ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
CANADA-UNITED STATES FREE TRADE AGREEMENT

IN THE MATTER OF:	)	
The Final Determination of Dumping	)	
Made by the Deputy Minister of	)	
National Revenue, Customs and Excise,	)	Secretariat File No.
regarding Gypsum Board	)	CDA-93-1904-01
Originating in or Exported from the	)	
United States of America	)	

Before: Ivan R. Feltham, Q.C. - Chairperson
Michael J. Coursey, Esq.
Joel Davidow, Esq.
James P. McIlroy
E. David D. Tavender, Q.C.

DECISION AND REASONS OF THE PANEL

November 17, 1993

Appearances:

James H. Smellie, Peter A. Magnus and Peter Glossop of Hosler, Hoskin & Harcourt on behalf of National Gypsum Company (Gold Bond Building Products Division)

Joseph de Pencier of the Department of Justice on behalf of the Deputy Minister of National Revenue (Customs and Excise) and The Attorney General of Canada for the Government of Canada

Riyaz Dattu of McCarthy Tétrault on behalf of CGC Inc.

Donald Kubesh of Stikeman, Elliott on behalf of Domtar Inc. and Domtar Gypsum Inc. (U.S.)

Denis Gascon of Ogilvy Renault on behalf of Westroc Industries Limited

Allan H. Turnbull and Paul D. Burns of Baker & McKenzie on behalf of United States Gypsum Company

1. INTRODUCTION

This Binational Panel Review was conducted pursuant to Article 1904 of the *Canada-United States Free Trade Agreement* ("FTA"), the *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c.65, and Part II of the *Special Import Measures Act*, R.S.C. 1985, c.s-15 ("SIMA"), following a Request for Panel Review filed by U.S. exporters National Gypsum Company (Gold Bond Building Products Division) ("National Gypsum") and James Hardie Gypsum (Washington) Inc. ("James Hardie") on January 7, 1993. Pursuant to Rule 39(1) of the *Rules of Procedure for Article 1904 Binational Panel Reviews* (the "Panel Rules"), complaints were filed by National Gypsum, James Hardie and Westroc Industries Ltd. ("Westroc") on February 8, 1993 (collectively referred to as the "Complainants") seeking a remand of the final determination of dumping issued December 14, 1992 by the Deputy Minister of National Revenue, Customs and Excise ("Revenue Canada") concerning gypsum board originating in or exported from the United States of America (Investigation file No. 4243-34) (the "Final Determination"). Pursuant to section 41(1)(a) of SIMA, the Final Determination held that gypsum board originating in or exported from the United States of America had been dumped into Canada and that the margin of dumping and the actual or potential volume of dumped goods was not negligible.

In this decision, the Panel reviews the procedural history of this matter, identifies the issues which must be addressed, examines the standard of review governing Binational Panel Review for issues in cases in which Canada is the importing country, and then considers the challenged aspects of the Final Determination in relation to relevant legislation and legal principles.

2. PROCEDURAL HISTORY

On April 13, 1992 Revenue Canada received a draft complaint respecting the injurious dumping of gypsum wallboard filed jointly on behalf of three Canadian producers: CGC Inc. ("CGC"), Westroc and Domtar Inc. ("Domtar"). The initial draft complaint received on April 13, 1992 led to a meeting on April 15, 1992 between Revenue Canada, CGC, Domtar and Westroc. During this meeting the parties were advised of inadequacies in their initial draft complaint and of the additional information required to document their complaints. During the week of May 19, 1992, officials from Revenue Canada visited the mining and manufacturing facilities of CGC, Domtar and Westroc. On May 28, 1992 Revenue Canada received formal complaints from CGC, Domtar and Westroc. On June 11, 1992 Revenue Canada officials notified CGC, Domtar and Westroc in writing that their submissions constituted properly documented complaints in accordance with section 32(1)(a) of SIMA. On June 24, 1992 Revenue Canada caused an investigation to be initiated pursuant to section 31(1) of SIMA. Notice of the investigation was published in the *Canada Gazette*, Part I, on July 11, 1992.

At the time of initiation, information gathered by Revenue Canada officials indicated that US imports as a percentage of the total Canadian market had increased from 6.3% in 1989 to 12.6% in the first four months of 1992. After initiation, Revenue Canada officials found an error in the import statistics for March, 1992. Corrections were therefore made in the Statement of Reasons accompanying the

Preliminary Determination (defined below) to recognize that US imports as a percentage of the total Canadian market had increased from 6.3% in 1989 to 8.7% in the first four months of 1992[1].

As a result of the investigation a preliminary determination of dumping was made on September 22, 1992 (the "Preliminary Determination"), notice of which was published in the *Canada Gazette*, Part I, on October 3, 1992. Revenue Canada issued its Final Determination in this case on December 14, 1992 from which, as previously noted, the Complainants sought Binational Panel Review.

A Panel Hearing was held in Ottawa, Canada on August 12 and 13, 1993, at which the Attorney General for Canada (for Revenue Canada), CGC, United States Gypsum Company ("U.S. Gypsum") Westroc, Domtar and National Gypsum presented oral argument to the Panel. By letter dated May 25, 1993, counsel for James Hardie indicated that James Hardie would not appear before the Panel.

3. PROCEEDINGS BEFORE THE PANEL

In response to numerous Notices of Motion filed by various parties in this matter prior to the commencement of the Panel Hearing, various Orders were granted by the Panel prior to the August 12-13 hearing date. Summarized below is a list of the proceedings before the Panel prior to the actual hearing date.

(a) Panel Order dated March 8, 1993 allowing for extension of time to file certain replies to motions pursuant to Panel Rule 20(1)(a).

(b) Panel Order dated March 26, 1993 permitting Westroc to file an amended Complaint.

(c) Panel Order dated March 31, 1993 requiring Revenue Canada to file an Amended Index of the Administrative Record listing all documentary and other information (including notes or memoranda relating to meetings between the Complainants and Revenue Canada about the selection of the POI) concerning proceedings that occurred before June 24, 1992 which relate to the POI.

(d) Panel Order dated April 1, 1993 permitting the Attorney General of Canada five days from the date of the Order to file submissions in response to the Panel Order dated March 26, 1993.

(e) Panel Order dated April 1, 1993 allowing three days to reply from the date of a submission by the Attorney General of Canada as noted above.

(f) Panel Order dated April 14, 1993 granting permission to James Hardie and National Gypsum to file replies to the submissions of Revenue Canada, and requiring Revenue Canada to file certain documents identified in the Index of the Administrative Record as appearing at Tab "G" in File 4243-34-2, volume 1, for the purpose of examination

[1] Statement of Reasons on Initiation, Appendix 2, Administrative Record, Volume 92, 109; Statement of Reasons, Preliminary Determination, page 9, Administrative Record, Volume 94: 86-110.

of the document by two members of the Panel in accordance with section 55 of the Panel Rules to determine whether the document contained privileged information.

(g) Panel Reasons dated April 21, 1993 for the Panel Order issued March 31, 1993 to amend the Index of the Administrative Record.

(h) Panel Order dated April 21, 1993 denying the motions of James Hardie and National Gypsum requesting Joint Panel Review of the Final Determination and the injury determination rendered by the Canadian International Trade Tribunal ("CITT") February 4, 1993 pursuant to section 42 of SIMA.

(i) Panel Order dated April 28, 1993 ordering Revenue Canada to deliver to the Canadian Secretary of the Binational Secretariat two copies of the document identified in the Index of the Administrative Record as appearing at Tab G in file 4243-34-2, volume 1.

(j) Panel Order dated May 7, 1993 allowing Complainants extension of time to file briefs, with corresponding extension to file briefs in reply.

(k) Reasons of the Panel dated June 29, 1993 for the Panel Order issued April 21, 1993 denying motions for Joint Panel Review.

(l) Panel Reasons dated July 9, 1993 for the Panel Order issued April 30, 1993 requiring Revenue Canada to disclose certain documents for which privilege was claimed.

(m) Panel Order dated August 10, 1993 allowing parties to file responses to the Notice of Motion regarding admission of certain additional affidavits into evidence during the Panel Hearing.

