

ARTICLE 1904
BI-NATIONAL PANEL REVIEW PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:

CERTAIN TOP-MOUNT ELECTRIC
REFRIGERATORS, ELECTRIC HOUSEHOLD
DISHWASHERS, AND GAS OR ELECTRIC
LAUNDRY DRYERS, ORIGINATING IN OR
EXPORTED FROM THE UNITED STATES OF
AMERICA AND PRODUCED BY, OR ON
BEHALF OF WHITE CONSOLIDATED
INDUSTRIES, INC. AND WHIRLPOOL
CORPORATION, THEIR RESPECTIVE
AFFILIATES, SUCCESSORS AND ASSIGNS

Secretariat File No.:
CDA-USA-2000-1904-03

DECISION OF THE PANEL

ON REVIEW OF THE FINAL DETERMINATION
OF THE
COMMISSIONER OF CUSTOMS AND REVENUE

April 15, 2002

Before: Prof. William P. Alford,
Mr. Serge Anissimoff (Chair),
Prof. Peter L. Fitzgerald,
Mr. Anthony L. Halliday, and
Mr. Paul C. LaBarge

Hearing: January 15 and 16, 2002, Ottawa, Ontario, Canada

Appearances:

On behalf of Camco Inc.:

Mr. Riyaz Dattu
Mr. John W. Boscarol

On behalf of Whirlpool Corporation and
Inglis Limited:

Mr. C. J. Michael Flavell, Q.C.
Mr. Geoffrey C. Kubrick

On behalf of WCI Canada Inc. and
White Consolidated Industries Inc.:

Mr. Darrel H. Pearson

On behalf of the Commissioner of Customs and Revenue:

Mr. F.B. Woyiwada

On behalf of Maytag Corporation:

Mr. Richard G. Dearden

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I. INTRODUCTION

This bi-national panel (the “Panel”) was convened pursuant to Article 1904(2) of the *North American Free Trade Agreement* (“NAFTA”) to review a final determination of dumping (the “Final Determination”) made by the Canadian Commissioner of Customs and Revenue (the “Commissioner”) on June 30, 2000 in respect of certain top-mount electric refrigerators, electric household dishwashers, and gas or electric laundry dryers, originating in or exported from the United States of America and produced by, or on behalf of, White Consolidated Industries, Inc. (“WCI”) and Whirlpool Corporation (“Whirlpool”), their respective affiliates, successors and assigns.

II. ADMINISTRATIVE HISTORY AND PANEL PROCEEDINGS

Pursuant to a written complaint filed by Camco, Inc. (“Camco”), a domestic Canadian producer of the subject goods, alleging injurious dumping of the subject goods by WCI and Whirlpool, the Commissioner commenced an investigation into alleged dumping on November 30, 1999.

On April 3, 2000, the Commissioner made a preliminary determination of dumping (the “Preliminary Determination”) with respect to the subject goods in accordance with subsection 38(1) of the *Special Import Measures Act*¹ (the “SIMA”). On April 7, 2000, Whirlpool and Inglis Limited (“Inglis”) filed an application with the Federal Court of Canada for judicial review of the Preliminary Determination. On April 28, 2000, Whirlpool and Inglis served a notice of motion seeking an interim order to stay the Preliminary Determination and to direct that no provisional duties be collected, pending the hearing of the judicial review application. The Federal Court of Canada dismissed this motion on June 20, 2000. The judicial review itself continued until it was discontinued by Whirlpool and Inglis on consent of the parties on September 1, 2000.

On June 30, 2000 the Commissioner made the Final Determination in accordance with paragraph 41(1)(a) of the SIMA. On August 11, 2000, Whirlpool and Inglis filed a request for panel review of the Final Determination. On September 8, 2000, Camco filed a complaint with the Canadian Section of the NAFTA Secretariat pursuant to section 39 of the Rules of Procedure for

¹ R.S.C. 1985, c. S-15, as amended.

NAFTA Article 1904 panel reviews (the “Rules of Procedure”), and on September 11, 2000 Whirlpool and Inglis filed a similar complaint with the Canadian Section.

This Panel was constituted to review the complaints filed by each of Camco and Whirlpool and Inglis. Hearings were held before this Panel on January 15th and 16th, 2002 in Ottawa, at which counsel for Camco, Whirlpool and Inglis, WCI Canada Inc. (“WCI Canada”) and WCI, the Commissioner, and Maytag Corporation (“Maytag”) appeared and presented oral argument with respect to both complaints.

III. STANDARD OF REVIEW

In reviewing the Final Determination, the Panel is to rely on Canadian statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of Canada would rely on such materials in reviewing a final determination of the Commissioner². In terms of the standard of review to be applied, each of NAFTA Article 1904(3), NAFTA Annex 1911 and the SIMA subsection 77.011(5) require that this Panel base its review of the Final Determination on the grounds set out in subsection 18.1(4) of the *Federal Court Act* (Canada)³.

In light of the complaints filed by both Camco and Whirlpool and Inglis, the Panel must examine whether the Commissioner:

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

² NAFTA Article 1904(2).

³ R.S.C. 1985, c. F-7, as amended.

- (iv) 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;
- (v) acted, or failed to act, by reason of fraud or perjured evidence; or
- (vi) acted in any other way that was contrary to law.

(a) **Issues of Jurisdiction**

The purpose of jurisdictional review is to ensure that, in coming to a certain decision, an administrative agency acted within the parameters of its empowering legislation. The administrative agency has no inherent power and must, instead, rely entirely on legislation as the source for its authority. Any action or decision of such an agency that exceeds the boundaries of its empowering legislation is action without authority and is a jurisdictional error. Similarly, the failure of an agency to do something that is required under that agency's empowering legislation can be a jurisdictional error.

