputy Minister in relying on the *Beer* decision submits that under subparagraph 28(1)(a) the administrative body must not exceed its jurisdictional limits and must be "correct" in its determination of those limits or boundaries.

This issue has been addressed frequently by the Supreme Court of Canada in the context of judicial review of decisions of administrative bodies operating pursuant to labour laws. In the recent case of *Public Service Alliance v. Canada (A.G.)*[7], the Supreme Court held that the interpretation of the word "employees" in the *Public Service Staff Relations Act* was a jurisdictional question. Consequently, the Public Service Relations Board was incorrect in its decision that a group of individuals was, in fact, "employees" of the Solicitor General and judicial intervention was warranted to set aside the Board decision. Similarly, in *U.E.S., Local 298 v. Bibeault*[8], the Supreme Court ruled that jurisdictional intervention was warranted where no "alienation" or transfer of contractual rights within the meaning of civil law took place, thereby concluding that the labour court did not have authority to confirm the issuance of the transfer of rights and obligations from one union to another body of employees[9].

The complainants submit that the Deputy Minister's decision must be set aside if it is "wrong", whereas the Deputy Minister submits that the administrative body must not exceed its jurisdictional limits and must be "correct" in its determination of those limits or boundaries. It goes to reason that if something is not correct, then it is wrong. The Panel is of the opinion that the applicable standard with respect to paragraph 28(1)(a) is the one enunciated in the *Beer* decision. An administrative body may not exceed its jurisdictional limits or boundaries and must be "correct" in its determination of these limits or boundaries[10].

ii) Paragraph 28(1)(b)

The complainants submit in their briefs that the standard of review to be applied to a review of a final determination of dumping in respect of errors of law is

---

7 [1991] 1 S.C.R. 614.

8 [1988] 2 S.C.R. 1048.

9 See also *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227; *Syndicat des employées de production de Québec et de l'Acadie v. Canadian Labour Relations Board*, [1984] 2 S.C.R. 412.

10 *Beer* decision at pages 11-12.

the standard of legal correctness[11]. In their reply briefs, the complainants submit that the applicable standard of review for the Deputy Minister's determination extends beyond reasonableness and her decision should be remanded if it is clearly wrong[12]. The Deputy Minister, on the other hand, submits that given there is no privative clause involved, the test of "reasonableness" should be used when reviewing alleged errors of law.

The Supreme Court has stated that the standard of review for issues of law determined by an administrative agency depends upon whether the statute authorizing the agency to decide the issue includes a "privative clause" limiting the review of that decision. The decision-making processes of many Canadian administrative agencies are protected by a privative clause. A privative clause is a provision in the enabling legislation which limits or precludes judicial review. As a result, if an administrative agency is protected by a privative clause, review is limited to cases where an error of law is "patently unreasonable". In *National Corn Growers Association v. Canada (Canadian Import Tribunal)*[13], the Supreme Court remarks that this "severe test" is needed because only a manifest and patent error could justify a reviewing court correcting an error when the legislation has articulated an express intention to the contrary. On behalf of four members of the Court, Justice Gonthier wrote:

> [a]lthough the terms of Section 28 of the Federal Court Act are quite broad in scope, it is to be remembered that courts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law[14].

However, three members of the Court in a concurring opinion written by Justice Wilson articulated a more deferential view that asks whether the tribunal so misinterpreted the provisions of the legislation as to embark on an inquiry, or answer a question, not remitted to it. Justice Wilson contended that the patently unreasonable standard should not be applied to the decision of the tribunal but should be applied to the threshold question of whether the tribunal's interpretation of its constitutive

---

11 Brief of the complainant Carpet and Rug Institute, at page 20, paragraph 55; confidential brief of the complainant Shaw Industries, Inc. at page 23, paragraph 67.

12 Reply brief of the complainant Carpet and Rug Institute at page 4, paragraph 7; reply brief of the complainant Shaw Industries, Inc. at page 7, paragraph 15.

13 [1990] 2 S.C.R. 1324 ("*National Corn Growers*").

14 *National Corn Growers* at pages 1369-70.

legislation was patently unreasonable. If the tribunal has reasonably interpreted its constitutive legislation, then judicial inquiry ends and the Court should not delve into the reasonableness of the conclusions reached by the agency in the administrative process. As explained by Justice Wilson:

> The distinction is a subtle one, but it is not without importance. One must, in my view, not begin, with the question whether the tribunal's *conclusions* are patently unreasonable; rather, one must begin with the question whether the tribunal's interpretation of the provisions in its constitutive legislation that define the way it is to set about answering particular questions is patently unreasonable. If the Tribunal has not interpreted its constitutive statute in a patently unreasonable fashion, the courts must not then proceed to a wide ranging review of whether the tribunal's conclusions are unreasonable[15].

While this more modern standard of judicial review is slightly less deferential to agency determinations, it remains a standard which, in absolute terms, is very deferential. The opinion does not overturn the ingrained judicial deference to specialized agencies protected by privative clauses.

The final determination of the investigating authority in these proceedings is not protected by a privative clause. Consequently, there is no requirement that this Panel's review is limited to a "patently unreasonable" test. However, many cases demonstrate judicial deference to administrative decisions even where the administrative decisions are not protected by a privative clause. The Supreme Court of Canada has addressed the standard of review on an appeal in the absence of a privative clause in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*[16]. In discussing the appropriate standard of review, the Court at pages 1745-46 states:

> It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal. However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise.

---

15 *National Corn Growers* at pages 1347-48. (emphasis in original)

16 [1989] 1 S.C.R. 1722.

The Court cites with approval the Federal Court of Appeal in *Canadian Pacific Limited v. Canadian Transport Commission*[17] where the Court of Appeal held that it "should not interfere with the interpretation made by bodies having the expertise of the [Railway Transport Committee of the Canadian Transport Commission] in an area within their jurisdiction, unless their interpretation is *not reasonable or is clearly wrong*" (emphasis added).

If curial deference is appropriate on an appeal, it must be still more appropriate on a review, as in the instant case, because the jurisdiction on appeal is much broader than the jurisdiction of a court on judicial review. The interpretation and application of SIMA falls squarely within Revenue Canada's area of expertise. Therefore, any determinations made by Revenue Canada in the course of carrying out its duties pursuant to SIMA should be treated with deference by a review Panel.

In assessing the extent of the deference to be accorded, commentary by J. Estey of the Supreme Court of Canada in his partial dissent in *Douglas Aircraft Company of Canada Ltd. v. McConnell*[18], is helpful. At page 276, he states:

> A *Certiorari* review of a statutory board free of a privative cloak, brings with it the added ground of review for error on the face of the record. Such error exceeds a difference of opinion by the reviewing tribunal on an interpretative issue and falls short of an error resulting in an excess of its jurisdiction on the part of the board. In the modern era of administrative law, such reviewable error ... must amount to an error ... of such magnitude that the interpretation so adopted by the board may not be reasonably borne by the wording of the document in question ...

If there is more than one reasonable interpretation of the statute, a reviewing body should not substitute its judgement for that of the administrative agency so long as the agency adopts one of the possible "reasonable" interpretations. In reviewing purported "errors in law", the Panel, therefore, adopts a standard of "reasonableness". If a decision adopted by Revenue Canada respecting an issue of law is a reasonable interpretation, the Panel cannot interfere with the interpretation.

---

17 (1987), 79 N.R. 13 (F.C.A.) at pages 16-17.

18 [1980] 1 S.C.R. 245.

iii) Paragraph 28(1)(c)

The complainants submit that in respect of factual findings, the Deputy Minister's decisions are reviewable if they are without regard to the material before her, or are arbitrary or capricious.[19] The Deputy Minister's brief submitted that with respect to paragraph 28(1)(c), a "patently unreasonable" test was to be applied to the review of the sufficiency of evidence or facts.[20] The Deputy Minister's proposed test was based on the decision reached by the Panel in the *Beer* case. However, during the hearing before this Panel, counsel for the Deputy Minister resiled from the initial position in the written brief and substituted in place of the patently unreasonable test the language of section 28 itself.

With respect to the interpretation of paragraph 28(1)(c), this Panel is content to rely on the explicit wording of section 28. It is therefore the opinion of this Panel that a request for a review of a finding of fact can only be made if the Deputy Minister "based [her] decision or order on an erroneous finding of fact that [she] made in a perverse or capricious manner or without regard for the material before [her]."

II RES JUDICATA

The Deputy Minister has raised the issue of *res judicata* as a defence regarding the issues of exclusion of sales and determination of like goods with respect to Shaw. The Deputy Minister maintains that the issue was settled as a result of the decision of Muldoon, J. in a preliminary application by Shaw. While conceding that that decision is not *res judicata* as it pertains to CRI, the Deputy Minister maintains that the statement of Muldoon, J. is a firm statement of Canadian law.

Shaw takes the position that the decision of Justice Muldoon does not raise the issue of *res judicata* and that it was a decision pertaining to the preliminary determination of dumping by the Deputy Minister. Shaw maintains that the decision did not relate to the final determination which is the subject of the complaint before this Panel. Further, Shaw maintains that the decision of the Trial Judge in no way supplants the jurisdiction of this Panel.

During the course of the investigatory process by the Deputy Minister, Shaw brought two applications before the Federal Court of Canada in an effort to quash the Deputy Minister's inquiries. The initial application was brought before Mr. Justice MacKay prior to the issuance of the preliminary determination by the Deputy Minister. Mr. Justice MacKay, in a decision dated the 10th day of January 1992, dismissed the application, on the

---

19 Reply brief of the complainant Carpet and Rug Institute at page 6, paragraph 11; reply brief of the complainant Shaw Industries, Inc. at page 9, paragraph 19.

20 Briefs of the Deputy Minister of National Revenue, Customs and Excise: the Carpet and Rug Institute at page 18; Shaw Industries, Inc. at page 28.

basis that he would be forced to assume that the Deputy Minister would not proceed in accordance with her statutory duties[21]:

> The application for *prohibition* and *mandamus*, is here cast in terms that would require the respondent to act in a manner consistent with the *Special Import Measures Act*, the *Special Import Measures Regulations* and relevant portions of the departmental *Assessment Programs Manual*. It would not be appropriate for the Court to presume on the basis of the evidence here presented, that the respondent will not act in accord with statutory duties and in accord with the common law principle of fairness.

Subsequent to the issuing of the preliminary determination by the Deputy Minister, Shaw made a further application to the Federal Court for an Order for *certiorari*, asking that the preliminary determination of the Deputy Minister be quashed on the basis that she had not acted in accordance with her statutory obligations. This application was heard by Justice Muldoon, who dismissed the application stating, at page 10:[22]

> Because the Court, after weighing the parties' respective arguments, written and oral, adopts the approach, methods and arguments of, and on behalf of, the Dep. M.N.R., the Court will, in the exercise of its discretion, not quash her preliminary determination of dumping in regard to the applicant, Horizon. Its application will be dismissed because the Dep. M.N.R. made no error in law.

Justice Muldoon further stated at page 11:

> The applicants urge that Mr. Justice Strayer's decision in *Chisholm* affords them no solace, since the Dep. M.N.R. has already issued her reasons for her preliminary determination. So it was in that *Chisholm* case, but there the applicant decided to attack the preliminary determination by attacking the decision to initiate an investigation. Strayer J. demonstrates in para. (6), above that the applicants' complaints can be appropriately subsumed into, and articulated at, the "section 46 enquiry", including the questioning of the Dep. M.N.R.'s preliminary determination, by means of an investigation. The yet-to-be articulated rights of the applicants are a strong factor which disinclines this Court to intervene at this stage of a process which, at least up to now, has been found by the Court, Mr. Justice MacKay to be fair, a matter of *res judicata* between the parties. SIMA is so replete with avenues to question decisions taken and determinations made thereunder, including finally an

---

21 *Shaw Industries Inc. v. Deputy Minister of National Revenue for Customs and Excise* Federal Court of Canada, December 18, 1991 at pages 14 & 15..

22 *Shaw Industries Inc. and Horizon Industries Inc. v. Deputy Minister of National Revenue for Customs and Excise* Federal Court of Canada, March 17, 1992.

appeal under section 62 to this Court "on any question of law", that the Court's discretion on this section 18.1 application inclines firmly to reject the applicants' application. So be it. Indeed, so was it, by order already signed on March 16, 1992.