4. SUMMARY OF ISSUES AND PANEL DECISION

Issues Presented

Complainant National Gypsum, supported by James Hardie in their previous submissions, submitted that the Final Determination of dumping issued on December 14, 1992 must be remanded by the Panel because Revenue Canada committed an error of law in respect of the selection of the period of investigation ("POI") for the examination of exports of gypsum board to Canada. Complainant Westroc supported the POI as chosen by Revenue Canada (as did CGC and Domtar).

Westroc submitted that Revenue Canada erred in fact and law in respect of the decision not to include certain interest expenses in the calculation of the "costs of production" of certain US exporters such as National Gypsum and USG for the purposes of determining "normal value" of like goods under sections 16 and 19 of SIMA, and the Regulations thereunder. Westroc seeks a partial remand on this issue, with USG and National Gypsum supporting the position taken by Revenue Canada.

In this decision the Panel will address the issues of what standard of review governs the POI issue, whether Revenue Canada's selection and maintenance of a two-month POI was reasonable in the circumstances, what standard of review governs the non-allocation of leveraged buy-out ("LBO") and "Poison Pill" interest costs and whether Revenue Canada reasonably interpreted the statutory section dealing with allocation of expenses not directly related to the production of particular goods.

Panel Decision

The Panel remands both the POI and the treatment of interest expenses to Revenue Canada for further consideration and action not inconsistent with this decision.

The Panel directs Revenue Canada to complete its work within ninety (90) days of the date of this decision.

5. PERIOD OF INVESTIGATION

Standard of Review

Pursuant to Article 1904:3 and 1911 of the FTA this Panel is required to apply the standard of review "that a court of the importing Party would otherwise apply to a review of a determination of the competent investigating authority". Section 77.11(4) of SIMA indicates that "a request by the Minister for the review of a definitive decision may be made only on a ground set forth in subsection 28(1) of the *Federal Court Act*", R.S.C. 1985, c. F-7. Section 77.29(c) of SIMA further provides that, unless expressly stated to apply to goods of the United States, no amendment of, *inter alia*, section 28(1) of the *Federal Court Act* shall apply in respect of such goods. The applicable grounds of review are therefore as set out in the *Federal Court Act* as it stood at the implementation of the FTA. Section 28(1) of the *Federal Court Act* reads as follows:

> 28(1) 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, upon 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 a 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 is made in a perverse or capricious manner or without regard for the material before it.

Final determinations by Revenue Canada are made pursuant to section 41(1)(a) of SIMA, with no privative clauses existing in SIMA to insulate the Final Determination of Revenue Canada from Binational Panel review.

With respect to the POI issue, National Gypsum focused on section 28(1)(b) of the *Federal Court Act* as the relevant ground for its complaint. Specifically, National Gypsum alleges that Revenue Canada committed an error in law in making its decision, whether or not the error appears on the face of the record.

Section 31(1) of SIMA governs the commencement of investigations respecting the dumping or subsidizing of goods into Canada. In particular, section 31(1) states as follows:

> 31(1) The Deputy Minister shall cause an investigation to be initiated respecting the dumping or subsidizing of any goods forthwith on his own initiative, or, where he receives a written complaint respecting the dumping or subsidizing of the goods, within 30 days after the date on which written notice is given by or on behalf of the Deputy Minister to the complainant that the complaint is properly documented, if he is of the opinion:
>
> (a) that there is evidence that the goods have been or are being dumped or subsidized; and
>
> (b) that the evidence discloses a reasonable indication that the dumping or subsidizing referred to in paragraph (a) has caused, is causing or is likely to cause material injury or has caused or is causing retardation.

Nowhere in SIMA or the Regulations thereunder is any guidance given with respect to the timing or duration of the POI selected by Revenue Canada in any given case. The choice of a POI is a discretionary decision taken by Revenue Canada officials. Further, as was agreed by the parties during the oral hearing, in selecting a POI, Revenue Canada officials choose a period which will allow, within the time frames imposed by SIMA, the examination of a sufficient number of sales to determine whether dumping is occurring. Indeed, as noted in section 35(1) of SIMA, where there is *insufficient evidence* of dumping or subsidizing to justify proceeding with the investigation, or if the margin of dumping or the actual or potential volume of dumped goods is negligible, the Deputy Minister shall cause an investigation to be terminated. National Gypsum and counsel for the Attorney General of Canada agreed during the oral hearing that in selecting a POI Revenue Canada's objective is to select a period which accurately reflects the exporter's price levels to Canada and in the country of export.

Counsel for the Attorney General of Canada took the position during oral hearings that the selection of a POI by Revenue Canada officials is a discretionary exercise falling within Revenue Canada's core area of expertise. Counsel for the Attorney General, supported by Canadian producers, submitted that this Panel should treat the actions of Revenue Canada officials in selecting the POI with a high degree of deference, adopting a "reasonableness" standard. National Gypsum, however, takes the

position that the selection of a POI by Revenue Canada officials is not a matter that is subject to any interpretative exercise involving a high degree of expertise, and certainly not discretion falling within Revenue Canada's core area of expertise. During oral hearings National Gypsum's position was stated in the following fashion:

> So I submit, gentlemen, that in dealing with errors of law on the part of the Deputy Minister, in the absence of a privative clause, the standard of review may be correctness or it may be reasonableness, one or the other. But it is only where the issue in question – in this case the selection of a POI – falls within the core expertise of the Deputy Minister that there can be a possibility of deference and, accordingly, a possibility of applying a standard of reasonableness. Absent that expertise, there is no reason for deference and, therefore, the standard is correctness.[2]

In the Panel's view, National Gypsum's argument that the decision of Revenue Canada must be the "correct" decision rather than one that is "reasonable" is not supportable.

As noted succinctly in the May 19, 1993 decision, *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*, CDA–92–1904–01, the Panel concluded that, in the absence of a privative clause, a "reasonableness" test should be used when reviewing alleged errors of law under section 28(1)(b) of the *Federal Court Act*. As stated at page 6 of the *Machine Tufted Carpeting* decision:

> 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 addressed the issue of standard of review in the absence of a privative clause in *Bell Canada v. CRTC*, [1989] 1 S.C.R. 1722. In discussing the appropriate standard of review, the Supreme 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 a lower tribunal on issues which fall squarely within its area of expertise.

---

[2] Transcript of Public Hearing, August 12, 1993, Page 58.

The Panel in the *Machine Tufted Carpeting* decision goes on to note that in the *Bell Canada* case, the Supreme Court of Canada cited with approval the Federal Court of Appeal decision *Canadian Pacific Limited v. CTC* (1987), 79 N.R. 13, wherein the Court held, at pages 16-17, that "it should not interfere with the interpretation made by bodies having the expertise of the CTC in an area within their jurisdiction, unless their interpretation is not reasonable or is clearly wrong".

The Panel in the *Machine Tufted Carpeting* decision also reviews the commentary of Estey, J. in his partial dissent in *Douglas Aircraft Company of Canada v. McConnell*, [1980] 1 S.C.R. 245 wherein Justice Estey stated:

> 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 interpretive issue and then 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 interpretations so adopted by the Board may not be reasonably borne by the wording of the document in question . . . .

At page 7 of the *Machine Tufted Carpeting* decision the Panel notes that "if there is more than one reasonable interpretation of the statute, a reviewing body should not substitute its judgment for that of the administrative agency so long as the agency adopts one of the possible "reasonable" interpretations.

National Gypsum cites a recent Supreme Court of Canada decision to support its proposition that less deference should be applied to decisions of administrative bodies such as Revenue Canada if the exercise of discretion does not fall within that administrative body's core area of expertise. As was noted in *UBC v. Berg* (Unreported) May 19, 1993 (S.C.C.) at page 14, "the superior expertise of a human rights tribunal does relate to fact finding and adjudication in a human rights context, but does not extend to general questions of law". Chief Justice Lamer at page 14 quotes with approval from the recent Supreme Court of Canada case *Canada (AG) v. Mossop*, [1993] 1 S.C.R. 554 wherein at 584 LaForest, J. stated as follows:

> The position of a human rights tribunal is not analogous to a labour board (and similar highly specialized bodies) to which, even absent a privative clause, the courts will give a considerable measure of deference on questions of law falling within the area of expertise of these bodies because of the role and functions accorded to them by their constituent Act in the operation of the legislation.

