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

RE: Deputy Minister of National Revenue Determination on Remand

IN THE MATTER OF:

Certain Corrosion Resistant Steel Sheet Products Originating in or Exported From the United States of America

November 2, 1995

In its decision issued June 23, 1995 the Panel made the following disposition of the issues in this proceeding:

> 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 issues 4(a) concerning short term interest income;
> >
> > AFFIRMS all other aspects of the Deputy Minister's determination at issue before this Panel.

The Deputy Minister's Determination on Remand was filed August 4; the Complainants' written submissions challenging the Determination on Remand on August 29; the Deputy Minister's response on September 15 and the submissions of the participants on September 18.

The Complainants gave notice of their objection to one paragraph of the Deputy Minister's response as introducing new and erroneous allegations of fact. As no timely date for an oral hearing was convenient to all counsel the Panel directed the Complainants to file a memorandum by September 28 setting out their objection. The Deputy Minister was granted a limited right of reply to the Complainants' objection. In a memorandum filed 5 October the Deputy Minister disclaimed any intention of requesting that substantive effect be given the allegations to which objection was taken.

These reasons constitute the Panel's decision on the adequacy of the Deputy Minister's Determination on Remand after full consideration of the submissions contained in the filings described

in the second paragraph of these reasons. The Panel adopts and has applied in this decision the standard of review contained in Part V of its decision of June 23, 1995.

It should first be noted no issue is taken with the Deputy Minister's response to the Panel's direction with respect to the interest charge related to the *U.S. Coal Industry Retiree Health Benefit Act* and the Deputy Minister's disposition of this direction is accordingly affirmed.

SHORT TERM INTEREST INCOME

This Panel affirms the Deputy Minister's Determination on Remand relating to his policy of limiting the offset of interest income to the amount of interest expense.

This panel remanded for further consideration and policy formulation the issue of whether LTV Steel Company's interest income should be offset against a wider category of costs than interest expense. In the Investigation, the Deputy Minister had permitted an offset of interest income in an amount equal to interest expense. In fact, interest income exceeded interest expense. During the Panel review, Complainants argued that the excess interest income should be used to offset other costs of producing subject goods.

On Remand, the Deputy Minister stated that it is reasonable to include interest expense and income account in one category for offset purposes because "they record the results of the company's cash management transaction" even though they arise from different sources. Further the Deputy Minister found that "with respect to interest income and interest expenses ... these two general account balances are related to each other, and therefore effectively constitute a distinct category of costs, which are in turn unrelated to any other category of costs which arise from the production of subject goods." For these reasons, the Deputy Minister found it would not be reasonable to use a credit from the cash management category to offset costs in another category.

Complainants challenge the remand results. They argue the Deputy Minister has failed to provide adequate justification in law or accounting principles for limiting the use of interest income to offset interest expense. They state that there is no accounting concept that includes various interest expense and income items in the same accounting unity such as there is for pension income and liabilities. Moreover, they argue that it is incorrect that LTV has "two general account balances", one for interest expense and the other for interest income and that the interest was culled from various accounts of two different companies -- LTV Steel Co and the LTV Management Company.

The Deputy Minister supports his remand results by pointing out that the limitation on interest income offsetting (equal, but not in excess of, interest expenses) avoids the calculation of "negative costs". SIMA requires the calculation of the full cost of goods. "To allow surplus interest income earned by the producer to offset unrelated categories of costs would not provide an accurate construction of costs for SIMA purposes." As to the argument that no accounting standard supports the grouping of interest, the Deputy Minister responds that he is required to follow SIMA, not GAAP or other accounting standards and that companies report interest income and expenses in different ways.

The Deputy Minister has explained why his policy is to group interest accounts and to limit offset. The explanation is grounded in the requirements of SIMA. Complainants have failed to demonstrate why the Deputy Minister's policy is not a reasonable interpretation of SIMA. The Panel finds that the Deputy Minister's policy is reasonable and, therefore, the Panel unanimously affirms.

B& LE LITIGATION EXPENSE

The Panel majority affirms the Deputy Minister's Determination on Remand relating to the treatment of the B& LE railroad anti-trust settlement costs for the reasons that follow.

