ARTICLE 1904

BINATIONAL PANEL REVIEW PURSUANT TO THE NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:	)	
CERTAIN CORROSION RESISTANT STEEL SHEET PRODUCTS ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA	)	CDA-94-1904-03

Before: William E. Code (Chair)
Harry First
D. Michael M. Goldie
Kathleen F. Patterson
Robert E. Ruggeri

MEMORANDUM OPINION AND ORDER

June 23, 1995

C.J. Michael Flavell and Geoffrey C. Kubrick of Flavell Kubrick and Lalonde for U.S. Steel, a Division of USX Corporation, LTV Steel Company, Inland Steel Company and I/N Kote.

Riyaz Dattu and Colin Baxter of McCarthy Tétrault for Stelco Inc.

John Morin, Steven D'Arcy and Laura Lundie of Fasken Campbell Godfrey for Dofasco Inc.

Greg Somers of Osler, Hoskin and Harcourt for Sorevco Inc.

Michael Ciavaglia of the Department of Justice for the Deputy Minister of National Revenue, Customs, Excise and Taxation.

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MEMORANDUM OPINION

I. INTRODUCTION

This panel review was requested and complaints were filed by U.S. Steel (a division of U.S.X. Corporation) ("U.S. Steel" or "USS"), LTV Steel Company ("LTV"), Inland Steel Company ("Inland") and I/N Kote ("I/N Kote") to contest the final determination of dumping issued by the Deputy Minister of National Revenue for Customs and Excise ("Deputy Minister") in the matter of certain corrosion-resistant steel sheet products originating in or exported from the United States of America.[1] This Panel has jurisdiction over this action pursuant to Chapter Nineteen of the North American Free Trade Agreement ("NAFTA") and Section 77.15 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15, as amended ("SIMA"). The products at issue in this review are imports of certain corrosion-resistant steel sheet products from the United States of America by or on behalf of U.S. Steel, LTV, Inland and I/N Kote.

II. ADMINISTRATIVE HISTORY

On September 27, 1993, a formal dumping complaint was submitted by Dofasco Inc. and Stelco Inc. respecting certain corrosion-resistant steel products. The Deputy Minister initiated a dumping investigation on November 17, 1993, pursuant to Section 31(1) of SIMA on the basis that there was evidence that the subject goods were being dumped and that the dumping had caused, was causing and was likely to cause material injury to the production of like goods in Canada. On March 31, 1994, the Deputy Minister made a preliminary determination of dumping with respect to imports of the subject goods, pursuant to Section 38(1)(a) of SIMA.

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[1] Canada Gazette, Part 1, July 16, 1994 [Volume 128, no. 29].

On June 29, 1994 the Deputy Minister issued a final determination that certain subject goods originating in or exported from the United States were being dumped in Canada by the following weighted average margins:

Inland/I/N Kote	8.1%
LTV Steel Company Inc.	13.2%
USX United States Steel	4.2%

On December 20, 1993 the Canadian International Trade Tribunal made a final finding that the dumping of subject goods from the United States was causing material injury to the Canadian industry of like goods.

III. PANEL PROCEEDINGS

U.S. Steel, Inland, I/N Kote and LTV the ("U.S. Complainants") filed a first request for panel review on August 12, 1994. On September 9, 1994 the U. S. Complainants filed a Complaint with the Canadian Secretary pursuant to Section 39 of the NAFTA Article 1904 panel rules. An Amended Complaint was subsequently filed on September 29, 1994. Stelco Inc. filed a motion on December 5, 1994 requesting the Panel to rule that the Amended Complaint was not properly before the panel. The U.S. Complainants subsequently withdrew the Amended Complaint on December 14, 1994.

The U.S. Complainants filed Briefs of Argument on December 13, 1994. The Deputy Minister filed a Brief of Argument on February 10, 1995. Dofasco Inc., Sorevco and Company Limited and Stelco Inc. filed written Briefs of Argument on February 10, 1995. The U.S. Complainants filed a Reply brief on February 28, 1995.

A public hearing took place in Ottawa, Ontario on March 20, 1995 in which all participants referenced in the immediately preceding paragraph presented oral argument before the Panel.

IV. SUMMARY OF ISSUES AND PANEL DECISION

Issues Presented

The U.S. Complainants argue that the Deputy Minister erred:

1. in including the following costs in his Sections 16(2)(b) and 19(b) calculations of subject goods:

   (a) costs related to the settlement of an antitrust action against a former railroad subsidiary of USX Corporation, the Bessemer and Lake Erie Railroad ("B&LE") (USS);

   (b) an interest charge incurred on liability under the U.S. Coal Industry Retiree Health Benefit Act (LTV);

2. in not including LTV's alleged receipt of funds in settlement of the B&LE litigation (LTV);

3. in changing U.S. Complainants' method of allocating the following costs or credits:

   (a) The Deputy Minister did not include in the calculation of USS' 1993 costs a credit taken in 1993 to adjust for overestimating a liability in 1992 related to litigation with the Energy Buyers Corp;

(b) The Deputy Minister changed the allocation of overhead costs made by Inland and I/N Kote;

(c) The Deputy Minister did not adjust LTV's cost of production to account for profits earned by electrogalvanizing joint ventures in which LTV was a partner;

4. in not including certain items in his section 16(2)(b) and 19(b) calculations:

(a) short term interest income (Inland) and short term interest income in excess of interest expense (LTV);

(b) pension credit (Inland);

(c) credit for emerging from bankruptcy (LTV); and

5. in employing the order confirmation date as the date of sale rather than the date of invoicing/shipping (Inland, I/N Kote, LTV).

Panel Decision

Upon examination of the administrative record, the relevant law, and after full consideration of the arguments presented by the participants in their briefs and at the hearing, the Panel takes the following action, as is fully explained in the body of the opinion:

REMANDS issues 1(a) and (b) concerning the B&LE litigation and the Coal Retiree Act interest charge;

REMANDS issue 4(a) concerning short term interest income; and

AFFIRMS all other aspects of the Deputy Minister's determination at issue before this Panel.

V. STANDARD OF REVIEW

A binational panel appointed under Article 1904 of the NAFTA Agreement to review a final anti-dumping or countervailing duty determination is to

> …determine whether such determination was in accordance with the anti-dumping or countervailing duty law of the importing Party.

In doing so, and in accordance with Annex 1911 of NAFTA, it applies as its standard of review the grounds set out in subsection 18.1(4) of the *Federal Court Act* R.S.C. 1985 c. F-7 as amended. It must determine whether the authority whose acts are being reviewed:

> (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> (d) 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;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

Article 1904(2) of the NAFTA provides that for the purpose of this review:

> …the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination…

In effect, a binational panel is constituted as a court of first instance undertaking judicial review of a tribunal decision. It is accepted by all participants that the judgments of the Supreme Court of Canada constitute binding legal precedents for all lower courts in Canada, as well as for binational panels.