The Court in the *Mossop* decision determined that a human rights tribunal has no particular expertise in determining general questions of law with wide social implications. As noted at page 14 "there being no reason why deference should be given to the Council on this question, the appropriate standard of review is one of correctness".

The analysis contained in the recent Supreme Court of Canada decision *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction* (Unreported) May 19, 1993

(S.C.C.) is helpful in putting the issue of "deference" into context. This case dealt with the interpretation of a collective agreement. At page 14 of this decision Sopinka, J. states as follows:

> The standard of review to be applied to a decision of an administrative tribunal is governed by the legislative provisions which govern judicial review, the wording of the particular statute conferring jurisdiction on the administrative body, and the common law relating to judicial review of administrative action including the common law policy of judicial deference . . . Determining the appropriate standard of review, therefore, is largely a question of interpreting the legislative provisions in the context of the policy with respect to judicial deference. The legislative provisions in question must be interpreted in light of the nature of the particular tribunal and the type of questions which are entrusted to it. On this basis, the court must determine what the legislator intended should be the standard of review applied to the particular decision at issue, having due regard for the policy enunciated by this court that, in the case of specialized tribunals, decisions upon matters entrusted to them by reason of their expertise should be accorded deference.

It is the Panel's opinion in this case that the discretionary exercise of choosing a POI is indeed a matter falling within Revenue Canada's core area of expertise. The officials at Revenue Canada perform a highly specialized function, and are the officials primarily responsible for the application of SIMA and the Regulations thereunder in dumping cases. Deference to the actions of Revenue Canada officials is thus appropriate. Recent judicial authority suggests that the degree of deference to be given to an administrative body does appear to change depending on the level of specialized knowledge and expertise held by the administrative decision-maker. Accordingly, the standard of review also appears to change, with a more deferential standard being applied to administrative bodies which develop higher levels of specialized knowledge and expertise. Due to the absence of a privative clause in this case, and given Revenue Canada's specialized role and function and the corresponding deference which should thus be accorded to their decisions, the Panel adopts the "reasonableness" standard of review.

In determining whether the actions taken by Revenue Canada officials were "reasonable", reference can usefully be made to the 1988 Supreme Court of Canada decision *UES, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 wherein, at 1084, Beetz, J. quoted with approval from the case of *SEIU v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 wherein Dickson, J. at 389 illustrated what he meant by "patently unreasonable" decisions:

> . . . acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice, or misinterpreting the provisions of the Act so as to embark on an enquiry or answer a question not remitted to it.

While the *Nipawin* case dealt with "patently unreasonable" decisions, the analysis and comments of Dickson, J. are helpful in a case such as the one before the Panel. Indeed, National Gypsum relied on two similar decisions to make the same point. In *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R.

2, a case dealing with the breadth of ministerial discretion to deny permits under the *Exports and Imports Permit Act*, R.S.C. 1970, c. E-17, at page 7 Justice McIntyre stated the following:

> The court should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved. It is, as well, a clearly established rule that the courts should not intervene with the exercise of a discretion by a statutory authority merely because the court might have exercised a discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not intervene.

As was noted in the case of *Oakwood Development Ltd. v. Rural Municipality of St. Francois Xavier* (1985), 61 N.R. 321 (S.C.C.) however, highly relevant considerations should not be ignored by administrative decision makers. As stated by Wilson, J. at 332:

> The failure of an administrative decision maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration.

Using the standard and principles as outlined above the Panel now turns to an analysis of the POI issue.

The Issue

Based on the foregoing discussion of the standard of review and our analysis of the facts presented, we view the POI issue as follows:

> *Whether it was reasonable for Revenue Canada to select and/or continue with its two–month, March/April POI notwithstanding its shortness, the representations of National Gypsum, and the evidence it received regarding a price increase that was implemented in Canada on May 15, 1992 after being implemented in the United States on April 1, 1992.*

It was argued that by including the price increase in the United States and excluding the price increase in Canada, Revenue Canada did not capture a representative picture of pricing and did not obtain the data necessary to provide a reasonable estimate of the margin of dumping.

To clarify the significance of the POI issue, Revenue Canada's procedures and purpose in conducting an anti-dumping investigation must be briefly discussed.

Revenue Canada's Role in an Antidumping Investigation

From the time Revenue Canada initiates its investigation and announces the POI, until the time the final determination is made, Revenue Canada is required to obtain relevant data in order to make margin of dumping estimates based on available pricing and cost information. Section 38(1)(a)(i) of SIMA requires the Deputy Minister to make a preliminary determination of dumping

> ...after estimating and specifying, in relation to each importer of goods in respect of which the investigation is made, as follows, namely, in the case of dumped goods, estimating the margin of dumping of the goods to which the preliminary determination applies, using the information available to him at the time the estimate is made...

Likewise, section 41(1)(a) of SIMA requires the Deputy Minister to make a final determination "on the evidence available to him" 90 days after the preliminary determination. In order to estimate the margins of dumping, Revenue Canada chooses a POI and gathers and verifies information from the importers and exporters of the subject goods. In the present case, when Revenue Canada officials initiated their investigation on June 24, 1992, they sent exporters and importers a cover letter and a Request for Information ("RFI") consisting of a questionnaire. The cover letter and RFI provided notice of the two–month POI and stipulated that questionnaire responses would be required five weeks after the date of the cover letter, i.e. by July 31, 1992. The cover letter further stated that:

> Any information received after this date may only be given consideration for the purpose of a final determination.[3]

In sum, Revenue Canada's fact–finding mission continues up until the time of the final determination. Throughout the investigation, Revenue Canada has to be open and must "listen to information that is coming forward"[4] on various issues, including the POI.

The Purpose of the POI

As Counsel for CGC noted, the purpose of the POI is to set a period for Revenue Canada's fact–finding exercise.[5] The POI is an important element in any anti-dumping proceeding because it limits the parameters of Revenue Canada's 180–225 day investigation which culminates in a final determination. The POI plays a particularly important role in Revenue Canada's price comparisons and dumping determinations.

Counsel for Revenue Canada succinctly summarized the objective of the POI as follows:

---

[3] Administrative Record, Vol. 92 at Pages 30–38 and Pages 73–97.

[4] Argued by Counsel for CGC Inc., Transcript of the Public Hearing, August 12, 1993, Page 234.

[5] Transcript of the Public Hearing, August 12, 1993, Page 210.

> In selecting a POI, the Deputy Minister's objective is to select a period which accurately reflects the exporters' price levels to Canada and in the country of export and in order to affirm or dispute the allegations of dumping and injury made by Canadian industry in order to eventually issue a final determination of dumping which reflects the extent to which the subject goods have been dumped.[6]
>
> (emphasis added)

Revenue Canada's Selection of the POI

The Administrative Record does not disclose the exact date when Revenue Canada selected the March/April POI. We know only that this decision was made sometime before the initiation of the investigation was formally announced on June 24, 1992.

Revenue Canada's June 24, 1992 cover letter and RFI constituted the first notice to the exporters and their importers of the investigation and the fact that Revenue Canada had selected a two–month (March 1, 1992 to April 30, 1992) POI. Therefore, at the time Revenue Canada made its initial POI decision, neither the exporters nor their importers had any knowledge of the investigation or the coverage of the POI. Likewise, the exporters and importers had no opportunity to respond or provide submissions or data prior to the public announcement of the investigation on June 24, 1992.

As a result, neither the exporters nor the importers provided the data Revenue Canada analyzed at the time it initially selected the POI. The Administrative Record does, however, indicate that Revenue Canada did have estimates supplied to it by a Canadian Complainant dated May 28, 1992, which forecasted Canadian price increases during May or June, 1993.[7]

The only evidence which discloses the reasons for Revenue Canada's initial selection of the POI appears in two internal Revenue Canada memoranda to file, both dated July 23, 1992, approximately one month after initiation. These documents refer to four reasons for the selection of the March\April POI. However, each of the stated reasons for selection of that two-month period is subject to question.