This Panel remanded the B&LE anti-trust settlement costs to permit the Deputy Minister to review the record to find "a connection between [the] cost and subject goods. The Panel noted the requirement of "attribution" in Regulation 11© and stated that "[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." Further, the Panel noted the Deputy Minister's conclusion that if the railroad were still a subsidiary, the cost would not have been allocated to steel, but entirely to the railroad. This, according to the Panel, "eliminates any implicit finding of the required connection". The Panel also found that "[t]he Deputy Minister is not relieved of the necessity of finding a connection between the cost and the subject goods merely because the apparently appropriate cost centre has been sold."

The Panel further held as follows:

> 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.

In his determination on remand, the Deputy Minster relied on several items of evidence to support the conclusion that the B&LE settlement was a general overhead expense of the U.S. Steel Group with a portion allocable to subject goods. The evidence is of two types: (1) that which is related to accounting (including the historical reasons why the cost was assigned to the books of the US Steel Group, rather than those of one of the other two divisions and the fact that the settlement, along with other law suit judgment, would be "material" to the U.S. Steel Group's financial

statements, and (2) that which attempts to relate the railroad activities factually to steel operations (B&LE transported iron ore to steel mills and iron ore is "one component of a large integrated steel producer.")

The Deputy Minister is the authority charged with SIMA interpretations and the Panel is required to give deference to the rational exercise of his expertise. In this context, it is useful to note that the Deputy Minister's interpretation of SIMA Sections 16(2)(b), 19(b) and SIMA Regulations 11© as applied in this case reflects an adjustment of policy following a late November 1993 panel decision.[1]

Prior to that panel decision, the Deputy Minster apparently interpreted the relevant provisions to require attribution of an expense to subject goods only when it was related to the production of subject goods or operation of the facility producing subject goods [2]

This method was found contrary to law in Gypsum where the Panel evaluated several interest expenses that had been incurred for the benefit of the entire company concerned. These expenses, which had no nexus to any particular division, good, or service, were not allocated to subject goods by the Deputy Minister. The Panel disagreed. It reviewed SIMA, in particular Section 19(b) and Regulation 11© and concluded that these were general corporate expenses that fit the category of "all other costs" and that a proportionate allocation of these indirect costs to subject goods was required.

Subsequently, in adopting the rationale of Gypsum, the Deputy Minister revised his interpretation of SIMA Sections 16(2)(b), 19(b) and Regulation 11(c), determining that he was required to allocate to the subject goods some portion of all company costs that could not be assigned

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[1] 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. hereinafter "Gypsum".

[2] Transcript of the Public Hearing, March 20, 1995, pages 41-42.

to another active division, product, or service. Thus, in testing the profitability of cold rolled steel under SIMA Section 16 (2) (b), the Deputy Minister allocated to subject goods a cost related to idled coal operations.

The Cold Rolled Steel panel found that SIMA Section 16(2)(b) did not require a cost to be allocated to subject goods if it could be allocated directly to another division, "regardless of the profitability or revenue generating circumstance of that" division. [3]

Finally, in the instant case, the Deputy Minister looked at a cost related to the spun-off railroad division. Unlike the idled coal operation, the railroad division no longer existed within the corporate family during the period of investigation. Applying his revised interpretation of SIMA, the Deputy Minister concluded this was a generalized cost that had to be allocated in part to subject goods.

Against this background, the Panel remanded the case for the reasons stated above.

The Deputy Minister argues that his interpretation on remand is reasonable because evidence firmly connects the B&LE expense to the U.S. Steel Group, (as opposed to the other two Groups) as general overhead and subsequently to subject goods since the railroad was part of the U.S. Steel Group, since the railroad transported iron ore to steel mills, and since there is no other division within the U.S. Steel Group to which to assign the anti-trust settlement.

Complainants claim that the evidence is still insufficient to connect the anti-trust cost to subject goods. Complainants offer that the B&LE expense was booked to the U.S. Steel Group because USX Corp. (the parent company) routinely books any asset or liability not specifically related to the other two company groups (natural gas and petroleum) to the U.S. Steel Group. Complainants

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[3] 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.

also point out that it has been the Deputy Minister's consistent policy to treat related companies separately and not to merge costs. They point out as an example that while coal is an input to steel production, sister coal producing companies have been treated separately by the Deputy Minister in the absence of information that transactions were not carried out on an "arms length" basis.