The most recent pronouncement in the field of administrative law is found in *C.B.C.* v. *Canada Labour Relations Board*, a judgment of the Supreme Court of Canada pronounced on 27 January 1995. This case originated with a complaint of an unfair labour practice by the Canadian Broadcasting Corporation. The underlying facts have little to do with what is before this panel.

In his reasons for judgment commencing at p. 14 Mr. Justice Iacobucci provides a useful summary of the state of the present law on this subject. The following excerpts are from his reasons for judgment:

V. Analysis

A. *The Standard of Review*

1. General Principles

28 The first step in the judicial review of an administrative tribunal's decision is to determine the appropriate standard of review. As was noted in *Pezim* v. *British Columbia* (*Superintendent of Brokers*), [1994] 2 S.C.R. 557, at pp. 589-90:

> There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.

Having regard to these and other factors, the courts have developed a spectrum that ranges from the standard of patent unreasonableness at one extreme to that of correctness at the other…

29 Generally speaking, where the tribunal whose decision is under review is protected by a broad privative clause, its decision is subject to review on a standard of patent unreasonableness. However, this is only true so long as the tribunal has not committed a jurisdictional error. Jurisdictional questions addressed by the tribunal are independently reviewed on a correctness standard. An error on such a jurisdictional question will result in the entire decision of the tribunal being set aside.

30 In distinguishing jurisdictional questions from questions of law within a tribunal's jurisdiction, this Court has eschewed a formalistic approach. Rather, it has endorsed a "pragmatic and functional analysis",…The goal is to determine whether the legislature intended that the question in issue be ultimately decided by the tribunal, or rather by the courts.

2. Application of General Principles to this Appeal

> 31 … The labour relations tribunal, in its federal and provincial manifestations, is a classic example of an administrative body which is both highly specialized and highly insulated from review. …The Canada Labour Relations Board must develop a coherent and workable structure for the application of the numerous statutory provisions…In order for these workers and their employers to receive rapid resolution of their disputes in a manner which can be rationalized with their other rights and duties under the *Canada Labour Code*, the decisions of the Board cannot routinely be overturned by the courts whenever they disagree with the Board's treatment of an isolated issue. …

(Citations to authorities in the above omitted.)

The Deputy Minister's determination is not protected by a privative clause. Some statutory guidance is obtained from the words of Article 1902(2)(d)(ii) of the NAFTA:

> (ii) the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement **while maintaining effective and fair disciplines on unfair trade practices…**

(Emphasis added.)

The word "effective" in the emphasized clause above implies the development of a high level of skill based on continuing experience and monitoring of trade relations. "Fair" implies a process permitting parties affected an adequate opportunity of stating their case or meeting what is alleged against them.

As might be expected at this stage of the binational panel review process, there is a considerable measure of agreement on the principles applicable to reviews of a final determination by the Deputy Minister under SIMA, the relevant legislation.

Applying the classification adopted in s. 18.1(4) of the *Federal Court Act*, the following provides a general guide to the application of current law:

1. "Acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction";

Jurisdiction of administrative tribunals is statutory in origin and correctness is the test in the interpretation of the constituting statute. Before this test is applied by the court in substitution for that of the tribunal, the court must analyze "the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal".

From this pragmatic and functional analysis the court will determine the extent to which the legislature wished the tribunal to define its own jurisdiction. Where this intention is manifest, as in the case of labour relations tribunals, the courts will intervene on a jurisdictional issue only if the tribunal's interpretation is patently unreasonable.

Even without the protection of a privative clause, the Deputy Minister's determination of jurisdiction under SIMA should not be interfered with unless it is patently unreasonable. Thereafter, correctness in the determination of jurisdiction is the test and is the test adopted by previous panels.

2. "Failed to observe the principle of natural justice, procedural fairness or other procedure that it was required by law to observe."

A material breach of this ground of review would result in loss of jurisdiction. Fairness according to the exigencies of the fact finding process is the criterion. The Deputy Minister is not a quasi-judicial tribunal and the criterion is satisfied if an affected party is provided a reasonable opportunity to present its case and to respond to the case against it.

3. "Erred in law in making a decision or an order, whether or not the error appeared on the face of the record."

Where the tribunal purports to interpret a general statute or regulation, other than its constituent statute or the relevant regulations, it must be correct as it is not assumed it has any skill or experience in the general interpretation of statutes. As noted, in the application of its own statute and regulations, the standard is reasonableness.

4. "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".

A specialized tribunal such as the Deputy Minister is entitled to wide latitude in findings of fact provided there is some relevant evidence supporting those findings.

Neither of the two remaining categories under s. 18.1(4) of the *Federal Court Act* has relevance here.

The Panel has applied these principles in its review of the issues.

VI. INCLUSION OF CERTAIN COSTS

VI. A. General Principles Governing Review of the Deputy Minister's Determination of the Costs Under Sections 16(2)(b) and (19)(b) of SIMA

Several of the issues before this Panel are bound together by a common problem: What is the appropriate interpretation of "cost" for purposes of Sections 16(2)(b) and 19 (b) of SIMA?

Section 19 comes into play when the Deputy Minister is unable to determine the normal value of the goods in question by examining actual prices in the exporting country, but must instead determine normal value by constructing what the price should have been. This constructed value (in the language of the statute) is "the aggregate of (i) the cost of production of the goods, (ii) an amount for administrative, selling and all other costs, and (iii) and an amount for profits."[2]

A regulation under SIMA has been adopted to help implement section 19. In relevant part this regulation defines the statutory phrase "cost of production" to mean "all costs" that are "attributable to, or in any manner related to, the production of the goods." The statutory phrase "administrative, selling and all other costs" is defined as the sum of administrative and selling costs "that are directly attributable to the production and sale of the goods," costs of warranties or guarantees "attributable to the goods," and "other costs" that are "attributable to the goods" but are not otherwise named.[3]

Thus, although the language of SIMA speaks broadly of administrative and selling costs, and profits, without using the modifier "of the goods," the regulation makes clear that the Deputy Minister's inquiry is to be focused on the goods in question. For each category of cost, the regulation states that the Deputy Minister will determine the costs "attributable to the goods."

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[2] SIMA, s.19(b). One reason why the Deputy Minister might be unable to determine normal value by looking at prices in the exporter's home market is that the Deputy Minister must exclude sales "that do not provide for recovery ... of the cost of production of the goods, the administration and selling costs with respect to the goods and an amount for profit". SIMA, s.16(2)(b). This language is somewhat different from the language for constructing value under s.19(b) ("administrative, selling and all other costs," emphasis added). To the extent that any of the determinations in this case involve determinations of cost under both sections of the Act, however, none of the parties claim that the difference in language affects the result. Furthermore, while there have been many discussions concerning the difference in statutory language between sections 16 and 19, it is not disputed that Section 16 is not broader than Section 19. Consequently, if a cost is inappropriate for Section 19, it would also be inappropriate for Section 16.