First, Revenue Canada concluded that there were no significant trends or seasonal factors affecting imports. Our own review of the data and the material concerning the industry indicates that it was subject to seasonal trends typical of the construction industry, with larger sales at higher prices in the summer months. Moreover, Revenue Canada's conclusion that there were no significant trends seems at odds with its separate conclusion that there was a steep upward trend of U.S. imports that justified initiation of the investigation (a conclusion which later was found by Revenue Canada to be erroneous).

---

[6] Non–Confidential Brief of the Attorney General of Canada and the Investigating Authority, Paragraph 48 at Page 28.

[7] Confidential Transcript of the Public Hearing, August 13, 1993, Pages 55–58.
See also Administrative Record, Vol. S–6 at Pages 42, 192, and 193 (submission of Domtar).

Revenue Canada's second reason was that since there were approximately 1300 entries in two months, selecting a longer period would adversely affect the administrative feasibility of the investigation. Revenue Canada, however, has conducted numerous six month investigations in which there were just as many or more entries or total transactions per month. There is nothing to indicate that adding one more month, or shifting to the May-June period, would have been unfeasible.

The third reason given was that March-April was the most recent period for which import data was available from Revenue Canada's entry processing system. It is not clear why this data was relevant to the POI. Also, the statement does not make clear how many days delay would have been required to allow Revenue Canada to obtain data for one more month, nor does it explain why Revenue Canada was able in most other cases to select a POI that extended up to or through the date of initiation instead of ending six to eight weeks prior to such date. According to the list of dumping cases analyzed in Appendix A to National Gypsum's main brief, 54 of Revenue Canada's 74 dumping investigations have had POIs that include the month just prior to initiation. Indeed, in 42 of these 54 cases, the month of initiation was included in the POI. Presumably, CCS import data was not available in these 54 cases for the month preceding, and the month of, initiation, for there is no explanation on the record that CCS's data was lagging in this case for some special reason.

The fourth justification was that the 1300 entries during the period were sufficiently numerous to substantiate or refute the dumping allegations in the complaints. This point, however, does not explain why a six month period was selected in many other cases with just as many entries or sales per month. Nor does it explain why a three month period or a May-June period would not also have provided adequate volume (and more current prices). Certainly pricing is more crucial than volume to analysis of a dumping case.[8] Revenue Canada had received from one of the Complainants even prior to initiation a prediction that low winter prices in Canada might well strengthen in the summer of 1992 to previous high levels.[9] Thus, even before protests about the March/April POI were made by U.S. Embassy officials, and by National Gypsum after initiation, Revenue Canada had some reason to suspect that its March-April POI would miss price increases in the spring or early summer.

It is our view that, even according deference to expert administrative bodies, compelling reasons would be needed to justify the choice of such an unusually short POI ending well before the initiation date of the investigation. While the Panel feels that the four original reasons presented have some merit[10], the reasons leave many doubts unresolved, particularly given Revenue Canada's departure from past practice. Since we conclude that Revenue Canada acted unreasonably in refusing to alter or extend the POI once the price-change issue was clearly presented to them, however, it is

---

8 The *Carpets* case involved a three month POI with more than 700 entries per month.

9 See supra, at p. 12, footnote 7.

10 Panelist Michael Coursey is of the opinion that the reasons given by Revenue Canada in its July 23, 1993 memoranda are unreasonable, and thus cannot support the reasonableness of the March-April POI. While he agrees with the analysis presented in this decision of facts that occurred subsequent to the July 23 memoranda, he would not reach the question of whether Revenue Canada's later inaction with respect to its receipt of information relevant to the POI rendered the selection of the POI unreasonable.

unnecessary for us to decide whether the initial selection of this unprecedented POI would have justified remand in itself.

Representations to Revenue Canada Subsequent to the June 24, 1992, POI Announcement

During the oral hearing, counsel for Revenue Canada argued that the initial POI decision was reasonable and that:

> ...furthermore, there was nothing presented to the Investigating Authority, nothing sufficient and nothing timely, that ought to have caused it to change that decision.[11]

Counsel for Revenue Canada stated also that the type of documentation Revenue Canada was looking for to substantiate National Gypsum's export prices included invoices, sale slips, and price bulletins.[12]

In contrast, Counsel for National Gypsum took the position that there was sufficient evidence before Revenue Canada reasonably to require them to revise the two–month POI prior to the Preliminary Determination.[13] To determine whether the reasonableness test was satisfied in the present case the Panel analyzed the evidence that came before Revenue Canada on the following dates, and examined Revenue Canada's response to this evidence.

(i)	July 17, 1992	Meeting with United States Embassy Officials
(ii)	July 30, 1992	National Gypsum's Questionnaire Response
(iii)	August 19–21, 1992	Revenue Canada's Verification Visit
(iv)	August 21, 1992	Canadian Complainants' Update of Injury Evidence

(i) The July 17, 1992, Meeting Between Revenue Canada and the United States Embassy

As noted above, in accordance with Revenue Canada's present disclosure policies, exporters and importers were not advised that an investigation had been initiated or that the two–month POI had been selected until they received the cover letter and RFI that Revenue Canada sent to them on June 24, 1992.

On Friday, July 17, 1992, three weeks after Revenue Canada sent the cover letter and RFI advising the exporters of the POI, Revenue Canada officials met with United States Embassy personnel. During this meeting, the American officials asked Revenue Canada to extend the two–month POI to

---

[11] Transcript of the Public Hearing, August 12, 1993, Page 169.

[12] Transcript of the Public Hearing, August 12, 1993, Page 182.

[13] Transcript of the Public Hearing, August 12, 1993, Page 154.

include May. Revenue Canada officials explained why the initial decision was taken.[14] The Revenue Canada officials present at the meeting then reviewed the Embassy's submissions internally with senior Revenue Canada officials, and five days later, on July 22, 1992, advised the United States Embassy by telephone that Revenue Canada had decided that the POI would not be revised.

The only documentary evidence in the Administrative Record regarding the July 17, 1992 meeting is a Memorandum to file dated July 23, 1992.[15] The Revenue Canada Memorandum to file dated July 23, 1992 provided documentary evidence confirming the statements made at the July 17, 1992 meeting and the follow-up telephone conversation, and it reiterated the reasons for maintaining the selection of the March/April POI. The Panel notes that this documentary evidence did not specifically deal with the United States' Embassy's request that the month of May 1992 be included in the POI.

(ii) National Gypsum's July 30. 1992 Questionnaire Response

The first time National Gypsum, the major exporter of the subject goods, separately raised the POI issue was in its July 30, 1992, Questionnaire Response. The first 2–3 pages of their response argued that the March/April POI was too short and unrepresentative, and that a May/June two–month POI was more appropriate.[16] Several reasons were provided to support their position,[17] including:

- Revenue Canada had never before used a two–month POI;
- Revenue Canada usually chose a POI that included the month prior to or the month ending with the initiation of the investigation — i.e. the POI should have included exports to Canada through May 31 or, alternatively, June 30; and
- short time frames can distort the results. In the present case the March/April, 1992 POI was inappropriate because a price increase had been implemented in the United States in April which was not implemented in Canada until after the two–month POI.[18]

National Gypsum also stated that it was "well known in the trade, months in advance, that prices for gypsum wallboard products sold in the United States would be increased in April, 1992." National Gypsum reported that "[d]ue to a major Canadian trade show National Gypsum "did not increase prices to Canadian customers until May, 1992." National Gypsum claimed that the Canadian

---

[14] Non–Confidential Brief of the Attorney General of Canada and the Investigating Authority, Paragraph 11 at Page 9. See also Transcript of the Public Hearing, August 12, 1993, Page 35.

[15] Administrative Record, Vol. 100, at Pages 1-2.

[16] It should be noted that National Gypsum did not share the view of the American Embassy that the POI should be three months — March/April/May.

[17] Administrative Record, Vol. 48 at Pages 47–50.

[18] Transcript of the Public Hearing, August 12, 1993, Pages 117–118.

producers who initiated the complaint were aware of major trade show discounts for customers in Canada which were provided by them as well as by U.S. exporters beginning in mid-March and continuing through the month of April."

National Gypsum alleged that "[s]uch special, temporary allowances ... distort the results of the dumping inquiry if only March and April are considered as the POI." National Gypsum concluded from these facts that the March-April POI "appear[s] clearly to have been selected in order to maximize the prospects of finding some margin of dumping", and requested Revenue Canada to abandon the March-April POI for a May-June POI.