The specific issue presented is whether the Deputy Minster has reasonably interpreted SIMA Sections 16(2)(b), 19(b) and Regulation 11(c) (iii) and relevant evidence on the record in assigning to subject goods an aliquot share of a cost related to activities of an operation that was sold prior to the period of investigation.

The language of Regulation 11(c) (iii) specifically instructs the Deputy Minster to include in Section 19(b) calculations "all selling, administrative and other costs" not already included as direct costs "that are attributable to the goods." Section 16(2)(b) requires the Deputy Minister to calculate the profitability of domestic sales by including, in addition to direct costs, "the administration... costs with respect to the goods..."

The B&LE cost was incurred because of illegal activities of the departed railroad. It is more difficult to categorize than the costs considered in Gypsum which were at their origin related to general company administration and activities. The Deputy Minster himself continues to state that had there been a railroad division within the U.S. Steel Group, then the full amount of the expense would have been allocated to that division. On remand, the Deputy Minister, in a more complete analysis than was done previously, points to evidence connecting the cost in question to the Steel Group and indirectly to subject goods. His position is that the cost has become a general overhead expense of the U.S. Steel Group. It is therefore allocable proportionally, along with other generalized costs, to all divisions of the Group, including the Complainant, the producer of the subject goods.

In the Panel's view, while the Complainants' interpretation of the law and evidence may be reasonable, the panel is unable to decide that the Deputy Minister's interpretation is unreasonable. It is supported by evidence "connecting" the cost indirectly to subject goods. Since the cost lacks

a connection elsewhere within the company, it is not unreasonable to view it as a general cost of doing business that must be borne throughout the entire U.S. Steel Group. The determination is also consistent with other decisions: (1) The decision recognizes and preserves the Deputy Minister's policy of not allocating costs to subject goods that can be assigned to non-subject goods or divisions within a company - the Deputy Minister admitted that the cost would have been assigned to the railroad division if it still existed; (2) The decision is also consistent with the newer policy of allocating generalized overhead costs across a broader spectrum, with some portion being assigned to subject goods.

The key difference between the two interpretations is that the Deputy Minister has found that the anti-trust expense, although admittedly different in origin from other general corporate overhead expenses, has become part of generalized administrative expenses that is attached to and must be spread over the Steel Group. The Complainants, on the other had, argue that the anti-trust expense does not shed light on the cost of producing subject goods, and that it must remain a railroad expense even if it is not fully absorbed for accounting purposes. The Panel finds that there is sufficient discretion for either approach under SIMA and the regulations. Given these two

reasonable interpretations, one of which was adopted by the Deputy Minister, the Panel majority is required to affirm.

SIGNED IN THE ORIGINAL BY:

William E. Code

WILLIAM E. CODE

D. Michael Goldie

D. MICHAEL GOLDIE

Kathleen F. Patterson

KATHLEEN F. PATTERSON

Issued on the 2nd day of November, 1995.

OPINION OF HARRY FIRST, dissenting in part.

One question presented on this remand is whether the cost of settling litigation arising out of the operations of the complainant's sister-subsidiary, which produced non-subject goods, can be attributed to the cost of the subject goods in constructing normal values under SIMA, when the subsidiary in question was sold before the settlement cost was paid. The litigation was an antitrust suit against the Bessemer & Lake Erie Railroad (B&LE), USX's former subsidiary. The B&LE was sold in 1988, with USX retaining the potential liability. The settlement was paid in 1993, during the period of investigation.

The Deputy Minister attributed an allocable share of the cost of the settlement to the production of the subject goods, both in his initial decision and in his remand determination. I believe that this decision was erroneous under SIMA, and hence I dissent from the majority's decision to affirm the Deputy Minister's Determination on Remand on this issue.[1]

The question presented to the Panel is a difficult one. The difficulty, however, lies not so much in determining the proper interpretation of SIMA. The difficulty for the Panel lies in determining whether the Deputy Minister exceeded his discretion in choosing the interpretation he did.

A short answer to the question whether the Deputy Minister exceeded his discretion might be that the Deputy Minister could not possibly have done so precisely because the substantive SIMA question is difficult. If there is no clear answer to the substantive question under SIMA, so the argument might go, the Deputy Minister should be free to choose the one he prefers.