Canadian case law has established that in respect of questions relating to its jurisdiction, an administrative agency's interpretation must be correct, and as such, this Panel will not defer to an agency's incorrect interpretation when dealing with questions of jurisdiction.

In determining whether a question is one that goes to jurisdiction, Canadian courts have adopted what has become known as the "pragmatic and functional approach"⁴. Using this approach, courts examine the legislation in question, the purpose of the statute creating the administrative agency, the expertise of the members of the agency and the nature of the problem at issue. The attempt, through an examination of each of these factors, is to determine the extent of the jurisdiction that the legislature intended to confer upon the administrative agency in question, and thereby determine whether the agency acted within or outside of the four corners of such jurisdiction.

There appears to be little dispute that an administrative agency's interpretation with respect to purely jurisdictional questions must be correct. Accordingly, this Panel adopts the correctness standard for any jurisdictional questions.

⁴ *Union des employés de service, local 298 v. Bibeault*, [1988] 2 S.C.R. 1048.

(b) **Issues of Law**

The bounds of an administrative agency's jurisdiction are carefully determined by the legislature when implementing such agency's empowering legislation. In light of such careful determination by the legislature, a court, and this Panel, is required to show some degree of deference to a decision of an administrative agency on a question of law if, following an analysis using the pragmatic and functional approach, it is found that the question falls squarely within the jurisdiction conferred upon such agency.

The level of deference to be shown to an administrative agency on questions of law within its jurisdiction has been the subject of much discussion both in Canadian courts and in the briefs filed in respect of this review. The Supreme Court of Canada has described the range of standards as follows:

Having regard to the large number of factors in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal is protected by a true privative clause in deciding a matter within its jurisdiction and where there is no statutory right of appeal...

At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question...⁵

Each of the parties to this panel review agree that some deference should be shown to the decisions of the Commissioner in respect of questions of law within its jurisdiction. The parties do not, however, agree on the level of deference that should be shown.

Following a careful examination of the authorities, this Panel concludes that if a question falls directly within the Commissioner's jurisdiction, a standard of review which is more deferential than "correctness" is appropriate. Looking to the other end of the spectrum, the absence of a

⁵ *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at 590.

privative clause protecting the decision of the Commissioner in this circumstance suggests a level of deference that is not as deferential as “patent unreasonableness”⁶. This Panel is left to apply a standard of review for questions of law that lies somewhere between the two extremes of “correctness” and “patent unreasonableness”.

As was found *In the Matter of the 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*⁷, this Panel finds that the officials of the Canada Customs and Revenue Agency perform a highly specialized function, have a developed expertise and are intended by Parliament to be primarily responsible for applying the SIMA and the regulations thereunder in dumping cases. As such, this Panel will show a considerable degree of deference to the decisions of the Commissioner on questions of law within its jurisdiction and will interfere only if it finds that the Commissioner’s decision cannot be sustained on any reasonable interpretation of the law.

(c) **Issues of Fact**

The standard of review to be applied to the fact-finding role of the Commissioner will be very deferential. This Panel is to review the determination of the Commissioner to determine whether the agency 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.⁸ The Panel views this test as requiring a high level of deference to the findings of fact by the Commissioner.

In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*⁹, Bastarache J. of the Supreme Court of Canada quoted, with approval, the dissenting opinion of L’Heureux-Dubé J. of the same court in *Mossop*¹⁰ as follows:

In general, deference is given on questions of fact because of the “signal advantage” enjoyed by the primary finder of fact. Less deference is warranted on questions of law, in part because the finder of fact may not have developed any

⁶ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

⁷ *In the Matter of the 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*, dated November 17, 1993, Secretariat File No. CDA-93-1904-01.

⁸ *Federal Court Act*, *supra*, paragraph 18.1(4)(d).

⁹ [1998] 1 S.C.R. 982 (hereinafter, “*Pushpanathan*”).

¹⁰ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

particular familiarity with issues of law. While there is merit in the distinction between fact and law, the distinction is not always so clear. Specialized boards are often called upon to make difficult findings of both fact and law. In some circumstances, the two are inextricably linked. Further, the “correct” interpretation of a term may be dictated by the mandate of the board and by the coherent body of jurisprudence it has developed. In some cases, even where courts might not agree with a given interpretation, the integrity of certain administrative processes may demand that deference be shown to that interpretation of law.¹¹

In respect of administrative decision making, there exists a spectrum that lies between those actions that are purely administrative and those that are seen to be “quasi-judicial”. The evolution of Canadian jurisprudence would indicate that, while administrative actions that are at the purely administrative end of the spectrum remain subject to a fairness test, the blurring of the distinction between purely administrative actions and those that are quasi-judicial means that distinction is now more relevant in considering the level of deference that will be shown in a review of an action of an administrative agency that is within its authority. Much of the Commissioner’s role in an anti-dumping investigation is to investigate the facts related to the allegations of dumping. Given the level of expertise of the Commissioner in this regard, the fact finding role of the Commissioner tends to be positioned more toward the administrative end of the spectrum and, thus, is afforded more deference by virtue of the Commissioner’s expertise.

With respect to questions of fact, this Panel adopts a standard of reasonableness, showing a high level of deference to the Commissioner in light of its expertise and superior ability to weigh and assess the evidence. Thus, unless a decision of the Commissioner cannot be supported by a reasonable interpretation of the facts before it, or unless it had no facts upon which it could reasonably base its decision, this Panel will show a high level of deference and will not interfere.