Subsequent to these determinations by the Federal Court, the Deputy Minister proceeded to make her final determination with respect to dumping as it relates to the applicants before this Panel. The Deputy Minister now maintains that the issue has already been determined as it relates to Shaw and is a matter that is *res judicata*.

Counsel has referred the Panel to the decision of *Re Bullen*.[23] In that case, the issue of *Res Judicata* was raised before Aikins J. who outlined concisely, and in the opinion of this Panel, accurately, the law in Canada relating to the doctrine of *res judicata*. Aikins, J. at page 631 stated:

> The constituent elements of the estoppel by *res judicata* which must be established by the party raising that defence are set out in *Doctrine of Res Judicata*, 2nd ed. (1969), at pp. 18-9, by Spencer Bower and Turner, as follows:
>
> (i) that the alleged judicial decision was what in law is deeded such;
>
> (ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;
>
> (iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
>
> (iv) that the judicial decision was final;
>
> (v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
>
> (vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem*.

---

23 21 D.L.R. (3d) 628 B.C.S.C.

The opinion of the Panel is that the doctrine *res judicata* does not apply in this case. In the first instance, it is clear that Justice Muldoon's decision was based in no small part upon the fact that the issues before him were of a preliminary nature and did not constitute a final determination by the Deputy Minister. As a result of the other avenues of redress open to the applicants, the Court declined to exercise its discretion, particularly in the absence of an obvious error on the part of the Deputy Minister.

Furthermore, while Justice Muldoon did state that he felt that the Deputy Minister had made no error in law, it should be remembered that this finding was on a preliminary determination by the Deputy Minister, not a final determination such as is before the Panel. The issues may well be similar, but the fact remains that exporters have had an opportunity to present additional evidence and arguments to the Deputy Minister prior to the final determination. For example, prior to making the final determination, the Deputy Minister did allow for an annualization of GS&A costs as a result of submissions by the exporting companies. Another example, is that the record makes clear that specific submissions concerning allocation of expenses to divisions of companies were received by the Deputy Minister and recalculations were conducted for the final determination that had not taken place in the preliminary determination.[24]

The Panel accepts that a clear judicial determination on a specific issue may, in some circumstances, be binding notwithstanding the fact that it deals with a preliminary determination as opposed to a final determination. It is important however that the determination be a clear one and on exactly the same issue as is being subsequently raised.

This being the case, this Panel takes the view the judicial decision was not on the same question as is required by the tests laid out in *Re Bullen* (supra). The Court declined to exercise its discretion on the basis of other avenues of redress being available to the applicants and further that the Court was hearing an application that pertained to the preliminary determination by the Deputy Minister.

III PREPONDERANT PRICE

The complainants take the position that the Deputy Minister erred in her determination of preponderant price. In particular, the complainants maintain that the Deputy Minister erred in applying a "twice as often" preponderant test as opposed to a "weighted average" test in determining the price of like goods under s.17 of SIMA. Furthermore, they maintain that the Deputy Minister applied her test concerning preponderant price inconsistently.

The Deputy Minister's position is that the test that was applied was reasonable in the circumstances of this case. Further, the Deputy Minister maintains that the complainants have not met the onus of proof that rests with them to show that the Deputy Minister was unreasonable in adopting the stance that was taken.

---

24 See Exporter Decision Recap - Aladdin Carpet Mills Inc., V. 371, page 174.

The SIMA mandates that the Deputy Minister, when conducting an investigation must determine the normal value of goods sold to importers in Canada.[25] In determining the normal value, the Minister must apply the test as set forth in Section 17 of the Act. The Act provides as follows:

> In determining the normal value of any goods under section 15, the price of like goods when sold by the exporter to purchasers during the period referred to in paragraph 15(d) is
>
> (a) the price at which the preponderance of sales of like goods that comply with all the terms and conditions referred to in section 15 or that are applicable by virtue of subsection 16(1) was made by the exporter to purchasers throughout the period; and
>
> (b) when there is no such preponderance of sales at a single price throughout the period, the weighted average of the prices at which like goods were so sold by the exporter to purchasers throughout the period.

The SIMA does not contain a definition of "preponderant" or "preponderance". However, the provisions of the Assessment Programs Manual ("Manual") provide guidance to the Deputy Minister in the selection of either the preponderant or weighted average price. In Volume II, Part VIII, Chapter 2, Section B, Page 12 at Sub-paragraph 4(b) the Manual states the following:

> A preponderance of sales means that a single price prevails in a significant number of sales to several purchasers. It does not mean that 50% or more of the quantity of goods sold must be at one price. Nor does it mean that the quantity of goods sold at any one price must exceed the quantity in goods sold at all other prices combined. If examination of the relevant domestic sales reveals that a single price prevails to several domestic customers and such sales in total are more numerous than for any other selling price, such a price may be considered as preponderant. However, if such a single price is found to be concentrated in a small number of domestic customers, while there are many other selling prices to other customers, such a single price may not be preponderant.

---

25 *The Special Import Measures Act*, Sections 15, 16, 17.

Counsel for the complainants maintains that the Deputy Minister, in interpreting the provisions of Section 17, used a definition of "preponderant" inconsistent with its ordinary meaning. By using a faulty definition of preponderant, counsel says that in certain instances the Deputy Minister used the wrong means to select the price of "like goods", favouring the preponderance of sales method over the weighted average selling price.

The definition of preponderant price of like goods used by the Deputy Minister was -

> the most frequently occurring price of the like goods where that price occurred at least twice as often as the next most frequently occurring price.

The complainants maintain that the definition of the test used by the Deputy Minister to determine preponderant price can lead to perverse results. Counsel for CRI and Shaw has provided, subsequent to the hearing of this matter, some specific references to sales where the Deputy Minister's test would, in the opinion of the complainants, lead to these perverse results.

As enunciated by this Panel in its decision on the standard of review, the role of a Panel pursuant to Section 19 of The Free Trade Agreement is not to substitute its judgment for that of the investigating authority. In this case, the Panel must determine whether or not the Deputy Minster's test for "preponderant price" is reasonable.

It is indeed conceivable that in some instances this test may lead to an unreasonable result. If, for example, there were a series of twenty sales of like goods it is conceivable that the preponderant price might be determined by using as little as two sales from that group. On the other hand, the test employed by the Deputy Minister may well be reasonable in the particular circumstances of any given case. It is incumbent upon the complainants to satisfy this Panel that the Deputy Minister's application of tests to the particulars of this case would indeed be unreasonable.

The Panel has had an opportunity to review the specific examples that have been provided to us by counsel for CRI and Shaw. These examples do show some difference between the preponderant price and the "weighted average" price. They also indicate that in many instances the preponderant price constituted less than fifty percent of the total sales. Having said this, it should be noted that in the examples cited by counsel for the complainants, the preponderant price represents a substantial number of sales and did not, in the opinion of this Panel, lead to an unfair result. It is also interesting to note that the example cited by counsel for the complainant refers to Queen Carpet Corporation which, in its response to the Request for Information from the Deputy Minister, utilized a "twice as often" test to determine preponderant price.[26] We are therefore of the opinion that, based on the examples cited by the complainants, there is not sufficient evidence to substantiate an allegation that the overall application of the test by the Deputy Minister was unreasonable.

---

26 Queen Carpet Corporation Response to Exporter Request for Information, C.S.T. V. 236, page 155.

The second issue that has been raised by counsel for the complainants relates to an alleged inconsistent application of the preponderance test by the Deputy Minister. Counsel has cited five specific examples of instances where the Deputy Minister did not use the preponderance test, but rather the weighted average test. In each of these instances, the Deputy Minister indicated that the exporting company had not provided information that would allow it to apply the preponderance test.[27] Counsel for the complainants urges upon the Panel that the alleged inconsistency in application of the preponderance test should lead to a remand of this entire matter to the Deputy Minister. In light of this Panel's opinion that the preponderance test as utilized by the Deputy Minister is not unreasonable in these circumstances, this Panel is not of the view that the entire matter should be remanded to the Deputy Minister.

IV PERIOD OF INVESTIGATION

The complainants assert that the Deputy Minister erred both in the selection of the period of investigation and in the application of that period in this case.[28] The period of investigation selected by the Deputy Minister was January 1 through March 31, 1991. The complainants claim in the Brief that the period of investigation was inconsistent with previous periods of investigation, was selected arbitrarily and was anomalous and that this prejudiced the complainants.[29] In their Reply Brief, the complainants raise for the first time allegations that the period of investigation did not reflect the average costs of manufacturing carpet because it was a period of abnormally high expenses and of decreased sales and production.[30] They claim that evidence was presented to the Deputy Minister supporting the claim that the period was non-representative, but that the Deputy Minister failed to address this evidence.[31] The complainants also allege that, having chosen this period of investigation, the Deputy Minister erroneously and belatedly decided to include within the investigation carpet sales that were executed before the period of investigation, but which were imported into Canada during the period.[32]

---

27 See Exporter Decision Recaps - Aladdin Carpet Mills Inc., V. 371, page 174; Mohawk Carpet Corporation, V. 371, page 233; Burtco Enterprises Inc., V. 371, page 223; Marglen Industries Inc., V. 371, page 228; Masland Carpets Inc., V. 371, page 230.

28 Complainants' Brief at page 22.

29 Complainants' Brief at pages 23-24.

30 Complainants' Brief at pages 10-15.

31 Ibid.

32 Complainants' Brief at pages 24-27.

The Deputy Minister and the supporting intervenor respond that the period of investigation that was chosen by the Deputy Minister was not unreasonable and that the Deputy Minister has broad discretion and authority to determine the period of investigation. The Deputy Minister argues that, to the extent that the period of investigation included atypical costs due to the regular increased expenses or the regular slow-down in production suffered during the winter quarter, the Deputy Minister's adjustment which annualized the general selling and administrative expenses eliminated any distortion created by the selection of that period.[33] With respect to the inclusion of certain sales before the period, the Deputy Minister asserts that the determination to cover all of the carpet imported during the period was a reasonable decision within the discretion of the Deputy Minister, that it was administrable and fair, and that it was fully disclosed to the parties at an early point in the investigation.[34]

The Panel finds that the selection of the period of investigation is a matter particularly within the discretion of the Deputy Minister and that such selection should not be overturned absent a clear showing that it was improper. It is axiomatic that any period chosen by the Deputy Minister will be more favourable for one party than for the opposing party, in comparison with the average results over a broader time period. Thus, the mere fact that the particular time period chosen by the Deputy Minister disfavors a party cannot be grounds for challenging the period, and the complainants' assertion that the period is one during which the results were adverse to their position, even if proved, is not grounds for rejecting that time period.

Furthermore, even if the Deputy Minister's determination of which sales to include within the investigation is somewhat arbitrary and may produce irregular results, this is not sufficient to warrant reversal. Because the Deputy Minister must set the period-of-investigation parameters at the outset of an investigation, that decision cannot be based upon a full analysis of the evidence, which has not been received or even requested. Rather, the decision is necessarily made on a somewhat arbitrary basis after considerations of such factors as the volume of sales, the period for which the necessary data is most likely to be available and usable, and other general factors which do not turn on the state of the particular market or industry during the period chosen.

Once the parameters of the period of investigation have been decreed, and all of the parties are engaged in producing evidence and arguments based on that period, it is a major hardship, and may be virtually impossible, to alter the period substantially and still complete the investigation in a timely fashion. This is particularly true in an investigation such as that below, involving thousands of sales per month. Therefore, only compelling evidence that the period selected will produce highly anomalous and improper results that cannot be corrected in some other manner will necessitate a change in the selected period of investigation.

---

33 Deputy Minister's Brief at page 24.

34 Deputy Minister's Brief at pages 25-27.

While the Deputy Minister may not intentionally skew the results by selecting a period that is particularly adverse to a party, and while the period chosen by the Deputy Minister may not be so far removed from the time of the alleged dumping so as to be clearly irrelevant to assessing the dumping allegation, neither of these errors is alleged by the complainants here, and none is evident from the record. The complainants assert that it is the Deputy Minister's normal practice to select a period of investigation that covers at least six months that ends at approximately the time that the investigation is commenced.[35] Even if this is so, there is no requirement under SIMA that such a period of investigation be used. While the period should not be so short that the quantity of sales during the period is not adequate to determine if dumping has occurred, this was certainly not the case here; if anything, the number of sales during the period was so large that both the complainants and the Deputy Minister have suggested that it strained the Deputy Minister's ability to process. This circumstance alone provides an objective justification for the Deputy Minister's selection of the three-month investigation period.