This Panel, however, cannot discharge its reviewing responsibility so easily. An argument (even a reasonable one) about the proper interpretation of the statute does not, by definition, provide sufficient reason for the Panel to affirm the Deputy Minister. The Panel still has

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[1] I agree with the majority's decision on the short term interest income issue and hence vote to affirm the Deputy Minister’s Determination on Remand with regard to that issue.

the responsibility of being certain that the Deputy Minister's decision is within the bounds of the law, however difficult it may be to determine what those bounds are. We make this decision, not by deciding the legal issue as a matter of first impression, but by reviewing the reasons given by the Deputy Minister in support of his decision. What the Panel must be certain of is that the Deputy Minister has engaged in reasoned decision-making, given the applicable statute and regulations.

This Panel reviewed the relevant law in its initial Memorandum Opinion and Order. Without repeating all that the Panel said there, it is important to note several points.

First, although the language of Section 19 of SIMA speaks broadly of constructing "costs" without using the modifier "of the goods," the Deputy Minister's Regulation 11 makes clear that "cost" is understood as meaning costs "attributable to the goods." See Memorandum Opinion and Order at 11. This is true for costs attributable "to the production and sale of the goods" as well as for "other costs" that are "attributable to the goods" (that is, for indirect or overhead costs). See id. This requirement of attribution does not depend on this Panel's reading of the SIMA. It rests on the Deputy Minister's own reading of the statute, as embodied in his Regulation.

Second, for further elaboration of what costs can be considered "attributable to the goods," this Panel looked at decisions of prior panels, specifically three panel decisions which disagreed with the Deputy Minister's determination of what expense items he can properly include as a cost under SIMA and Regulation 11. In reviewing these decisions the Memorandum Opinion and Order emphasized that even the panel decision most willing to attribute indirect costs stated that these indirect costs must still "`bear a connection with the subject goods (as opposed to non-subject goods).'" Id. at 13 (quoting *Gypsum*). The Memorandum Opinion and Order also pointed to the language of another panel decision which stressed the importance of the statutory objective in determining what costs are attributable. That panel stated that to include charges attributable to other operations "`would create a serious distortion in the expenses of the steel operation in question and an inaccurate picture of the costs of steel production during the relevant period for purposes of comparison.'" Id. at 15 (quoting *Cold-Rolled Steel*).

Applying the law and guided by past panel decisions, this Panel rejected the Deputy Minister's initial decision to attribute the costs of the B&LE settlement to the cost of steel. The Deputy Minister's initial decision had rested on his view that in the absence of a specific operation to which the expenses could now be charged (that is, in the absence of any railroad operation currently on the books of USX) the statute required him to allocate part of the B&LE's expenses to the cost of steel production. This Panel unanimously disagreed with this view of the statute. See id. at 20. A unanimous Panel wrote that "[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." Id. at 21.

The Panel, of course, did not state what would be sufficient to connect this expense to the cost of steel. This was not our role. Nor did the Panel feel it appropriate to state that there could not possibly be any connection between the expense and the cost of steel. This, too, was not our role. Rather, the Panel chose to provide the Deputy Minister with another opportunity to review the record to see whether or not there were additional facts to support a determination of a connection between the B&LE settlement payment and the cost of steel.

In his Determination on Remand the Deputy Minister claimed to find such a connection. He concluded that the cost of the settlement is a "general overhead expense of the U.S. Steel Group." Determination on Remand at 1. He supported his conclusion with the following reasons: First, USX itself recorded the B&LE settlement as a general overhead expense of the Steel Group (rather than as an expense of the entire corporation), a decision consistent with USX's accounting practices. See id. at 2. Second, within the Steel Group there was no railroad to which to allocate the expense, so the Deputy Minister's only choice was to proportionally allocate the expense among all the Group's diverse divisions, including steel. See id. at 3.

In the Panel's initial Opinion, however, both of these reasons were unanimously found to be inadequate to support the Deputy Minister's decision. With regard to relying on USX's accounting practices we wrote: "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." Memorandum Opinion and Order at 20. As for the obvious fact that there is no longer a railroad to which to allocate the expense, we wrote: "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." Id. at 21.

There is only one fact which was added by the Deputy Minister in his remand and which is new to his decision-making. The Deputy Minister now writes that "[t]he B&LE railroad transported iron ore to steel mills. This activity relates to the production of steel, and is one component of a large integrated steel producer." Determination on Remand at 2.