IV. THE COMPLAINT OF CAMCO INC.

Camco asked the Panel to review the Final Determination based on the following questions:

- (i) Did the Commissioner commit either an error of jurisdiction or an error of law in its calculation of “an amount for profit” as that phrase appears in paragraph 25(1)(c) of the SIMA?

¹¹ *Pushpanathan, supra*, at 1012.

- (ii) Did the Commissioner commit either an error of jurisdiction or an error of law in calculating normal values for subject goods exported by WCI on the basis of “normal value multipliers”?
- (iii) Did the Commissioner commit either an error of jurisdiction or an error of law in deducting certain warehousing expenses in the calculation of normal values for exports of subject goods by WCI?
- (iv) Did the Commissioner commit either an error of jurisdiction or an error of law in calculating normal values applicable to subject goods of WCI by failing to account for differences in conditions of sale as required by paragraph 5(d) of the *Special Import Measures Regulations*¹² (the “SIMR”)?
- (v) Did the Commissioner commit either an error of jurisdiction or an error of law in its application of section 9 of the SIMR by deducting an “amount for profit” in its calculation of normal values applicable to subject goods of Whirlpool?

The Panel will deal with each of the above questions raised by Camco in turn.

(a) Determination of Amount for Profit Under Section 25 of the SIMA

The first issue raised by Camco concerns what it asserts is the erroneous use by the Commissioner of paragraph 25(1)(c) of the SIMA to calculate an “amount for profit by the importer on the sale.” Section 24 of the SIMA requires the Commissioner to calculate the export price of goods sold to an importer in Canada as the lesser of the exporter’s adjusted sale price for the goods and the adjusted price at which the importer has purchased (or agreed to purchase) the goods. However, the SIMA further provides at paragraphs 25(1)(b) and 25(1)(c) that when the Commissioner is of the opinion that the price determined under section 24 is unreliable, the export price is to be that at which the goods were sold in Canada, less certain amounts, including an amount for profit by the importer on the sale.

The phrase “an amount for profit” found in subparagraph 25(1)(c)(ii) of the SIMA is defined in section 20 of the SIMR to mean “the amount of profit that would be made in the ordinary course

¹² SOR/84-927, as amended.

of trade on the sale of the goods.” That phrase is, in turn, to be determined according to section 22 of the SIMR which reads as follows:

22. For the purpose of sections 20 and 21, the amount of profit that would be made in the ordinary course of trade on the sale of the goods is

(a) the amount of profit that generally results from sales of like goods in Canada by vendors who are at the same or substantially the same trade level as the importer to purchasers in Canada who are not associated with those vendors;

(b) where the amount described in paragraph (a) cannot be determined, the amount of profit that generally results from sales of goods of the same general category in Canada by vendor who are at the same or substantially the same trade level as the importer to purchaser in Canada who are not associated with those vendors; or

(c) where the amounts described in paragraphs (a) and (b) cannot be determined, the amount of profit that generally results from sale of goods that are of the group or range of goods that is next largest to the category referred to in paragraph (b); by vendors in Canada who are at the same or substantially the same trade level as the importer, to purchasers in Canada who are not associated with those vendors.

Camco claims that the Commissioner failed to follow the procedure set out in these sections of the SIMR when determining the amount for profit in respect of Whirlpool’s goods imported to Canada. In particular, Camco argues that, while the Commissioner purported to implement section 22(a) of the SIMR in the determination of an amount for profit, its calculations ultimately failed to meet the basic requirements of that paragraph. Camco argues that the Commissioner committed the following errors of jurisdiction or law:

- (i) The amount for profit was not an amount that resulted from sales of like goods in Canada to purchasers in Canada, as the sales data upon which the Commissioner relied included sales by Camco outside of Canada;
- (ii) The Commissioner ignored the requirement that the amount for profit must result from sales by vendors at the same or substantially the same trade level as the importers, that do not manufacture the subject goods in Canada, because the Commissioner included in its calculation profits realized on sales by Canadian producers of the subject goods (Camco, for example);

- (iii) The Commissioner ignored the requirements that the amount for profit must be based on (a) sales of like goods to each of the subject goods: refrigerators, dishwashers and dryers, and (b) that separate profits must be determined for each of these subject goods; and furthermore, the profit figures included not only the aggregate of profit on all these categories of subject goods, but also profit from other non-subject goods sold by the given companies included in the Commissioner's calculation and it is not clear that the Commissioner satisfied itself that the sales which generated those profits were made to purchasers who were not associated with one of the five companies; and
- (iv) The Commissioner ignored the requirement that the group of vendors considered for determining an amount for profit for the importer cannot include the importer itself, given the language of paragraph 22(a) of the SIMR which, according to Camco uses the terms "vendor" and "importer" in a manner meant to be distinct and its inclusion of the profits of Inglis and Frigidaire Canada in determining the profits of Inglis and Frigidaire Canada was, therefore, incorrect.

The parties appearing before this Panel were unable to agree on which of the paragraphs under section 22 of the SIMR was used by the Commissioner in determining "an amount for profit".

