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

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**

Before: Kathleen F. Patterson, Chair
Henri C. Alvarez
Howard N. Fenton, III
Lauren D. Rachlin
Leon E. Trakman

MEMORANDUM OPINION AND ORDER
June 14, I994

C.J. Michael Flavell, Q.C. and Geoffrey C. Kubrick of Flavell Kubrick & Associates argued for Bethlehem Steel Export Corp., U.S. Steel, A Division of USX Corp., National Steel Corporation, Inland Steel Company, and LTV Steel Company. With them on the brief was Paul M. Lalonde.

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

John T. Morin, Q.C. of Fasken Campbell Godfrey argued for Dofasco Inc. With him on the brief was Steven K. D'Arcy.

Ronald C. Cheng and Gregory O. Somers of Osler, Hoskin & Harcourt for Sidbec-Dosco, Inc. did not file briefs or make oral argument, but did file a post-hearing submission and indicated support for Dofasco as complainant and for Revenue Canada.

Michael Ciavaglia of the Department of Justice argued for the Deputy Minister of National Revenue, Customs, Excise and Taxation. With him on the brief was Anne Michaud.

I. INTRODUCTION

This panel review was requested and complaints were filed by Bethlehem Steel Export Corp.("Bethlehem"), U.S. Steel, A Division of USX Corp. ("USS"), National Steel Corporation ("National"), Inland Steel Company ("Inland"), LTV Steel Company ("LTV"), Dofasco Inc. ("Dofasco"), Sidbec-Dosco ("Sidbec") and Stelco Inc. ("Stelco") to contest the final determination made by the Deputy Minister of National Revenue for Customs and Excise ("Revenue Canada") of dumping of certain cold-rolled steel sheet products from the United States of America.[1] This Binational Panel has jurisdiction to resolve the issues raised pursuant to Article 1904(2) of the Canada-United States Free Trade Agreement and Section 77.15 of the Special Import Measures Act ("SIMA").[2]

II. ADMINISTRATIVE HISTORY

On November 16, 1993, following the October 29, 1993, filing of a complaint by Stelco and Dofasco, Revenue Canada initiated an investigation under §31(1) of SIMA into the alleged dumping of certain cold-rolled steel sheet products ("Subject Goods") originating in or exported from the United States

---

[1] Certain Cold-Rolled Steel Sheet Originating In Or Exported From The Federal Republic Of Germany, France, Italy, The United Kingdom And The United States of America , (Statement of Reasons), June 29, 1993 (hereinafter "Statement of Reasons"). See also Canadian Gazette, Part I, Vol. 127, No. 28, at 2200 (July 10, 1993).

[2] R.S.C. Ch. S-15 (1985) as amended.

of America as well as the Federal Republic of Germany, France, Italy and the United Kingdom.

On March 31, 1993, Revenue Canada made a preliminary determination that certain of the Subject Goods from the United States were being dumped. On June 29, 1993, Revenue Canada issued a Final Determination that certain Subject Goods from the United States were being dumped in Canada by the following weighted average margins:

Bethlehem	0.0%
USS - Gary Mill	8.0%
- Irvine Mill	16.4%
National	0.0%
Inland	0.9%
LTV	8.7%

On July 29, 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

A complaint was filed on September 1, 1993 by Bethlehem, USS, National, Inland and LTV as a group. ("The U.S. Complainants"). Complaints were filed on the same day individually by Dofasco, Sidbec and Stelco.

Both The U.S. Complainants and Dofasco filed briefs on December 3, 1993, setting forth their respective positions.[3] Revenue Canada filed a brief in support of its actions on January 31, 1994. Dofasco and Stelco filed briefs on February 2, 1994, to support Revenue Canada's actions on the issues raised by the U.S. Complainants. The U.S. Complainants and Dofasco filed reply briefs on February 16, 1994.

A hearing took place in Ottawa, Ontario on March 9, 1994 where all parties that had filed briefs presented oral argument before the Panel. On that same day, all parties, pursuant to a Panel request, filed brief papers summarizing their positions on the standard of review for each issue.

Pursuant to Panel request for further analysis of the calculation of pension costs for USS, Revenue Canada filed a post-hearing submission on March 17, 1994; U.S. Complainants and Sidbec filed responsive submissions on March 24, 1994.

No motions were submitted for Panel consideration at any time in the proceedings.

---

[3] Bethlehem, National and Inland supported USS and LTV with respect to issues relating to accrual accounting and "FAS 106" and opposed the issue raised by Complainant Dofasco, also relating to FAS 106. (See infra at 32 discussion of FAS 106.) However, because the three U.S. Complainants received zero or *de minimis* margins, they took no position on any of the other issues raised by USS and LTV.

IV. SUMMARY OF ISSUES AND PANEL DECISION

The U.S. Complainants argue that Revenue Canada erred in the following respects:

1. in including the following costs in its §§16(2)(b) and 19(b) of SIMA profitability calculation:

> a. corporate and financial expenses of the parent (USS);
> b. interest on long-term debt (USS);
> c. bankruptcy expenses (LTV); and
> d. extraordinary charge under Coal Industry Retiree Health Benefit Act of 1992 (LTV);

2. in (a) changing LTV's method of allocating certain corporate costs evenly to all mills to a method that related expenses directly to each mill and (b) changing USS's method of allocating certain expenses on the basis of cost of goods sold to a method that allocated the expenses on the basis of sales revenue, where both US Complainants' methods were in accordance with generally accepted accounting principles;

3. in allocating a portion of the "Transition Obligation" (a "catch-up" accounting requirement for retirement health care costs relating to prior years) to a period before the accrual accounting standard had been adopted by USS

and in allocating accrued health care costs to LTV where its intervening bankruptcy allegedly caused such obligation to cease;

4. in not including in its §§16(2)(b) and 19(b) of SIMA calculations the following items:

a. pension credits (USS)
b. income from employee benefit funds (LTV)
c. short term financing credits (LTV)
d. certain other corporate income (USS)

5. in not expressly addressing why the period chosen by Revenue Canada within which to determine profitability under §16(2)(b) of SIMA is a "reasonable period of time";

6. in the method of interpreting §16(1)(a) to mean that each mill is a separate exporter and in excluding certain U.S. sales so that §15 of SIMA was not used and, instead, normal value was constructed under §19 of SIMA; and

7. in not considering all "closely resembl[ing]" goods as required by §2(1) of SIMA.

Dofasco argues that Revenue Canada erred in not allocating the Transition Obligation to the year the accounting principle was adopted and to subsequent years under investigation.

Upon examination of the administrative record, the relevant law, and after full consideration of the arguments presented by the parties in their briefs and at the hearing, the Panel:

REMANDS to Revenue Canada that aspect of the final determination which concerns the allocation under §§16(2)(b) and 19(b) of the charge against LTV mandated by the Coal Industry Retiree Health Benefit Act of 1992. Revenue Canada is instructed to reconsider its conclusion that the charge is related to LTV's steel production on the basis of evidence on the record and to take such further action as is not inconsistent with this decision.

REMANDS to Revenue Canada that aspect of the final determination which concerns the failure to consider pension assets for USS and income from the Voluntary Employees' Beneficiary Association Trust for LTV in computing pension and "other post-employment benefit" costs for purposes of §§16(2)(b) and 19(b) calculations. Revenue Canada is instructed to reconsider its conclusion not to consider related income in its calculation of pension and other post-employment benefit costs for those companies on the basis of evidence on the record and to take such further action as is not inconsistent with this decision.

REMANDS to Revenue Canada that aspect of the final determination which holds that returns from certain near liquid short-term investments, as well as income from other investments are part of the investment activities of a company and that they cannot be considered in reducing the financing or

interest charges allocated to steel production. In light of Revenue Canada's policy to include income from operating cash accounts and revenue from scrap in §§16(2)(b) and 19(b) calculations, Revenue Canada is instructed to explain, clarify, and reconsider the following, on the basis of evidence on the record and to take such further action as is not inconsistent with this decision:

a. Whether (i) interest income on LTV's short-term investments, and (ii) interest income on USS' investments, relate to financing or interest costs deemed to be related to steel production.

b. If any of the above-mentioned interest income is related to financing or interest costs deemed to be related to steel production, Revenue Canada should include such income as an offset against such financing or interest costs in LTV's and USS' §§16(2)(b) and 19(b) calculations.

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

V. STANDARD OF REVIEW

The Parties vary with respect to the applicable standards of review. Stelco and Sidbec argue that all issues should be subject to a "reasonableness" standard.[4] Dofasco argues that all issues, but one, should

[4] Stelco, Classification of Issues (March 9, 1994).

be treated as issues of fact, and should be subject to an "erroneous finding of fact" standard of review.[5] Revenue Canada argues that issues of law should be subject to a standard of review based on "reasonableness applied with curial deference."[6] Issues of fact, it asserts, should be subject to a standard of review based on "whether the finding in issue is supported by evidence in the administrative record."[7] It adds that "[t]his Panel is not entitled to reweigh the evidence nor to set aside the finding because it might have reached a different conclusion than the Deputy Minister."[8] Revenue Canada also treats two issues, allocation of corporate overhead and allocation of expenses based on sales, as not "rais[ing] any issue subject to review pursuant to former §28 of the Federal Court Act."[9]

---

[5] The exception is the treatment of "the transition obligation" which Dofasco treats as an issue of law subject to a "reasonableness" standard. Issues To Be Argued -- Standard of Review (March 9, 1994).

[6] Revenue Canada subjects the following issues to this standard: costs of production for profitability, inclusion of corporate expenses in costs, interest on long term debt, bankruptcy expenses, exclusion of certain sales, post-retirement benefits and like goods. See Position of the Deputy Minister of National Revenue for Customs and Excise on the Standard of Review (March 9, 1994).

[7] Id.

[8] These issues are: offset of interest expenses with financing credits - LTV; Coal Retiree Act - LTV; and pension credit offset. Id.

[9] Id.