[3] Special Import Measures Regulations, SOR 84/927, s.11(a), (c).

Beyond the statute and regulation, however, there is little in the way of prior Canadian law to guide this Panel in undertaking its review of those items of cost which the Deputy Minister has determined are properly attributable to the products involved in this investigation. Guidance to the propriety of the Deputy Minister's approach to the question of "cost" is provided from jurisprudence that has been developed by binational panels following the enactment of the U.S. - Canada Free Trade Agreement. These panel decisions have apparently guided the decisions of the Deputy Minister.

Three of these panel decisions are particularly relevant to our decision, *Beer*,[4] *Gypsum*,[5] and *Cold-Rolled Steel*.[6] In each case the Panel was required to deal with the definition of "cost" under SIMA.

Beer involved the exclusion of below cost sales of Stroh's beer under section 16(2)(b) of SIMA. In computing cost, the Deputy Minister had included the interest expense that Stroh had incurred in its acquisition of two beer companies. The Deputy Minister agreed that the borrowing to finance the acquisitions had to have been "related" to the brewery at which the allegedly dumped beer had been produced; it argued that there was such a relation. In other words the Panel agreed that a producer's costs for his non-subject goods could not be allocated to subject goods. The Panel agreed with the Deputy Minister's construction of the statute, but found no evidence to support the determination that there was such a relation. The Panel accordingly remanded the issue for reconsideration.

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[4] In the Matter of: Certain Beer Originating in or Exported from the United States of America by G. Heilman Brewing Co., Inc., Pabst Co., and the Stroh Brewery Co. for Use or Consumption in the Province of British Columbia, CDA-91-1904-01, 1992 FTAPD LEXIS 3(1992) Q.L. [1992] F.T.A.D. No. 4.

[5] In the Matter of: Final Determination of Dumping Made by the Deputy Minister of National Revenue, Customs and Excise, regarding Gypsum Board Originating in or Exported from the United States, CDA-93-1904-01, 1993 FTAPD LEXIS 17 (1993), Q.L. [1993] F.T.A.D. No. 5.

[6] In the Matter of: Final Determination of Dumping Regarding Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America, CDA-93-1904-08, 1994 FTAPD LEXIS 12 (1994), Q.L. [1994] F.T.A.D. No. 6.

The next case was *Gypsum*. The question was whether to include two items as a "cost" under section 19(b); 1) the interest expenses that National *Gypsum* incurred in connection with a leveraged buy-out of the company; and 2) the interest expenses that U.S. Gypsum incurred in connection with the adoption of its "poison pill" provisions. The Deputy Minister did not include these expenses as a cost of production of the gypsum board in question because the expenditures were not "related" to the production or operation of the subsidiaries of the two companies producing gypsum board.

A Canadian producer, Westroc, sought review, arguing that the Deputy Minister erred in not including these interest expenses, which Westroc characterized as "part of each exporter's general costs of doing business".[7] The Deputy Minister argued that the expenses were not costs under section 19(b) because they were not (in the language of the regulations) "attributable" to the subject goods. For a cost to be attributable, the Deputy Minister argued, there must be a "causal connection" between the cost and the production of the goods in question.[8]

The Panel disagreed with the Deputy Minister's interpretation of the statute and its regulation. Stating that there was no "particular judicial or other authority determining or assisting in the interpretation" of section 19 or the regulation, the Panel proceeded to parse the statute to determine what "connection" the costs must bear to the subject goods.

> To determine [constructed] 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

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[7] Gypsum, supra, note 5, at 25.

[8] Id. at 26.

> subject goods forms a part, and not include other costs which are to be found on the books of the company[9] (emphasis added).

Although the interest expense for both the LBO and poison pill might have been simply characterized as relating to the operations of the entire company (like the CEO's salary, for example) and hence be attributable, in part, to the subject goods, the Panel chose to write more broadly. The Panel stated that the interest expense "required payment" and "would be deducted as an expense" in "calculating the net profit or loss of the company".[10]

The *Gypsum* panel distinguished the *Beer* decision since "[t]here was no suggestion [in *Beer*], as there is in this case, that the costs might not be allocated to any production."[11] The issue in *Gypsum*, therefore, was how to treat corporate expenses which were not related to any particular *production*, including the subject goods.

The Panel rejected the Deputy Minister's interpretation that only costs caused by or related to *production* of the subject goods can be included in the cost calculation:

> [A]ll 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.[12]

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9 Id. at 27 (emphases added).

10 Id. at 29.

11 Id. at 26.

12 Id. at 29.

Therefore, as in *Beer*, the *Gypsum* panel held that costs which were specifically related to a corporation's non-subject goods cannot be included in a cost calculation of the subject goods. However, other expenses, such as general corporate or overhead costs, no matter how unrelated to *production* of the subject goods, can be allocated over all production including the subject goods.

Gypsum was followed by the third case, *Cold-Rolled Steel*. The Deputy Minister, apparently acquiescing in the broad interpretation of the statute in *Gypsum*, found a number of items to include under sections 16(2)(b) and 19(b) of SIMA when computing the "cost" of the steel products under investigation: costs of maintaining a parent entity, interest on financing obligations at the parent level, general bankruptcy expenses, and costs incurred under the Coal Retiree Act (about which more later).

The Panel's decision on all four items stressed that attribution of costs to a particular product should be done in a way that "provides a more accurate assessment both of the profitability of the steel operation and of its constructed costs".[13] Thus, it agreed with the Deputy Minister's allocation of the items of "headquarters" costs and bankruptcy expenses, but it disagreed on the Coal Retiree Act obligations. With regard to the latter, the *Cold-Rolled Steel* panel felt that the *Beer* decision was a more "appropriate" precedent than Gypsum.[14] The Coal Retiree Act charge was "directly attributable" to "idled coal operations".[15] To include this charge "would create a serious distortion in the expenses of the steel operation and an inaccurate picture of the costs of steel production during the relevant period for purposes of comparison".[16]

The Panel explained that "general overhead costs are to be distinguished, however, from costs that specifically relate to other operations of the corporation, which cannot reasonably be

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[13] Cold-Rolled Steel at 23.

[14] Id. at 24.

[15] Id. at 25.

[16] Id. at 28.

included in s. 16(2)(b) determinations, as the Beer Panel has already stated, nor in a section 19(b) cost construction."[17] Relying on *Beer*, the Panel held that:

> It is the Panel's conclusion that there is neither a legal nor a factual basis for charges such as this, that directly relate to LTV's coal operation, to be included in a determination or construction of the costs of its steel operation.[18]

The Panel also distinguished *Cold-Rolled Steel* from *Gypsum*: "There Revenue Canada had failed to include a general corporate expense arising out of a company's efforts to fend off a take-over attempt. … The expense was at the general corporate level and was not attributable to a specific operation of the company not producing the goods in question."