Camco has argued that the Commissioner relied upon paragraph 22(a) of the SIMR in determining "an amount for profit". In support of this argument, Camco cites from a memorandum to file (the "Memorandum") used by the Commissioner for the determination of profit under section 25 of the SIMA as follows:

To determine the Canadian industry profit, we are advised to use Regulations 22(a) to (c) in sequence. Thus, the first approach (or Regulation sub-section 22(a)) is to use the profit generally realized on the sales of like goods by vendors in Canada as a whole.¹³

Camco suggests that the Commissioner went on to review the information that it gathered concerning the profit generally realized on the sales of like goods by vendors in Canada as a whole. Camco further notes that the Memorandum then states that:

¹³ Administrative Record, File No. 4246-106, Volume 3, Tab 5, "Section 25 Profit at FD for the Appliance Case", June 1, 2000, at 23.

I think that the foregoing Canadian profit survey recommendation best meets the requirements of Regulation 22 and the guidelines set out in the SIMA Handbook, as the profit established in the first criteria recommended to use.¹⁴

Camco argues that it is clear, based on the foregoing, that the Commissioner calculated an amount for profit on the basis of paragraph 22(a) of the SIMR.

WCI has suggested that the Commissioner relied on paragraph 22(b) of the SIMR, which contemplates that the amount for profit be that which generally results from sales of goods of the “same general category” in Canada, rather than paragraph 22(a). WCI argues, therefore, that Camco’s arguments regarding the alleged error on the part of the Commissioner in applying paragraph 22(a) of the SIMR are irrelevant.

Whirlpool offered this Panel yet another interpretation of the Commissioner’s application of section 22 of the SIMR. According to Whirlpool, the Commissioner could not have applied paragraph 22(a), but instead, employed an approach that appears to be more consistent with the wording of paragraphs 22(b) or 22(c).

The Commissioner argued before this Panel that the Memorandum, as cited by Camco, refers to paragraph 22(a) of the SIMR as the first approach to be considered before it then discussed using the profits data of appliance firms. The approach explained in the Memorandum would, according to the Commissioner, be consistent with the approach outlined in paragraph 22(c), which refers to the profit resulting from sales of goods of the group or range of goods in the next largest category.

There is no dispute among the parties to this review that the paragraphs under section 22 of the SIMR are to be applied in a consecutive manner -- i.e. only if paragraph 22(a) does not apply can the Commissioner turn to paragraph 22(b), and so on. However, in the present case, although the Commissioner claims that it began its inquiry with paragraph 22(a), as is required, it is unable to state definitively upon which paragraph its investigators relied in conducting their inquiry.

This Panel notes that the Commissioner could have easily avoided this dispute had it followed the guidelines provided in its own SIMA Handbook¹⁵ and clearly stated, in its

¹⁴ Ibid, at 24.

¹⁵ SIMA Handbook, Anti-dumping and Countervailing Directorate, Canada Customs and Revenue Agency. (hereinafter the “SIMA Handbook”)

Memorandum or in the Final Determination, the paragraph under section 22 of the SIMR upon which it made its calculations. Such clear statement is necessary both for ensuring that the Commissioner does not exceed the boundaries of its authority and for allowing affected parties to monitor and challenge the Commissioner's conduct where they believe the Commissioner has erred. As counsel for the Commissioner agreed in oral argument before this Panel, it would be useful if the Commissioner's document had a simple statement of the provision applied.

In response to the Commissioner's assertion that it relied upon paragraph 22(c) of the SIMR to determine "an amount for profit", Camco argued that even if the Commissioner had based its calculations on paragraph 22(c), such determination was deficient, as, in Camco's view, the alleged errors enumerated above with regard to the application of paragraph 22(a) also apply with respect to paragraph 22(c). Specifically, in oral argument before the Panel, counsel for Camco emphasized the inclusion of sales made in Canada to purchasers outside of Canada; the inclusion of sales by vendors who were not at the same or substantially the same trade level as the importers, to purchasers who were not all unassociated with the vendors; and the inclusion of the importer itself as one of the vendors.

In respect of Camco's argument that the Commissioner failed to exclude figures relating to sales made by Camco to purchasers outside of Canada, the Commissioner conceded that indeed Camco's sales outside of Canada were not excluded. However, the Commissioner claimed that it relied on the information provided to it by Camco, and that despite several requests by the Commissioner, Camco failed to provide a separate assessment for goods sold in Canada. The Commissioner also alleged that it made several attempts to obtain separate sales data from outside sources (such as Statistics Canada), but to no avail.

At the hearing, counsel for the Commissioner made the uncontradicted assertion that the evidence on the record shows that the impact on the overall calculation of not subtracting the export sales was insignificant. Therefore, although this Panel believes that it was possible for the Commissioner to have made greater efforts in obtaining separate sales data, the Panel has no indication that these greater efforts would have amounted to a significant difference in the ultimate calculations.

As to whether the sales that were taken into account were made by vendors at substantially the same trade levels, to purchasers not associated with the companies investigated, the

Commissioner explained that it sought to obtain profit information from numerous Canadian sources during the course of the investigation, and that the resulting profit figure used was based on the best information available. In this context, the SIMA Handbook, part 5.10.2.3, stipulates that:

In considering the terms “same” or “substantially the same trade level” a firm should not arbitrarily be dismissed from the data based simply because of its designation, i.e., distributor or manufacturer. Rather, care should be taken to examine the functions performed in that industry, particularly those relating to sales and distribution. In most industries, it would be appropriate to utilize data from both manufacturers and importers in that their sales and distribution functions will likely have significant similarities. It is recognized that, in some cases, it may be reasonable for firms at different trade levels to anticipate different profit levels... Companies in Canada are generally considered to be at “substantially the same trade level” when they sell to the same customers and compete directly in the marketplace for the same customers. In any case where the above trade level considerations exist, the file should clearly explain the rationality for the decision.