The U.S. Complainants take a different view. They classify the majority of issues as "law and fact", and subject them to a "reasonableness" standard of review.[10] They classify one issue, the attribution of costs to subject goods, as an issue of jurisdiction which they subject to a "correctness" standard of review. They construe two further issues as issues of jurisdiction and law, to be subject to a "correctness" standard as well.[11] Finally, U.S. Complainants treat the remaining issues, "failure to consider offsetting FAS 106 assets and failure to consider closely resembling goods" as issues of law, to be subject to a "correctness" standard because they do not fall within the expertise of the Deputy Minister.[12]

The Panel has determined, first, that no material issue of jurisdiction arises that requires application of a correctness standard of review. Second, the questions of law at issue in this matter are subject to a reasonableness standard. Third, with respect to questions of fact, greater deference must be extended to decisions of Revenue Canada. However, there must be some evidence to support Revenue Canada's decision so that it cannot be said that

---

[10] These issues are: inclusion of irrelevant costs, other changes to reasonable allocations under GAAP (except "failure to consider offsetting FAS 106 assets"), retroactive allocation of FAS 106 transition obligation, and inclusion of FAS 106 transition obligation where no legal obligation to fund. See Revised Classification of Issues (March 10, 1994).

[11] These issues are: failure to justify the "reasonable period of time" criterion under §16(2)(a) and exclusion of relevant sales of like goods, including interpretation of §16(1)(a). Id.

[12] Revised Classification of Issues, supra note 10. See Canada (Attorney General) v. Mossop , [1993] 1 S.C.R. 544, 577-578; see also infra note 16 and accompanying text.

the decision was made in a perverse or capricious manner or without regard for the material before it. In applying this standard of review, there must be objective evidence that Revenue Canada acted reasonably. The Panel will discuss each of these three questions in order.[13]

A. Issues Of Jurisdiction

The Panel acknowledges the general contention of U.S. Complainants that a failure by Revenue Canada to justify the "reasonable period of time" criterion under §16(2)(b) of SIMA and the interpretation of §16(1)(a) of SIMA with respect to excluding relevant sales of like goods might be subject to a correctness standard of review. However, as these issues were presented and resolved in this review, they are issues of law and are subject to the standard of review discussed below.[14]

Regarding other alleged errors of jurisdiction, Revenue Canada acted within its jurisdiction under the SIMA. The agency exercised jurisdiction in a proper manner in the circumstances and did not violate any fundamental principle of natural justice.

---

[13] The Panel is aware of the recent decision in THE MATTER OF: CERTAIN FLAT HOT-ROLLED CARBON STEEL SHEET PRODUCTS ORIGINATING IN OR EXPORTED FROM THE UNITED STATES (INJURY), Panel No. CDA-93-1904-07 (1994). The standard of review used in that case is not appropriate here, however; that case discussed a privative clause not applicable in this case.

[14] See discussion of these two issues at Sections X and XII, infra, at 49 and 58, respectively.

B. Issues Of Law

The Panel determines that there must be a rational basis for Revenue Canada's determinations in law, viewed in light of the statute and regulations, as well as its expertise. In determining this rational basis objectively, the Panel has considered that which is reasonable for Revenue Canada to do in the circumstances and has taken into account, inter alia, the following factors: the statutory authority vested in Revenue Canada under SIMA, the manner in which that authority was interpreted, and the effect of that interpretation upon the Parties to this dispute. The issue is not whether the Panel would have arrived at the same decision, nor that it would decide the matter on the basis of the same criteria.

Regarding matters of statutory interpretation, the Panel adopts a reasonableness, rather than a correctness, standard of review. We are of the opinion that Revenue Canada has the expertise to interpret and apply §§15, 16 and 19 of SIMA; it does so regularly and is statutorily authorized to do so. In addition, this case involves no extraordinary issue of law requiring the application of a different standard of review.[15]

---

[15] Our conclusion that Revenue Canada's administrative decision should be subject to a reasonableness standard of review is based upon §28(1) of the Federal Court Act (as it existed at the time of the Canada-United States Free Trade Agreement). Section 28(1) provides:

> Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal Board, Commission, or other Tribunal, upon the grounds that the Board, Commission or

The decision to apply a reasonableness standard in matters of law is supported both by the Supreme Court of Canada and by prior Binational Panels. The Supreme Court of Canada has held that particular deference should be given to findings of law in areas where the decision maker has particular expertise.[16] Revenue Canada has particular expertise in applying the SIMA to anti-dumping decisions.[17] In addition, other binational panels have held that Revenue Canada's decisions are subject to "reasonable interpretation" regarding questions of law within its expertise.[18] While the Gypsum Panel advised against automatically deferring to Revenue Canada on

---

Tribunal: (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[16] Mossop, supra note 12 at 609, citing (L'Heureux-Dubé J., dissenting) Zurich Insurance Co. v. Ontario (Human Rights Commission) , [1992] 2 S.C.R. 321; United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316, 335-36.

[17] See 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 OF AMERICA, Panel No. CDA-93-1904-01 at 9 (1993) (hereinafter "Gypsum Panel").

[18] See IN THE MATTER OF: CERTAIN BEER ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA BY G. HEILEMAN BREWING COMPANY, INC., PABST COMPANY, AND THE STROH BREWERY COMPANY FOR USE OR CONSUMPTION IN THE PROVINCE OF BRITISH COLUMBIA, Panel No. CDA-91-1904-01, at 19 (1992) (hereinafter "Beer Panel"); IN THE MATTER OF: CERTAIN MACHINE TUFTED CARPETING ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA, Panel No. CDA-92-1904-01, at 7 (1993) (hereinafter "Tufted Carpeting Panel").

questions of law, it nevertheless applied a reasonableness standard of review in evaluating Revenue Canada's treatment of certain interest expenses.

C. Issues Of Fact

The Panel extends greater deference to Revenue Canada in regard to questions of fact than to questions of law. In particular, §28(1)(c) of the Federal Court Act provides that decisions or orders of boards, commissions or tribunals can be set aside only when they are "based...on an erroneous finding of fact that...[is] made in a perverse or capricious manner or without regard for the material before it [here, Revenue Canada]."[19] This standard of review significantly limits judicial review of factual determinations, even in the absence of a privative clause. In National Corn Growers Association v. Canada, the Supreme Court of Canada held that, in the case of the privative clause contained in §76 of SIMA, it "will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law." [20] As there is no privative clause in this case, it could be argued that the standard of review to be met by Revenue Canada may be somewhat higher. In E.W. Bickle v. M.N.R., the Federal Court of Appeal held that, in the absence of a privative

---

[19] The Panel notes with approval the emphasis placed by the Tufted Carpeting Panel upon the above quoted language of § 28(1)(c). See Tufted Carpeting Panel supra note 18 at 8. However, this Panel believes that a more fully articulated standard of review should be applied to questions of fact in this case.

[20] Nat'l Corn Growers Ass'n v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324, 1369-70.

clause, the standard to be met on an issue of fact was whether there was evidence upon which Revenue Canada could "properly" have reached its decision.[21]

For purposes of this case, the Panel does not find the differences between the standard of review of factual issues set out in National Corn Growers Association and in E.W. Bickle to be significant. The relevant question here is not whether there is any evidence whatsoever which supports Revenue Canada's determinations of fact. In issue is whether there is evidence of a nature that indicates that Revenue Canada could reasonably have reached the determination it did.

In applying this standard of review, the Panel rejects the blanket contention, argued by counsel for Revenue Canada, that Revenue Canada "has the right to be wrong"[22]. Similarly the Panel rejects the assertion of Revenue Canada that the Panel simply apply a "no evidence" standard of review, reversing findings of fact only when there is no evidence in the record to support Revenue Canada's decision.[23] The Panel believes that neither of

---

[21] E.W. Bickle v. M.N.R., (1981), 2 C.E.R. 323, 327 (F.C.A.).

[22] Transcript of Public Hearing, Cold Rolled Steel Sheet, File No. CDA-93-1904-08 at 162. (hereinafter "Hearing Tr. ").

[23] Revenue Canada asserts in its brief (at 32) that the Beer Panel adopted the "no evidence" test in reaching its determination on the facts. While the Beer Panel did refer to the "no evidence" test articulated in Nat'l Corn Growers Assn. v. Canada , supra note 20, it held that there was no evidence in support of the agency decision. Accordingly, it held that it did not have to decide what amount

these positions comports with the standards set out above[24]. The Panel may well be compelled to defer to a decision of Revenue Canada that the Panel believes is wrong, but only where there is some evidence, objectively construed, that Revenue Canada acted reasonably in so deciding.

VI. INCLUSION OF CERTAIN COSTS UNDER §§16(2)(B) AND 19(B) OF SIMA

Complainants USS and LTV assert that Revenue Canada erroneously included certain costs when calculating profitability under §16(2)(b) and in constructing costs under §19(b) of SIMA. The U.S. Complainants contend that the inclusion of these costs in part led Revenue Canada to determine that the Complainants sold the Subject Goods in the Canadian market below fair value.

A. USS

USS is part of the corporate structure of USX, Inc. USX is a holding company consisting of two divisions. US Steel Group is a division of USX containing over thirty units engaged in steel related activities.[25] USS is one of

---

of evidence was necessary to support the agency decision. Beer Panel supra note 16 at 19-20.

[24] The Tufted Carpeting Panel noted that Revenue Canada had withdrawn its assertion that questions of fact should be judged on a "patently unreasonable" standard. Tufted Carpeting Panel supra note 18 at 8.

[25] Marathon, a petroleum concern, is the other division of USX.

the units within the US Steel Group. Of these units, only USS produces the Subject Goods.

Within this corporate structure, certain costs arise that relate to maintaining the parent entity. These costs are allocated by the parent, USX, to the two divisions it holds. For financial reporting purposes, the USX corporate costs passed down to the US Steel Group division are not apportioned among US Steel Group's units. Interest on financing obligations incurred at the parent level receives similar treatment.

Revenue Canada included a portion of these costs in calculating the profitability of USS's U.S. sales under §16(2)(b) and in constructing the costs of the product under §19(b). Citing the Gypsum Panel's decisIon, Revenue Canada contends that the parent corporate expenses and interest costs must be allocated to the production of steel. In Gypsum, the Panel addressed the inclusion of costs associated with a corporation's takeover defense in a SIMA §19(b) computation. The Gypsum Panel held 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."[26] Revenue Canada viewed USX's parent and interest costs as falling within this mandate and included the costs when determining profitability under SIMA §16(2)(b) and as part of the constructed costs under §19(b).