If there is a consistent theme among the decisions of all three panels, it is that there must be some "connection" between the costs in question and the subject goods. This is consistent with the overall purpose of the statute itself. SIMA, after all, does not prohibit low prices in Canada. It prohibits unfairly low prices. Prices are unfair either if they are below the exporter's selling price for the goods in its home market, or are below what should fairly have been the exporter's price, that is, below what it cost the exporter to produce, plus profit. Critical to the latter determination, in the words of the Deputy Minister's regulation, is to find out what costs are "attributable" to the product that is being investigated.

In determining costs under section 19, the goal, therefore, is to find this connection between the item in question and the cost of the goods under investigation. To look for this connection, as the panels in all three cases implied, is to attempt to obtain as accurate a picture as possible of the costs during the relevant period so as to compare that price to the prices charged to consumers in Canada. See *Cold-Rolled Steel*. It is this "connection" test which we now attempt to

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[17] Id. at 23 - 24 (footnote omitted).

[18] Id. at 28.

apply, recognizing that "connection" must include direct costs and indirect costs attributed through the appropriate distribution of general corporate expenses.

VI. B. Cost of Settling an Antitrust Suit Involving Bessemer & Lake Erie Railroad

Complainant, U.S. Steel, seeks review on the grounds that the Deputy Minister included certain costs not attributable to the subject goods in the constructed normal values calculations under SIMA Sections 16(2)(b) and 19(b). The costs at issue are expenses incurred by U.S. Steel (with interest) in 1993 related to the settlement of antitrust litigation against the Bessemer and Lake Erie Railroad [hereinafter B&LE], a former subsidiary of USX Corporation. USX sold the B&LE in 1988, but, under the terms of sale, remained obligated for any liability resulting from the pending litigation. In the antitrust litigation, B&LE, according to the administrative record, had been accused of monopolizing inland transportation and dock handling on iron ore from the 1950's to the early 1980's,[19] but the characterization of the complained of activity was not identified with precision. The litigation was instigated by LTV Steel and others against a number of eastern U.S. railroads, including B&LE. LTV Steel appears to have regarded that the main purpose of the conspiracy was to delay to it and others the benefits of cost savings in the operation of self unloading ore vessels on the Great Lakes.

The Deputy Minister has not clarified USX's rationale for charging the B&LE settlement to the U.S. Steel Group beyond the fact that B&LE was a subsidiary of USX Corporation and in the latter's sale of B&LE, it retained an obligation to satisfy the judgment. USX Corporation consists of 3 groups: Marathon Group, U.S. Steel Group and Delhi Group. In turn the U.S. Steel Group includes U.S. Steel (the complainant here). USX Corporation's common stock consists of three classes, each identified with one of the groups. Each group issues separate annual reports and financial statements. These statements reflect USX Corporation's attribution to each group of assets, liabilities (including contingent liabilities) and stakeholders' equity in USX Corporation. Such

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[19] Exporter Summary at 11 and 13, Administrative Record, Index Page 103, Tab A, p. 417, 418.

attribution does not affect legal title to such assets and responsibility for such liabilities. These remain with USX Corporation.[20]

The Deputy Minister's Calculation

For purposes of determining normal value, the Deputy Minister, in his preliminary and final determinations, included both the B&LE litigation judgment and its accruing interest in his arithmetic calculating U.S. Steel's profitability and constructed value.

The complainant's essential point is that the B&LE litigation costs are related to USX's former railroad operations, not its steel operations, stressing the "attribution" requirement articulated clearly in Section 11 of the Regulations.[21] The Deputy Minister, however, believed that *Gypsum* required him to allocate the cost of this judgment to the cost of the subject goods. Quoting the broad language in *Gypsum* ("The section speaks without qualification of 'all other costs' ..."), the Deputy Minister stated:

> USX could not charge these costs to the B&LE as the railroad is no longer in the US Steel Group. The B&LE was sold in 1988 with USX Corporation retaining liability for the judgment and any related interest expenses. In the absence of a railroad division these expenses were charged directly to the US Steel Group (as shown in the financial statement) because the B&LE used to be a part of the US Steel Group.[22]

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[20] Administrative Record, Index Page 130 at p. 43 (SEC form 10-K, USX Corp.).

[21] Complainant also argues that even if it is related to the subject goods, the B&LE litigation expense was not incurred by U. S. Steel during the period of investigation. We are not persuaded by this point as the charge was clearly taken on USX's books during 1993.

[22] Preliminary Exporter Summary at 12, Administrative Record, Index Page 103, Tab A, p. 418. The Deputy Minister subsequently allocated the expenses of the US Steel Group "to the steel operations in a manner consistent with the allocation of other fixed expenses, that is, as a percentage of costs of sales of the group." Final Exporter Summary, Administrative Record, Index Page 103, Tab J, p. 57.

The Deputy Minister acknowledges "the direction provided in the *Cold-Rolled Steel Sheet* and *Beer* Panel decisions which distinguished general overhead expenses from costs that specifically related to other operations of a corporation. Expenses relating to other operations of a corporation are not to be included in paragraph 16(2)(b) domestic profitability analyses or subsection 19(b) cost construction".

Counsel for the Deputy Minister further elaborated in his brief:

> Had USX and U.S. Steel retained a railroad operation, the anti-trust settlement and related expenses could have been allocated to the company's railroad operation and thus not form part of the cost of the subject goods. ... In the absence of a specific operation to which these expenses could be charged, the Deputy Minister *had no alternative* but to consider these expenses incurred by U.S. Steel to be of a general corporate nature.

(emphasis added)[23]

Therefore, the Deputy Minister does not claim that the B&LE railroad charges were related to steel production. Rather, he argues that the B&LE expenses are "of a general corporate nature" and therefore, under *Gypsum*, can be allocated to the subject goods.

A close reading of *Gypsum*, however, indicates that the Deputy Minister was not, in fact, compelled to allocate these expenses to the cost of producing the subject goods. It is true that *Gypsum* contains broad language about allocating "all other costs," but, as we have pointed out above, *Gypsum* still draws the statutorily required distinction between the subject goods and non-subject goods, that is, other goods made by the company in question.

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[23] Brief of the Deputy Minister of National Revenue for Customs and Excise at paras.72 and 73.

> To determine that value [that is, constructed 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 found on the books of the company.[24]

What this makes clear is that a connection must be made to the subject goods either as a cost directly related to those goods or as an overhead cost properly allocated to those goods. In our view, however, the Deputy Minister has failed to articulate the connection between the subject goods and the B&LE expense or to articulate a reason, other than the reference to *Gypsum*, for inclusion in general overhead expense. In the absence of such a finding, the Deputy Minister cannot simply say that his allocation was required by the holding of *Gypsum*.