This finding, however, still does not adequately connect the B&LE to U.S. Steel. Railroad services may be an input into the production of steel, but we still do not know (nor apparently does the Deputy Minister) the extent to which the B&LE was in fact integrated into USX's steel making operations. Counsel for the Deputy Minister admits as much in his brief, stating that "[i]n retrospect, given another opportunity to investigate and collect additional information, the Deputy Minister suggests that a connection could be established between the railroad and the goods produced by US Steel, the steel-making division." Response of the Deputy Minister at 3 (emphasis added). Our remand, however, was to give the Deputy Minister an opportunity to recanvass the current record for support for this connection between the railroad and the steel operations, not to speculate on what he might have found had the record been different.

The Deputy Minister's rationale is thus the same as it was in his first decision. If there had been a railroad division in existence, "then the full amount of the B&LE expense would have been allocated to that division." Determination on Remand at 3. Since there was no railroad, the costs then become "a general overhead expense" to be allocated in some way around the company, including to the subject goods.

As I indicated above, however, this Panel unanimously rejected a construction of the statute which would permit costs in fact attributable to some other goods to be attributed to the subject goods simply because there is no place else to put them on the books of the company. SIMA allocates costs, not losses. The litigation was a loss to USX, but that does not make it a cost of steel. The cost of settling the B&LE litigation was a cost of railroading (an overhead cost of railroading to be sure, since it did not relate to the production of any specific railroading service). The Deputy Minister said as much when he stated that the entire costs would have been allocated to the B&LE if it were still in existence.[2] This cost of railroading would have been allocated entirely to the B&LE even if the subsidiary had no assets, in which case the rest of the corporation in fact would have borne the economic loss arising from the litigation. This cost of railroading would have been allocated entirely to the B&LE even if the subsidiary simply had a paper existence and were not operating at all (as this Panel's unanimous opinion on the Coal Retiree Act charge makes clear, see Memorandum Opinion and Order at 21-23). To now say that this cost of railroading has become a cost of steel simply because the auditors have erased "B&LE" from the books of USX is to make the dumping determination (and U.S. Steel's prices) turn on a fortuity, not on any economic connection between the B&LE litigation and what it cost USX to produce steel.

I do not believe that the Deputy Minister has the discretion to construe SIMA in this way. The requirement of "attribution," made clear in Regulation 11, plays an economic role in the dumping determination. Wherever the line might be between attributable and non-attributable costs, it distorts the determination of costs to include in the cost of the subject goods items which the Deputy Minister concedes relate to the cost of producing non-subject goods.

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[2]Note that the Deputy Minister does not normally treat litigation expenses as a general overhead expense. See, e.g., this Panel's discussion of the Energy Buyers issue, Memorandum Opinion and Order at 25-26.

Accordingly, I dissent.

SIGNED IN THE ORIGINAL BY:

Harry First

HARRY FIRST

Issued on the 2nd day of November, 1995.

Opinion of ROBERT E. RUGGERI, dissenting in part:

I dissent, in part, from the majority's opinion and would not affirm the Deputy Minister's remand determination with regard to one issue.[1]

That issue is whether USX's cost of settling certain antitrust litigation was a cost "attributable" to the subject goods. The Deputy Minister had included that cost in assessing the profitability of the subject goods and constructing their normal value under SIMA.

The antitrust litigation had been brought against the Bessemer & Lake Erie Railroad [B&LE], a former subsidiary of USX. USX sold B&LE in 1988, but retained the liability for the antitrust litigation. USX paid the antitrust settlement in 1993, during the period of investigation.

The Deputy Minister's determination on remand, *inter alia*, was that USX's cost of settling the B&LE railroad litigation was a cost "attributable" to the subject goods.[2] In light of the administrative record, the Deputy Minister's conclusion was not reasonable. Accordingly, I cannot affirm the Determination on Remand.

I. The applicable statute and regulation

SIMA section 16(2)(b) excludes from the normal value of like goods those sales which do not recover "the cost of production of the goods, the administration and selling costs with respect to the goods, and an amount for profit." In this investigation, the Deputy Minister included as a cost of the subject goods USX's cost of settling the railroad litigation. Having calculated that USX's

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1 I affirm the Deputy Minister's Determination on Remand with regard to the short term interest income issue.