Revenue Canada did not reply to National Gypsum's July 30th submission. An internal memorandum of Revenue Canada makes clear that they were aware of National Gypsum's points about the unrepresentative nature of the POI but decided not to comment about them.[19] There is no evidence indicating that Revenue Canada ever conceived of, addressed or communicated any reasons why the higher prices in May and June should be kept out of the case.

(iii) Revenue Canada's August 19–21, 1992, Verification Visit

During August 19-21, 1992, in accordance with their administrative practice, Revenue Canada officials visited National Gypsum's offices in North Carolina to verify the data provided in National Gypsum's Questionnaire Response dated July 30, 1992.

During the verification meeting, National Gypsum's Director of Pricing advised Revenue Canada of the quantitative dollar amount and the percentage of its price increases, both domestically and in Canada.[20] Revenue Canada's Verification Minutes also indicate that National Gypsum provided calculations of the impact a different POI would have on estimated margins of dumping.[21] At this time, National Gypsum was not arguing that the POI should be longer, but rather that the two–month period of May/June should be substituted for the two–month period of March/April, 1992.[22]

Counsel for National Gypsum admitted that they provided no documentary evidence regarding prices for sales in the United States market or for sales in the Canadian market outside of the March–April, 1992 POI.[23]

Counsel for Revenue Canada argued that, following the August 19–21 verification meeting, Revenue Canada expected to receive additional evidence from National Gypsum regarding the POI issue and

---

19 Administrative Record, Vol. 48 at page 264.

20 Transcript of the Public Hearing, August 12, 1993, Pages 119–120 and Pages 122–123.
See also Administrative Record, Vol. 56 at Pages 160–197, particularly at Pages 183–187.

21 Administrative Record, Vol. 56 at Pages 160–197, particularly at Page 186.

22 Transcript of the Public Hearing, August 12, 1993, Page 125–126.

23 Confidential Transcript of the Public Hearing, August 13, 1993, Pages 90–91.

indicated that Revenue Canada would have considered such information had it been provided.[24] Counsel for National Gypsum submitted that they did not provide any documentary evidence regarding domestic and export sale prices outside the two–month POI because Revenue Canada had refused to change the POI and, therefore, was not inclined to consider further information. Revenue Canada admitted that it did not communicate to National Gypsum that it was awaiting further evidence regarding the POI issue.[25]

Following the August verification meeting, counsel for National Gypsum stopped pressing the POI issue with Revenue Canada.[26]

(iv) The Canadian Complainants' August 21, 1992, Update of Injury Evidence

Subsequent to the June 24, 1992, initiation of its investigation, Revenue Canada requested and received from one of the Canadian Complainants updated evidence regarding injury in a document dated August 21, 1992. Revenue Canada received this updated evidence on August 24, 1992 — i.e. three days after the August 19–21 verification meetings and approximately one month before the Preliminary Determination dated September 22, 1992.

Revenue Canada stated that the first time they learned of National Gypsum's May Canadian price increase was in the document received on August 24, 1992. This document included a copy of National Gypsum's Price Bulletin dated April 3, 1992 that National Gypsum distributed to its customers in Ontario, Quebec and the Maritimes indicating that, effective May 15, 1992, its prices on gypsum wallboard would be increased.[27]

The copy of the National Gypsum Price Bulletin that was provided to Revenue Canada indicated that it was received by a Canadian dealer on April 9, 1992. The impending Canadian price increase was therefore known in the Eastern Canadian market in April, 1992. The Price Bulletin announced that, effective May 15, 1992, prices on specified gypsum wallboard would rise 10% and that prices on all other gypsum wallboard products would rise by 6%. It was specified that these price increases would apply to orders shipped after May 15, 1992, regardless of the date the order was placed. In other words, the price increases could apply to orders that were placed within the March/April POI which were not actually shipped until after May 15, 1992, i.e. outside of the POI.[28]

---

[24] Transcript of the Public Hearing, August 12, 1993, Pages 185–187.

[25] Transcript of the Public Hearing, August 12, 1993, Page 38.

[26] Transcript of the Public Hearing, August 13, 1993, Pages 358–359.

[27] Transcript of the Public Hearing, August 12, 1993, Pages 179–180. See also Confidential Transcript of the Public Hearing, August 13, 1993, Pages 59–70; Administrative Record, Vol. 87 at Pages 16–18 and 31.

[28] Administrative Record, Vol. 87 at Page 31.

As noted above, counsel for Revenue Canada advised the Panel that price bulletins were the type of documentation Revenue Canada was looking for to substantiate National Gypsum's export prices.[29]

In sum, three days after the verification meetings in which National Gypsum forcefully argued the POI issue with Revenue Canada on the grounds that the May Canadian price increase fell outside of the POI (whereas the American price increase fell within the POI), Revenue Canada received a copy of the Price Bulletin which documented this increase.[30]

Conclusion and Decision - POI

Based on the foregoing application of the standard of review to the facts of this case, the Panel finds that it was unreasonable for Revenue Canada to maintain the two–month March/April POI throughout its investigation.

Given that the U.S. exporters and the U.S. Government had no knowledge of the contemplated POI before the Requests For Information ("RFI") were issued, they communicated their objections and reasons concerning the POI as soon as could be reasonably expected, and soon enough for Revenue Canada to lengthen the investigation while extending the POI at least through May or May and June. Certainly the objections to the POI were relevant. It is hard to think of a more relevant factor in a dumping inquiry than a price increase by the major accused exporter in the importing country prior to initiation of the investigation. Yet, there is nothing in the record indicating that Revenue Canada ever considered the issue of May/June pricing after it was raised or communicated to the U.S. Government or National Gypsum any specific reason why the POI should not be extended to cover one or two more months. Revenue Canada did not indicate in any manner why excluding a May or June price increase from the investigation could possibly contribute to the accuracy and fairness of analysis and result. It is now clear that the representations made by U.S. officials on July 17 and in National's submission of July 30 were accurate. Revenue Canada could easily have verified in July that there had been a May price increase in Canada.

---

[29] Transcript of the Public Hearing, August 12, 1993, Page 182.

[30] On November 26, 1992, counsel for James Hardie faxed to Revenue Canada a two–page letter and two graphs depicting American and Canadian prices for subject goods outside of the POI. On December 14, 1992 (the day of the Final Determination), Revenue Canada received by mail a copy of the two–page letter and two graphs, as well as four–pages of pricing information. (Transcript of the Public Hearing, August 13, 1993, Page 296. See also Administrative Record, Vol. 60 at Pages 93–96, and at Pages 97–103.) Given that this information was received by Revenue Canada less than three weeks before the Final Determination dated December 14, 1992, counsel for National Gypsum admitted that the information was "too little too late". (Transcript of the Public Hearing, August 13, 1993, Page 359.)

Revenue Canada has altered its POIs in the past[31], and changing the POI after the RFIs have been issued is within its discretion. Moreover, Revenue Canada has the authority to extend investigations by 45 days, which would have allowed the importers and exporters adequate additional time to respond to the amended RFIs and enabled Revenue Canada to analyze such data.[32]

The Panel recognizes that National Gypsum never provided Revenue Canada with detailed domestic and export price information relating to sales outside of the POI. Following the August verification meeting, National Gypsum might have provided May/June domestic and export pricing information to buttress its position. Its failure to do so, however, cannot excuse Revenue Canada's earlier and continuing refusal to alter the POI.

The Panel remands the decision regarding the POI to the Deputy Minister of National Revenue and directs that he reconsider the POI in light of the foregoing facts and reasoning. The Panel requests that Revenue Canada provide detailed reasons explaining why the POI that results from its reconsideration will produce an accurate reflection of the exporters' price levels and reasonable estimates of dumping margins.

The Panel directs Revenue Canada to complete its work within ninety (90) days from the date of this decision.