The Deputy Minister asserted, as a factual matter, that, "In the absence of a specific operation to which these expenses could be charged, [he] had no other alternative but to consider these expenses incurred by U.S. Steel to be of a general corporate nature". We have not been presented with sufficient evidence of record supporting that conclusion. The mere fact that the B&LE expense was apparently charged to the books of the U.S. Steel Group does not alone, without, for example, further explanation or analysis of the corporate structure, support the treatment of the railroad expense as overhead for SIMA purposes.

A connection to steel is not made merely by demonstrating payment of a liability assumed by the parent upon the sale of the subsidiary railroad. In fact, the Deputy Minister found that if the railroad were still a subsidiary during the period of investigation, no allocation of the cost of the judgment to steel would have been made. This eliminates any implicit finding of the required connection.

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[24] Gypsum at 27.

The Deputy Minister is not relieved of the necessity of finding a connection between cost and subject goods merely because the apparently appropriate cost centre has been sold. It is not clear from the record to which the Panel was referred what the B&LE's relationship was to the Steel Operations Group. The Deputy Minister has not pointed us to anything in the record supporting the conclusion that it was reasonable to allocate the charge to the steel operations once the B&LE expense was charged to the larger and more diverse Steel Group. Without sufficient further explanation of why the parent company charged the Steel Group with the liability, we cannot uphold the Deputy Minister's decision.

Accordingly, the Panel remands this issue to the Deputy Minister for reconsideration whether evidence of record supports the conclusion that the cost recorded by virtue of the antitrust judgment against the B&LE is "connected" to the subject goods. If the Deputy Minister finds that there is such a connection, his reasoning shall be provided to the panel. If the Deputy Minister finds no connection, the resultant recomputation should be provided.

VI. C. Interest Charge Related to the U.S. Coal Industry Retiree Health Benefit Act

The Deputy Minister included in LTV's Section 16(2)(b) and 19(b) calculations an interest charge incurred by LTV on the principal sum of its estimated liability under the U.S. Coal Industry Retiree Health Benefit Act (the "Coal Retiree Act").[25] The charge on the principal sum was taken in the fiscal year ending December 31, 1992. The charge taken in respect of the interest liability accrued in 1993. The period of investigation in the present matter was from 1 January 1993 to 30 June 1993.

The issue of the proper allocation of liabilities under this Act has been considered by the *Cold-Rolled Steel* Panel. In its opinion of June 14, 1994, that Panel wrote:

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[25] *See* 26 U.S.C. 9706 *et seq.*

> The Panel finds that with regard to the Coal Retiree Act charge against LTV, Revenue Canada acted unreasonably in including it in corporate overhead rather than treating it as a cost relating to a separate operation in both its § 19(b) cost construction. Revenue Canada unreasonably interpreted the provisions of SIMA to require the inclusion of these charges, and erroneously attributed them to the steel operations of LTV without evidence to support that decision. The Panel remands this matter to Revenue Canada to revise its § 16(2)(b) calculation for LTV and, if necessary, its § 19(b) calculation excluding the Coal Retiree Act charge.[26]

The charge in question amounted to $140 million, described as the present value of all future estimated liabilities related to the requirements of the Coal Retiree Act. Those were succinctly described by the *Cold-Rolled Steel* Panel:

> In this instance, the charge to LTV is directly attributable to its idled coal operations. LTV's liability is based on its share of coal retirees from its coal operations. In enacting the Coal Retiree Act, the U.S. Congress specifically chose to apportion liability for retirees whose former employers were no longer in business among those coal operators (or successor companies) who had been party to the earlier union agreements, rather than to the current coal mining companies who entered the business after the agreements were reached. Thus, while it is true that the liability of LTV for the charge arose in 1992 because U.S. government action (when the company no longer had any active coal mining activity), the source and basis for that liability flow directly from the number of employees LTV had in its coal mining operations, and who are now retired.[27]

The Deputy Minister, however, has allocated the 1993 interest charge to LTV's steel production facilities for the purpose of constructing the cost of product sold in the Canadian market. He does so on the grounds that there is more complete information available to this Panel than to the

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[26] Cold Rolled Steel at 24.

[27] Id. at 25.

Cold-Rolled Steel Panel.[28] The *Cold-Rolled Steel* Panel had described the coal mining operations as "idled", attaching no time dependent qualifications to this condition. According to the Deputy Minister, additional information filed during this investigation showed that no coal had been produced since 1986 from LTV-owned operations, or for eight years.

It was on the basis of and in the light of this additional information that the Deputy Minister reviewed data that had been available to the Cold-Rolled Steel Panel and found that the coal operations were "extant". He concluded that:

> it was not reasonable to assign costs to extant companies which have been inactive for years and for which there is no apparent expectation of their resuming operations. While it may be proper to allocate costs to a separate profit centre regardless of the profitability of that operation, it is not reasonable to assign costs to subsidiaries which appear to have permanently ceased operations.[29]

The panel finds no basis on which to distinguish the facts of the present case from the facts of the *Cold-Rolled Steel* decision. Accordingly, the panel remands the issue of the LTV Coal Retiree Act interest costs with instructions to remove this item from calculations under both sections 16(2)(b) and section 19(b) of SIMA. In so doing, the Panel need not reach the question as to what the panel would have done in the event that the Minister had successfully established that the record supported the position that the coal operations were effectively non-extant.

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[28] It was not suggested to us that any accounting principle required the interest liability to be given any different treatment than that accorded the principal sum.

[29] Deputy Minister's Brief at para. 65.

VII. INCOME RELATED TO ANTITRUST SUIT - BESSEMER & LAKE ERIE RR CO. (LTV)

Complainants argue that if the cost of settling the B&LE suit is deemed a cost of producing steel for USS, then the settlement in favour of the LTV in the same law suit should be considered a reduction in LTV's costs of producing steel.

The Deputy Minister rejects Complainants' argument on the ground that LTV submitted no evidence showing that it had taken any settlement proceeds into income during the period of investigation. The Deputy Minister cites to an LTV filing for the third quarter of 1993 which, referring to the B&LE settlement, states the "Company has not recognized any income or proceeds related to this contingent asset..."[30]

Other evidence from USS's records[31] shows that USX did make a partial payment to LTV in the last days of 1993. There is, however, no corresponding document from LTV showing when the payment was received or recognized. In either event, no payment was made, recorded or recognized during the period of investigation, January through June 1993. Accordingly, the Panel finds the Deputy Minister was not unreasonable in his evaluation of the evidence and the Panel affirms.

There is in principle no necessary relationship between the accounting treatment accorded the liability by USX Corporation and that reflected on the books of the judgment creditor. What is prudent recognition of a liability by the judgment debtor may be a premature taking into income by the judgment creditor.