[26] Gypsum Panel supra note 17 at 29.

Complainant USS asserts that the general corporate and interest costs of the parent are not attributable to the production of steel. USS argues that Revenue Canada failed to base the attribution of these costs to the production of the Subject Goods on evidence within the record. Therefore, USS submits that the corporate and interest costs of the parent were improperly employed in determining profitability under SIMA §16(2)(b) and in constructing costs under §19(b).

B. LTV

LTV was in reorganizational bankruptcy at the time the Subject Goods were produced. LTV incurred expenses related to their bankrupt status during the period of investigation. LTV reported these costs as administrative expenses.

Revenue Canada included the bankruptcy expenses in its SIMA §§16(2)(b) and 19(b) calculations. Revenue Canada determined that the bankruptcy costs were essential to the production of the Subject Goods. Also, under the Gypsum analysis discussed above, Revenue Canada claims the bankruptcy costs were properly included in the §§16(2)(b) and 19(b) computations.

LTV contends the bankruptcy expenditures are unrelated to the production of the Subject Goods. LTV characterizes the bankruptcy expenses as non-operational. From that premise, LTV argues that the costs are not

attributable to the Subject Goods and cannot be included when computing profitability of sales under SIMA §16(2)(b) or in constructing costs under §19(b).

During the period of investigation, LTV also incurred an extraordinary charge related to its former coal operations. This liability arose as a result of the passage of the U.S. Coal Industry Retiree Health Act of 1992.[27] Under the Coal Retiree Act, companies engaged in coal mining during specified years, which predate the period of this investigation, incur a current liability for the coal miners' pensions earned during the years specified. This liability attached at the passage of the Act, which occurred within the period of investigation. LTV operated coal mines during the years designated in the Coal Retiree Act, and thereby accrued liability under the Act. The extent of liability LTV incurred under the Act is directly linked to the number of miners LTV employed during the former periods. Although LTV still owns a number of coal properties, LTV no longer mines coal nor was any coal which LTV previously mined used in the production of the Subject Goods.

Revenue Canada included the expense LTV incurred as a result of the Coal Retiree Act as a cost under §§16(2)(b) and 19(b). Again, Revenue Canada cites the Gypsum Panel's decision as authority for inclusion of this cost. Revenue Canada points particularly to the language in Gypsum stating

[27] 26 U.S.C. §§ 9701 et seq. (hereinafter "Coal Retiree Act").

that all costs "no matter how extraordinary" must be allocated to all products.[28] As steel was the only product LTV manufactured at the time the cost was incurred, Revenue Canada argues that this cost must be attributed to steel.

LTV contends that the liability arising from the Coal Retiree Act is not attributable to the production of Subject Goods. LTV first asserts that extraordinary charges in general cannot be attributed to the production of a good. It then claims that, in this instance, such attribution constitutes an error because the Coal Retiree Act costs are attributable to coal, not steel.

C. Treatment of Costs Under §§16(2)(b) and 19(b)

The U.S. Complainants argue in their briefs that Revenue Canada erred in including the costs discussed above in calculating profitability under §§16(2)(b) and in constructing costs under §19(b) because they did not relate to steel "operations" as required by SIMA. The parties also assert that these were examples of costs that should not be counted in §16(2)(b) because they were not related to production of the goods, or administration and selling costs related to these goods, although they might well be included as "other costs" under §19(b).[29] In raising this argument, Complainants ask the Panel to

---

[28] Gypsum Panel supra note 17 at 29.

[29] Section 16(2)(b) of SIMA provides that in determining normal value of domestic sales, Revenue Canada shall not consider "any sale of like goods that, in the opinion of the Deputy Minister, forms part of a series of sales of goods at prices that do not provide for recovery in the normal course of trade and within a reasonable period of time of the cost of production of the goods, the administration and selling costs with respect to the goods and an amount for profit."

resolve an issue that has never been directly addressed, that is whether the difference in statutory and regulatory language might result in a profitability calculation under §16(2)(b) that yields a lower total cost for the goods than the constructed cost calculation under §19(b).

Revenue Canada argues that while the language and purpose of the two sections are different, the calculations required to satisfy each one are essentially the same, and the resulting total costs will invariably be essentially the same. The §16(2)(b) calculation is to determine if in fact the domestic goods in question have been sold at a profit, while the §19(b) calculation is for the purpose of constructing the actual costs of producing the exported goods. Revenue Canada suggests that notwithstanding the variation in the wording, it is necessary to include the same component figures in both calculations. Furthermore, relying on Gypsum, Revenue Canada argues that both calculations must include all costs, no matter how remote or extraordinary.

U.S. complainants during the hearing withdrew their request that the Panel review the costs in issue to determine if they should be excluded under §16(2)(b), although included under §19(b), choosing instead to focus their attention solely on the appropriateness of the inclusion of the disputed costs in

---

Section 19(b) provides a method of determining normal value on the basis of the cost of the export sales under investigation in cases where normal value cannot be based on the prices of domestic sales. Section 19(b) states that normal value shall be determined by "the aggregate of (i) the cost of production of the goods, (ii) an amount for administrative, selling and all other costs, and (iii) an amount for profits" (emphasis added).

the §16(2)(b) calculation.[30] The Panel finds that in this case, the costs in question are appropriately treated in the same manner for purposes of the two sections of SIMA. Therefore, in resolving the issues before us, the Panel is not confronted with any questions of costs that might be included under a §19(b) cost construction, but excluded in a §16(2)(b) profitability calculation.

D. Standard of Review

The U.S. Complainants challenge the inclusion of the corporate and financial expense, interest on long-term debt, bankruptcy expenses, and the Coal Retiree Act charges for essentially the same reason: they do not relate to the costs of the Subject Goods as required by §§16(2)(b) and 19(b) of SIMA. Revenue Canada included these costs as part of general corporate overhead that was proportionately allocated to steel production in the case of USS, and completely allocated to steel production in the case of LTV. The Panel regards these decisions as questions of law and fact, which are addressed under the standards articulated above.

E. Discussion and Findings of the Panel

The Panel finds that Revenue Canada acted reasonably in determining that certain of the general corporate overhead costs should be included in some form in §§16(2)(b) and 19(b) calculations. There are going to be certain

---

[30] See, e.g., Hearing Tr. supra note 22 at 132-33, 390-94.

normal corporate or "headquarters" costs of the administration of a business that will not directly relate to the producing or selling of particular goods, or even to the administration of that process at the operational level. Each operational part bears a portion of these costs, and in determining the profitability of that part of the business, such costs can properly be taken into account.

Revenue Canada acted reasonably when it allocated general corporate and interest expenses of the parent USX to USS steel operations in calculating the profitability of these steel operations. Failure to attribute some portion of these expenses would provide an inaccurate gauge of the profitability of steel production. Similarly, failure to include these expenses in constructing the costs of steel production would yield an equally inaccurate figure.

The Panel also finds that Revenue Canada acted reasonably in including the LTV bankruptcy expenses in its profitability calculations for LTV's steel operations. While bankruptcy costs are an unusual expense, they relate directly to the general operation of the corporation. 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.

These general overhead costs are to be distinguished, however, from costs that specifically relate to other operations of the corporation, which cannot reasonably be included in §16(2)(b) determinations, as the Beer Panel

has already stated,[31] nor in a §19(b) cost construction. 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 §16(b)(2) profitability calculation and 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.

F. Coal Retiree Act Liability

In calculating the §16(2)(b) costs, Revenue Canada allocated the charge taken by LTV under the Coal Retiree Act to its steel production facilities apparently on the theory that as an obligation accrued by the company, it had to be attributed to the only income producing operation the company had, in this case steel production. Revenue Canada cites the Gypsum Panel decision for authority. As discussed above, that Panel held that all costs incurred by a company during the period of investigation had to be included in a §19(b) calculation. The Beer Panel's decision is more appropriate in this instance,

---

[31] Beer Panel supra note 18 at 51-53.

however, in its determination that costs specifically attributable to a separate operation cannot be included in determining profitability under §16(2)(b)[32].

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.[33] Thus, while it is true that the liability of LTV for the charge arose in 1992 because of 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.

The situation is substantively different from that reviewed by the panel in 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 panel indicated that such expenses had to be included in constructing the cost of the product under §19(b). The expense was at the general corporate level

---

[32] Id.

[33] Coal Retiree Act, 26 U.S.C. at §§ 9704(a), 9706(a).

and was not attributable to a specific operation of the company not producing the goods in question. The Panel regards Revenue Canada's treatment of the other three challenged costs consistent with this reasoning as appropriate. However, the Coal Retiree Act charge in this case more closely parallels the determination of the Beer Panel, which held that costs allocated to one operation were directly associated with another, and could not be included in making the §16(2)(b) profitability determination for sales of the first operation. The Panel adopts this reasoning for purposes of §19(b) cost construction as well.

In its final determination, Revenue Canada compares LTV's obligation under the Coal Retiree Act to the liability the company might incur through legal fees or environmental clean-up costs the company would pay during a review period that were based on prior activities of the business. This comparison somewhat overstates the inclusiveness of the requirements of §16(2)(b) and of §19(b). Revenue Canada's position that a liability arising from the company's past activity must be taken into account during the period in which the company meets the liability is fundamentally sound. Were the charge an obligation for retired steelworkers employed by other firms no longer in business, Revenue Canada would be correct in including it in a construction of the costs of steel production or a profitability analysis of the steel operations. The liability actually at issue here, however, does not bear the relation to steel operations that such a charge for steelworkers would bear.

The Coal Retiree Act amounts to a U.S. government imposed rescue of the United Mine Workers retirement funds. The Act covers the costs of benefits to coal retirees, particularly of firms that are no longer in business (so-called "orphan" retirees). The costs are to be paid by the companies still in existence that had participated in the earlier negotiated plans that established those funds.[34] LTV coal operations were party to those earlier agreements, and participated in the establishment and funding of the original coal retiree plans. Under the 1992 Act, LTV was assigned liability for a percentage of the orphan retirees of defunct firms based on the percentage the LTV retirees represented of the pool of retirees of still extant firms. This is the origin of the charge the company took against its 1992 earnings.