6. TREATMENT OF INTEREST EXPENSE

The Issue

In its Complaint, Westroc framed the interest expense issue as follows:

> In her final determination of dumping made with respect to gypsum board, the Deputy Minister of National Revenue for Customs and Excise (the "Deputy Minister") decided not to include certain interest expenses in the calculation of the costs of production of some U.S. exporters such as National Gypsum Company and United States Gypsum Company, for the purposes of determining normal values of like goods.
>
> The Complainant respectfully submits that the Deputy Minister erred in fact and in law in respect of her calculation of these interest expenses for the purposes of

---

31 See, e.g., Certain Beer Originating in or Exported from the United States of America, Department of National Revenue, Customs and Excise, Preliminary Determination Statement of Reasons, June 4, 1991; Finished Artificial Graphite Electrodes and Connecting Pins Originating in or Exported From Belgium, Sweden and the United States of America, Department of National Revenue, Customs and Excise, Preliminary Determination Statement of Reasons, 1986; Certain Stainless Steel Welded Pipe Originating in or Exported From Taiwan, Department of National Revenue, Customs and Excise, Preliminary Determination Statement of Reasons, May 8, 1991.

32 SIMA, Section 39

> determining normal values and margins of dumping of U.S. exporters of gypsum board...[33]

In particular, Westroc took issue with Revenue Canada's decision to exclude the following two types of interest expense from its calculations under paragraph 19(b) of SIMA[34]:

- the LBO interest expenses with respect to National Gypsum; and
- the "poison-pill" protection interest expenses relating to U.S. Gypsum[35].

Although Westroc's Complaint made reference to the Deputy Minister's decision only with regard to "some U.S. exporters such as National Gypsum Company and United States Gypsum Company", Westroc's brief also referred in the statement of the case to the Deputy Minister's decision with regard to specific costs of Georgia Pacific Corporation[36] ("Georgia Pacific") and, in the claim for relief, sought remand to include the application of the appropriate principles to the costs of all three U.S. exporters[37].

However, during the hearing, counsel for Westroc stated that the interest expenses of Georgia Pacific were not the subject of Westroc's complaint.[38] Georgia-Pacific did not appear in these proceedings and their particular circumstances were not argued before the Panel. In any event, on the facts which were set out in Westroc's Brief[39] and accepted by Revenue Canada[40], the interest incurred by Georgia Pacific appears to have been attributable solely to non-subject goods. The Panel concludes, therefore, that it is not necessary to give further consideration to the Deputy Minister's decision with respect to Georgia Pacific.

The Standard of Review

---

33 Complaint of Westroc Industries Limited, Page 2, Paragraph 5(B)

34 Where domestic selling prices were found not be to profitable under paragraph 16(2)(b) of SIMA, some of the American exporters' normal values were determined pursuant to paragraph 19(b) of SIMA on the basis of the cost of production of the subject goods, plus an amount for administrative, selling and all other costs, plus an amount for profits. It should be noted that the paragraph 16(2)(b) findings of non-profitability which excluded a substantial number of sales from normal value determination under section 15 were not challenged.

35 Transcript of the Public Hearing, August 13, 1993, Page 372

36 Confidential Brief of Complainant Westroc Industries Limited, Page 11, Paragraph 21

37 Confidential Brief of Complainant Westroc Industries Limited, Page 38, Paragraph 75

38 Transcript of the Public Hearing, August 13, 1993, Pages 373-374

39 Confidential Brief of Complainant Westroc Industries Limited, Page 11, Paragraph 21

40 Non-Confidential Brief of the Attorney General of Canada and the Investigating Authority, Page 15, Paragraph 25

The standard of review by which to assess the decision of Revenue Canada with regard to the treatment of interest expenses is the standard of "reasonableness" applied with deference. In coming to this conclusion the Panel adopts the legal principles outlined in the previous section dealing with the standard of review applicable to the POI issue.[41]

The Panel also notes that Revenue Canada[42], Westroc[43], National Gypsum[44], CGC[45], and U.S. Gypsum[46] argued in their Briefs for the application of the "reasonableness" standard.

In order to apply the reasonableness standard of review to the facts of this case, we must first look to Revenue Canada's treatment of interest expenses in its Final Determination and then analyze the relevant statutory and regulatory provisions -- i.e. paragraph 19(b) of SIMA and section 11 of the SIM Regulations.

Revenue Canada's Treatment of Interest Expenses in its Final Determination

With respect to National Gypsum, Revenue Canada's Final Determination stated at page 8:

> National Gypsum Company is a holding company with two subsidiaries, Gold Bond Building Products Division (Gold Bond) and Austin Company. The Austin Company provides engineering and construction services while Gold Bond produces gypsum wallboard and related products.

---

41 We are nevertheless mindful that the test applied by the Supreme Court of Canada in *University of British Columbia v. Berg*, supra, might be applicable in that, while Revenue Canada officials have expertise in the allocation of expenses among the several products of a company, the interpretation, as distinct from the application, of SIMA paragraph 19(b) and SIM Regulation 11 is a "general question of law" to which the "correctness" test properly applies. (See the judgment of Chief Justice Lamer writing for the majority at page 14).

In any event, if an interpretation is found to be unreasonable, it cannot be correct. On the other hand, the interpretation may be reasonable, although not "correct" in our view. Since our conclusion is that Revenue Canada's interpretation of the relevant provisions of SIMA and the SIM Regulations was not reasonable, it is not necessary to determine whether the correctness test might be the proper standard.

42 Non-Confidential Brief of the Attorney General of Canada and the Investigating Authority, Pages 17-26, particularly at Page 25, Paragraph 42 which states:

"If there is more than one reasonable interpretation of the stature, a reviewing body should not substitute its judgment for that of the administrative agency so long as the agency adopts a reasonable interpretation..."

43 Non-Confidential Brief of Complainant Westroc Industries Limited, Pages 21-24

44 Brief of Complainant National Gypsum Company Re: Interest Expenses Complaint of Westroc Industries Limited, Pages 10-11

45 Non-Confidential Brief of the Participant CGC Inc., In Support of the Investigating Authority, Pages 5-10, particularly Page 7, Paragraph 21

46 Non-Confidential Brief of United States Gypsum Company, at Pages 13-27, particularly at Page 23, Paragraph 45

> During the period of investigation, National Gypsum was operating under the protection of Chapter 11 of the Federal Bankruptcy Code of the United States of America. Notwithstanding this fact, the Department reviewed all costs relating to the costs of production of the subject goods including the interest expenses relating to the leveraged buy-out of National Gypsum. The Department is satisfied that in this particular situation the interest expenses relating to the leveraged buy-out are not related to Gold Bond's production or operations and are therefore not attributable to the subject goods. However, in reviewing the financial data of Gold Bond, it was determined that certain interest expenses were attributable to the subject goods. Therefore, these expenses have been included in both the profitability analysis and the cost of production calculations for purposes of determining normal values pursuant to paragraph 19(b) of the Act.

At page 9 of the Final Determination, Revenue Canada described its allocation of the interest expenses of U.S. Gypsum as follows:

> USG Corporation ("USG") is a holding company for several subsidiaries which supply the building products market. The principal subsidiaries are United States Gypsum Company, USG Interiors, L & W Supply Corporation, CGC Inc. and USG International. Both United States Gypsum Company and CGC Inc. which is located in Canada, and one of the complainants in this investigation, produce gypsum wallboard.
>
> At the preliminary determination, all interest expenses incurred or accrued by the holding company USG were allocated to United States Gypsum Company and included in their costs of both domestic and export goods. The United States Gypsum Company has made representation to the Department that the majority of these interest expenses are not related to United States Gypsum and did not contribute to the production capacity or operation of their facilities. The Department has reviewed the arguments and information presented and is satisfied that the majority of the holding company interest expense is not related to the production or operation of United States Gypsum Company. Consequently, these interest expenses have not been included in calculations of cost of production of gypsum wallboard for purposes of the final determination. However, in reviewing the financial data of United States Gypsum Company, it was determined that the remainder of the interest expenses have been included in the cost of production calculations for the purpose of profitability analysis and determining normal values pursuant to section 15 and 19(b) of the Act.