2 The B&LE Railroad, while owned by USX, had been part of its Steel Group. The U.S. Steel Group, in turn, was comprised of numerous and diverse entities including the division which actually produced the subject goods. However, the Steel Group also included entities unrelated to steel. The Deputy Minister allocated the B&LE railroad litigation cost over the Steel Group, and a proportionate share to the steel making division in particular.

domestic sales were at a loss, the Deputy Minister then used a constructed normal value in lieu of those sales, pursuant to SIMA section 19(b). That section requires that

> [W]here the normal value of any goods cannot be determined…the normal value of the goods shall be determined…as
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> …
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> (b) the aggregate of
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> (i) the cost of production of the goods
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> (ii) an amount for administrative, selling, and all other costs, and
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> (iii) an amount for profits.

In calculating the normal value, the Deputy Minister included the railroad litigation expense under section 19(b)(ii) as among "all other costs" relating to the subject goods.

Section 11(c) of the SIMA Regulations, promulgated by the Deputy Minister, in turn defines "administrative, selling and all other costs" as:

> (i) all administrative and selling costs that are "*directly attributable* to the production and sale of the goods ";
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> (ii) any warranty costs "*attributable* to the goods"; and
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> (iii) "the estimated amount of all selling, administrative, and other costs…that are *attributable* to the goods but not included in (i) and (ii)."

(Emphasis added).

II. The Determination on Remand

A review of the decisions in this case concerning the B&LE cost issue is a good starting point. The Deputy Minister's reasoning for his initial determination was as follows:

> [W]hile USX retained liability for the eventual settlement and charged the expenses relating to the judgment to U.S. Steel's operations in 1993, U.S. Steel could not allocate these charges to its railroad operations because the company had sold B&LE in 1988. 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 a general corporate nature.
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> As the expenses were general expenses of U.S. Steel, a portion of these expenses were allocated to Steel Operations, a division operating within U.S. Steel Group.[3]

In essence, the Deputy Minister asserted that the B&LE costs are "attributable" to the subject goods, not as direct costs of the subject goods, but as general corporate expenses of U.S. Steel Group.

In its *Memorandum Opinion and Order*, this Panel unanimously held, in language worth quoting in full, that:

> 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.
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> 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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> 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

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[3] *Brief of the Deputy Minister of National Revenue for Customs and Excise* ¶¶ 72 and 73.

> 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.
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> 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 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.

Memorandum Opinion and Order, 20-21. It is against this backdrop that the *Determination on Remand* must be reviewed.

The Deputy Minister in his remand determination held that the B&LE expense, while not a direct cost of the subject goods, was "properly categorized as a general overhead expense of the U.S. Steel Group" for the following reasons.[4] However, much of this information was already before the Panel when it issued its Order remanding this matter.

1) *USX itself, in its 1993 10-K statement, had recorded the B&LE expense to the general overhead expense of the Steel Group.*

But, the Panel already rejected USX's accounting as a basis for attributing the B&LE cost to the Group[5]

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[4] *Determination on Remand*, 2.

[5] *Memorandum Opinion and Order*, 20. "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."

2) *USX is comprised of three main groups. The two groups other than the Steel Group are engaged in activities unrelated to steel production.*

This adds little to the analysis. The fact that it may not have been appropriate to charge the railroad expense to the other two USX groups does not help to explain why the cost is part of the U.S. *Steel Group's* "general overhead". The Panel has already held that the expense cannot be charged to the Steel Group by default.

3) *"The B&LE Railroad was historically part of the U.S. Steel Group before the railway was sold. USX is therefore reporting the expenses in the manner consistent with past practices…"*

This information was also already before the Panel when it remanded. The Panel remanded for "sufficient *further* explanation" of why the Group was charged.

4) *"The B&LE railroad transported iron ore to steel mills. This activity relates to the production of steel, and is one component of a large integrated steel producer."*

This thin reed hardly supports the conclusion that the B&LE expense is "attributable" to the subject goods. There is nothing in the administrative record confirming that the B&LE actually transported ore for the goods under investigation, much less for U.S. Steel's goods. The record is silent on the role - if any - played by B&LE in U.S. Steel's "integrated operations".[6] Therefore, in the absence of *any* support in the record, the Deputy Minister's reliance on this point can be only considered unreasonable.