While removing this charge from LTV's overhead and allocating it to the idled coal operations does result in a cost on the company's books that is not captured in Revenue Canada's §§16(2)(b) and 19(b) calculations, this is not materially different from any separate attribution to a money-losing or non-revenue generating operation. Revenue Canada has itself acknowledged that costs related to non-revenue generating activities of separate operations need not be included in §16(2)(b) calculations.[35] The Panel believes this principle is equally applicable to Revenue Canada cost construction exercises under §19(b). The determination to allocate costs to separate activities or operations

---

[34] Coal Retiree Act, 26 U.S.C. at § 9706.

[35] See Revenue Canada letter, Administrative Record, Index p. 95, at Tab W (hereinafter "Index").

should be made regardless of the profitability or revenue generating circumstance of that activity or operation.

The Panel is not suggesting that the Coal Retiree Act charge is too remote, or too extraordinary an expense, to be brought within general corporate overhead. Nor is the Panel ignoring the fact that competing Canadian firms may also experience unusual, government imposed expenses on unrelated operations. 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. Such inclusion 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.

VII. REALLOCATION OF CERTAIN COSTS

LTV and USS each take issue with certain methods of allocation used by Revenue Canada with respect to their products.

A. LTV

In its response filed in the administrative proceeding, LTV allocated certain corporate overhead expenses, such as depreciation and plant overhead, using a method "based on company-wide manufacturing costs which result[ed] in a product receiving the same allocated amount regardless of the

mill in which it was produced."[36] Rather than accept LTV's allocation, Revenue Canada calculated production costs by a method that "relat[ed] the expenses in question to manufacturing costs incurred at each of the mills."[37]

LTV argues that its method of allocation is consistent with generally accepted accounting principles (GAAP) and that the revised allocation creates a distortion as to certain costs which are not directly related to specific mills. Revenue Canada argues that its approach is reasonable because costs vary at each mill and, therefore, its revised method of allocation was more successful than LTV's in reflecting the total costs of the product in question. Revenue Canada also argues that it is not bound to follow GAAP in its interpretation of SIMA.

The Panel finds that Revenue Canada's reallocation of LTV's corporate overhead costs was not unreasonable and that there was proper evidence to support the action. Revenue Canada is not required by SIMA to adopt a particular allocation method just because it is in accordance with GAAP. Revenue Canada has stated a preference for applying allocations submitted by the exporter in accordance with its internal books and records, and our review of the record indicates that Revenue Canada adopted these companies' accounting methods more often than not. Nevertheless, SIMA leaves

---

[36] Statement of Reasons supra note 1 at 11.

[37] Id.

Revenue Canada the discretion to adopt other methods where, as is the case here, the facts of the particular case make the other method reasonable and that method is consistent with SIMA.[38]

B. USS

USS allocated its interest and selling expenses to the products under investigation on the basis of the cost of goods sold. Revenue Canada reallocated those expenses on the basis of sales revenue.

USS argues that Revenue Canada's reallocation overstated its product costs by having USS bear the costs of business units which had costs but not sales. In addition, USS argues that its submission was in accordance with GAAP and that it was the "established practice of Revenue Canada . . . to allocate such costs on the basis of costs of sales".[39] Revenue Canada explains the reasons for its reallocation by reference to confidential evidence in the administrative record.[40]

---

[38] See, e.g., The SIMA Policy Manual, v. II, part VIII, c. 4, § 6 providing that the amount allocated for administrative, selling and other costs "generally . . . should be based on an appropriate allocation of such costs by the exporter." That same paragraph also cautions the investigator not to accept allocations at face value. ("[T]he investigator must ensure that the amounts allocated to export sales are reasonable and that there has not been an improper allocation of expenses."

[39] Hearing Tr. supra note 22 at 81-82.

[40] Index supra note 35 at 80, Tab I, pp.3-4.

As stated above, the Panel finds that Revenue Canada is not bound by GAAP. GAAP provides solid guidelines for allocations, but not the only possible methods. Even though USS's method may have been a reasonable one, and possibly even a better one, the Panel is unable to hold that the evidence cited by Revenue Canada, and the interpretation attached thereto, are not reasonable to support the action taken.[41]

VIII. TREATMENT OF TRANSITION AND ANNUAL OBLIGATION COSTS UNDER FASB 106 (ISSUES RAISED BY US COMPLAINANTS AND DOFASCO)

A. Issues

Several issues arise relating to accounting standards and changes thereto for U.S. companies with retirement health care plans for their employees. In the past, companies accounted for such costs on a cash basis. Under Financial Accounting Standards Board Standard No. 106 ("FAS 106"), companies must, by no later than 1993, account each year for the estimated costs of "other post employment benefits" ("OPEB")[42] on an accrual basis (the

---

[41] The Panel notes that there may appear to be a certain inconsistency between our decision on this issue and our decision that Coal Retiree Act charges, relating to a non-revenue generating operation, should not be allocated to the steel operations. Here, however, the question is not whether certain expenses relate to steel production, but rather how to allocate the expenses. We note as well that the question of a possible inconsistency was not raised at any time by the parties.

[42] Essentially, this means all benefits other than pensions, which are governed by the principles of FAS No. 87. See infra at 42 (discussion of FAS 87).

"Annual Obligation"). The companies are also required to "catch up" for OPEB liabilities that should have been accrued in past years. Under this catch-up or "Transition Obligation," companies have the option of (a) charging the full amount of past accrued liabilities to the year in which the FAS 106 standard was implemented or (b) amortizing it over 20 years.

The U.S. steel companies under investigation adopted the requirements of FAS 106 at different times and in different ways. Some of the companies adopted the new standard in 1992 (or earlier) and some in 1993; some accounted for the Transition Obligation in one year; others amortized it over 20 years. Both in its §§16(2)(b) and 19(b) SIMA calculations, Revenue Canada accounted for the Transition Obligation by allocating 1/20 of the amount recognized to the year or years prior to the one in which FAS 106 was adopted. Revenue Canada also decided not to allocate any of the Transition Obligation to the year in which the standard was adopted or to subsequent years under investigation.

Complainant Dofasco argues that the Transition Obligation should have been allocated, not only in the year prior to adoption of the standard, but in the year of adoption and in subsequent years under investigation as well.[43] U.S. Complainants, principally USS, on the other hand, argue that Revenue Canada should not have allocated any of the Transition Obligation to periods before the

[43] Dofasco did not contest Revenue Canada's decision to amortize the Transition Obligation over 20 years for those companies which accounted for the full amount in one year.

accrual accounting was adopted because the accrual basis Transition Obligation was added to actual cash basis health benefit costs, thus causing some double counting. In addition, LTV argues that none of the accrued Annual Obligation expenses should have been included in its cost calculation because they were unfunded, estimated costs. Since LTV was in bankruptcy proceedings, it argues it was under no legal obligation to pay OPEB's in the future "absent a voluntary acceptance of those obligations after the termination of the Chapter 11 bankruptcy...."[44] Because of the uncertainty, LTV indicated its actual cash payouts separately from the accrued portion of the OPEB's in its books.

B. Discussion And Findings of the Panel

The Panel finds that Revenue Canada's treatment of the Transition and Annual Obligation costs was reasonable for all companies and is supported by evidence in the record.

1. Dofasco Issue

SIMA requires Revenue Canada to include all costs in normal value calculations that are properly allocable to the goods under investigation.[45]

---

[44] Hearing Tr. supra note 22 at 120.

[45] Beer Panel supra note 18 at 51-53; Gypsum Panel supra note 17 at 29.

Revenue Canada's decision was based on allocating costs to goods in the period to which the obligations relate. If the obligations related to Subject Goods sold in a period of investigation, then a portion of the Transition Obligation was included in the cost calculations. Dofasco's argument that the Transition Obligation should have been allocated to each subsequent period under investigation does not in any way undermine the factual basis for Revenue Canada's decision, i.e. that the obligations relate to goods from prior periods. Instead Dofasco observes that, from an accounting point of view, if the obligation is amortized over 20 years, it represents a cost on future years that must be recognized in the SIMA calculations.

The Panel does not agree with Dofasco's position. Revenue Canada is empowered and is required to determine whether particular costs relate to the period under investigation. In this case, Revenue Canada determined on the evidence that certain Transition Obligation costs did not relate to Subject Goods produced during the period of investigation. Dofasco is unable to show that the costs can be specifically matched to Subject Goods. The Panel finds, therefore, that Revenue Canada's determination is reasonable and supported by evidence on the record.

2. USS Issue

With respect to the amount of Transition Obligation allocated to USS, which adopted FAS 106 in 1992, Revenue Canada allocated 1/20th of the Transition Obligation to 1991 and added it to the actual cash pay-outs for

health care costs in 1991.[46] Revenue Canada agrees that the 1/20th allocation was an estimate of the amount that should be allocated to Subject Goods, but argues that USS did not submit specific data as to the amount of subject steel sold in 1991 and shipped in 1992.[47] Our review of the record indicates that USS made certain arguments during the administrative proceeding, which we were not asked to review,[48] to reduce the amount of Transition Obligation allocated to 1991. USS, however, did not submit data to permit Revenue Canada to derive a different or more precise calculation. That being the case, Revenue Canada's allocation was reasonable.

3. LTV Issue

Finally, LTV's argument that the intervening bankruptcy cut off any liability for the accrual portions of the Annual Obligation, is also unpersuasive.[49] By their nature, accrued health care and pension costs involve estimates and uncertainties. Yet the accounting standards require their inclusion as costs on companies' books. It is correct that the bankruptcy creates uncertainties with

---

[46] Hearing Tr. supra note 22 at 273-74.

[47] Id.

[48] See Index supra note 35 at 80, 6-8.

[49] LTV submitted its actual costs for OPEB's during the investigation period, but argued that accrued costs should not be included in the cost calculations.

respect to what will occur in the future. However, LTV itself states that it might voluntarily accept the employee obligations upon leaving bankruptcy.[50] The Panel concludes, therefore, that Revenue Canada was not unreasonable in including a cost shown on LTV's books which is directly related to steel production in the period of investigation, even though subsequent events might mean that the obligations are never paid.