The Commissioner has argued that all the companies investigated sold to the same customers and competed for the same market; consequently, they should be considered of the same trade level. This Panel was not directed to any evidence on the record, and it is the Commissioner’s submission that it had no evidence before it at the investigation stage which would indicate that the sales made were to associated companies. This Panel is not convinced of Camco’s arguments in this matter. If the sales contested by Camco were those made by Camco to associated purchasers, then it should have pointed that fact out to the Commissioner at an earlier stage. Instead, Camco provided the Commissioner with figures, only to complain about the use of those figures following the Final Determination.

In response to Camco’s challenge to the inclusion of the importer’s sales, the Commissioner asserted that it is its policy to include the profit of the importer for whom the export price is being determined in this calculation. None of the parties pointed this Panel to any legislative or other authority that would preclude this practice. In addition, neither the SIMA nor the SIMR provide a restrictive and qualified definition of “vendors” that would suggest that this group of sellers should be limited.

This Panel also heard an alternative argument from Camco wherein it suggested an alternative methodology to that followed by the Commissioner for the determination of export price which is found under subsection 29(1) of the SIMA:

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

This Panel fails to see how this alternative authority offered by Camco advances its argument; the very broad scope of discretion accorded to the Commissioner by subsection 29(1) of the SIMA is wide enough to include the methodology ultimately employed by the Commissioner in the present case.

In light of the above, Camco has failed to convince this Panel of the merit of its objections in respect of the Commissioner's determination of "an amount for profit" under section 22 of the SIMR and, therefore, this Panel will not remand on this issue.

(b) Calculation of Normal Values for Subject Goods Exported by WCI on the Basis of "Multipliers"

Camco alleges that the Commissioner failed to properly apply the SIMA sections 16 to 19 when calculating the "normal values" of the goods exported by WCI to Canada. In particular, Camco alleges that Commissioner's use of normal value "multipliers" is contrary to the requirements of the SIMA that normal values of the subject goods be calculated on the basis of "qualifying home market sales."

Section 15 of the SIMA provides that the "normal value" of the subject goods is determined on the basis of actual sales in the ordinary course of business to unaffiliated purchasers of like goods, in comparable quantities, under competitive conditions, and at substantially the same level of trade as the Canadian importer, which occur in the exporter's home market during defined time periods surrounding the alleged dumping.

Sections 16 to 19 of the SIMA provide a series of rules for making adjustments to approximate the conditions described in section 15 of the SIMA, when data relating to one or more of the circumstances set out in section 15 is not available. The adjustments these provisions envision are further detailed in the SIMR sections 3 to 19.

The essence of Camco's allegation with respect to this issue is that the use of "multipliers" is not specifically endorsed in the provisions of the SIMA or the SIMR.

The Commissioner argues that it fully complied with the dictates of the SIMA and the SIMR in calculating the “normal values” for the subject goods sold by WCI. In its briefs, and at the hearing, the Commissioner restated the description of the steps it took in calculating the “normal values” of the subject goods. Those steps were described in the June 30, 2000, statement of reasons for the Final Determination as follows:

Based on the WCI submission, normal values were determined using section 15 of SIMA, where there were profitable sales of like goods and sales to more than one domestic customer. The normal values were based on the weighted average selling price of the like goods sold to larger volume customers in the United States of America.

Where sales of like goods were found not to be profitable or where sales of like goods were to only one customer, normal values were determined, using paragraph 19(b) of SIMA, based on the production cost of the subject goods, plus reasonable amounts for administrative, selling and all other costs and an amount for profit pursuant to regulation 11, subparagraph (1)(b)(ii) of the *Special Import Measures Regulations* (SIMR). Regulation 13 of the SIMR was applied when determining profit of goods of the same general category.

Where applicable, the normal values determined under section 15 of the SIMA were adjusted in accordance with the SIMR, as follows:

- a regulation 3 quantity adjustment was allowed when quality discounts were generally granted in the domestic market and the importer would have qualified if the sale had occurred in the United States of America;
- a regulation 6 adjustment was allowed when cash discounts, rebates, and deferred discounts were generally granted in the domestic market and the importer would have qualified if the sale had occurred in the United States of America;
- a regulation 7 freight adjustment was allowed for domestic sales that were sold on a delivered or a freight included basis; and
- a regulation 9 trade level adjustment was made to take into account advertising, warehousing and sales’ staff expenses incurred on domestic sales which are at a trade level nearest or subsequent to that of the importer.¹⁶

The Commissioner further detailed the process of its calculations in correspondence with WCI on June 30, 2000, which set forth the results of its investigation. In that correspondence, after

¹⁶ Statement of Reasons concerning the making of a final determination of dumping with respect to certain top-mount electric refrigerators, electric household dishwashers, and gas or electric laundry dryers, originating in or exported from the United States of America and Produced by, or on behalf of, White Consolidated Industries, Inc. and Whirlpool Corporation, their respective affiliates, successors and assigns, Commissioner of Customs and Revenue, June 30, 2000 (hereinafter the “Statement of Reasons”).

providing much the same description of the process noted as appearing in its Statement of Reasons above, the Commissioner continued with the following:

In order to simplify the determination of normal values for the final determination, specific normal value multipliers were used.