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[6] The record is hopelessly vague on this point. It states that "other railroads" as well as the B&LE were illegally transporting iron ore to unnamed mills in three different states from the 1950's to the 1980's. *Administrative Record, Index Page 99, Tab C, page 90 (quoting* public data from 1993 Form 10-Q). No connection to U.S. Steel's production, much less during the period under investigation, has been made at all.

The Deputy Minister, in his Response to the Complainants' challenge to the remand, concedes that: "In retrospect, given another opportunity to investigate the issue and collect additional information, … a connection *could* be established between the railroad and the goods produced by U.S. Steel, the steel-making division."[7] Until such information is developed, the Deputy Minister's determination remains unsupported by evidence of record and, admittedly, the requisite connection with the subject goods has not been made. Without any support in the record at all on this point, the Deputy Minister's determination remains unreasonable.

Under SIMA section 19(b) and Regulation 11(c)(iii), only costs "attributable" to the subject goods may be included in the costs calculations. Neither the statute nor the regulations speaks of indirect costs merely "connected" to the goods. We had unanimously remanded in order for the Deputy Minister to supply the reasoning for any such "connection". However, that was obviously in order to determine whether such a "connection" was of sufficient degree that it could be the basis for attributing the costs to the goods. In any event, since no further connection of any degree was presented following remand, we can hardly conclude that the B&LE cost was "attributed" to the subject goods.

The majority in its Opinion concedes that the Complainants' challenge to the remand determination is reasonable, but also finds that "it is unable to decide that the Deputy Minister's interpretation is unreasonable." Without providing any specifics, the majority merely concludes that the Deputy Minister's interpretation, "in a more complete analysis than was done previously" is "supported by evidence 'connecting' the cost indirectly to the subject goods." Without any explanation of how the four "new" items identified on remand, *supra*, are of any significance at all, I am unable to join the majority.

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[7] *Response of the Deputy Minister to the U.S. Complainants' Challenge to the Determination on Remand*, 3 (emphasis added). If the Deputy Minister were to seek the opportunity to re-open his investigation to obtain such information, this Panel should seriously consider granting him that opportunity. However, that is not the present posture of this case. In any event, such information, if it does exist, would seem to be evidence of *direct* costs, not any general overhead.

The majority further concludes that: "Since the [B&LE] cost lacks a connection elsewhere within the company, it is not unreasonable to view it as a general cost of doing business that must be borne throughout the entire U.S. Steel Group." But it *is* unreasonable unless *some* sufficient basis for treating it as such can be articulated.

More to the point, this conclusion merely restates what the Panel has already squarely rejected. This Panel has unanimously held that: "The Deputy Minister is not relieved of the necessity of finding a connection between the cost and subject goods merely because the apparently appropriate cost centre has been sold." Unless the Deputy Minister is now to be relieved of that necessity, his determination can be no more reasonable now than it was when we remanded the matter to him. Put another way, without the requisite connection to the subject goods, costs for *specific* non-subject goods (or services such as a railroad) cannot be converted to general overhead. The point of the remand, I had thought, was to allow the Deputy Minister to present further sufficient explanation of that connection to the subject goods. That connection clearly was not made on remand and, therefore, I cannot affirm.

The majority also concludes that the Deputy Minister has "sufficient discretion" under SIMA and the regulations to find that "the anti-trust expense, although admittedly different in origin from other general corporate overhead expenses, has become part of the generalized administrative expenses that is attached to and must be spread over the Steel Group". I refer to this Panel's unanimous finding that the Deputy Minister "ha[d] failed to articulate a reason, other than the reference to *Gypsum*, for inclu[ding the B&LE cost] in general overhead expense."[8] As explained above, the additional four reasons in the remand clearly are not a reasonable basis for including the cost in overhead.

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[8] *Memorandum Opinion and Order*, 20.

I am not unmindful of the deference which the Deputy Minister is due in interpreting SIMA and the regulations.[9] However, no amount of deference would permit the four "new" items on remand to constitute a reasonable basis for treating the B&LE railroad expense as overhead.

For the foregoing reasons, I respectfully dissent.

SIGNED IN THE ORIGINAL BY:

Robert E. Ruggery

ROBERT E. RUGGERI

Issued on the 2nd day of November, 1995.

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[9] *See, e.g., Pezim* v. *British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 591 (Iacobucci J.) ("the concept of specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.").