IX. OMISSION OF CERTAIN INCOME AND CREDITS

Both LTV and USS raise issues relating to the failure of Revenue Canada to include certain revenue or credit items as offsets to related costs in the §16(2)(b) profitability and §19(b) constructed value calculations.

A. USS

USS argues that certain pension credits should have been used to reduce its costs. In its financial statements, under the heading of "Pension Cost (Credit)" (and pursuant to FAS 87),[51] USS calculated the net cost of its pension plan by accounting for accrued costs, cost of interest on projected benefit obligations, and the return on plan assets. This resulted in a net credit

---

[50] Hearing Tr. supra note 22 at 120.

[51] FAS 87, or Financial Accounting Standards Number 87, establishes accounting standards for U.S. companies' pension plans.

for pension fund activities. Revenue Canada charged the cost components only in the §§16(2)(b) and 19(b) calculations.

USS also argues that certain other items of income should have been offset against general corporate financial costs that were allocated by Revenue Canada to Subject Goods in the §§16(2)(b) and 19(b) calculations.

B. LTV

LTV argues that income it earned on certain cash balances held in operational bank accounts should be used to offset costs calculated under §§16(2)(b) and 19(b). Both LTV and Revenue Canada agree that the income was from short-term investments[52] and that the investments were made from steel operation revenues. Since the interest income was originally derived from steel operations, LTV argues that the income is related to steel production and should be used to reduce the cost of production.

In addition, among the items of interest income was return from the Voluntary Employees' Beneficiary Association (VEBA) Trust. This trust was established by LTV to prefund 1992 medical insurance benefits to be paid to active and retired employees who are covered under the steel workers' collective bargaining agreement. LTV argues that this income should have

[52] See, e.g. Statement of Reasons supra note 1 at 11.

been offset against liabilities relating to other post-retirement health benefits (OPEB's), which liabilities were included in the cost calculations.

C. Response of Revenue Canada

Revenue Canada declines to offset any costs with any of the income items referred to above on the same three grounds. Revenue Canada argues, first, that §§16(2)(b) and 19(b) of SIMA require the calculation of costs incurred with respect to or attributable to the goods under investigation. Since income is not a cost, and there is no provision in SIMA for offsetting income items, it cannot be included in a cost of production calculation. Second, Revenue Canada finds that all of the income items referred to by LTV and USS are not related to steel operations and are, instead, non-operating income related to an entirely different activity, i.e., investment operations. Finally, Revenue Canada argues that SIMA does not require it to follow the accounting principles of GAAP or of FAS 87 or 106.

D. Discussion and Findings of the Panel

These issues raise mixed questions of law and fact which we decide on the basis of the standards articulated in Section V.

The discussion that follows considers each one of Revenue Canada's arguments in support of its decision in the order listed above.

1. Whether Income can offset costs under SIMA.

The Panel agrees that SIMA does not specifically provide for the netting out or offsetting of certain income items from related costs. However, SIMA, and the regulations that implement it, are necessarily broad rules governing complex calculations in antidumping duty investigations. The statute and regulations do not anticipate every factual variance. Frequently, Revenue Canada is required to "supplement" SIMA because the law is silent on a particular point or because such interpretation is necessary to ensure that the statute's purpose is properly and fairly carried out. In that way, policies are set that help to round out SIMA and provide guidelines to those subject to the law.

Here, the blanket fact that SIMA does not expressly permit consideration of net costs is not sufficient to resolve the issues raised. Further, Revenue Canada itself has interpreted SIMA to permit the use of net costs in at least two circumstances:

-- Revenues from the sale of scrap are offset against the cost of materials;[53] and

-- Interest income on operational bank accounts is netted out from interest expense.[54]

---

[53] See, e.g. Hearing Tr. supra note 22 at 269-70 (explanation of how this is done.)

[54] For example, the questionnaires presented to steel exporters by Revenue Canada contained the following question in Part D relating to Financial Data:

Revenue Canada argues that these two circumstances are not relevant to the issues raised and that they can be distinguished. As discussed below, it is not clear to the Panel what the distinctions are. However, since Revenue Canada itself interprets SIMA to permit the calculation of net costs in certain circumstances, the Panel finds Revenue Canada's blanket premise that SIMA does not permit the calculation of net costs in §§16(2)(b) and 19(b) calculations to be unreasonable.

2. Whether the Income Items In Question Are Related To Separate Investment Activities, Or to Steel Operations

i. Pension Benefits

D5. Other expenses (Net)

Provide all other expenses (net) that are directly or indirectly attributed to the production and sale of the goods in question on a per unit basis.

These expenses are often reported on the company's income statement below the operational income line and include such items as

losses from foreign exchange transactions and gains from foreign exchange transactions... Report the net result. If a net gain, this will reduce the total net reported for "other expenses."

Interest income (from operations only eg. interest charges on late payment) and interest expense (eg. interest charges on loans for capital or operational purposes)...Report the net results.

. . .

See, e.g. Index supra note 35 at 31, Tab O, 34, 71.

USS claims that pension credits should have been included in the cost calculations to reduce its general, administrative and selling expenses. Revenue Canada declined to include the credits, stating that the "investment activities of . . . the pension fund have nothing to do with the production and sale of steel products. The pension fund surplus should . . . be treated in the same manner as any other long term investment made by the company, that is, as non-operating income/revenues/credits not associated with the business of making steel."[55]

In deciding whether Revenue Canada's decision is reasonable, the Panel looked closely at the evidence referenced by all parties, including FAS 87 itself, an accounting standard which sets forth the principles of accrual accounting for pensions. As pointed out by USS, the standard refers repeatedly to the notion that pension cost is a net figure comprising different elements.[56] USS' financial statements report on pension benefits plans on a net cost (credit) basis.[57]

---

[55] Statement of Reasons supra note 1 at 12.

[56] The Summary section of FAS 87 provides:

> The *net cost* feature means that the recognized consequences of events and transactions affecting a pension plan are reported as a single net amount in the employer's financial statements. That approach aggregates at least three items that might be reported separately for any other part of an employer's operations: the compensation cost of benefits promised, interest cost resulting from deferred payment of those benefits, and the results of investing what are often significant amounts of assets.

[57] See Index supra note 35 at 59, Tab 11, S-11 (USS 1991 10-K).

Revenue Canada cites a different provision of FAS 87 to demonstrate that the costs it allocated to USS arise from the compensation component of the "net periodic pension cost" as opposed to the financial arrangements, which include the return on plan assets.[58] Revenue Canada takes the position that only the components representing costs are relevant to SIMA calculations. The return on assets figures, according to Revenue Canada, merely relate to investment activities.

However, the pension fund investments in the case of USS are not isolated long-term investments of the company. They relate directly to an integrated pension plan and are an essential component of that plan. The Panel finds that the pension fund investments should not be isolated from the other pension plan components and that they should be considered in an analysis of pension cost.

---

[58] FAS 87 paragraph 16 provides:

> Net periodic pension cost has often been viewed as a single homogeneous amount, but in fact it is made up of several *components* that reflect different aspects of the employer's financial arrangements as well as the cost of benefits earned by employees. The cost of a benefit can be determined without regard to how the employer decides to finance the plan. The **service cost component** of net periodic pension cost is the **actuarial present value** of benefits attributed by the plan's benefit formula to services rendered by employees during the period. The service cost component is conceptually the same for an unfunded plan, a plan with minimal funding, and a well-funded plan. The other components of net periodic pension cost are **interest cost** (interest on the **projected benefit obligation**, which is a discounted amount), **actual return on plan assets, amortization** of **unrecognized prior service cost,** and **gain or loss.** Both the return on plan assets and interest cost components are in substance financial items rather than employee compensation costs.

The annual or periodic "service cost", which is one of the components of the net pension cost that Revenue Canada allocated to Subject Goods, is the "actuarial present value of benefits...[as measured by] use of an attribution method and assumptions."[59] Although there is a certain lack of clarity in this regard, it appears that Revenue Canada allocated the "service cost" or "compensation" component to USS' costs, along with other costs from the "financial arrangement" components of net cost. These figures are based on many assumptions about the future (such as future compensation levels and inflation).[60] The return on plan assets is netted from the cost components to give as real a picture as possible of what the company's actual pension liabilities are in light of future uncertainties. This distinguishes those returns from other long-term investments of a company which are unrelated to pension obligations.

In summary, the pension plan, both on the cost and on the income sides, forms an integral whole which relates directly to steel workers and, therefore, to steel production. If a company has funded a pension plan, it is not reasonable to isolate the cost components only without recognizing the reduction in costs associated with the prefunded assets.

---

[59] FAS 87 para. 21.

[60] Id. at para. 46.

Isolation of income from costs could result in an inaccurate picture of the true cost of the production of steel and would thereby defeat the intent of SIMA. In this case, the true cost of a pension plan will be represented by the amount a company must include as a component of the price of steel in order to recoup the cost of the plan. The nature of the true cost of a pension plan makes it necessary to consider income accrued from the plan.

The Panel recognizes that because of the nature of the pension plan and pension accounting, many variables exist which make it difficult to ascertain the plan's true cost. The Panel has not been asked to and does not give any specific directions with respect to the amount of income, if any, Revenue Canada should use to reduce cost in this particular instance or to the method of calculation. However, the Panel would expect that, before any cost can be reduced by income, the income must be related to the pension plan and must ultimately be available to the employer to reduce the cost of the benefit attributable to the employer for the year in question (i.e. the period of investigation).