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[30] Index p.38 at 120.

[31] *See* U.S. Steel Group 1993 Annual Report, Index p. 103 at 240, 323.

In affirming the Deputy Minister's position that the evidence does not support LTV's claim, the Panel finds it unnecessary to address whether SIMA would have permitted or required the Deputy Minister to reduce LTV's cost of producing steel because settlement money paid to it by USS was considered a cost to USS of producing steel.

VIII. CHANGES TO ALLOCATIONS

VIII. A. Energy Buyers v. USX

In 1992 an arbitrator issued an award against USX in a case titled *Energy Buyers v. USX Corp*. USX fully accrued this charge to the US Steel group in 1992; according to USX, in a previous investigation the Deputy Minister attributed the full charge to the cost of production for that year. In 1993, USX settled the matter for an amount less than the award. Most of the settlement was to be paid in 1993; some of it would be paid in 1994 and 1995.

U.S. Steel argued that savings from the settlement should be recognized as a credit in 1993, thereby reducing the cost of its sales during the period of investigation. The Deputy Minister disagreed, stating that "[i]t is the Department's position to recognize these expenses when they are incurred" and that "[t]he [amount in question] is clearly not attributable to the P.O.I."[32]

The Panel upholds the Deputy Minister's decision. U.S. Steel had accrued in 1992 what it believed would be the full cost of the settlement, even though the settlement fund would not actually be paid until sometime later. Having already determined that the predicted cost of the settlement would be treated as part of the cost of production in the year in which it was accrued, it is logical that the change in that prediction would affect costs for that year and not costs for some

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[32] Final Exporter Summary at 5, Administrative Record, Index Page 103 Tab J, p. 48. We note that in making its decision, the Deputy Minister did not rely on, or refer to, Generally Accepted Accounting Principles (GAAP) relating to prior period adjustments. Accordingly, our review of the decision is made without expressing any opinion on whether the Deputy Minister's decision is in accord with such principles.

subsequent year. The change in the cost of the settlement was not relevant to the cost of steel in 1993, and the Deputy Minister was correct in so deciding.

VIII. B. Inland I/N Kote Overhead

Complainants have asserted that the Deputy Minister unreasonably changed the allocations of overhead costs made by Inland and I/N Kote. Inland's overhead costs had been allocated on a per ton shipped basis. The Deputy Minister allocated them on a cost of goods sold basis.

The Deputy Minister's methodology was to apportion Inland's overhead, research, GS&A, interest and other expenses as a percentage of the cost of goods sold.[33] His rationale was that "the burden placed on each product for these fixed cost items is directly proportional to the cost of the product being produced."[34] The Deputy Minister in particular noted that Inland has a relatively varied mix of steel products.[35]

The Deputy Minister's methodology was not unreasonable. While Inland's approach might be considered reasonable as well, the Panel is not free to substitute another approach - even if more reasonable - than the Deputy Minister's if his approach is reasonable.

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[33] Preliminary Exporter Summary at 11, Administrative Record Index Page 36, Tab U, p. 60.

[34] Id. at 11-12.

[35] Inland also argued that on its books the costs had been allocated in accordance with GAAP on a per ton basis and that the Deputy Minister should have followed that approach. Complainant argues that its accounting methodology should have been followed by the Deputy Minister if in accordance with GAAP, barring compelling evidence to the contrary. However, SIMA does not require Revenue Canada to follow GAAP. *Cold-Rolled Steel* note 6, at 49. While Article 2.1.1. of the recent 1994 Anti-Dumping Code favours the use of GAAP in the exporting country, it does not require that Revenue Canada apply it. In any event, the GATT's 1994 Anti-Dumping Code was only adopted by Canada effective January 1, 1995 - after the Final Determination and period of investigation in this matter.

For I/N Kote's costs, the Deputy Minister did allocate them on a per ton shipped basis. Since I/N Kote does not produce the mix of products which Inland does, the Deputy Minister was reasonable in this approach since there was no concern that the per tonnage basis would not accurately reflect the cost of the subject goods.

The other reason which the Deputy Minister gave for choosing a per ton basis for I/N Kote was the difficulty in determining the cost of its total sales. Inland and Nippon Steel are equal partners in I/N Kote. The partnership agreement between them sets out how the cost of substrate supplied by Inland to I/N Kote shall be determined. Inland supplies all of the steel for I/N Kote at a transfer price which the Deputy Minister reasonably found [

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VIII. C. Exclusion of Joint Venture Profits from Cost of Production (LTV)

During the period of investigation, LTV paid a tolling fee to two electrogalvanizing ventures for them to finish steel supplied by LTV. LTV Steel is a joint venturer in both operations with a 50% ownership in one and 60% in the other. Those ventures are referred to as LS-II and LSE/EGL. LTV submitted in its filings before the Deputy Minister that LTV's profits from the joint ventures should have been excluded from the calculation of LTV's cost of producing steel.

The Deputy Minister agreed that it was appropriate to reduce the tolling fee by the amount of profit returned to LTV from the joint venture and did so for LS-II based on evidence from LTV's internal books. However, for LSE/EGL, the Deputy Minister argued that he was unable to determine from LTV's internal books what LTV's profit was. In addition, LTV did not file the profit and loss statements of the joint venture.

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[36] Exporter's Summary, supra, note 33 at 3, (emphasis in original).

LTV argues that it was unable to file the financial statement because it did not have the consent of the joint venture partner. Instead, the partner agreed to let the Deputy Minister look at the financial statement in Cleveland, Ohio, but not take away copies. LTV also argues that the Deputy Minister could have derived the profit from LTV's books.

The Panel affirms the Deputy Minister's action. The Panel reviewed closely the evidence cited by LTV to prove LTV's profit in LSE/EGL. The Panel agrees with the Deputy Minister that the evidence is inconclusive and does not prove what the profit was. We also find the Deputy Minister was not unreasonable in not travelling to Cleveland to look at the joint venture's financial statements. It is unfortunate that the joint venture partner would not consent to the filing of the statements. However, the Deputy Minister cannot be faulted for requiring LTV to file evidence supporting its position for inclusion in the record.

IX. INCOME OFFSET

IX. A. Use of Financing Income to Offset Financing Expenses (LTV and Inland)

Facts

The Deputy Minister found that LTV's short term interest income was related to steel production. Following the *Cold Rolled Steel* Panel decision, it then offset the income against LTV Steel and its affiliate LTV Management Group's interest expenses down to zero. Since interest income exceeded expenses, some interest income was not applied as an offset to reduce LTV's steel production costs. Complainants allege that the excess interest income should have been applied to reduce other costs such as plant or corporate overhead.

Inland's interest from short term investments was not used as an offset because the Deputy Minister found no evidence the income was related to steel operations. Complainants argue

that since the segment of Inland under investigation only produces steel, the cash used to make the investment had to come from steel revenues and, therefore, should have been used as an offset.