Nor did the Deputy Minister have any obligation to modify the period of review in response to the complainants' assertion late in the investigation that it covered atypical recessionary market circumstances. Dumping often occurs in unusual periods, such as periods of excess capacity. As noted above, no period is "normal"; every period will vary in its circumstances. There is no inherent reason to conclude that the unusual market circumstances claimed by the complainants would be different on one side of the Canadian/U.S. border than the other, and thus warp the dumping margins established in this case based on price-to-price comparisons between the United States and Canada.

Moreover, while SIMA Section 16(2) recognizes that home-market sales should not be rejected as the basis for normal value where the home market prices will recover all costs plus a profit within a reasonable period of time, the reasonable period of time used to determine such costs is not pre-determined necessarily by the period of investigation. The period of time over which costs are considered by the Deputy Minister in determining if the prices charged in the home market are sufficient to make a profit over a reasonable period of time may exceed the period of investigation. This independent issue is addressed below in Section VIII. The Panel accordingly concludes that the claimed annual business cycle swings, recessionary effects, fuel-cost based fiber price increases, and other factors cited by complainants do not warrant changing the period of investigation selected by the Deputy Minister.

Complainants also challenge the Deputy Minister's decision to include within the investigation imports of products that were sold before the period of investigation but not actually shipped into Canada until the period of investigation. The complainants challenge two aspects of the decision: first, that the Deputy Minister improperly applied her own period of review, and second, that the approach was communicated to the parties in a confusing, contradictory and untimely manner.

---

35 Complainants' Brief at page 26.

It is the Panel's opinion that it was not an error or abuse of discretion for the Deputy Minister to include within the investigation sales of carpet imported during the period that were executed prior to the beginning of the period. As we observed above, the decision establishing what sales will be included within the investigation is almost wholly within the discretion of the Deputy Minister. Accordingly, in order to overturn such a decision, there must be compelling evidence on the record that the Deputy Minister was aware that its chosen approach would produce seriously misleading results but nevertheless decided to follow that approach.

The record below does not show that the complainants presented a compelling case that the Deputy Minister's approach would have produced seriously misleading results. There is no substantiated allegation or evidence that the prices for sales to Canada executed in the fourth quarter, but not shipped until the first quarter, were materially lower than the prices for sales to Canada executed in the first quarter. Thus there was no showing that such fourth quarter sales prices skewed the results. There is no substantiated allegation that carpet shipped to Canada in the first quarter based on previous sales was less likely to have been manufactured during the first quarter than carpet sold during the first quarter. Thus, there was no showing that use of first quarter cost-based normal values would be inappropriate in the case of such sales. The mere fact that the decision of the Deputy Minister to include some pre-period sales might have ultimately had an adverse impact on the complainants is not a sufficient basis to overturn that decision; it could just as easily have had a beneficial impact, as could any other change in the period of review.

With regard to the complainants' allegation that the Deputy Minister issued confusing questionnaires and failed to notify the parties in a timely fashion of the inclusion of pre-period sales within the period of investigation, the Panel finds that the record below does not support a finding that the Deputy Minister erred or that any party was prejudiced. Although there was some ambiguity in the Deputy Minister's initial request, the parties were apprised of the parameters of the investigation with sufficient clarity and in sufficient time to provide the necessary information, and it appears that most provided the information sought by the Deputy Minister. Any confused party had ample opportunity to obtain clarification. The fact that the Deputy Minister used the information she sought was not an error, and there is no evidence that the Deputy Minister's actions prejudiced any party.

V EXCLUSION OF SALES

Section 16(2)(b) prohibits the Deputy Minister from using certain below cost sales in calculating normal value under paragraph 15 of SIMA. Specifically, Section 16(2)(b) states that:

> (2) In determining the normal value of any goods under section 15, there shall not be taken into account
>
> . . .

> (b) any sale of like goods that, in the opinion of the Deputy Minister, forms part of a series of sales of goods at prices that do not provide for recovery in the normal course of trade and within a reasonable period of time of the cost of production of the goods, the administration and selling costs with respect to the goods and an amount for profit. (emphasis added)

In the investigation, the Deputy Minister excluded from her normal value calculation pursuant to Section 16(2)(b) domestic sales of a carpet style when the total revenue generated by all sales of that particular style did not exceed the total cost of production of that style during the period of investigation. In essence, the Deputy Minister treated sales of each style of carpet sold in the home market during the period of investigations as "series of sales" under Section 16(2)(b). If total revenues from any "series of sales" were less than the cost of production during the period of investigation,[36] the Deputy Minister then presumed that "series of sales" had been made "at prices that did not provide for recovery in the normal course of trade and within a reasonable period of time" of the cost of production. On that basis, the Deputy Minister excluded the entire "series of sales," i.e. that style, from her calculations of normal value, and calculated the normal value of the style based on its cost of production in accordance with Section 19 of SIMA.

Complainants contend that the Deputy Minister made two mistakes. First, they argue that the Deputy Minister incorrectly designated all sales of a particular style of carpet as a "series of sales" even when some of those sales, analyzed individually, were profitable.[37] Second, they assert that the Deputy Minister was wrong in presuming that the three month period of investigation was a "reasonable period of time" in which exporters should be able to recover the cost of production.[38]

The Deputy Minister's interpretation of "series of sales" was reasonable. As an initial matter, the Panel notes that Section 16(2)(b) specifically states that the determination of whether a sale forms part of a "series of sales" is within the Deputy Minister's discretion, that is "in the opinion of the Deputy Minister."[39] Accordingly, unless the Deputy Minister has failed to consider an element of Section 16(2)(b), or her decision is otherwise unreasonable, this Panel cannot reverse on this question.

---

36 With the exception of general, selling and administrative ("GS&A") expenses (see discussion below), the Deputy Minister apparently based cost of production on costs incurred during the period of investigation, January 1, 1991 through March 31, 1991.

37 Brief of Shaw Industries, Inc. at pages 34-35.

38 Brief of Carpet and Rug Institute at page 19.

39 The inclusion of the phrase "in the opinion of the Deputy Minister" in Section 16(2)(b) of SIMA is most reasonably interpreted as a directive that the question of whether a series of sale is below cost is specifically reserved to the discretion of the Deputy Minister.

Section 16(2)(b) does not require the Deputy Minister to exclude only those sales which, taken individually, are unprofitable. Nothing in the plain language of Section 16(2)(b) requires such a result. Although Section 16(2)(b) is not a model of clarity, its grammatical construction indicates that it is the "series of sales" (and not "any sale") which must be made at "prices that do not provide for recovery." The two phrases -- "series of sales" and "prices that do not provide for recovery" -- clearly were intended to operate in concert. Moreover, the word "prices" is plural, and therefore probably refers to the plural "sales" in "series of sales," not the singular "any sale." Finally, if the Canadian Parliament had intended that the Deputy Minister exclude all unprofitable sales, the requirement that those sales form part of a "series of sales" would become mere surplusage. Thus, the Deputy Minister's exclusion of some sales pursuant to Section 16(2)(b) is not unreasonable.[40]

A related argument advanced by complainants is that the Deputy Minister erred in failing to consider whether a series composed of all sales of a given style during the period of investigation was the appropriate "series of sales", or whether another "series" was more suitable. Complainants point to the Manual as evidence of the proper factors the Deputy Minister should consider in selecting an appropriate "series."[41] However, the Manual does

---

40 Nor do the two final determinations of Revenue Canada submitted by Complainants in their post-hearing citation filing persuade us otherwise. With respect to the first cited final determination -- Recreation Vehicle Entrance Doors: Final Determination Statement of Reasons (February 6, 1988) -- it is unclear from the decision itself whether the Deputy Minister excluded only unprofitable sales, or, all sales (profitable and unprofitable) of each model determined to have been sold at an overall loss.

With respect to the second final determination -- Final Determination of Dumping Respecting Cars Produced by or on behalf of Hyundai Motor Company, Seoul, Republic of Korea ("Cars from Hyundai") -- it does appear that the Deputy Minister excluded some unprofitable sales of automobiles (the fourth quarter of 1985) and based normal value on profitable sales in the following two month period. The fact that the Deputy Minister excluded some sales in one case does not compel the identical result in this case, however. For example, the Deputy Minister may have concluded that the fourth quarter Hyundai sales constituted a "sub-series" of sales at a loss (see discussion below), and should be excluded from section 15 normal value calculations on that basis. As discussed below, it does not appear that Complainants adequately made such a "sub-series" argument below.

41 The Manual suggests that the Deputy Minister may consider whether the sales:

- form a chronological series
- involve geographical considerations
- be to the same customer or customers
- depend on quantities purchased
- be tied to end use considerations.

Manual at 10.

not specifically require the Deputy Minister to consider every factor, and the Deputy Minister apparently selected one of the factors -- sales forming a chronological series -- in defining her "series."

Moreover, the Manual expressly provides for the methodology employed by the Deputy Minister:

> It should also be noted that, in the preliminary examination of sales that were made during the entire period under review, the officer may determine that the weighted average selling price is lower than the average total unit cost of the goods. It is possible, under this circumstance, to reject all of the sales because they comprise an overall chronological series of sales made at a loss during the period under review.

Manual at 11.[42] Complainants cannot use one part of the Manual to overturn the Deputy Minister's decision when that decision is consistent with another part of the Manual.

Complainants argue that the Manual allows the Deputy Minister to look inside the series of sales made during the entire period of review to eliminate sub-series of unprofitable sales. This is true.[43] However, the Manual does not indicate that the Deputy Minister is required to adopt this approach. Moreover, there is nothing in the record to suggest that Complainant timely provided the Deputy Minister with a methodology and verifiable data that would permit her to identify appropriate "sub-series" of unprofitable sales. In the absence of either a requirement in the Manual that the Deputy Minister investigate "sub-series" or record evidence for identifying "sub-series," this Panel will not compel the Deputy Minister to embark on a search for such "sub-series."

---

42 The Manual does appear contradictory. For example, the Manual indicates that it "will usually be necessary to examine whether each individual sale is profitable" (Manual at 10, emphasis supplied) but it also states that "[i]t is possible . . . to reject all of the sales [presumably profitable as well as unprofitable] because they comprise an overall chronological series of sales made at a loss during the period under review" (Manual at 11). The Panel believes that elimination of the Manual's internal inconsistencies would be desirable, but declines to reject on the basis of the Manual the Deputy Minister's selection of a methodology for determining sales below cost specifically authorized by the Manual.

43 As the Manual explicitly states:

> if the officer conducts a closer examination of the sales at a loss, as described under paragraphs viii - xi above and determines that the overall loss is attributable to only a portion of the total sales which can be identified as comprising one or more series, these sales may be eliminated from consideration. If the weighted average selling price of the remaining sales is greater than the total cost thereof, it would be appropriate to determine normal values under section 15 of the Act. Id.

VI RECOVERY OF COSTS

Complainants argue that the Deputy Minister incorrectly presumed that the three month period of investigation was a "reasonable period of time" during which exporters could recover the cost of production. Although this question is a close one on this record, the Panel agrees with complainants and remands this issue to the Deputy Minister.