Both Revenue Canada and Sidbec argue that if USS' position is accepted, the cost of goods could be reduced to zero solely because of well invested pension fund credits. That would only happen if the matter were carried to absurd proportions, which the Panel certainly does not intend to suggest. 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. The Panel believes Revenue Canada would be reasonable in limiting the use of pension income to the reduction of pension liabilities only.[61]

In summary, the Panel finds that Revenue Canada's blanket assertion that revenue from pension fund assets relate to a separate investment activity and is, therefore, not includable in the calculation of pension costs was unreasonable. The Panel remands this matter to Revenue Canada to determine, in accordance with this decision, whether the pension fund income relates to the cost of the pension fund, and, if so, to recalculate §§16(2)(b) and 19(b) costs.

ii. Other Post-Employment Benefit Fund Income

The Panel resolves LTV's arguments with respect to income from the VEBA Trust in the same way as USS' pension credits argument. The VEBA Trust represents the only funded post-employment benefit package of LTV. Accounting Standard FAS 106 governs other post-employment benefits ("OPEB") like medical insurance in a similar way that FAS 87 governs pension benefits. FAS 106 is also based on a system of net costs. The accrued costs also are based on best estimates of future events and the "net" feature presents an accurate picture of the company's benefits liability in a particular

[61] At oral argument, USS appeared to agree with this proposition and receded from its previous argument that pension credits should be used to reduce other administrative costs. Hearing Tr. supra note 22 at 115.

year. The composite of OPEB assets and liabilities comprises LTV's OPEB costs for the period under investigation. The Panel, therefore, finds that Revenue Canada's decision that the VEBA trust income cannot be used to reduce OPEB liability was unreasonable.

The Panel remands the matter to Revenue Canada to determine in accordance with this decision, whether the VEBA Trust income relates to the cost of OPEB liabilities and, if so, to recalculate §§16(2)(b) and 19(b) costs.

iii. Other Interest Income

LTV argues that certain other short-term interest income should be used as an offset in the cost calculations.[62] USS argues that certain interest income should have been used to offset interest expense. The U.S. Complainants also argue generally that any time a financing or interest expense is deemed to be related to steel production and, therefore, a "cost" for purposes of §§16(2)(b) or 19(b), that "cost" should be determined net of related interest income.

At oral argument, the Panel questioned Revenue Canada closely [63] about the rationale for allowing an offset for interest income on operating cash

[62] LTV submitted a detailed breakdown of its interest income with explanation as to the source of the income. Index supra note 35 at 43, Tab 2, 11.

[63] See various exchanges between the representative for Revenue Canada and Panel members, Hearing Tr. supra note 22 at 223-33, 269-72.

deposits, but not for other types of interest income, including those that flow from short-term, near liquid, cash equivalents. No satisfactory distinction was drawn, especially as to those "investments" which are closely similar to cash accounts.

Due to the lack of clarity in the rationale for Revenue Canada's position, we are unable to determine the reasonableness of its decision that all interest income, except for income from operating cash accounts, arises from separate investment activities and cannot be used to offset financing or interest expenses. We, therefore, remand the issue to Revenue Canada for explanation, clarification and reconsideration of the following in light of Revenue Canada's policy to include income from operating cash accounts and revenue from scrap in §§16(2)(b) and 19(b) calculations:

a. On the basis of evidence on the record, whether (i) interest income on LTV's short-term investments, and (ii) interest income on USS' investments, relate to financing or interest costs deemed to be related to steel production.

b. If any of the above-mentioned interest income is related to financing or interest costs deemed to be related to steel production, Revenue Canada should include such income as an offset against such financing or interest costs in LTV's and USS' §§16(2)(b) and 19(b) calculations.

3. Whether Revenue Canada is required to follow GAAP.

Our holding that certain income items should have been considered is not based on the view that SIMA incorporates GAAP or any other accounting standards. As stated throughout, the Panel agrees that SIMA does not bind Revenue Canada to follow GAAP, or other accounting standards, including FAS 87 and 106. They are useful guidelines, but not mandates.

X. REASONABLE PERIOD OF TIME

For both USS and LTV, Revenue Canada used a six month period for determining profitability under §16(2)(b) of SIMA. Section 16(2)(b) of SIMA provides that in determining normal value under section 15, "there shall not be taken into account . . . any sale of like goods that, in the opinion of the Deputy Minister, forms part of a series of sales of goods at prices that do not provide for recovery in the normal course of trade and within a reasonable period of time of the cost of production of the goods, the administration and selling costs with respect to the goods and an amount for profit" (emphasis added).

USS and LTV argue that Revenue Canada erred in not making specific findings on each element of §16(2)(b), and in particular in not specifically addressing, in the context of the cyclical steel industry, whether the U.S. domestic sales provided for recovery "within a reasonable period of time." Revenue Canada responds that the record contains evidence supporting its analysis and that Complainants at no time argued during the administrative

proceeding that something other than a six month period would be more appropriate.

In the circumstances of this case, the Panel finds it was reasonable for Revenue Canada to presume that a six month period of analysis was a "reasonable period of time" and required no specific statement of reasons where no submission to the contrary was made by any party.[64]

XI. METHOD OF CALCULATING NORMAL VALUE

Revenue Canada computed LTV's normal value according to the constructed value method of §19 of SIMA. LTV alleges that Revenue Canada should have determined its normal value by using U.S. market prices pursuant to §15 of SIMA. According to LTV, the process by which Revenue Canada concluded that it could not use §15 was marked by several errors of law.

The process by which Revenue Canada concluded that a §19 calculation was necessary is complicated. Several different grounds for exclusion of U.S. sales set out in §16 of SIMA were utilized. These grounds give rise to two distinct issues raised by LTV:

---

[64] By contrast, the Tufted Carpeting Panel remanded the issue of whether a three month period was a sufficiently long period of time to expect the recovery of costs where that issue had been raised during the administrative proceedings and it was unclear to the Panel whether the Deputy Minister had "actually considered and made a reasoned opinion as to the appropriate 'reasonable period of time.'" Tufted Carpeting Panel supra note 18 at 21-24.

1. Was it reasonable for Revenue Canada to exclude sales of like Goods produced at a different location in the interpretation and application of §16(1)(a)?
2. Was Revenue Canada's application of §§15 and 16 to exclude certain sales reasonable?

A. Application of §16(1)(a)

During the period of investigation, LTV provided domestic sales information that was not mill specific. That is, LTV grouped information from different mills for certain products. No distinction was made on a product line basis to identify the mill origin for each one of the sales. In order to determine the profitability of export sales on a mill by mill basis, Revenue Canada reformulated the domestic sales information and examined the profitability of goods exported to Canada on a mill by mill basis.

In so doing, Revenue Canada relies on §§15(e) and 16(1)(a) of SIMA. Section 15 provides that before a normal value using the price of like goods can be applied, certain criteria must be met. One of these criteria, listed in §15(e) of SIMA, provides that the goods must be sold by the exporter at the place from which the goods were shipped to Canada. Section 16(1)(a) assists in the interpretation of §15(e). It reads:

> 16(1) In the application of section 15 in the case of any goods,

> (a) if there was not, in the opinion of the Deputy Minister, such a number of sales of like goods made by the exporter at the place described in paragraph 15(e) as to permit a proper comparison with the sales of the goods to the importer in Canada, but sales of like goods were made by the exporter at one other place or several other places in the country of export, there shall, for the purpose of making that comparison, be included with sales of like goods made by the exporter at the place described in paragraph 15(e) sales of like goods made by the exporter at that one other place or at the nearest of the several other places to the place described in paragraph 15(e), as the case may be;

In applying these two sections, Revenue Canada decided to treat each mill as a separate exporter since the mills have different production facilities and techniques and different costs of production. As a result, sales of goods produced at another mill do not permit a proper comparison with goods shipped to Canada. Revenue Canada recognizes that a product produced at a specific mill may be sold not only direct from the mill but from other locations such as a warehouse or distribution outlet. Where it is of the opinion that the number of sales of like goods directly from the mill in question is insufficient to permit a comparison with the sale of goods to the importer in Canada, Revenue Canada will then look to another location where sales of like goods have been made. In this case, there were apparently no sales of goods produced at the same mill sold from any other location and therefore a comparison could not be made.

LTV argues that Revenue Canada has misread §16(1)(a). The company argues that the phrase "one other place or at the nearest of the several other

places" should be read to include sales of like goods produced at other mills. Furthermore, the language in §16(1)(a) is mandatory and therefore a failure to consider sales from other mills is a reviewable error of jurisdiction.

The Panel does not agree with LTV's position. In the Panel's view, §15(e) permits Revenue Canada to treat each mill as a separate exporter for the purpose of a §15 determination. Although the language of §16(1)(a) states that the government "shall" include "sales of like goods made by the exporter at that one other place or at the nearest of the several other places", we cannot say that the interpretation given to the phrase by Revenue Canada is unreasonable. If this section were interpreted to allow the comparison of sales from another mill, a true picture of the firm's profitability with respect to the sale of goods from the mill in question might not be shown. As LTV argues in its brief, "only by the sheerest coincidence would the cost of obtaining materials, the cost of labour, and overhead costs relating to the construction of the facilities be identical between different plants in a company." We find that Revenue Canada's interpretation and application of §§15 and 16 to treat each of LTV's mills separately is reasonable and consistent with SIMA's intent.

Lastly, the Panel notes that in U.S. Complainants' reply brief, they raise, for the first time, the issue that similar errors were made by Revenue Canada with respect to USS. Unfortunately, the Panel did not receive any specific argument or review of the relevant facts in support of this allegation. At the hearing, counsel on behalf of Revenue Canada stated that the government's response to complaints concerning USS was the same as for LTV. In the

circumstances, the Panel assumes that its reasons relating to LTV's complaint fully respond to USS's complaint and declines to interfere with Revenue Canada's decision.

B. Application of §16 to exclude certain sales from §15 consideration

LTV also questions Revenue Canada's application of §16(2), which reads:

> 16(2) In determining the normal value of any goods under section 15, there shall not be taken into account
>
> > (a) any sale of like goods for use in the country of export by a vendor to a purchaser if the vendor did not, at the same time, sell like goods in the ordinary course of trade to other persons in the country of export at the same trade level as, and not associated with, the purchaser; and
> >
> > (b) any sale of like goods that, in the opinion of the Deputy Minister, forms part of a series of sales of goods at prices that do not provide for recovery in the normal course of trade and within a reasonable period of time of the cost of production of the goods, the administration and selling costs with respect to the goods and an amount for profit.