The *Cold Rolled Steel* decision on offsets

In *Cold Rolled Steel* decision, the Panel rejected the Deputy Minister's statement that SIMA does not permit the calculation of net costs in Section 16(2)(b) and 19(b) calculations. The Panel then considered several income items, specifically pension credits and interest income.

Regarding pension credits, the Panel found that "the pension plan, both on the cost and on the income sides, forms an integral whole which related directly to steel workers and, therefore, to steel production. . . . The nature of the true cost of a pension plan makes it necessary to consider income accrued from the plan".[37] The Panel also found that it was reasonable to apply pension income only as a reduction to pension costs. "Just as revenue from scrap is used to calculate the cost of raw materials and income from operating bank accounts helps determine the cost of interest expenses, so should the pension fund income be used to determine the cost of pensions".[38] The reason for restricting the use of pension income was to avoid the unintended result of reducing the cost of steel production to zero by virtue of "well invested pension fund credits".[39]

Regarding interest income, and following a remand and instructions from the Panel, the Deputy Minister offset interest income against interest expenses where it found evidence on the record that the income was related to steel production or to interest expense that had been deemed related to steel production. The language of the Panel's Opinion remanding the Final Determination

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[37] Id. at 44-45.

[38] Id. at 45.

[39] Id.

and the Panel's Opinion following remand[40] require that the income item be matched to an expense item, such as steel related interest income to steel related interest expense. However, in that case, the interest income was not greater than interest expenses. Therefore, the question did not arise, as it did for pension income, whether the category of "interest" expense or cost could result in a credit that could be used to offset other expenses. The question also was not addressed as to whether "interest expense" as a cost category was overly narrow.

Discussion

The facts in this case require the Panel to consider the reasonableness of the Deputy Minister in (1) limiting LTV's interest income to an offset of interest expense only and (2) deciding that Inland's interest income was not proven to be related to steel production.

The Deputy Minister, citing to language from *Cold Rolled Steel* states that interest income can be offset only where it is "related to financing or interest costs deemed to be related to the production of steel".[41] In response, Complainants' allege that the Deputy Minister has interpreted the *Cold Rolled Steel* so narrowly that it would be "essentially impossible to obtain a credit".[42] The important factor, according to Complainants, is whether the income is related to steel production, not whether it can be factually linked to an expense item.[43]

The Participants' disagreement lies in whether and how closely linked or matched an income item must be to a cost for it to be properly considered for offset. In the Cold Rolled Steel

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[40] *See Id.* at 7, 48 and 49 and In the Matter of Final Determination of Dumping Regarding Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America, Panel No. CDA-93-1904-08 at 13-14.

[41] Deputy Minister's Brief at paras. 179-180.

[42] Reply Brief at para. 68.

[43] Id. at para. 69.

Panel decision, the question of appropriate categories did not arise because interest income was less than interest expense. There was no need to ask whether the category of "interest expense" was unreasonably narrow.

The Deputy Minister argues that SIMA requires him to build costs, not to calculate income.[44] The Panel agrees. Section 16(2)(b) of SIMA refers to the "cost of production," and Section 19(b) requires the construction of "the cost of production, an amount for administrative, selling, and all other costs. . . ." Thus, it is not the net income of the company that matters, but the costs attributable to the subject goods. These costs, of course, may be lowered by a related item of income; but this means that if a steel related income item is considered in the construction of production costs, the income item must be matched against some category of cost. The product must cost something. On the other hand, it makes no sense to require automatically that income arise out of or flow from the same transaction that gave rise to the expense. If that were the test, steel scrap revenues could not be offset against material costs. If an income item is appropriate for offset, it must relate in a reasonable, but not overly restrictive way, to a cost or even groups of costs of producing the product in question. It must also itself relate to subject goods.[45]

Complainants point out that there is no "unity of accounting" for financial items such as there is for pension costs. For LTV, financial income and expense items were taken from LTV Steel Corporation as well as from LTV Management Corporation and "bundled" into a package of financing items. Complainants argue that the interest income which is related to steel production should not be limited to offsetting interest expense but should be used as well to offset either plant overhead or corporate overhead costs depending upon the source of the income.

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[44] Deputy Minister's Brief at paras. 177-178; Transcript of Oral Argument at 208-209.

[45] However, an income item should not be subject to a higher standard of linkage to steel production than the expense item it offsets. Thus if income relates to an item already determined to be related to steel production, then it seems reasonable that the income should also meet the steel production relationship test.

The Panel believes there must be a reasoned analysis behind the category selection for offset purposes. The Deputy Minister's stated reason in the record for limiting interest income to an offset of interest expense only, was that in the *Cold Rolled Steel* Panel decision, pension income was allowed as an offset against pension expense only.[46] However, that Panel gave very specific reasons why the pension program should be considered as one unit. Those reasons do not apply to interest.

It may be that it is reasonable to limit interest income offsets to interest expense, but the Deputy Minister has not supplied the rationale. Short term financing income is cash available to operations that a company could consider in costing its products. It may or may not be that the income is an appropriate offset to a broader category of cost than interest expense. The Panel does not believe that it should formulate reasons for the Deputy Minister. It is the responsibility of the Deputy Minister, rather than NAFTA panels, to fine-tune SIMA interpretations as they relate to specific facts. Therefore, the Panel remands for further consideration and policy formulation by the Deputy Minister the question of whether LTV's interest income should be offset against a wider category of cost than interest expense.

With respect to Inland, the facts are not entirely clear. In the investigation, the Deputy Minister did not consider certain short term interest income for offset on the grounds that (1) Inland did not ask for the offset and (2) there was no evidence that the income is related to steel operations.[47] In his brief, the Deputy Minister states that Inland did not establish that "this income was related to financing or interest costs related to steel operations".[48] In reply, Complainants argue that the Inland Steel Flat Product Company only produces steel and that the interest income "could only have come from the sale of steel and. . . is therefore related to the production of steel".[49] Complainants argue the income should be offset against the administrative expenses of Inland.

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[46] Administrative Record, Index Page 57, p. 68.

[47] Administrative Record, Index Page 37, p. 46.

[48] Deputy Minister's Brief at para. 185.

[49] Reply Brief at para. 69.

The Panel cannot determine for certain whether any interest costs were charged to Inland's Section 16(2)(b) and 19(b) costs. The briefs suggest that there were none although the record indicates otherwise. In either event, the threshold question is the reasonableness of the Deputy Minister's factual determination that no evidence showed that the interest income related to steel production. The record does not provide detail about the interest. However, given the business of the company, which is amply supported by the record,[50] the Panel finds it difficult to imagine that the interest income had any source other than returns from the short term investment of steel revenues. The Panel, therefore, remands the issue of short-term interest income for Inland with the following instructions:

1. If interest expense has been charged to Inland's Section 16(2)(b) and 19(b) costs, then it should be offset by the amount of short-term interest income, unless there is evidence on the record that the interest income is not related to steel production.