In sum, as the following extracts from the Final Determination state, Revenue Canada did not include certain interest costs in their paragraph 19(b) calculation of the costs of production for both National Gypsum and U.S. Gypsum because they were *not related to the production or operations* of the respective companies:

> The Department is satisfied that in this particular situation the interest expenses relating to the leveraged buy-out are not related to Gold Bond's production or operations and are therefore not attributable to the subject goods.
>
> The Department has reviewed the arguments and information presented and is satisfied that the majority of the holding company interest expense is not related to the production or operation of United States Gypsum Company.
>
> (emphasis added)

To determine whether Revenue Canada's interpretation of paragraph 19(b) was reasonable, an analysis of both paragraph 19(b) and its related regulations is required.

Paragraph 19(b) of SIMA and Section 11 of the SIM Regulations

As noted earlier, where domestic selling prices were found not to be profitable under paragraph 16(2)(b) of SIMA, some of the American exporters' normal value were determined pursuant to paragraph 19(b) of SIMA.

The relevant provisions of section 19 of SIMA state:

> .. the normal value of the goods shall be determined, at the option of the Deputy Minister in any case or class of cases, as:
>
> (a) ...., or
>
> (b) the aggregate of
>
> (i) the cost of production of the goods,
> (ii) an amount for administrative, selling and all other costs, and
> (iii) an amount for profits.

In sum, paragraph 19(b) of SIMA requires Revenue Canada to aggregate the following five components:

- the cost of production of the goods;
- an amount for administrative costs;
- an amount for selling costs;
- an amount for all other costs; and
- an amount for profits.

Westroc's Complaint focused on Revenue Canada's interpretation of the fourth component, "all other costs".[47]

Section 97(1)(e) of SIMA grants the Governor in Council the authority to make regulations:

> defining the expressions "cost of production", an amount for administrative, selling and all other costs" and "an amount for profits" for the purpose of paragraph 19(b)...

Section 11 of the SIM Regulations contains three paragraphs. Paragraph (a) deals with the expression "cost of production" and paragraph (b) deals with the expression "an amount for profits".

Paragraph 11(c) of the SIM Regulations states:

> the expression "an amount for administrative, selling and all other costs" in relation to any goods, means an amount equal to the sum of
>
> (i) all administrative and selling costs that are directly attributable to the production and sale of the goods,
>
> (ii) the amount that reflects the cost of any warranty against defect or guarantee of performance attributable to the goods, and
>
> (iii) the estimated amount of all selling, administrative and other costs, including any costs attributable to the design or engineering of the goods that are not included in their cost of production, that are attributable to the goods but not included in subparagraphs (i) and (ii).

Applying the reasonableness standard to this case, the issue before the Panel is therefore whether Revenue Canada's interpretation of section 19(b) of SIMA and SIM Regulation 11(c)(iii) and the application of that interpretation to the facts in the Administrative Record, were reasonable, although there also may be another reasonable interpretation of the relevant statutory and regulatory provisions.

---

[47] Non-Confidential Brief of Complainant Westroc Industries Limited, Pages 29-30, Paragraph 55. See also Non-Confidential Brief of the Attorney General of Canada and the Investigating Authority, Page 34, Paragraph 65

The Application of the Reasonableness Standard to Revenue Canada's Treatment of Certain Interest Expenses in its Final Determination

With regard to National Gypsum and U.S. Gypsum, Westroc argued that the plain meaning of "all other costs" does not permit the total omission of any costs on the basis that they are not attributable to the production of the subject goods or other products.[48]

Westroc took the position that the interest expenses at issue were simply part of each exporter's general costs of doing business -- "the financing of its capitalization" -- and thus must be accounted for in the calculation of normal value under paragraph 19(b).[49] With regard to National Gypsum, Westroc also argued in their Brief that the interest cost incurred as a result of the LBO (but from which National Gypsum was relieved from paying due to an Order under Chapter 11 of the U.S. Bankruptcy Code) should also be taken into account[50].

Revenue Canada, supported by National Gypsum and U.S. Gypsum, responded that Revenue Canada interpreted SIMA and SIM Regulations reasonably in not attributing the costs in question to the subject goods. They relied in particular on the word "attributable" in subparagraph 11(c)(iii) of the SIM Regulations and argued that a requirement of causal connection should be read into that word and inferred from the context of sections 15, 16 and 19 of SIMA. Revenue Canada also took the position that interest that is waived and not accruing as a result of Chapter 11 of the U.S. Bankruptcy Code does not represent a cost.[51] At the hearing, National Gypsum did not seek to rely on the fact that National Gypsum was relieved of the obligation to pay the interest costs by the order under Chapter 11.[52]

No participant was able to make reference to any particular judicial or other authority determining or assisting in the interpretation of SIMA paragraph 19(b) or SIM Regulation 11. Nor did Revenue Canada assert any established administrative practice for the interpretation of the relevant provision in these or similar circumstances. Reference was made to the decision of the Binational panel in

---

48 On Page 465 of the Transcript of the Public Hearing, August 13, 1993, counsel for Westroc argued:

> "... we agree with National Gypsum or the Attorney General that interest expenses which are incurred for totally irrelevant production facilities or for a new plant or for a product which is totally independent from the subject goods cannot be attributed to the subject goods, but here you have expenses which are incurred for the whole company, for the total company, which are, according to the evidence, of a general nature, and they have rationally and logically to be attributed and allocated over all production and operations."

49 Transcript of the Public Hearing, August 13, 1993, Page 405

50 Non-Confidential Brief of Complainant Westroc Industries Limited, Page 38, Paragraph 75

51 Non-Confidential Brief of the Attorney General of Canada and the Investigating Authority, Page 37

52 Transcript of the Public Hearing, August 13, 1993, Pages 424-425

Beer[53]. In our view, however, the decision is not relevant. In *Beer*, the only question was whether, for the purposes of paragraph 16(2)(b) of SIMA, certain interest costs should be attributed to the production of a particular brewery or to some other production facilities. There was no suggestion, as there is in this case, that the costs might not be allocated to any production.

We are not assisted by comparing SIMA paragraph 16(2)(b) with paragraph 19(b). Notwithstanding that paragraph 16(2)(b) does not contain the words "all other costs" (which are contained in paragraph 19(b)), it was argued on behalf of Revenue Canada and the U.S. exporters that the two provisions should be interpreted to achieve the same calculated cost-plus-profit figure.[54] Although it appears incongruous that the cost-plus-profit figure determined under the two sections respectively might be different, the complaint in this case relates solely to the application of paragraph 19(b).[55]

It was not suggested that a calculation under paragraph 16(2)(b) could result in a higher figure, thus assisting in the interpretation of paragraph 19(b). Rather, the possibility was raised that the application of paragraph 16(2)(b) might result in a lower figure. However, that possible result, although incongruous in the scheme of SIMA, cannot control the interpretation of the plain wording contained in paragraph 19(b).

In sum, we need not -- indeed, cannot -- render a decision regarding Revenue Canada's claim that the paragraph 16(2)(b) and paragraph 19(b) calculations must always include identical cost elements, because that question is not properly before us. The only pertinent question is whether Revenue Canada's decision to exclude the relevant interest expenses from its paragraph 19(b) calculations was reasonable. The issue is therefore whether the words "all ... other costs that are attributable to the goods" reasonably support the interpretation adopted by Revenue Canada that some kinds of costs in fact borne by a corporation can be regarded as not being attributable to a product. In other words, the issue is whether it is reasonable to interpret the words "attributable to the goods" as requiring that costs be "related to the production or operation" activities of an exporter of subject goods. Put yet another way, we are required to determine whether it was reasonable for Revenue Canada to rely on the word "attributable", the context of the possibly relevant sections of SIMA, or the concept of remoteness, as the basis for using as the pool of costs to be attributed to the products of a company something less than the sum of all costs of the company. For the reasons set out below, we are unable to find it reasonable to differentiate among indirect costs in that manner.

The theory advanced is that the context of sections 15, 16, and 19 of SIMA requires that the costs to be attributed must be causally connected to the production of the subject goods. The word "attributable", standing alone, could perhaps be interpreted reasonably in the restricted manner

---

[53] Certain Beer originating in or exported from the United States of America by G. Heileman 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 CDA-91-1904-01

[54] It should also be noted that section 11 of the SIM Regulation specifically applies to paragraph 19(b) and does not apply to paragraph 16(2)(b).