Model specific weighted average net mark up was calculated for models sold to a national distributor (FHP Canada) by comparing the adjusted totaled invoice price (net of all regulation adjustments) with the total Cost of Manufacturing (material, labour, and factory overhead). This is indicative of the amount by which FHP would mark up its Cost of Manufacturing to arrive at the selling price to a domestic national distributor. The net mark-up figure in essence includes the required regulation 5(a) quality adjustment where applicable, a downward adjustment for quantity adjustment (regulation 3), a downward adjustment for cash discounts and rebates (regulation 6), a downward adjustment for delivery costs included in the selling price (regulation 7); and a downward adjustment to reflect the difference in trade level between domestic customers and importers in Canada (regulation 9).

The multipliers were then applied to the Cost of Manufacturing of the exported models to arrive at normal values.

The calculations are included in a CD remitted to your Canadian counsel...¹⁷

The Commissioner argues that by using “multipliers” it was simply applying arithmetic processes to its computations. Counsel for the Commissioner argued before this Panel that the Commissioner’s use of “multipliers” in the course of calculating the “normal values” for WCI’s products in this case did, in fact, produce the correct mathematical results.

WCI supports the Commissioner’s submission that no error was committed in using “multipliers” to compute the “normal values” for the subject goods sold by WCI. WCI asserts that the “multipliers” of which Camco complains are simply arithmetic calculations, which are in fact necessary to make the various adjustments required under sections 15 to 19 of the SIMA and under the applicable provisions of the SIMR.

WCI also pointed out to this Panel that Camco did not offer any substitute or alternative methodology as being more appropriate or proper, other than calling for the use of “actual qualifying sales.” WCI further noted that Camco’s complaint on this issue goes more to the description of the processes employed in the Commissioner’s correspondence with WCI, rather than to the actual calculations performed by the Commissioner.

¹⁷ Administrative Record, File No. 4246-106-1, WCI Inc.- FD, Volume 34, Tab 8, p. 15.

The “multipliers” to which Camco objects are simply the mathematical means of making the comparisons and adjustments required under sections 16 to 19 of the SIMA and the applicable sections under the SIMR in order to compute “normal values” for the subject goods. Despite the apparent concession implicit in the reference to “simplifying” the computations in Commissioner’s letter to WCI, it is difficult to conceive of other means of making the adjustments called for under the law and regulations without resort to mathematical tools such as weighted averages and percentages for each of the various computations.

Moreover, this Panel was not directed to any evidence on the record showing that the Commissioner’s computations were in error as a result of the use of “multipliers,” nor what other results might have been obtained with the use of some other methodology. The entire thrust of Camco’s complaint, which at its core seems to center on terminology, is the use of what was called a “multiplier.”

While the precise term “multiplier” may not be found in the text of the SIMA or the SIMR, the purported alternative suggested by Camco, being “actual qualifying sales”, is also absent. Additionally, there appears to be no dispute over the Commissioner’s use of sales that fit within the requirements of section 15 of the SIMA when that data was available. The issue of “multipliers” only arises when information concerning sales fitting the requirements of section 15 of the SIMA is not available -- when “actual qualifying sales” are lacking as it were -- and adjustments are therefore necessary under other provisions of the SIMA.

Not only has Camco failed to provide this Panel with any authority which precludes the process employed by the Commissioner, but to the contrary, the types of comparisons and adjustments called for under sections 16 to 19 of the SIMA and the applicable sections of the SIMR logically and implicitly would seem to envision use of mathematical tools such as percentages or “multipliers” in order for the Commissioner to carry out its obligations. What is important is not the terminology employed as a convenient shorthand description of the mathematical processes to be applied, but whether the Commissioner complied with the law and regulations in actually computing the “normal values” for the subject goods.

Accordingly, this Panel is not convinced that there has been an error committed by the Commissioner through the use of the so-called “multipliers” and will not remand on this issue.

(c) Deduction of Warehousing Expenses in Calculation of Normal Values for WCI's Exports of Subject Goods

The third central question raised by Camco is whether the Commissioner erred when it included warehousing expenses incurred by WCI in determining the trade level adjustments under section 9 of the SIMR necessary to compute "normal value" for WCI's exports pursuant to sections 15 and 16 of the SIMA.

Paragraphs 15(a) and 15(e) of the SIMA stipulate that the normal value of subject goods is the price of like goods when they are sold by the exporter to its home market customers at the same place from which the subject goods were shipped directly to Canada. Paragraph 15(e) of the SIMA reads as follows:

15. Subject to sections 19 and 20, where goods are sold to an importer in Canada, the normal value of the goods is the price of like goods when they are sold by the exporter of the first mentioned goods

...

(e) at the place from which the good were shipped directly to Canada or, if the goods have not been shipped to Canada, at the place from which the goods would be shipped directly to Canada under normal conditions of trade,

adjusted in the prescribed manner and circumstances to reflect the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importer and the like goods sold by the exporter.

Paragraph 16(1)(a) of the SIMA addresses the situation where there is an insufficient number of home market sales made by the exporter at the same place from which the subject goods were shipped directly to Canada, thereby precluding a proper comparison. In such case, if there are home market sales made by the exporter at one or more other places, home market sales in such other place or places should be included in the determination of normal value.

In its initial investigation, the Commissioner included in its calculation of normal value certain home market sales that, pursuant to the SIMA, ought not to have been included. The Commissioner recognized this error and rectified it during its review of normal values and export prices for the purposes of finalizing the duty liability for goods released from Customs from the date of the Preliminary Determination. In initially making its determination of the amount for profit for

these erroneously included goods, the Commissioner turned to the trade-level adjustments provided in paragraph 9(a) of the SIMR which reads as follows:

9. For the purposes of sections 15 and 19 and subparagraph 20(1)(c)(i) of the Act, where purchasers of like goods who are at the trade level nearest and subsequent to that of the importer in Canada have been substituted for purchasers who are at the same or substantially the same trade level as that of the importer, the price of the like good shall be adjusted by deducting therefrom

(a) the amount of any costs, charges or expenses incurred by the vendor of the like goods in selling to purchasers who are at the trade level and nearest and subsequent to that of the importer that result from activities that would not be performed if the like goods were sold to purchaser who are at the same or substantially the same trade level as that of the importer; ...