As noted above, in order to exclude sales of goods from the Section 15 normal value calculation, the Deputy Minister must determine that the "series of sales" have been made "at prices that do not provide for recovery in the normal course of trade and within a reasonable period of time of the cost of production of the goods, the administration and selling costs with respect to the goods and an amount for profit." The Deputy Minister's Manual explains that SIMA does not define the words "within a reasonable period of time." It further states that:

> [i]n view of the statutory time frames which govern investigations, and the desirability of concluding re-investigations of normal values in a timely manner, it will not be possible for the investigating officer to conduct an exhaustive economic study to determine whether costs are recoverable over a reasonable period of time at the prevailing prices. As an alternative, the officer may compare the vendor's prices with the prices of other producers that are selling at a profit. If this comparison reveals that the prices are comparable, the officer may conduct a further review of the reasons why that particular vendor is selling at a loss and whether the situation is likely to be reversed in the foreseeable future.[44]

The Manual further explains that, once a series of sales at a loss is identified, "the onus will generally be on the producer to present evidence which would demonstrate that the sales at a loss are in fact made at prices that would provide for the recovery of all costs within a reasonable period of time."[45] Finally, the Manual identifies the factors to be considered in determining what period of time is "reasonable:"

---

44 Manual at 11.

45 Manual at 12.

> [t]he words "reasonable period of time" shall normally be interpreted to mean a period of time that does not exceed one year, and shall be interpreted in the context of the nature of the industry involved. Consideration should be given to such factors as the producer's internal cost structures, pricing trends for important raw materials, the general state of the economy, the outlook for the industrial sector being studied, competing products and technologies, the effect of foreign competition in the producer's domestic market, and surplus capacity in the domestic market and in other countries.[46]

In the investigation below, complainants argued that it was unreasonable to expect them to recover all costs and realize a profit on the goods sold in the domestic market during such a short period as the three month period of the investigation.[47] According to the Deputy Minister's final determination, complainants put forward the following reasons:

- a normal seasonal decrease in the volume of industry shipments in January and February,

- extraordinarily poor sales in the first quarter of 1991 due to recessionary pressures and the onset of the Persian Gulf War, and

- normal heavy first quarter product introduction and marketing expenses related to product development, the provision of samples and trade show activity.[48]

The Panel's review of the administrative record reveals that one Complainant provided the Deputy Minister with an additional reason and data that indicated that the three month period of investigation was distorted. In particular, the Complainant contended and submitted some evidence indicating that costs of certain materials used in making carpets were substantially higher in the first quarter of 1991 as a result of the Gulf War, and that these costs subsequently declined.

The evidence presented by complainants is by no means determinative of the question whether they could in fact have recovered their costs over a "reasonable period of time." However, the evidence is sufficient -- albeit barely -- to raise a valid issue as to whether the

---

46 Manual at 12.

47 Final Determination of Dumping at 12.

48 Ibid

period of investigation was a "reasonable period of time" in which to recover costs.[49] The next issue, therefore, is whether the Deputy Minister actually considered this issue.

The Deputy Minister and CCI have not pointed to any evidence in the administrative record indicating that the Deputy Minister actually considered and made a reasoned judgment as to the appropriate "reasonable period of time." The most extensive discussion of the subject occurs in the Final Determination of Dumping. In response to complainants' argument that the Department should assess the profitability of domestic sales over a period considerably longer than the three month period of investigation, the Deputy Minister stated as follows:

> Having considered the arguments presented by the exporters, the Department's position is that SIMA does not permit the use for normal value purposes of domestic sales which do not recover the fully absorbed costs of the product, i.e. the full cost of production of the goods plus the general, selling and administrative expenses and other costs related to the product. For the purpose of the final determination of dumping, domestic sales of a style have again been rejected where the total revenue for the style did not exceed the total cost of the style during the period of investigation.[50]

This passage does not establish that the Deputy Minister actually considered the question of the proper period during which costs should be recovered. On the other hand, if this excerpt from the Final Determination does represent the result of such a consideration, then the most reasonable interpretation is that the Deputy Minister interpreted SIMA as requiring her to exclude for normal value purposes domestic sales which do not recover the fully absorbed costs of the product during the period of investigation. This would be a clear error of the law. Section 16(2)(b) states that the recovery of costs must be within a "reasonable period of time," not during the "period of investigation." If Parliament had intended the two phrases to be interchangeable, it surely would have used a single phrase.[51]

---

49 The evidence provided by Complainants in this case is, in the opinion of the Panel, the minimum sufficient to raise a question regarding the Deputy Minister's decision on "reasonable period of time." In challenging the cost recovery period chosen by the Deputy Minister, it would have been prudent for respondents to present verifiable data to the Deputy Minister demonstrating that the costs of materials, labor or overhead were atypical during the period of investigation. The Panel emphasizes that counsel bear the burden of supporting their allegations with facts and should provide the Deputy Minister as early as possible in an investigation all the evidence necessary to support their legal arguments.

50 Final Determination of Dumping at page 13.

51 None of the Parties has presented any legislative history on the meaning of this term, or indeed any other SIMA term.

This does not mean that a "reasonable period of time" cannot be the "period of investigation." Nor does it mean that the Deputy Minister is prohibited from presuming, in the absence of any record evidence to the contrary, that the period of investigation is a "reasonable period of time." This Panel wishes to stress that it does not hold that the Deputy Minister has the burden of proving a negative -- that respondent cannot recover costs within a reasonable period of time. However, where there is some evidence on the record that the period of investigation is not a "reasonable period of time," the Deputy Minister cannot decline to address the issue by implying that SIMA equates "period of investigation" with "reasonable period of time." Instead, the Deputy Minister must consider the relevant evidence on the record and determine whether or not the period of investigation is a "reasonable period of time" for recovery of all costs.[52]

It is worth noting that in one context, the Deputy Minister did base her below cost determination on a longer period than the three month period of investigation: she assessed respondents' general, selling and administrative ("GS&A") expenses on a full year, rather than three month, basis.[53] If anything, however, the Deputy Minister's use of a year for calculating GS&A expenses underscores the lack of any rationale in the administrative record for the use of the three month period of investigation for total recovery of other costs, such as overhead[54]. Accordingly, the Panel remands to the Deputy Minister who is directed to address and determine the appropriate "reasonable period" based on the administrative record, provide an explanation explicitly discussing the grounds for the determination, and, if necessary, recalculate the pertinent normal values.

---

52 According to the Manual, "the onus will generally be on the producer to present evidence which would demonstrate that the sales at a loss are in fact made at prices that would provide for the recovery of all costs within a reasonable period of time." The Panel does not believe that the Deputy Minister can abdicate her statutory duty under Section 16(2)(b) to determine a "reasonable period of time" so easily. Where respondents have produced reasonable evidence indicating that the period of investigation is not a "reasonable period of time," the Deputy Minister cannot simply ignore such evidence and presume that the period of investigation is a "reasonable period of time." She must weigh the evidence before her and make a reasoned decision as to the appropriate "reasonable period of time."

53 "[T]he Department has accepted the contention of the exporters that allocating general, selling and administrative expenses based upon expenses incurred during any one quarter of a year does not account for seasonal or other fluctuations which may distort total cost figures. Accordingly, the amounts for general, selling and administrative expenses used by the Department in calculating the profitability of the styles sold in the domestic market have not been assessed on the basis of the period of investigation but instead have been assessed on a full year basis. The period chosen was the most recent fiscal year which included the period of investigation." Final Determination of Dumping, at 13.

54 The failure of the Deputy Minister to annualize overhead expenses is particularly peculiar in light of the administrative record which indicates that Revenue Canada staff had agreed to annualize overhead. Memorandum from M. Jackson to A. Atwood dated February 12, 1992.

VII THE DETERMINATION OF LIKE GOODS

Where the Deputy Minister determined that "identical" goods were sold at below cost pursuant at Section 16(2)(b), she calculated normal value under Section 19 of SIMA. Complainants contend this was error. They argue that the Deputy Minister is required by SIMA to calculate normal values under Section 15 based sales of "similar" goods in those instances where "identical" goods were determined to have been sold at below cost. In light of the recent decision of the Canadian International Trade Tribunal in the *Fletcher Leisure Group Inc.* case, this Panel agrees and remands the Deputy Minister's determination on this issue.[55]

This issue turns on the interpretation of two provisions of SIMA, Section 2(1) and Section 19. Section 2(1) defines "like goods":

> 'like goods', in relation to any other goods, means
>
> (a) goods that are identical in all respects to the other goods, or
>
> (b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

Section 19 describes the situations in which the Deputy Minister can base normal value on third country sales or the constructed value of the goods: that is,

> where the normal value of any goods cannot be determined under section 15 by reason that there was not, in the opinion of the Deputy Minister, such a number of sales of like goods that comply with all the terms and conditions referred to in that section or that are applicable by virtue of subsection 16(1) as to permit a proper comparison with the sale of the goods to the importer ...

The Deputy Minister contends that, under Section 2, Revenue Canada must base normal value on sales of identical goods, unless those goods are "absent". In the "absence" of identical goods, normal value can be based on sales of "closely resembling" goods. The Deputy Minister contends that where there are sales of identical goods, but that goods are sold at a loss, there is no "absence" of identical goods, but in fact a "presence." When

---

55 The Panel notes that neither the Deputy Minister nor the Canadian Carpet Institute availed itself of the opportunity under Panel Rule 70 to provide the Panel with a rationale for not following the Fletcher Leisure Group Inc. v. Deputy Minister of National Revenue for Customs and Excise case, a copy of which is attached to this decision (***Fletcher Leisure***).

identical goods are "present," the Deputy Minister contends that Revenue Canada cannot base normal value on sales of "closely resembling goods." At the same time, Revenue Canada cannot base normal value on sales of identical goods under Section 15 because those goods have been sold below costs. Accordingly, the Deputy Minister argues that Revenue Canada has no choice but to base normal value on Section 19.[56]

Complainants dispute the meaning "absence" in Section 2(1). According to complainants, identical goods are "absent" under Section 2(1) when the Deputy Minister cannot calculate normal value based on sales of those goods under Section 15 because those sales were made at below cost under Section 16(2)(b). Under this analysis, when identical goods are "absent" because they are sold "below cost," the Deputy Minister must base normal value on sales of "closely resembling" goods.

Although the language of the statute is ambiguous, the issue was decided by a recent decision of the Canadian International Trade Tribunal. On March 19, 1993, the Tribunal in *Fletcher Leisure* held that the Deputy Minister erred when, in determining the normal value of a certain brand of Italian ski poles (i.e. identical ski poles), she based normal value on the cost of production under section 19 of SIMA instead of the prices of closely resembling ski poles under section 15. In that case, the Deputy Minister could not use the prices of identical Italian ski poles because those ski poles had been sold in Italy to only one related customer.

The Tribunal stated that, when the Deputy Minister cannot use the prices of identical goods because such goods were sold to related parties, she must use the prices at which closely resembling merchandise was sold:

> In the Tribunal's view, the respondent erred in interpreting SPF's sales of "like goods" in the Italian market under section 15 of SIMA to mean only "identical" goods, namely, Scott poles. Paragraph (b) of the definition of "like goods" under subsection 2(1) of SIMA further defines "like goods", in the absence of "identical goods in all respects," as "goods the uses and other characteristics of which closely resemble" each other. In determining whether goods closely resemble each other, SIMA specifically directs the respondent to consider the "uses and other characteristics" of the goods. Therefore, having found that identical Scott poles, sold by SPF in the Italian market, were sold to a related distributor, the respondent was required to apply the second prong in paragraph (b) of the statutory definition of "like goods" under subsection 2(1) of SIMA to determine whether there were "like goods" sold by SPF in the Italian market that closely resembled the Scott poles sold to the appellant.[57]

---

56 Deputy Minister's Brief at page 52.

57 *Fletcher Leisure* at page 3.

The clear implication of the Tribunal's determination is that when prices of identical goods cannot be used under section 15 because the sales were made to related parties, those goods are "absent" within the meaning of section 2, and that therefore the Deputy Minister must base normal value on the prices of closely resembling goods. The Tribunal's decision appears to be the only case in which this issue has been squarely addressed.

The sole basis in which *Fletcher Leisure* is distinguishable from the case before the Panel is that *Fletcher Leisure* involved exclusion of sales between related parties (under section 15 of SIMA) whereas this case involves the exclusion of sales made at below cost of production (Section 16(2)(b) of SIMA). The Panel finds no rational basis for distinguishing the two cases. Although the phrasing of section 15 and 16(2)(b) is different, the key words in question -- "like goods" -- are identical. Under section 15, the normal value of the goods is "the price of <u>like goods</u> when they are sold by the exporter . . . to purchasers . . . with whom the exporter is not associated . . . " Under section 16(2)(b), "[i]n determining the normal value of any goods under section 15, there shall not be taken into account . . . any sale of <u>like goods</u> that . . . forms part of a series of sales that do not provide recovery" of the cost of production.

Although Section 15 and 16(2)(b) are not identical in all respects, under both provisions, after sales of identical merchandise are excluded, the Deputy Minister must decide whether to use prices of closely resembling goods or to calculate normal value under section 19. This decision turns on the meaning of the term "like goods." Thus, in order to uphold the Deputy Minister's decision in this case, this Panel would have to conclude that the words "like goods" have one meaning in Section 15 (as determined by the Tribunal) and another meaning in Section 16(2)(b). This we decline to do.