[55] Again, it should be noted that the paragraph 16(2)(b) findings of non-profitability which excluded a substantial number of sales from normal value determination under section 15 were not challenged.

adopted by Revenue Canada and argued by the U.S. exporters. However, the word is not alone; it must be interpreted in the context of SIMA.

Paragraph 19(b) gives Revenue Canada options for determining the normal value when the value cannot be determined under section 15. One of the options is usually referred to as "constructed value" or "cost plus". To determine that value, the Deputy Minister is directed to calculate the sum of certain specified costs and "all other costs." It is clearly implied that such costs must bear a connection with the subject goods (as opposed to non-subject goods), but there is nothing to indicate that such costs should be limited to costs caused by the production of the subject goods, such as head office expenses for the management of the company of which the production of the subject goods forms a part, and not include other costs which are to be found on the books of the company.

As noted above, paragraph 19(b) of SIMA is supplemented by regulations which define "an amount for administrative, selling and all other costs" in the context of paragraph 19(b). First, it must be noted that paragraph 11(c) of the SIM Regulations deals with the following three cost components:

(i) administrative costs;

(ii) selling costs; and

(iii) all other costs.

Of the three subparagraphs under paragraph 11(c) of the SIM Regulations, the only provision that deals with "all other costs" is subparagraph 11(c)(iii).

Second, the scheme of the regulations is to move from the particular to the general. The wording of subparagraph 11(c)(iii) refers to an "estimated amount" and envisions that this subparagraph goes beyond subparagraphs 11(c)(i) and 11(c)(ii) because it clearly states that it includes "all ... other costs ... that are attributable to the goods but not included in subparagraphs (i) and (ii)".

Likewise, subparagraph 11(c)(i) specifies that the following two requirements must be met:

- the administrative and selling costs must be directly attributable; and
- the administrative and selling costs must be directly attributable to two specific types of activities -- the production and sale of the goods.

However, subparagraph 11(c)(iii) contains neither of these requirements; it only requires that *all other costs* be "attributable to the goods" and that such costs are not included in subparagraphs (i) and (ii). In this context, it is therefore clear that subparagraph 11(c)(iii) does not permit certain costs to be omitted from the pool of costs to be allocated merely because they are not caused by or related to the production of the subject goods.

Nevertheless, as noted above, Revenue Canada interpreted paragraph 11(c)(iii) to require that interest expenses be related to "production or operations":

> The Department is satisfied that in this particular situation the interest expenses relating to the leveraged buy-out are not related to Gold Bond's production or operations and are therefore not attributable to the subject goods.
>
> The Department has reviewed the arguments and information presented and is satisfied that the majority of the holding company interest expense is not related to the production or operation of United States Gypsum Company.

In our view, the only reasonable interpretation of the relevant provisions of SIMA and SIM Regulations is that, in calculating normal values on a constructed-value basis, the costs to which the profit margin is to be added are what are commonly called "fully distributed" or "total" costs. For whatever reason and however incurred, the interest expenses in question (absent the Chapter 11 Order) became part of the actual costs of the corporation, and are "attributable". They required payment; they were not notional or phantom costs in any sense. In calculating the net profit or loss of the company, they would be deducted as an expense. This means simply that all costs of a corporation, paid or accruing as payables, must be spread in some reasonable manner over the products of the corporation.

The statutory direction that "all other costs" are to be allocated indicates that every type of corporate expenditure, no matter how extraordinary or unrelated to production, is to be allocated to all products in some fair way. Counsel for Revenue Canada stated that they routinely allocate to exported products an aliquot portion of general corporate costs such as executive salaries and business insurance, even though such costs have no direct relation to the production of the exported goods.[56]

---

[56] Transcript of the Public Hearing, August 13, 1993, Pages 412-414:

> Mr. Davidow: Let me try two examples. What I am trying to do is probe the consistency of your approach.
>
> Let's say U.S. Gypsum or National Gypsum decides that it is going to buy insurance for all its top executives. So it pays $5 million a year for life insurance. That's right there on the books, it is an expense. There is an approach where you say, "They insured the lives of their people, there's the expense, we have a total cost approach. If the sales to Canada are 10 per cent of their total sales we take 10 per cent of the expense to insure their executives and we attribute it." Would you attribute it roughly that way?
>
> Mr. de Pencier: I think sir, that sort of expense would be seen as part of the general administrative expenses.
>
> Mr. Davidow: Okay. So now they have insured their executives. Now somebody says, "God, we may lose the whole company, so we need a poison-pill defence" or "we need a huge set of cash. So in this case we are ensuring the survival of the company by having a poison pill or an LBO." And in this case they have an even bigger pile of money than they did to insure their executives. In this case you say, "that's too remote and it is just our discretion."
>
> Mr. de Pencier: We feel, sir, that it is reasonable, in light of the direction given to us by the Act and the regulations, that we keep our focus on the subject goods. No doubt that means that, as you move away from that, say, in concentric circles, as you get further and further away from that, there may in any given case be a line beyond which we are unwilling to go.

If the statute is read literally to require the allocation of all costs, be they episodic or unrelated to production, then the peculiar nature of LBO or "poison pill" costs would merely result in an estimated allocation by formula rather than by tracing such costs to the production of particular goods.[57]

Our reasoning is confirmed by considering the situation in which a company makes a single undifferentiated product and has no other activities so that there would be no question of spreading interest or any other costs over more than one product or activity. In that situation, it appears clear that all costs of the company would have to be taken into account if paragraph 19(b) were applicable. The section speaks without qualification of "all other costs", the plain meaning of which does not permit a gloss of excluding some costs of the company that may be characterized as unusual, extraordinary or not related to producing the products of the company. Hence, if the company were to expand to several product lines, the same costs would have to be allocated among the subject goods and non-subject goods.[58]

> We think that the line drawn was reasonable, particularly where there are expenses, I suppose, related to the particular ownership group of a company on one hand that really has nothing to do with its actual operations and production, which may be totally unaffected by whatever these corporate machinations which are going on.

[57] Subparagraph 11(c)(iii) of the SIM Regulations specifically refers to an "estimated amount".

[58] The published reasons for the Final Determination appear to take the approach that the interest that was waived by the Chapter 11 Order, even if the effect of the Order is ignored, was not properly attributable to the subject goods or presumably to any other product of National Gypsum or its affiliated companies. At page 8 of its Final Determination, Revenue Canada stated:

> "During the period of investigation, National Gypsum was operating under the protection of Chapter 11 of the Federal Bankruptcy Code of the United States of America. Notwithstanding this fact, the Department reviewed all costs relating to the costs of production of the subject goods including the interest expenses relating to the leveraged buyout of National Gypsum. The Department is satisfied that in this particular situation the interest expenses relating to the leveraged buyout are not related to Gold Bond's production or operations and are therefore not attributable to the subject goods."
>
> Westroc argued that the interest should be included among "all other costs" regardless of the effect of the Chapter 11 Order and that "Chapter 11 of the American statute cannot require that paragraph 19(b) of the Canadian SIMA allow for the calculation of widely differing costs of production for two essentially similar enterprises, one of which is protected from its creditors and the other not."
>
> Revenue Canada responded that interest that is waived or not accruing as a result of the application of Chapter 11 does not represent a cost and therefore the question of whether such interest should be attributable to the goods does not arise.
>
> National Gypsum chose not to rely on the fact that the Chapter 11 Order relieved the company from any obligation to pay the interest in question. Although we were not provided with expert evidence about the effect under U.S. law of the Chapter 11 Order, the assertion that the effect of the order was to relieve National Gypsum from any obligation to pay the interest in question was not challenged. We would find it difficult to conceive how what might have been a cost in the absence of the court Order to the contrary should be a cost for the purposes of SIMA.

Conclusion and Decision - Interest

The Panel remands the decision regarding the interest expenses of National Gypsum and U.S. Gypsum to the Deputy Minister of National Revenue for action not inconsistent with this decision.

The Panel directs Revenue Canada to complete its work within ninety (90) days from the date of this decision.

Signed in the original by:

Ivan R. Feltham Q.C. (Chairperson)

Michael J. Coursey, Esq.

Joel Davidow, Esq.

James P. McIlroy

E. David D. Tavender, Q.C.

Issued on this 17th day of November, 1993