Pursuant to this authority, the Commissioner made a downward adjustment for warehousing and freight for a number of sales, some of which ought not to have been included at all in determining normal value and others of which ought not to have been adjusted downward.

In its complaint, Camco correctly argued that when determining normal value on the basis of home market sales from a place other than the place of direct shipment, neither the SIMA nor the SIMR provide for any deduction for costs incurred in respect of activities performed prior to the arrival of the goods at that other place. Only if the Commissioner is of the opinion that there is an insufficient number of sales of like goods made by the exporter at the place from which the subject goods are shipped directly to Canada so as to permit a proper comparison between the sales, can it then include in its calculation sales made from another place of sale, nearest to the place of shipment.

The Commissioner has conceded that there were, in fact, sufficient sales of like goods by WCI at the place of direct shipment to Canada so as to permit a proper comparison with the sales of goods to the importer in Canada, and therefore it was not necessary to examine additional places from which goods were shipped to Canada. Accordingly, the Commissioner could make its determination of normal value under section 15 of the SIMA, and there was no need to turn to paragraph 16(1)(a) of the SIMA, or perform a trade level adjustment under section 9 of the SIMR.

The Commissioner concedes that the trade level adjustment, including the deduction of warehousing expenses, conducted under paragraph 9(a) of the SIMR was indeed erroneous, and stated that the error was rectified during the review of normal values and export prices for the

purpose of finalizing the duty liability for goods released from Customs from the date of the Preliminary Determination of dumping.

Despite this submission, Camco has argued before this Panel that a remand is still required to amend the Final Determination. As the Commissioner has admitted that an error was made, all evidence referred to by the parties indicates that the error made had only a minor impact upon the Final Determination and the error was later rectified in subsequent review of the final duties imposed, this Panel is not convinced that, in this circumstance, a remand is required.

(d) Failure to Account for Differences in Conditions of Sale as Required by Paragraph 5(d) of the SIMR

Camco alleges that the Commissioner failed to properly apply paragraph 5(d) of the SIMR when calculating the “normal values” of the goods exported by WCI to Canada pursuant to section 15 of the SIMA. In particular, Camco alleges that a difference in the time which payment was rendered by WCI Canada versus WCI’s customers in the United States should have resulted in an adjustment for differing “conditions of sale” under the SIMR.

Section 15 of the SIMA directs that the normal value of the goods should be adjusted in the prescribed manner and circumstances to reflect the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between goods sold to the importer and like goods sold by the exporter. Paragraph 5(d) of the SIMR provides that “where the goods sold to the importer in Canada and the like goods differ... in their conditions of sale... and that difference would be reflected in a difference in the price of like goods and the price at which goods that are identical in all respects, including conditions of sale, to the goods sold to the importer in Canada would be sold in the country of export, the price of like goods shall be adjusted...”

The Commissioner determined that there was a difference in the amount of time in which payment was usually rendered by WCI Canada, but did not adjust the normal value of WCI’s goods as a result. Camco asserts that this failure or refusal by the Commissioner to adjust the normal value of WCI’s goods is an error justifying remand because, Camco submits, the difference was not trivial when measured in percentage terms.

The Commissioner acknowledges that there is a difference in the time in which payment was usually rendered by WCI Canada, but asserts that no adjustment is required in this case. In its

respondent's brief, the Commissioner asserts that the adjustment it makes under paragraph 5(d) of the SIMR for differences in the time when payment might be rendered in the domestic and export markets depends upon establishing the prevailing interest rate in both markets. The Commissioner states at page 53 of its respondent's brief that:

The difference in value of the two payment periods, or the amount of time customers take to remit payment, is quantified on this basis. This difference is the adjustment to the price of like goods. This adjustment can either be an addition to or a deduction from the price of the like goods depending upon which party has the longer payment period (i.e. the importer in Canada or the exporter's domestic customers).

The Commissioner's policy for making such adjustments under paragraph 5(d) of the SIMR is stated in section 5.7.1.1 of the SIMA Handbook, as follows:

It may not be practicable to adjust for credit in every instance where credit terms are available. Therefore it is Divisional policy that an adjustment under paragraph 5(d) of the [SIMR] will generally be made only in instances where...it is determined that there is more than a 30 day difference in the credit terms available in each market.

The Commissioner, therefore, asserts that as there was less than a 30 day difference between the domestic market and the sales in Canada, no adjustment was warranted under its policy. The Commissioner argued that this policy and its actions are both reasonable and correct.

WCI supports the Commissioner's contention that no error was committed by failing to adjust the normal value of its products, notwithstanding the existence of a difference in the time in which payment is remitted in the two markets in this case. WCI asserts that under paragraph 5(d) of the SIMR, only differences in conditions of sale which would be reflected in the price of the goods in the two markets should result in an adjustment. In other words, not every difference in the conditions of sale necessarily requires that an adjustment be made to determine normal value. Accordingly, WCI asserts that the Commissioner has some degree of discretion to determine whether a particular difference in credit terms would or would not be reflected in the price of the goods, and that the "Divisional policy" reflected in the SIMA Handbook is a valid exercise of that discretion.