The panel therefore remands to the Deputy Minister that portion of the final determination relating to the determination of like goods and directs the Deputy Minister to calculate normal values for like goods in a manner consistent with *Fletcher Leisure*.

VIII CALCULATION OF AN AMOUNT FOR PROFITS

The Deputy Minister calculated an amount for profit under Section 19 based upon the weighted average profit made by complainants on the domestic sales of all styles which had been sold at a profit (as calculated under 16(2)(b) discussed above).[58] Complainants' briefs fail to identify the precise error that the Deputy Minister committed in calculating an amount for profit, and complainants' counsel did not clarify the point during the hearing. Section 19(b) of SIMA provides that normal value can be based on the aggregate of the cost of production of the goods, an amount for administrative, selling and all other costs, and an amount for profit. Section 19(b) does not, however, provide the methodology for calculating an amount for profit. Special Import Measures Regulations 11(b) and 13 provide specific instructions, as follows:

---

58 Deputy Minister's Brief at page 54.

11. For the purposes of paragraph 19(b) and subparagraph 20(a)(ii) of the Act,

. . .

(b) subject to section 13 of these Regulations, the expression "an amount for profits", in relation to any goods, means an amount equal to

> (i) where there are a number of sales of like goods made by the exporter which, taken together, produce a profit and are such as to permit a proper comparison, the weighted average profit made on such sales,
>
> (ii) where subparagraph (i) is not applicable but there are a number of sales of goods of the same general category as the goods sold to the importer in Canada made by the exporter which, taken together, produce a profit and are such as to permit a proper comparison, the weighted average profit made on such sales.
>
> (iii) where subparagraphs (i) and (ii) are not applicable but there are a number of sales of like goods made by other producers located in the country of export which, taken together, produce a profit and are such as to permit a proper comparison, the weighted average profit made on such sales,
>
> (iv) where subparagraphs (i) to (iii) are not applicable but there are a number of sales of goods of the same general category as the goods sold to the importer in Canada made by other producers located in the country of export which, taken together, produce a profit and are such as to permit a proper comparison, the weighted average profit made on such sales, or
>
> (v) where subparagraphs (i) to (iv) are not applicable, 8 percent of the sum of
>
> > (A) the cost of production of the goods, and
> >
> > (B) the amount of administrative, selling and all other costs, as determined in accordance with paragraph (c) ...

Complainants did not identify which of the above regulations the Deputy Minister failed to follow. According to her counsel, the Deputy Minister allegedly calculated profit pursuant to (ii) above. In other words, the Deputy Minister calculated profit on "sales of goods of the same general category ... which, taken together, produce a profit" -- which the

Deputy Minister interpreted as being all profitable sales of the product subject to her investigation -- machine tufted carpet.

Although complainants might have taken issue with the Deputy Minister's decision to equate all profitable sales of tufted carpet with "sales of goods of the same general category," it does not appear from the administrative record that complainants did so. Instead, the administrative record reveals that complainants argued that the Deputy Minister should have based profit on company financial statements rather than calculating profit pursuant to the methodologies outlined in SIM Regulation 11(b).

The Deputy Minister used one of the specified methods and complainants failed to identify a cognizable error in the Deputy Minister's methodology. Therefore this Panel upholds the Deputy Minister's decision.

IX LEVEL OF TRADE ADJUSTMENT

In its Final Determination of Dumping, the Deputy Minister made trade level adjustments to normal values for six exporters, reasoning that, as required by Section 9 of the SIM Regulations, "in these cases, differential selling activities dependent on trade level were clearly established and the exporters were able to document the differences in costs resulting from these different selling functions." For the other exporters subject to investigation, the Deputy Minister denied any claimed level of trade adjustment.

Shaw and CRI challenged this determination, arguing in their Briefs that "the interpretation put on paragraph 9(a) of the SIM Regulations by the Deputy Minister is unreasonable in that it unduly restricts the applicability of the provision, and ignores the statutory intent of the SIMA provision, the recognition of the actual differences in costs, charges and expenses incurred by exporters in selling to different levels of trade." Shaw and CRI claimed that "the SIM Regulations provide that a proper comparison of the selling prices to 2 different trade levels must involve an adjustment of the costs of selling to each particular trade level."

In reply, the Deputy Minister and CCI argued that the Deputy Minister's determination complied with the applicable Regulation, since a level of trade adjustment was only warranted where there are different "activities" performed on one trade level and not another. The Deputy Minister stated that the Deputy Minister "does not calculate a trade level adjustment as the difference between the exporter's costs for domestic and export direct sales activities but rather on the basis of the exporter's cost of direct selling activities which the exporter performs exclusively on domestic sales, i.e. activities which the exporter does not in any measure perform on sales to the importer in Canada." The CCI stated that the Deputy Minister's rationale in denying the adjustment "has been accepted by both the Canadian International Trade Tribunal and a Binational Panel in earlier cases," and that because "neither the SIMA nor the SIM Regulations sets out the broad rule promoted by the complainant ... complainant's problem in this regard is a matter for Parliament."

At the Hearing, counsel for Shaw and CRI argued that the Deputy Minister's refusal to grant the requested level of trade adjustment constituted "a plain error of law," since that decision was made "without any evidence on the record for refusing to observe Regulation 9." Counsel claimed that evidence had been submitted to establish that the "conditions of Regulation 9 were satisfied," and that it was now up to the Deputy Minister "to demonstrate ... that there is evidence that permitted the Deputy Minister to ignore Regulation 9." Upon request of the Panel, counsel stated that he would provide some examples of the evidence offered by the exporters in support of their claimed adjustment "in order that you have that information before you."

In a Posthearing submission, dated March 19, 1993, Shaw and CRI submitted for the Panel's review portions of the administrative record which they believed supported the claimed level of trade adjustment. The evidence presented was specifically related to two exporters: Shaw and Horizon Industries Inc. ("Horizon").

As to Horizon, the materials submitted for the Panel's review consisted of the following documents:

1. Response to Request for Information, dated September 13, 1991, which stated that sales are made on two levels of trade in Canada, and which set forth a claimed percentage adjustment for differences in costs for different trade levels.

2. Report of disclosure conference of January 20, 1992, which did not specifically discuss the level of trade issue.

3. Letter from Horizon to Revenue Canada, dated March 13, 1992, which stated as a general proposition that "the selling functions to support the U.S. retailers ... were very different from those involved with Canadian distributors," and that the overall costs to large U.S. distributors "throughout the 1980's ... [were] much lower than retailers and very much in line with the costs incurred in servicing large Canadian distributors in 1991."

4. Letter from Horizon to Revenue Canada, dated February 28, 1992, with calculations of level of trade factor.

5. Memorandum on Verification meeting, which noted that Horizon had argued that "there are many activities undertaken on behalf of their U.S. customers that are not undertaken with respect to sales in Canada," and that in the opinion of the Canadian government official at verification the "trade level adjustment was only applicable to selling activities carried out to one level of customer that was not undertaken at another level," and could only be based on the "cost of the selling activities between the different levels in the domestic market, and not between the domestic and export market." The Horizon representative replied that selling activity differences between different markets "could be easily quantified," but that "to determine what

activities would not be carried out on behalf of national distributors, we would have to look at an earlier period of time."

6. January 24, 1992, response by Horizon to Supplemental Request for Information, setting forth detailed GS&A expenses of various divisions.

Nowhere in any of the documents presented to the Panel for review was there any direct evidence of differences in the activities performed for customers at different levels of trade.

As to Shaw, the materials presented for the Panel's review consisted of the following documents:

1. Response to Request for Information, dated September 13, 1991, which stated that "due to the different type of activities and responsibilities in selling to distributors versus retailers, there is at least [a] difference in selling expense between the two trade channels." The response then sets forth a summary of the "key expense items associated with the sales through each selling channel," which listed identical expense items for each level, with different amounts for each. The response further noted the substantial difference in the number of sales persons at each level.

2. Verification report, dated October 2, 1991, which found that while "no information was provided in the submission to substantiate that there is a difference in selling prices between distributors and retailers in the domestic market," a trade level adjustment would be allowed for the preliminary determination, subject to "further examination."

3. Exporter decision recap, dated December 19, 1991, which noted that "details of selling functions particular to the retail divisions and not applicable to [the other divisions] should be obtained for the purposes of the final determination. A trade level adjustment should be made ONLY where selling functions are performed by the retail divisions, but not [other divisions]."

4. Supplemental Request for Information, dated January 7, 1992, which requested that Shaw "detail any selling activities which [one] division undertakes on behalf of clients, which the [other] division does not undertake on behalf of its distributor clients."

5. Response of Shaw to Supplemental Request for Information, dated January 24, 1992, which discussed various services performed by [one] division.

6. Report of Verification Meeting, dated February 5-6, 1992, which noted that the Revenue Canada officials "examined the selling expense accounts for both [one] and [and the other division], but learned that there were few functions which were exclusive to [the first division]."

7. Revenue Canada internal memorandum dated March 19, 1992, which notes that upon further examination after the preliminary determination, "it was learned that Shaw did not carry out selling activities on behalf of their retail customers which were not also carried out with respect to their distributor customers."

The SIMA does not, on its face, require that the Deputy Minister adjust prices because of differences in level of trade in determining normal value. However, Section 15 of the SIMA provides that the Deputy Minister should adjust the price "in the prescribed manner and circumstances to reflect the differences in terms and conditions of sale, in taxation and other differences in price comparability between the goods sold to the importer and the like goods sold by the exporter."

The Canadian government's interpretation of Section 15 of the SIMA, insofar as it relates to a level of trade adjustment, is found in Section 9 of the SIM Regulations, which provides that:

> For the purposes of sections 15 and 19 and subparagraph 20(c)(i) of the Act, where purchasers of like goods who are at the trade level nearest and subsequent to that of the importer in Canada have been substituted for purchasers who are at the same or substantially the same trade level as that of the importer, the price of the like goods shall be adjusted by deducting therefrom:
>
> (a) the amount of any costs, charges or expenses incurred by the vendor of the like goods in selling to purchasers who are at the trade level nearest and subsequent to that of the importer that result from activities that would not be performed if the like goods were sold to purchasers who are at the same or substantially the same trade level as that of the importer; or
>
> (b) in the absence of information relating to the costs, charges and expenses mentioned in paragraph (a), an amount not exceeding the discount that is generally granted on the sale of like goods by other vendors in the country of export to purchasers who are at the same or substantially the same trade level as the importer.

The scope of this Regulation is discussed in detail in the Manual. For example, Volume II, Part VIII, Chapter 2, Section B, Page 6, provides that "regulation 9 contains

further guidance on adjustments to normal value to compensate for using a lower trade level domestically than the importer's trade level." Volume II, Part VIII, Chapter 3, Section E, Page 8, similarly provides that "an adjustment may be required to reflect the differences between the trade level of the importer and the trade level of the purchasers in the exporter's home market. Regulation 9 provides the manner of making the adjustment." The Manual discusses how the Section 9 adjustment should be made in Volume II, Part VIII, Chapter 3, Section E, Page 9:

> In determining the amount of the adjustment under paragraph 9(a), we must establish the amount of costs, charges or expenses which are incurred by the exporter in carrying out, in respect of sales in his domestic market, each activity which distinguishes the trade level difference. The total amount of the adjustment to be deducted under paragraph 9(a) is the sum of the separate amounts determined for each activity. An amount may be included only in respect of activities which the exporter, or vendor, has not performed with respect to sales to the importer in Canada, and has not performed on behalf of the importer within Canada. That is, an adjustment is made only to account for activities which the exporter performs in his domestic market, but which he does not perform in respect of selling to the importer because it is the importer's role to perform those activities in Canada, in view of his trade level.

The Manual then sets forth an example of when a level of trade adjustment would be allowed:

> In the example referred to above, the exporter pays for salespersons' expenses in his domestic market since he is selling directly to retailers. He does not perform these activities in selling to the importer, because the importer is a national distributor and a sales force is not needed to sell to a customer at that trade level. On the other hand, the importer has to employ a sales force in order to sell to his customers at the retail level in Canada. Thus, in this example salespersons' expenses are established as a feature of the trade level difference between the distributor and retailer levels of trade, and an allowance should properly be made under Regulation 9 for that activity. For all such selling activities which meet this test, an allowance can be made under Regulation 9, equal to the costs, charges or expenses incurred by the exporter in his domestic market. As mentioned earlier, the total allowance under paragraph 9(a) is the sum of the individual amounts allowable under each qualifying activity.