This section was applied to one product category produced at LTV's mills. LTV's allegations of error extend to the treatment of this product category at two of its mills. At one mill, domestic sales were [ ] on the basis of [ ] by one application of §16(2)(b). With respect to the second mill, the steps taken by Revenue Canada were more complex. Revenue Canada found

that the product was sold to [ ] domestic customers at an overall profit. Of these [ ] customers, one accounted for [ ] of the total sales. This sale was initially excluded under §16(2)(a) on the basis that it was a sale at a different level of trade. In oral argument, Revenue Canada submitted that a more appropriate basis of exclusion of the sale to this customer would have been on the basis of §15(b) which requires that domestic sales used for comparison to export sales must be "in the same or substantially the same quantities as the sale of goods to the importer." For the reasons that follow, the Panel has not found it necessary to determine whether §16(2)(a) was a proper basis for exclusion of this sale.

Of the [ ] remaining domestic sales, [ ] The sale made [ ] was excluded from the determination of normal values in accordance with §16(2)(b) as it formed part of a series of sales at a price that did not provide for recovery of costs in the normal course of trade. The [ ] sale, although made at a [ ], was excluded pursuant to §16(2)(a) on the basis that it was a sale made only to one customer. As a result, Revenue Canada did not compute normal values according to §15 and was required to use §19(b) to construct the value of that product category.

LTV has several specific complaints about the methodology used by Revenue Canada. First, issue is taken with the way in which sales to the [ ] customer were eliminated. LTV submits that one cannot eliminate these sales by relying on §16(2)(a) because that section is for eliminating sales to single customers. Furthermore, if Revenue Canada relies on §15(b) to exclude

this particular sale, then Revenue Canada must also take note of the exceptions to §15(b) embodied in §§16(1)(d) and (e). It is further submitted that these sections provide mandatory directions to Revenue Canada in such a case.

Second, LTV submits that the [ ] sale at the mill excluded on the basis that it was [ ] should not be excluded because it cannot logically be classified as a sale that "forms part of a series of sales at a loss."

Third, LTV submits that it is patently unreasonable to exclude the [ ] sale on the basis of §16(1)(a) as this would result in [ ] sales being eliminated on the grounds that they were sales to single customers.

With regard to the first complaint, it is clear that the criterion in §15(b) was not met and thus Revenue Canada can justifiably exclude the sales to the preponderant customer that accounts for such a large volume of total sales. In our view, §§16(1)(d) and (e) do not affect this conclusion. These sections only properly apply when there is more than one comparable sale that is in "the same or substantially the same quantities as the sale of goods to the importer."[65] This is the threshold criterion that must first be met in order for each subsection (d) or (e) to apply. Otherwise, LTV's interpretation would have the effect of reading out the primary obligation under §15(b) that stipulates that comparable sales must be in the same or substantially the same quantities.

---

[65] SIMA supra note 2 at §§ 15(a)(ii), 16(1)(b).

With respect to the second complaint, LTV is asking the Panel to accept that a [ ] sale should be considered for the basis of a comparison because it does not form part of a "series of sales." In the Panel's view, this is contrary to the intent of SIMA which premises the use of comparable sales of like goods that provide for a profit in the ordinary course of trade. The Panel finds that Revenue Canada's interpretation of a "series of sales" of goods is reasonable in the circumstances.

Pursuant to §16(2)(b) which applies to the normal value of any goods under §15, the basis for LTV's third complaint disappears because of the previously eliminated sale to the preponderant customer on the basis of §15(b). The provisions of §16(2)(a) require the existence of profitable sales to two or more customers at the same trade level. Since here there is [ ] sale at the same trade level, Revenue Canada was able to reasonably exclude [ ] sale.

As a result, the Panel finds that Revenue Canada's interpretation and application of §§15 and 16 of SIMA in excluding certain sales of LTV for the purpose of a comparison pursuant to §15 of SIMA was not unreasonable.

XII. CLOSELY RESEMBLING GOODS

USS and LTV argue that Revenue Canada incorrectly interpreted the provision of §2 of SIMA defining "like goods" (and thereby ignoring several

court and panel decisions)[66] by considering exporters' sales in the United States of identical goods only in performing the §16(2)(b) calculation; Complainants argue that where there were no sales of identical goods that survived the profitability test of §16(2)(b), then, rather than considering other U.S. sales of "closely resembling" goods, Revenue Canada determined normal values by means of constructed value under §19 of SIMA. Revenue Canada argues that the issue of its interpretation of §2 of SIMA never arises because, in fact, Revenue Canada did consider U.S. sales of both identical and closely resembling goods for USS and LTV.

The Panel agrees with Revenue Canada and finds that its actions in this regard were reasonable and supported by evidence in the record.

The term "like goods" is defined as

> a) goods that are identical in all respects to the other goods,
>
> or
>
> b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.[67]

---

[66] Fletcher Leisure Group Inc. v. Deputy M.N.R., (1993), AP-90-023, AP-90-127, at 3 (CITT), Madison Ind. Equip. Ltd., v. Deputy M.N.R. , (1991), 5 T.T.R. 300 (CITT), Tufted Carpeting Panel supra note 18 at 25-27.

[67] SIMA supra note 2 at § 2(1).

As stated at oral argument[68] and as supported by confidential information on the record,[69] Revenue Canada examined both identical and similar goods for USS and LTV based on submissions by those companies. It is, therefore, not necessary for us to examine the legal authorities cited by complainants.

---

[68] The representative for Revenue Canada advised as follows:
"The [product] groupings for both LTV and U.S. Steel were similar goods. U.S. Steel provided a grouping [of] goods under . . . 2(1)(b) goods. . . These were accepted by the Deputy Minister and then the Deputy Minister determined that these sales were not profitable. Therefore, they were eliminated. LTV did the same thing -- similar goods. How they can say that we didn't use 2(1)(b) is rather surprising." Hearing Tr. supra note 22 at 280.

[69] For USS, see Index supra note 35 at 57, Tab A, 24; for LTV, see Index supra note 35 at 31, Tab O, 57.

XIV. CONCLUSION AND ORDER

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

The results of this remand shall be provided by Revenue Canada to the Panel within 90 days of this decision.

SIGNED IN THE ORIGINAL BY:

Kathleen F. Patterson
Kathleen F. Patterson, Chair

Henri C. Alvarez
Henri C. Alvarez

Howard N. Fenton, III
Howard N. Fenton, III

Lauren D. Rachlin
Lauren D. Rachlin

Leon E. Trakman
Leon E. Trakman

Issued on the 14th of June, 1994.

LAUREN RACHLIN AND LEON TRAKMAN (CONCURRING):

U.S. Complainants contended in their brief that Revenue Canada erred in including certain costs in calculating profitability under §16(2)(b).[70] These included, among others, the general and interest costs of USS's parent company, LTV's bankruptcy costs, and LTV's costs under the COAL RETIREE ACT. U.S. Complainants also argued, in relation to LTV's costs under the COAL RETIREE ACT, that these costs did not relate to steel "operations" under the SIMA.[71] They asserted, further, that these costs did not relate to the production of the goods under §16(2)(b).[72]

However, U.S. Complainants also contended in their brief that normal values often are determined under §19(b),[73] and further that LTV's Coal Retiree liability and bankruptcy expenses are included as part of constructed total value under that sub-

---

[70] Brief of Complainants, para.73-75.

[71] Id., para. 99 to 101.

[72] Id., para. 101.

[73] Id., para.137.

section.[74] Finally, they argued that §16(2)(b) ought to be construed restrictively here, because it does not refer to "other costs" contained in §19(b) of the SIMA.[75]

Revenue Canada argued in its brief that, despite the difference in language used in §§16(2)(b) and 19(b), both sub-sections included all costs, no matter how remote or extraordinary.[76] It argued further, that each section served a different purpose, and that their application should be evinced from that difference, not from simply comparing the words used in each section.[77]

During the hearing U.S. Complainants argued that §§16(2)(b) and 19(2) should be evaluated in light of a "plain words" method of interpretation.[78] They argued, in light of the words used, that costs under §16(2)(b) ought to restricted to operating expenses, while §19(b) should "relate to all attributable costs, some of which might be indirect".[79]

---

[74] Reply Brief of Complainants, para. 49-53.

[75] Id.

[76] Brief of Revenue Canada, para.93. See too, Transcript of Public Hearing, Cold Rolled Steel Sheet, File No.CDA-93-1904-08 at 186-187, 196.

[77] Id.

[78] Transcript of Public Hearings, at 63-68.

[79] Id., at 53.

Revenue Canada responded that §16(2) was directed at calculating the profitability of domestic sales: while normal value was calculated only thereafter, under §15 of the SIMA.[80] They argued, further, that §19(b) was directed at constructing normal value in the event that normal value could not be calculated under §15.[81] They concluded that, as the purposes underlying §§16(2)(b) and 19(b) were different, each ought to be given meaning in light of its distinct purpose.[82]

While U.S. Complainants requested that the Panel review Revenue Canada's determination of costs under both §§16(2(b) and 19(b) in their brief,[83] in oral argument they appeared to withdraw this assertion that costs be construed differently under these two sections.[84] However, they continued to assert that §16(2)(b) ought to be more narrowly construed than §19(b). Revenue Canada argued instead that §16(2)(b) ought to be construed expansively because it conferred a discretion on the Deputy Minister in accordance with the purpose

---

80 Id., at 182-83 and 185-86.

81 Id., at 186-87 and 200-201.

82 Id., at 182-83.

83 Brief of the Complainants, para.137.

84 Transcript of Public Hearing, at 135.

underlying the SIMA. Accordingly, it remains to be determined to what extent §§16(2)(b) and 19(b) give rise to different constructions of cost, and if so, what implications ought to arise from those differences in this case.

THE MEANING OF SECTION 16(2)(b) AND SECTION 19 OF THE SIMA

Section 16(2)(b) of the SIMA provides that, in determining the profitability of domestic sales, Revenue Canada shall not consider

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

On establishing the profitability of domestic sales, Revenue Canada is authorized by §15 of the SIMA to calculate the normal value of the goods in question.