2. If no interest expense has been charged to Inland's costs, then the short-term interest income (unless it is not related to steel production), should be treated in the same way that the Deputy Minister determines to treat LTV's interest income which is in excess of interest expense.

IX. B. Offset of Pension Costs (Inland)

Complainants allege that a pension credit should have been applied to reduce Inland's pension costs. The Deputy Minister, following the rationale in *Cold Rolled Steel* agrees that it is appropriate in certain circumstances to offset pension costs with pension income. However, the Deputy Minister interpreted Inland's evidence to mean that the pension credit already represented a netting out of pension costs. Since the *Cold Rolled Steel* Panel approved the offsetting of pension costs down to, but not below, zero, the Deputy Minister did not recognize the pension credit in his calculation of Inland's costs of production.

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[50] Administrative Record, Index Page 36, pp. 1-24.

The Panel closely reviewed confidential evidence claimed by Complainants to prove that pension costs had not already been offset by pension income. The Panel, however, is unpersuaded by that evidence that the Deputy Minister's conclusion was unreasonable. The Panel affirms.

Complainants also ask the Panel to remand the pension credit issue to permit Inland to submit additional evidence. They point out that prior to the *Cold Rolled Steel* decision, the Deputy Minister did not offset pension costs by pension income. Since that decision was released only days before the final determination in this investigation, Inland allegedly did not specifically submit all evidence in its favour on this point.

In the interest of finality, the Panel declines to remand and order the reopening of the record on this issue. Should there be a subsequent review by the Deputy Minister, Inland will have an opportunity to submit all relevant evidence at that time.

IX. C. Bankruptcy Costs and Credit for Emerging From Bankruptcy (LTV)

Complainants argue that if LTV's costs related to reorganizational bankruptcy are charged to the production of steel, then those costs should be offset by a certain extraordinary credit recorded by LTV upon emerging from bankruptcy. The Deputy Minister included LTV's bankruptcy costs in the cost of steel production, but declined to offset them with the credit.

In considering LTV's bankruptcy costs, the *Cold Rolled Steel* found that the costs, while unusual, "relate directly to the general operation of the company. Their inclusion as part of general corporate overhead that can be attributed to steel production provides a more accurate assessment both of the profitability of the steel operation and of its constructed costs".[51] This Panel

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[51] Cold Rolled Steel at 23.

finds the reasoning equally valid here and affirms as reasonable the Deputy Minister's inclusion of bankruptcy expenses in LTV's costs of production.

The Panel also affirms the Deputy Minister's decision not to offset the costs with the extraordinary credit. When LTV emerged from bankruptcy, it was able to settle many of its 1986 and earlier pre-petition liabilities for less than previously recorded. Since the liabilities had been carried on its books, LTV took a credit for the difference and showed it as an "extraordinary gain on debt discharge".[52]

The Deputy Minister argues that before it will consider an offset to cost, the income offset (1) must be related to an expense and (2) must be available to the employer to reduce the cost in the period.[53] He further argues that the debt discharge credit does not meet these tests: First, the credit has no impact on and is not related to the bankruptcy expenses, which were the costs of running LTV's business during bankruptcy or to any other expense; Second, the credit does not generate income which could be used to pay or reduce current liabilities.

The Deputy Minister's analysis is not unreasonable and the Panel affirms. As stated earlier, SIMA requires the Deputy Minister to calculate the "cost" of producing the product under investigation. In some circumstances, an income item must be considered before the cost of an item or category can be calculated. While the debt discharge significantly reduces the company's liabilities and improves its ability to continue in business, it is difficult to see how if affects the day-to-day costs involved in producing steel during the period of investigation.

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[52] Administrative Record, Index Page 38, p. 109.

[53] Deputy Minister's Brief at para. 194.

X. DATE OF SALE

The complainants Inland, I/N Kote and LTV maintain that the Deputy Minister, in performing the costs' analysis, employed a date of sale prior to the date of the actual sale, in law.

The Deputy Minister maintains that his decision to consider the order confirmation date as the date of the sale for the final determination is supported by evidence submitted by Inland, I/N Kote, and LTV during the investigation and which is on the administrative record. Specifically, the Deputy Minister maintains that in response to questions B6 (Sale to Canada - Appendix 1) and C4 (Domestic Sales of Like Goods - Appendix 2), Inland, I/N Kote, and LTV clearly selected, reported and listed the order confirmation dates as the dates of sale as shown in their respective work sheet headings entitled "Date of Sale".[54]

The Panel has reviewed the record and finds that at no time during the investigation did any Complainant advise the Deputy Minister that there was an issue with respect to the date of sale. No one appears to have advanced this argument or voiced any opposition to Revenue Canada's date of sale methodology at any point prior to the panel proceedings, including during verification visits, responses to supplementary requests for information, and other meetings.[55]

Furthermore, as is pointed out in the response brief of Stelco Inc., the request for information that was sent out by the Deputy Minister to the producers of the subject goods contains the following definition:

> Date of Sale - The date of sale is generally considered to be the date that the parties reach an agreement to purchase and sell the goods in

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[54] Administrative Record, Index Page 33, Tab P, pp. 66-297 (I/N Kote); Administrative Record, Index Page 29, Tab N, pp. 202-253 (Inland Steel); Administrative Record, Index Page 40, Tabs 12, 13, pp. 66-121 (LTV Steel).

[55] Administrative Record, Vol. 36, Tab Y, Z, pp. 71-72.

> question. The date of the confirmation of the Order is usually recorded as the date of sale.

Thus the complainants were on notice of the usual interpretation of the term "Date of Sale". If they believed that the usual interpretation was inapplicable to the facts of their particular operations, they needed to bring this to the attention of the Deputy Minister.

Accordingly, the Panel finds the Deputy Minister's decision to consider the order confirmation date as the date of sale is supported by evidence on the administrative record that was submitted by Inland, I/N Kote and LTV during the investigation and was, consequently, reasonable. Indeed, the record indicates that the Deputy Minister simply relied on the data reported by the complainants as the date of sale. The panel affirms the Deputy Minister's decision.

XI. CONCLUSION AND ORDER

For the reasons stated above, the Deputy Minister's determination is hereby affirmed in part and remanded in part.

The results of this remand shall be provided by the Deputy Minister to the Panel within 45 days of this decision.

SIGNED IN THE ORIGINAL BY:

William E. Code, Chair
William E. Code, Chair

Harry First
Harry First

D. Michael M. Goldie
D. Michael M. Goldie

Kathleen F. Patterson
Kathleen F. Patterson

Robert E. Ruggeri
Robert E. Ruggeri

Issued on the 23rd day of June, 1995.