Our review of the evidence presented to this Panel by Shaw and CRI, as summarized above, reveals that in her determination, the Deputy Minister followed the principles set forth in the Manual, and denied the claimed adjustment for the two exporters in question (Horizon and Shaw) because neither party was able to establish to the Deputy Minister's satisfaction that sales "activities" differed between levels of trade. The Deputy Minister's inquiry into the activities of the two exporters was thorough and the exporters were provided the opportunity to submit the data needed to establish their claim. For these two exporters, the record presented to this Panel for review does not establish a difference in activities.

Since the Deputy Minister allowed the claimed adjustment for six exporters, and since Shaw and CRI have been unable to provide record evidence in support of the exporters' claims which would establish differences in "activities" performed, the Panel concludes that the Deputy Minister's factual findings which underlay her conclusion to deny the requested level of trade adjustment were not "made in a perverse or capricious manner or without regard for the material before the decision maker."[59] The Deputy Minister's factual findings, therefore, were proper and are upheld.

This Panel also affirms the Deputy Minister's interpretation of the law, insofar as she determined that a level of trade adjustment should not be allowed unless an exporter could establish a difference in activities performed, as distinguished from a difference in the magnitude of the same activities. In this regard, while the statutory language is silent as to the scope of the level of trade adjustment, Section 9 of the Regulations expressly refers to costs, charges or expenses that "result from activities that would not be performed." The discussion in the Manual, as set forth above, is even more explicit as to the need to establish separate activities in order to be entitled to the adjustment.

Thus, while the Deputy Minister arguably could have chosen to be more liberal in her interpretation, her analysis clearly conformed to the instructions set forth in the Manual, and constituted a reasonable interpretation of Section 9 of the Regulations. As such, we uphold her construction of the law for the same basic reasons set forth in the *Beer* decision at pages 41 - 44. As the *Beer* Panel stated:

> If Regulation 9, together with the other provisions for adjustments, does not achieve the purpose of SIMA as reflected in section 15 of the Act, that is a matter for action by Parliament or the Governor in Council. Neither the Act nor the Regulations set out a broad rule that adjustments must be made by Revenue Canada to achieve price comparability. Rather the Regulations refer to particular "activities" which are or are not performed in the home and export markets respectively, and are exhaustive of the adjustments that may be made in determining

---

59 *Beer* at page 19.

> normal value. It might well be, having regard to the purpose of the Regulations indicated by section 15 of SIMA, that an interpretation of "activities" that permitted further differentiation among various levels of costs and types of promotional activities would be reasonable. However, the Panel cannot say that Revenue Canada's interpretation which grouped sponsorships as an activity category is not reasonable, and therefore Heileman's complaint fails on that ground.

The identical rationale applies to the instant proceeding. Thus, for all of the reasons discussed above, this Panel upholds the Deputy Minister's decision to deny the level of trade adjustment claimed by Shaw and CRI.

X RELATED PARTY PRICES

Pursuant to Section 25(b)(i) of the SIMA, the Deputy Minister has the authority to determine the export price based on "the importer's resale price of the goods less enumerated costs, charges and expenses," if the Deputy Minister "is of the opinion that the export price, as determined under section 24 is unreliable (i) by reason that the sales of the goods for export to Canada was a sale between associated persons..." Neither the statutory language nor Regulations provide any guidance as to the criteria on which the Deputy Minister should base a finding of reliability.

A discussion of the purpose of Section 25(b)(i) is found in Revenue Canada Memorandum S-123, which provides that resort to a secondary level "is applicable primarily when 'hidden' or 'secondary dumping is occurring -- that is where importer and exporter are related, and the dumping is the result of the importer's pricing in Canada." The memorandum states that "as a general rule where the exporter and importer are related, a reliability test should be made to determine whether the export price determined under section 24 is reliable." The memorandum then suggests that this reliability test "should consist of a representative sample of paragraph 25(c) calculations," and "if a convincing percentage of the sample indicates that the export price obtained under the paragraph 25(c) method is equal to or greater than the export price obtained under section 24, then the section 24 method will be considered to be reliable."

In the investigation subject to this Panel's review, the question of the reliability of the export price apparently did not arise in the manner contemplated by Memorandum S-123. The complainants apparently did not argue that the initial sales price should be rejected because the initial price was high, but the resale price was low, thereby "hiding dumping" unless the resale price was utilized to calculate dumping margins; rather, certain respondents (e.g., Galaxy Carpet Mills) argued that the initial related party sales price was artificially low, and therefore dumping would improperly be found unless the resale price to unrelated parties was utilized to calculate dumping margins. Since these respondents were claiming that the export price obtained under section 25(c) would be equal to or greater than the export price determined under section 24, the analysis contemplated by Revenue Canada

Memorandum S-123 arguably would have resulted in a finding that the initial related party price was "reliable." This Panel also notes that the weighted average margin of dumping for affiliated companies was not significantly different than the weighted average margin of dumping for non-affiliated companies, a result which arguably validates the reliability of the affiliated party prices.

While this Panel is concerned that the Deputy Minister did not fully explain her decision regarding the reliability of the related party prices, the Panel's review of the record reveals that there existed sufficient material on the record to establish the basis for that decision. In this regard, Respondents did not present any evidence that "secondary" or "hidden" dumping was occurring and the evidence of record revealed that the weighted average margin of dumping was not significantly different for affiliated and non-affiliated companies. Thus, since the Deputy Minister examined the related party sales issue raised by certain respondents, and since her conclusion that the related party prices were reliable was not made in a perverse or capricious manner or without regard for the material before her, the Panel upholds the Deputy Minister's decision to accept the exporters' selling prices as reliable for determining export prices under paragraph 24(a) of SIMA in those instances where the sales made to Canada were to related parties.

XI ERRORS IN NORMAL VALUE CALCULATIONS CONCERNING SALES VOLUMES

The complainants urge the Panel to review alleged methodology errors by the Deputy Minister in prospectively establishing the normal values used to determine the antidumping duty payments (if any) that would be due on shipments of carpet after April 21, 1992, if the Tribunal determined that injury had occurred. The complainants allege that the normal values were established without segmentation into different sales volume classifications, contrary to SIMA Section 15 and Special Import Measures Regulations Sections 3 and 4.[60] They also allege that the normal values were calculated on a weighted average basis using not the relative volume weightings experienced in the United States, but rather the volume weightings of imports into Canada, contrary to the law's requirement that normal value be based on sales in the exporters' home market.[61] Finally, complainant Shaw asserts that the Deputy Minister improperly failed to use volume-level breakdown information for retail sales in calculating the normal values for Shaw, contrary to the requirements of SIMA Section 15.[62]

The Deputy Minister responds with respect to the first two arguments that they do not pertain to the final determination itself, but rather pertain to enforcement of the final

---

60 Complainants' Brief at pages 48-50.

61 Complainants' Brief at pages 47-48.

62 Shaw Brief at pages 50-52.

determination of dumping with respect to importations made subsequent to that determination. The Deputy Minister states that neither of the alleged errors in development of normal values pertains to the calculations done in connection to the final determination itself. The Deputy Minister argues that therefore they are not reviewable by this Panel because the scope of our review is limited to the final determination.

With respect to the Shaw complaint, the Deputy Minister responds that because of the volume of sales, it was necessary to obtain sales information from Shaw on computer disks in addition to hard copy and to have Shaw itself perform some of the computer calculations. The Deputy Minister further responds that Shaw knowingly failed to provide the appropriate data on computer disks and to provide adequate explanations of the nature of the data in a timely fashion, and that Shaw did not resolve these problems in adequate time to permit certain types of volume information to be used in the calculation of the normal values. The Deputy Minister asserts that she considered all usable information that was before her in making her decision in this matter.

It is the opinion of the Panel that it is appropriate to review the enforcement normal values established on the basis of the final determination. However, for the reasons set forth below, the Panel finds that, even if the complainants' assertions are taken as correct, the Deputy Minister did not act improperly or unreasonably in the establishment of those normal values. With respect to the particular complaint of Shaw, the Panel finds that Shaw's delay in developing and providing data in the manner requested by the Deputy Minister was the principal reason for the Deputy Minister's inability to perform the volume breakdown calculations for retailers.

The Panel finds no clear precedent for the question whether the enforcement normal values developed by the Deputy Minister form part of the final determination that is subject to this review. However, the Panel concludes, both for reasons of judicial efficiency and because of the close interconnection between the final determination and the enforcement normal values, that it is appropriate and proper for the Panel to review those normal values as part of this particular review. The Panel takes no position on whether a Panel reviewing a final determination is obligated to review the enforcement normal values in all circumstances.

With respect to the enforcement normal values, the Deputy Minister provided, for each type of carpet, four different normal values, consisting of one normal value for cuts and one normal value for rolls sold to distributors, and one normal value for each of cuts and rolls sold to retailers. The Panel finds that this approach, for the limited purpose of establishing temporary enforcement normal values, was reasonable. Furthermore, given uncertainties as the future sales volumes of particular styles of carpet to particular customers, any prospective enforcement normal values, by their nature, can only do rough justice in application to different future transactions. Complainants cite Section 15 of SIMA in support of their argument that volume breakdowns must be used, but that section pertains to the final determination of dumping, not to the establishment of prospective normal values for

enforcement purposes. Given the short time period and temporary purposes for which these normal values were established, the Panel concludes that the Deputy Minister did not act unreasonably in limiting its breakdown for each type of carpet to four categories of sales.

With respect to complainants' assertion that Canadian sales volumes were used to create a weighted average normal value for each of the four composite enforcement normal values, the Panel concludes that this is an appropriate method of developing weighted averages for enforcement and would not be reversible error even if the allegations of the complainants are taken as true. The basic normal values below for each specific volume level were based purely on the home market sales (except in those cases where they were based on cost). The issue before the Deputy Minister was not how to calculate the normal values, but rather how to transfer those specific volume normal values equitably to composite groupings of sales which included several different volume levels. Given that enforcement normal values are used only to compare with the sales prices of carpet imported into the Canadian market, it is reasonable that weighted composite normal values be weighted in such a way that they reflect the volume composition of carpet sales to Canada. The reasonableness of this approach is demonstrated by the fact that, if the specific volume normal values had not been consolidated and thus U.S. based normal values calculated for each volume classification had been used to assess each Canadian sale at that particular volume classification, the weighted average of the normal values actually used would reflect the Canadian mix, not the United States mix, of volume classifications.

With respect to Shaw's complaint that the Deputy Minister failed to develop or apply the proper volume level breakdowns in calculating the dumping margins for retail sales, the Panel concludes that it was within Shaw's own power to prevent the problems that it attributed to the Deputy Minister. In an investigation such as this one, involving scores of producers and thousands of products and sales, it is reasonable for the Deputy Minister to require parties to produce data in computer medium and in a specific format, especially when such data is normally kept on computers, even if this requires some change in format and further computer analysis of the data by the party. Any respondent that resists complying with the Deputy Minister's reasonable requests for such data does so at its own peril.

Shaw understood the format of the data that would best allow the Deputy Minister to calculate the volume breakdowns that the Deputy Minister sought and Shaw knew what computer programming information was needed by the Deputy Minister to understand, verify, and develop its final results with respect to Shaw. Shaw sought to have the Deputy Minister do that work, and delayed in providing the requested computer formatted data breakdown and explanations sought by the Deputy Minister. This led to confusion over the proper classification of Shaw sales, confusion that Shaw itself could have prevented. Having resisted the Deputy Minister's requests, Shaw cannot now complain of the not unforeseeable consequences. Furthermore, Shaw has made no showing that the Deputy Minister's ultimate inability to use certain classifications for Shaw produced results that were materially different than they would have been had those classifications been used. Shaw was given reasonable time to conform to the Deputy Minister's request that information be provided on computer

diskette. It was Shaw's responsibility to ensure that the necessary information was supplied to the Deputy Minister in a timely manner. For these reasons the Panel is of the opinion that the Deputy Minister did not act in a perverse or capricious manner and without regard for the evidence before her.