Section 19(b) provides a method of determining normal value according to the cost of the export sales under investigation in cases in which the normal value of domestic goods cannot be determined by calculating profitability under §16(2)(b) and thereafter, normal value under §15. Section 19(b) states that normal value shall be based on

> the aggregate of (i)the cost of production of the goods, (ii) an amount for administrative, selling and **all other costs**, and (iii) an amount for profits.[85]

Using a "plain meaning" approach towards §§16(2)(b) and 19(b) of the SIMA, the issue is whether the words "all other costs" in §19(b) envisage a wider construction of costs than is expressed in §16(2)(b). Using a "purposive" method of interpretation, it is necessary to establish whether the purpose of §16(2)(b) is different from the purpose underlying §19(b), and further, whether that difference in purpose justified Revenue Canada including all costs, including non-operational costs, in determining profitability under §16(2)(b).

As these issues are matters of first instance, it is appropriate to construe them in light of established canons of interpretation, including both "plain words" and the "purposive" methods of interpretation.

The so called "golden rule" of interpretation requires that statutory language be accorded its ordinary meaning, unless doing so leads to an inconsistency or manifest absurdity. The "purposive" method of interpretation requires the tribunal to construe legislation, here the SIMA, reasonably in light of the legislature's purpose.

---

[85] Emphasis added.

The "plain words" meaning of the language used in §§16(2)(b) and 19(b) of the SIMA is clearly different. While both sections make reference to the cost of production of the goods, and administrative and selling costs, only §19(b) adds the words "all other costs". In this respect, U.S. Complainants are justified in distinguishing the language used in §§16(2)(b) and 19(b).

Moreover, the purposes underlying the two sections are different. The purpose of §16(2)(b) is to establish the profitability of domestic sales: §15 is directed at determining normal value. The purpose of §19 is to determine the normal value of export sales when normal value cannot be calculated under §15. In this respect, Revenue Canada is justified in contending that §§16(2)(b) and 19(b) have different purposes.

The question arises, in light of both the "plain words" and "purposive" methods of interpretation, whether there is a conflict in meaning between §§16(2)(b) and 19(b) and if so, whether this conflict gives rise to an inconsistency or manifest absurdity.

We find that there is no such conflict. However different their "plain words" meaning, §§16(2)(b) and 19(b) each has a different purpose. Parliament expressed that difference in requiring that Revenue Canada use §16(2)(b) to establish the profitability of domestic sales, not their normal value, while it required Revenue Canada to establish normal value of foreign sales under §19(b). Whether Parliament might have used language that more clearly distinguished between §§16(2)(b) and 19(b) is not in issue. Each sub-section, in seeking to accomplish different purposes, is not in conflict with the other.

The final issue, relating to determining the manner in which §16(2)(b) ought to be construed, depends upon the limits that ought to be imposed upon Revenue Canada in its interpretation of the law and in applying the law to the facts. Clearly, SIMA gives Revenue Canada a discretion to determine the profitability of domestic sales under §16(2)(b). However, that discretion is not unlimited. In particular, the Deputy Minister is required to comply with criteria, set out in §16(2)(b), in determining what costs he might include in determining the profitability of domestic sales. This limitation in its discretion is implicit from the "plain words" meaning of

the words used in §16(2)(b), in providing that production, administration and selling costs should arise "with respect to" the goods.[86]

Regarding the interpretation of §19(b),[87] it is clear that the SIMA gives Revenue Canada a wide discretion in constructing normal value. This is apparent from the wording used, notably, the inclusion of "all other costs". It is also evident from the pervasive purpose underlying the SIMA, to protect domestic industry from dumping by foreign corporations.[88]

---

[86] The requirement that the Deputy Minister, however broad his discretion, comply with criteria in arriving at decisions on questions of fact, is established by the courts. See, for example, the decision of the Federal Court of Appeal, in E.W.BICKLE V. M.N.R., (1981) 2 C.E.R.323 (F.C.A.) at 327. But, for a wide construction of the "in respect of" test adopted by the Supreme Court of Canada, see NOWEGIJICK v. THE QUEEN, [1983] 1 S.C.R. 29, 39.

[87] See infra p.71.

[88] This is evident from an examination of the history of the SIMA. See eg., the ELECTROHOME LIMITED v. CANADA (DEPUTY M.N.R., CUSTOMS AND EXCISE), [1986] 2 F.C.344, at 354, per Rouleau, J. "Generally, the purpose of the *Special Import Measures Act* is to protect Canadian manufacturers and producers from the dumping of goods into the Canadian market which results from goods being imported into Canada at lower prices than they would be sold in their home market." Revenue Canada's wide discretion is also reflected in the manner in which the Gypsum Panel construed §19(b). See "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 OF AMERICA, Panel No. CDA-93-1904-01, at 27-30.

We agree with the majority that it is not necessary to determine in this case what would be encompassed among "all other costs" under §19(b) because the costs in issue here, notably, coal retiree costs, are not encompassed within it. Clearly "all other costs" has a broad scope of application that may encompass costs that are ancillary to production, administration and sales costs. However, those costs still should be "attributable", however minimally, to production, administrative and selling.[89] As that minimal relationship between production, administration and sales is not present in relation to coal retiree costs, it is not necessary to speculate as to the outer limits of "all other costs" in this case.

APPLYING SECTION 16(2)(B) TO THE FACTS

We concur in the decision reached by the majority of the Panel in applying §16(2)(b) to the facts. In particular, we agree with its conclusion in regard to, **inter alia**, the general and interest costs of USS's parent company, LTV's bankruptcy costs, and LTV's costs under the COAL RETIREE ACT.

---

[89] Regulation 11 provides that the costs of production should include the aggregate of all costs that are: "(1) attributable to, or in any manner related to, the production of the goods". On the requirement that the Deputy Minister be required to produce evidence as to why he attributed a particular cost, here interest expenses, to production, see IN THE MATTER OF: CERTAIN BEER ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA BY G.HEILMAN BREWING COMPANY, INC. PABST COMPANY, AND THE STROH BREWERY COMPANY FOR USE OR CONSUMPTION IN THE PROVINCE OF BRITISH COLUMBIA, Panel No. CDA-91-1904-01, at 51-52.

While we agree with its determination in relation to the COAL RETIREE ACT, we arrive at that determination by a slightly different route. We find that those costs are not reasonably related to the costs of production, administration and sales in light of the "plain words" meaning of §16(2)(b). Section 16(2)(b) requires that costs identified by Revenue Canada arise "with respect to" the goods.[90] While these costs give rise to a current, not a past, obligation, they do not arise "with respect to" the production, administration and selling costs of steel. In particular, they relate to a wholly unrelated process of production, namely, the production and sale of coal. Accordingly, these costs do not fall within the "plain words" meaning of §16(2)(b) of the SIMA.

We acknowledge that Canadian companies sometimes incur production, sales and administrative costs that are extra-ordinary. For example, the Canadian Government sometimes requires Canadian companies to assume costs arising from the activities of other companies. This is especially the case in relation to environmental losses.[91] However, such costs justifiably fall within the "plain words"

---

[90] See supra note 86.

[91] For example, this responsibility arises under the CANADA SHIPPING ACT (C.S.A.). In particular, carriers of oil are required to contribute to a Ship-source Oil Pollution Fund (S.O.P.F.) which is used to fund oil pollution clean up costs. See eg., Ship-source Oil Pollution Fund, Annual Report, 1991-92 (Canada).

meaning of §16(2)(b) insofar as they relate to production, administration and sales in the industry concerned. Such is not the case here.

We find, further, that Coal Retiree costs are not encompassed within the phrase "all other costs" under §19(b) of the SIMA. "All other costs", however broad in their ambit of application, do not include coal retiree costs that are not attributable to production, administration and sales. Accordingly, for these reasons, such costs ought not to be included in the construction of normal value under §19(b).

Finally, we find that the construction of §§16(2)(b) and 19(b) respectively accords with the purposes underlying the SIMA.

We concur with the remand of this issue to Revenue Canada for further consideration in accordance with the decision of the majority of the Panel.

SIGNED IN THE ORIGINAL BY:

Lauren Rachlin
Lauren Rachlin

Leon E. Trakman
Leon E. Trakman

ISSUED ON THE 14 JUNE, 1994.

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ADMINISTRATIVE HISTORY 1

III. PANEL PROCEEDINGS 2

IV. SUMMARY OF ISSUES AND PANEL DECISION 4

V. STANDARD OF REVIEW 8

A. Issues Of Jurisdiction 10
B. Issues Of Law 11
C. Issues Of Fact 13

VI. INCLUSION OF CERTAIN COSTS UNDER §§16(2)(B) AND 19(B) OF SIMA 16

A. USS 16
B. LTV 18
C. Treatment of Costs Under §§16(2)(b) and 19(b) 20
D. Standard of Review 22
E. Discussion and Findings of the Panel 22
F. Coal Retiree Act Liability 24

VII. REALLOCATION OF CERTAIN COSTS 28

A. LTV 28
B. USS 30

VIII. TREATMENT OF TRANSITION AND ANNUAL OBLIGATION COSTS UNDER FASB 106 (ISSUES RAISED BY US COMPLAINANTS AND DOFASCO) 31

TABLE OF CONTENTS (Con't)

Page

A. Issues 31
B. Discussion And Findings of the Panel 34

1. Dofasco Issue 34
2. USS Issue 35
3. LTV Issue 36

IX. OMISSION OF CERTAIN INCOME AND CREDITS 37

A. USS 37
B. LTV 38
C. Response of Revenue Canada 38
D. Discussion and Findings of the Panel 39

1. Whether Income can offset costs under SIMA. 39
2. Whether the Income Items In Question Are Related To Separate Investment Activities, Or to Steel Operations 41

i. Pension Benefits 41
ii. Other Post-Employment Benefit Fund Income 46
iii. Other Interest Income 47

3. Whether Revenue Canada is required to follow GAAP. 49

X. REASONABLE PERIOD OF TIME 49

XI. METHOD OF CALCULATING NORMAL VALUE 50

A. Application of § 16(1)(a) 51

TABLE OF CONTENTS (Con't)

Page

B. Application of §16 to exclude certain sales from §15 consideration 54

XII. CLOSELY RESEMBLING GOODS 58

XIV. CONCLUSION AND ORDER 60

XV. CONCURRING OPINION BY RACHLIN, L. AND TRAKMAN, L. 61

CONFIDENTIAL APPENDIX
Confidential version of pages 55-58. Available to authorized persons only.