XII DECISION

Upon examination of applicable excerpts from the administrative record; after full consideration of the arguments presented by the parties in their briefs and at the hearing held in Ottawa, Ontario; and upon consideration of the March 19, 1993 decision of The Canadian International Trade Tribunal in the *Fletcher Leisure Group Inc.* case (copy attached) brought to the attention of this Panel by the Complainants under Rule 70 (Rules of Procedure for Article 1904 Binational Panel Reviews) this Panel:

1. Remands to Revenue Canada that aspect of its final determination of dumping that relates to the reasonable period of time for recovery of costs. Revenue Canada had used a three month period of investigation and, without providing any reasons, used the same three month period for recovery of all costs other than general, administrative and selling. On remand the Deputy Minister is directed to address and determine the appropriate reasonable period based on the administrative record, provide an explanation explicitly discussing the grounds for the determination and, if necessary, recalculate the pertinent normal values.

2. Remands to Revenue Canada that aspect of its final determination of dumping that relates to like goods. Revenue Canada had excluded identical goods under Section 16(2)(b) of SIMA and then calculated normal value under Section 19 of SIMA. The remand is on the basis that Revenue Canada shall calculate normal values for like goods in a manner consistent with *Fletcher Leisure*.

3. Affirms all other aspects of Revenue Canada's determination at issue before this Panel.

The results of the remands shall be provided by Revenue Canada to the Panel within 45 days of this decision.

Signed in the original this 19th day of May, 1993 by:

Robert J. Pitt

Robert J. Pitt (Chairperson)

(signatures continued on page 40)

(signatures continued from page 39)

Gail T. Cumins

Gail T. Cumins

Timothy A. Harr

Timothy A. Harr

Mark D. Herlach

Mark D. Herlach

Ross Stinson

Ross Stinson

THE CANADIAN INTERNATIONAL TRADE TRIBUNAL | LE TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, March 19, 1993

Appeal Nos. AP-90-023 and AP-90-127

IN THE MATTER OF two appeals heard on September 25, 1992, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF two re-determinations by the Deputy Minister of National Revenue for Customs and Excise dated March 21 and October 23, 1990, under section 59 of the *Special Import Measures Act*.

BETWEEN

FLETCHER LEISURE GROUP INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

DECISIONS OF THE TRIBUNAL

The Tribunal allows Appeal No. AP-90-023 and directs the respondent to determine the normal value of the Scott brand ski poles sold to the appellant on the basis of sales of "like" private brand ski poles sold by S.P.F. S.p.A. to unrelated companies in the Italian market during the relevant period, in accordance with section 15 of the *Special Import Measures Act*.

The Tribunal dismisses Appeal No. AP-90-127.

Arthur B. Trudeau
Presiding Member

Sidney A. Fraleigh
Member

Desmond Hallissey
Member

Michel P. Granger
Secretary

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

THE CANADIAN INTERNATIONAL TRADE TRIBUNAL | LE TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal Nos. AP-90-023 and AP-90-127

FLETCHER LEISURE GROUP INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

These are appeals under section 61 of the Special Import Measures Act of two re-determinations by the respondent assessing anti-dumping duties on ski poles imported into Canada by the appellant and subject to the Anti-dumping Tribunal's material injury finding of May 14, 1984, in respect of alpine ski poles of aluminum alloy, originating in or exported from France and Italy.

HELD: The Tribunal allows Appeal No. AP-90-023 and directs the respondent to determine the normal value of the Scott brand ski poles sold to the appellant on the basis of sales of "like" private brand ski poles sold by S.P.F. S.p.A. to unrelated companies in the Italian market during the relevant period, in accordance with section 15 of the Special Import Measures Act.

The Tribunal dismisses Appeal No. AP-90-127.

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*September 25, 1992*
Date of Decisions:	*March 19, 1993*
Tribunal Members:	*Arthur B. Trudeau, Presiding Member* *Sidney A. Fraleigh, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*Brenda C. Swick-Martin*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Glenn Cranker, for the appellant* *Rosemarie Millar, for the respondent*

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

THE CANADIAN INTERNATIONAL TRADE TRIBUNAL | LE TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal Nos. AP-90-023 and AP-90-127

FLETCHER LEISURE GROUP INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
SIDNEY A. FRALEIGH, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISIONS

These are appeals under section 61 of the *Special Import Measures Act*[1] (SIMA) of two re-determinations by the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) assessing anti-dumping duties on ski poles imported into Canada by the appellant and subject to the Anti-dumping Tribunal's material injury finding of May 14, 1984, in respect of alpine ski poles of aluminum alloy, originating in or exported from France and Italy.[2]

Fletcher Leisure Group Inc. is a Canadian importer and distributor of sporting goods. As part of its business, it is an importer and a distributor of Scott brand ski poles (Scott poles) produced by S.P.F. S.p.A. (SPF) in Italy. During the 1988-89 period, the appellant purchased various models of ski poles from SPF.

Appeal No. AP-90-023

In Appeal No. AP-90-023, anti-dumping duties were assessed on five shipments (approximately 60,000 pairs) of Scott poles imported from SPF during the period from July 18 to November 9, 1988.[3] The Deputy Minister decided that the normal value of the Scott poles exceeded their export prices and assessed anti-dumping duties equal to the margin of dumping.

The normal value of the goods for anti-dumping purposes is determined under sections 15 to 23 of SIMA. Section 15 of SIMA provides that the normal value of the goods sold to an importer in Canada be determined on the basis of the price of "like goods" sold by the exporter in the country of export (i.e. Italian market). Section 15 of SIMA provides that:

> *15. ... where goods are sold to an importer in Canada, the normal value of the goods is the price of like goods when they are sold by the exporter ...*

---

1. R.S.C. 1985, c. S-15.
2. The Anti-dumping Tribunal's material injury finding of May 14, 1984, in Inquiry No. ADT-5-84, was continued by the Canadian Import Tribunal on December 23, 1986, in Review No. R-8-86, but expired on December 22, 1991, after the Canadian International Trade Tribunal decided not to conduct a further review in Notice of Expiry No. LE-91-001 dated July 25, 1991.
3. Customs Entry Nos. 13052-39638530-9, 13052-38671390-8, 13052-41555060-9, 13052-43856950-6 and 13052-39638420-6.

365 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

365, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

(a) to purchasers
(i) with whom the exporter is not associated at the time of the sale of the like goods, and
...
(c) in the ordinary course of trade for use in the country of export under competitive conditions.

"Like goods," in turn, are defined in subsection 2(1) of SIMA to mean:

(a) goods that are identical in all respects to the other goods, or
(b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

The witness for the respondent, Ms. Caterina Ardito, testified that the normal value of the goods sold to the appellant was not determined under section 15 of SIMA because SPF's Italian sales of "like goods" were made to only one related customer. In reaching such a conclusion, the respondent interpreted SPF's sales of "like goods" in the Italian market for the purposes of section 15 of SIMA to mean "goods that are identical in all respects" to the goods imported by the appellant, namely, Scott poles. The respondent was of the view that the remaining pairs of other private brand labels sold to three unrelated customers were not "like" the Scott poles sold by SPF to the appellant in Canada.[4]

Therefore, in light of the foregoing, the normal value of the Scott poles sold to the appellant was determined by the respondent under paragraph 19(*b*) of SIMA based on the aggregate of (i) the cost of production of the Scott poles manufactured by SPF and sold to Canada, (ii) an amount for administrative, selling and all other costs, and (iii) an amount for profits.[5]

The appellant did not refute the respondent's determination of the cost of production and the amount for administrative, selling and all other costs (subparagraphs 19(*b*)(i) and (ii) of SIMA). The parties submitted that the issue was whether the Deputy Minister erred in using an amount for profits of 31.6 percent under subparagraph 19(*b*)(iii) of SIMA in the calculation of the normal value of the goods in issue.

---

4. Information with respect to quantity, brand names and customers in Italy is confidential and, therefore, cannot be disclosed.
5. Paragraph 19(*b*) of SIMA provides that:

19. Subject to section 20, where the normal value of any goods cannot be determined under section 15 by reason that there was not, in the opinion of the Deputy Minister, such a number of sales of like goods that comply with all the terms and conditions referred to in that section or that are applicable by virtue of subsection 16(1) as to permit a proper comparison with the sale of the goods to the importer, the normal value of the goods shall be determined, at the option of the Deputy Minister in any case or class of cases, as
...
(b) the aggregate of
(i) the cost of production of the goods,
(ii) an amount for administration, selling and all other costs, and
(iii) an amount for profits.

The respondent determined an amount for profits of 31.6 percent for the purposes of subparagraph 19(*b*)(iii) of SIMA under subparagraph 11(*b*)(iii) of the *Special Import Measures Regulations*[6] (the Regulations) which provide:

> *11. For the purposes of paragraph 19(b) and subparagraph 20(c)(ii) of the Act,*
>
> ...
>
> *(b) ... the expression "an amount for profits", in relation to any goods, means an amount equal to*
>
> ...
>
> *(iii) where subparagraphs (i) and (ii) are not applicable but there are a number of sales of like goods made by other producers located in the country of export which, taken together, produce a profit and are such as to permit a proper comparison, the weighted average profit made on such sales.*
>
> (Emphasis added)

In determining an amount for profits under subparagraph 11(*b*)(iii) of the Regulations, the respondent reviewed the profit earned by another Italian producer of ski poles, Giuseppe Pronzati S.P.A. (Pronzati), on its sales of "like goods" in the Italian market. Ms. Ardito testified that the "like goods" reviewed for the purposes of subparagraph 11(*b*)(iii) of the Regulations were a little more than 1,000 pairs of Gipron brand ski poles sold by Pronzati in the Italian market that were "identical" to the ski poles exported to Canada by Pronzati. The respondent then determined a profit of 31.6 percent on the sale of 1,204 pairs of Gipron brand ski poles sold by Pronzati to Italian customers. This profit figure was subsequently used for an amount for profits under subparagraph 19(*b*)(iii) of SIMA in constructing the normal value of the Scott poles sold to the appellant.

The Tribunal finds that the respondent erred in its determination of the normal value of the goods in issue.

Section 15 of SIMA requires the respondent to base the normal value on the price of goods sold in the country of export that are "like" the goods exported to Canada. Therefore, to determine the normal value, the respondent must first attempt to identify goods sold in the Italian market that are identical to the exported goods and, in their absence, to identify goods that closely resemble the exported goods.

In the Tribunal's view, the respondent erred in interpreting SPF's sales of "like goods" in the Italian market under section 15 of SIMA to mean only "identical" goods, namely, Scott poles. Paragraph (*b*) of the definition of "like goods" under subsection 2(1) of SIMA further defines "like goods", in the absence of "identical goods in all respects," as "goods the uses and other characteristics of which closely resemble" each other. In determining whether goods closely resemble each other, SIMA specifically directs the respondent to consider the "uses and other characteristics" of the goods.[7] Therefore, having found that identical Scott poles, sold by SPF in the Italian market, were sold to a related distributor, the respondent was required to apply the second prong in paragraph (*b*) of the statutory definition of "like goods" under subsection 2(1) of SIMA to determine whether there were "like goods" sold by SPF in the Italian market that closely resembled the Scott poles sold to the appellant.

The Tribunal is of the view that the Scott poles imported by the appellant are not "identical in all respects" to the private brand ski poles sold by SPF to unrelated distributors in

---

6. SOR/84-927, November 22, 1984, Canada Gazette Part II, Vol. 118, No. 25 at 4286.
7. *Sarco Canada Limited. v. Anti-dumping Tribunal*, [1979] 1 F.C. 247 (F.C.A.).

Italy. However, applying the second prong in paragraph (*b*) of the definition of "like goods" under subsection 2(1) of SIMA, the Tribunal finds that the private brand ski poles sold by SPF in the Italian market closely resemble the Scott poles sold to the appellant and are, therefore, "like goods" for the purposes of section 15 of SIMA. Both Scott poles and private brand ski poles manufactured by SPF closely resemble each other in their physical appearance, in that they are both comprised of an aluminum alloy shaft and grip, strap and basket. Both brands of ski poles serve the same end use, i.e. alpine skiing. Both brands of ski poles are sold by the same types of retailers to the same types of customers, namely, people who do alpine skiing. Although the Tribunal recognizes that there may be quality differences between the Scott poles and private brand ski poles, it is of the view that they compete with each other in the alpine ski pole market and are, to a certain degree, substitutable for each other.

For the foregoing reasons, the Tribunal allows the appeal and directs the respondent to determine the normal value of the Scott poles sold to the appellant on the basis of sales of "like" private brand ski poles sold by SPF to unrelated companies in the Italian market during the relevant period, in accordance with section 15 of SIMA.

Appeal No. AP-90-127

The second appeal concerns the assessment of anti-dumping duties on one shipment of alpine ski poles carrying the Kastle brand name (Kastle poles) imported by the appellant from SPF in Italy on August 21, 1989.[8] The Kastle poles were produced by SPF for another company, Kastle Austria.

Because of insufficient cost information in the opinion of the respondent, anti-dumping duties were assessed on the Kastle poles on September 20, 1989, using the normal value determined by advancing the export price of the goods by 47 percent, in accordance with the ministerial specification issued under subsection 29(1) of SIMA, which reads as follows:

> *29.(1) Where, in the opinion of the Deputy Minister, sufficient information has not been furnished or is not available to enable the determination of normal value or export price as provided in sections 15 to 28, the normal value or export price, as the case may be, shall be determined in such manner as the Minister specifies.*

At issue in this appeal is whether the respondent erred in advancing the export price of the goods by 47 percent in accordance with the ministerial specification or whether a specific normal value should have been determined for the goods in issue. The appellant requested that the respondent re-determine the normal value of the Kastle poles on the basis of new cost information adduced during this appeal proceeding.

The documentary evidence and testimony revealed that at no time prior to their importation in August 1989 was the normal value of the Kastle poles requested by SPF or any other party. Mr. Jim Quarles, Vice-president of the appellant company, testified that it did receive some requests from the Department of National Revenue (Revenue Canada) for additional information to establish the normal value of the Kastle poles, and that the appellant contacted Kastle Austria to have them respond to such requests.

After the assessment of anti-dumping duties in September 1989, Mr. Louis Nadon, who was Customs Attaché at the Canadian Mission in Brussels at that time, testified, on behalf of the respondent, that several unsuccessful attempts had been made to obtain the information required to calculate a specific normal value of the goods in issue from both Kastle Austria and SPF.

---

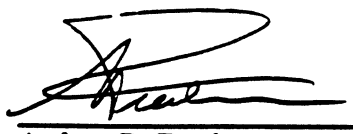
8. Customs Entry No. 13052-00727567-7.

In early January 1990, an official from Revenue Canada's headquarters in Brussels contacted a representative from Kastle Austria, by telephone and letter, asking him to provide basic information concerning the sales of Kastle poles in order to determine the normal value. Mr. Nadon further testified that additional attempts were made to obtain the information required to calculate a specific normal value of the Kastle poles from both SPF and Kastle Austria during a general re-investigation initiated on April 4, 1990. As part of the re-investigation, a questionnaire was sent to SPF to obtain information concerning the Kastle poles. However, such an attempt proved fruitless when Revenue Canada received a letter on May 2, 1990, from Mr. Stendhall of Scott Europe advising that the questionnaire would not be completed.[9] Kastle Austria was also advised by Revenue Canada in early April 1990 of the normal value review of the goods in issue and later declined to provide the information requested in order to determine the normal value of the Kastle poles manufactured by SPF and exported to Canada. Both Kastle Austria and SPF were thereafter advised by Revenue Canada that the normal value of the Kastle poles would be established under ministerial specification, given the lack of sufficient information.

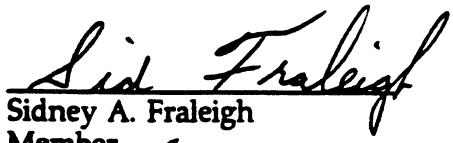
The appellant, in turn, acknowledged that sufficient information regarding the cost of production for the Kastle poles was not furnished on a timely basis, but that SPF was prepared to provide adequate cost information with respect to the Kastle poles that would permit the determination of a normal value under paragraph 19(*b*) of SIMA.

In the case of subsection 29(1) of SIMA, the manner so prescribed is applicable only "[w]here, in the opinion of the Deputy Minister, sufficient information has not been furnished or is not available to enable the determination of normal value or export price as provided in sections 15 to 28" of SIMA. In the Tribunal's view, the Deputy Minister is constituted as the judge of whether the preliminary conditions for the application of the prescription exist. Ample opportunity was given to both SPF and Kastle Austria to explain why the prescription was not applicable and to provide further information to enable the calculation of a specific normal value of the Kastle poles, which they chose not to pursue at that time.

For the foregoing reasons, the appeal is dismissed.



Arthur B. Trudeau
Presiding Member



Sidney A. Fraleigh
Member

Desmond Hallissey
Member

9. Witnesses testified during the hearing that SPF is owned by Scott Europe.

IN THE MATTER OF:

Final Determination of Dumping Made
by Revenue Canada, Customs and Excise,
Regarding Certain Machine Tufted Carpeting
Originating in or Exported from The
United States of America

CDA-92-1904-01

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

IN THE MATTER OF:	
FINAL DETERMINATION OF DUMPING MADE BY REVENUE CANADA, CUSTOMS AND EXCISE, REGARDING CERTAIN MACHINE TUFTED CARPETING ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA	Secretariat File CDA-92-1904-01

Before: Robert J. Pitt (Chairperson)
Gail T. Cumins
Timothy A. Harr
Mark D. Herlach
Ross Stinson

PANEL DECISION AND REASONS
FOLLOWING A DETERMINATION ON REMAND
SEPTEMBER 28, 1993

Peter A. Magnus of Osler, Hoskin & Harcourt, Ottawa, Ontario, argued on behalf of the complainants the Carpet & Rug Institute (U.S.A.) and Shaw Industries, Inc.

Robert P. Hynes of the Department of Justice of Canada, argued for the Minister of National Revenue for Customs and Excise.

Brian J. Barr, Barrister and Solicitor, of Ottawa, Ontario, argued on behalf of the Canadian Carpet Institute.

INTRODUCTION

A Binational panel Review in the matter of the Final Determination of Dumping made by Revenue Canada, Customs and Excise, regarding Certain Machine Tufted Carpeting Originating in or Exported from the United States of America was held pursuant to Article 1904 of the *Canada-United States Free Trade Agreement*, and section 77.15 of the *Special Import Measures Act*, Revised Statutes of Canada 1985, Chapter S-15, as amended ("SIMA").

The unanimous decision of the Panel was issued on May 19, 1993. In summary, the Panel:

1. remanded to Revenue Canada that aspect of its final determination of dumping that relates to the reasonable period of time for recovery of costs;

2. remanded to Revenue Canada that aspect of its final determination of dumping that relates to like goods; and

3. affirmed all other aspects of Revenue Canada's determination at issue before the Panel.

The Determination on Remand was issued on June 30, 1993. In response to the two remanded issues, Revenue Canada through the Deputy Minister of National Revenue:

1. Confirmed that the originally selected period of three months for the recovery of all costs other than general, selling and administrative expenses was an appropriate reasonable period of time;

2. Redetermined normal values (which were previously calculated under Section 19 of SIMA) pursuant to Section 15 of SIMA based on the normal value of the carpet style deemed to be most similar or comparable to the carpet style shipped to Canada.

Following the issuance of the Determination on Remand, the Carpet & Rug Institute, a trade association representing certain United States of America exporters of carpet, and Shaw Industries Inc. made a formal request for a further Binational Panel Review through a Notice of Motion filed on July 15, 1993. Replies to the Notice of Motion were filed by the investigating authority and by counsel for The Canadian Carpet Institute on July 22, 1993. By order dated July 26, 1993 this Panel ordered that a review would be conducted of the Determination on Remand pursuant to Rule 75 of the Article 1904 Panel Rules, directed the filing of written submissions and held a hearing thereon in Ottawa on September 13, 1993.

STANDARD OF REVIEW

The standard of review applied by the Panel in this review of the Determination on Remand is as fully set forth at pages 2 to 8 of the Opinion and Panel Decision dated May 19, 1993. That analysis is adopted and incorporated in this decision. In particular, on the remanded issues, the Panel is obligated to uphold the Determination on Remand unless the investigating authority "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

DECISION

After full consideration of the arguments and evidence presented by the parties in their written submissions and at the hearing this Panel affirms all aspects of Revenue Canada's Determination on Remand.

REASONS

A. Reasonable Period of Time for Recovery of Costs

In its preliminary and final determinations of dumping, Revenue Canada had used a three month period of investigation and, without providing any reasons, used the same three month period for recovery of all costs other than general, selling and administrative. On remand by the Panel the Deputy Minister was directed to address and determine the appropriate reasonable period based on the administrative record, provide an explanation explicitly discussing the grounds for the determination and, if necessary, recalculate the pertinent normal values. The Determination on Remand on this issue complies with the terms imposed by this Panel.[1]

---

1 Generally, the view of this Panel is that the Deputy Minister could have simplified the resolution of the issues before the Panel by providing more detailed explanations and supporting reasons in its final determination of dumping for the findings underpinning the determination.

In written submissions and oral arguments counsel for the complainants was unable to provide any substantive evidence to convince this Panel that the three month period was unreasonable.[2] When asked by the Panel, counsel for the complainants was unable to point to any evidence which would have supported the argument that a longer period of time would have resulted in the recovery of certain costs.[3] Further, when asked to suggest a reasonable period of time for recovery of costs, counsel for the complainants could only suggest some period of greater than three months to be based on data in the administrative record, data which varied on an exporter-by-exporter basis.

---

2 Immediately prior to the commencement of the hearing, counsel for the complainants tabled copies of voluminous extracts from the administrative record. The vast majority of the materials were not referred to during the original hearing and were not referenced in the written submission of the complainants dated August 18, 1993. The Panel notes that all of this information was available to the complainants prior to the original hearing and should have been cited in the original submissions. Further, counsel should restrict argument to matters referenced in the written submissions.

In any event, this Panel determined that while the figures contained in these materials may have illustrated some evidence of higher overhead costs during the three month period they did not establish the necessity for the Deputy Minister to use a longer period to assess whether costs would be recovered.

3 Although counsel for the complainants resiled from the position in his written submission, the submission on recovery of costs stated:

> "The point of these submissions is not, of course, to argue that a longer cost recovery period is necessarily appropriate in this case, but that this Panel obtains no assistance from even the confidential version of the Determination on Remand in assessing whether sufficient evidence exists on the record to justify the period relied upon by the Deputy Minister."

Based on the standard of review governing the proceedings before this Panel, there is no basis on which this Panel can alter Revenue Canada's determination and impose a different period of time for recovery of costs.

B. Calculation of Normal Values for Like Goods

Based on the March 19, 1993 decision of the Canadian International Trade Tribunal in the *Fletcher Leisure Group Inc.* case, this Panel had required Revenue Canada to calculate normal values for like goods pursuant to Section 15 of SIMA. In its final determination of dumping, where Revenue Canada had excluded identical goods under Section 16(2)(b) of SIMA, Revenue Canada had then calculated normal value under Section 19 of SIMA. The Determination on Remand complied with the decision of this Panel and the only real issue raised by the complainants was the question of determination of like goods. In its Determination on Remand the Deputy Minister calculated normal values based on the normal value of the carpet style deemed to be most similar or comparable to the carpet style shipped to Canada, and the following criteria were applied when selecting the most similar style:

(a) be from the same "product line" (e.g. commercial, residential) and from the same corporate division of the exporter;

(b) be made of the same fibre type, e.g. nylon;

(c) have the same or the closest face weight; and

(d) have the same backing material.

In the written submission, counsel for the complainants argued that the criteria used was not appropriate and that additional criteria should include branding and warranty. In oral argument, counsel for the complainants focused on the fact that the criteria did not include the method of carpet "construction".

This Panel has absolutely no evidential basis to question whether the criteria selected and applied by the Deputy Minister was unreasonable. Clearly, other criteria could have been used but the criteria used by the Deputy Minister were fair and reasonable. The criteria were not selected in a perverse or capricious fashion and absolutely no evidence was presented to suggest that the application of the criteria was prejudicial to one or more manufacturers or exporters.

Signed in the original by:

_____

Robert J. Pitt (Chairperson)

_____

Gail T. Cumins

_____

Timothy A. Harr

_____

Mark D. Herlach

_____

Ross Stinson

Issued on this 28th day of September, 1993.