Moreover, WCI has argued that the difference in the payment terms in this particular case would have only a *de minimis* impact on the actual price of the goods in any event. Accordingly, irrespective of the "Divisional policy", WCI asserts an adjustment is not necessarily required under

the terms of paragraph 5(d) of the SIMR. Alternatively, WCI asserts that no reviewable error occurred under any applicable standard of review.

The computations regarding the time value of money resulting from different payment practices are not actually included in the Final Determination being challenged in this proceeding, nor can they be found in the Statement of Reasons which accompanies the Final Determination. Rather, they are a small part of the numerous underlying calculations, computations, and judgments entrusted to the Commissioner which eventually result in a decision to issue a final determination of dumping.

The Commissioner, logically and under the terms of both section 15 of the SIMA and section 5 of the SIMR, has some degree of discretion in determining how to carry out its responsibilities with regard to these tertiary computations. The regulatory scheme clearly does not require that every difference, however minuscule, be reflected in an adjustment. Only those differences which would influence prices and the ability to compare the prices of relevant goods between the domestic and export markets necessitate adjustments be applied when computing normal value.

The differences in the time to remit payment in the two markets in this case are argued, by both the Commissioner and WCI, to be *de minimis*, and of little impact on the price of the goods in either market. Moreover, the difference involved is well within the Commissioner's established policy guidelines, which require more than a 30 day differential before an adjustment is applied.

Accordingly, in light of the tertiary nature of the computations involved, their *de minimis* impact, lying well within the scope of established Commissioner policy, and involving the Commissioner's determination of what is or is not a "qualitative difference" in the "conditions of sale" under paragraph 5(d) of the SIMR 5, this Panel is not convinced that there is a need for a remand on this issue.

(e) Deduction of an Amount for Profit in the Calculation of Whirlpool's Export Prices

Under section 15 and paragraph 16(1)(b) of the SIMA, in the determination of normal value, the Commissioner is permitted to make certain deductions from the exporter's domestic selling price where purchasers of like goods, who are at a trade level nearest and subsequent to that of the importer in Canada, have been substituted for purchasers who are at the same or substantially the same trade level as the importer.

All deductions and adjustments are to be made “in the prescribed manner and circumstances.” The adjustments are prescribed in sections 3 through 10 of the SIMR, and include adjustments for quantity discounts, qualitative differences, discounts, delivery costs, trade level adjustments and taxes and duties.

Paragraph 9(a) of the SIMR, which deals with trade level adjustments, provides that in making such adjustments under section 15 of the SIMA, a deduction must be made from the exporter’s home market selling price for the amount of any “costs, charges or expenses” incurred by the vendor of the like goods in selling to purchasers who are at the trade level nearest and subsequent to that of the importer where that amount results from activities that would not be performed if the like goods were sold to purchasers who are at the same or substantially the same level as that of the importer.

There was no dispute among the parties to this matter that in calculating the amount of this deduction in its determination of normal values for subject goods exported by Whirlpool, the Commissioner deducted an “amount for profit”. No such adjustment was made with respect to the determination of normal values applicable to exports of subject goods by WCI. The only issue in dispute is whether this deduction was permitted by the legislation.

The Commissioner conceded that such deduction in the case of Whirlpool’s exports was erroneous. Whirlpool, on the other hand, offered arguments in support of the Commissioner’s conduct, relying on sections 11 and 13 of the SIMR. Whirlpool argued that the methodology of the Commissioner was to take the normal value, whether determined under section 15 or 19 of the SIMA, and deduct from it the amount of the costs incurred on sales in the United States, but not incurred on sales to Canada, and then gross up the amount of deducted costs (on a product-by-product basis) by the amount of profitability found under Section 11 of the SIMR.

In addition, counsel for Whirlpool asked that this Panel interpret the SIMR, and specifically paragraph 9(b) thereof, as not only allowing for a deduction of an amount for profit, but in fact requiring such a deduction. Whirlpool claimed that a deduction of an amount for profit is necessary to allow for “a fair comparison between the export price and the normal value”, as stated in paragraph 2.4 of the WTO Anti-Dumping Agreement. Whirlpool claims that only such methodology would have enabled a “fair comparison” in the special context of a large volume of export sales to a

single customer (in the present case, Inglis), as such sales are necessarily made with smaller profit margins.

This Panel views Whirlpool's position as problematic. It not only ignores the Commissioner's acknowledgement of error, but would have this panel eschew the explicit and specific authority of paragraph 9(a) of the SIMR which clearly applies to the present situation. Sections 11 and 13 of the SIMR, upon which Whirlpool relies, deal with the cost of production and other costs, and not with substitution of trade level. Section 11 of the SIMR applies to paragraph 19(b) and subparagraph 20(1)(c)(ii) of the SIMA and section 13 of the SIMR applies to paragraph 11(1)(b) of the SIMA. Section 9 of the SIMR, on the other hand, specifically deals with the calculations under sections 15 and 19 of the SIMA, which govern the determination of normal values.

In addition, paragraph 9(b) of the SIMR very clearly states that it applies only in the absence of information relating to the costs, charges and expenses mentioned in paragraph 9(a). In the present case, there was no lack of information under paragraph 9(a). Accordingly, it was unnecessary to embark on a calculation under paragraph 9(b). Therefore, this Panel is not convinced of Whirlpool's claims as to what form of calculation "a fair comparison" rule may warrant under paragraph 9(b).

Camco has asked that this Panel remand to the Commissioner to recalculate the trade level adjustments under paragraph 9(a) of the SIMR without a deduction for an amount for profit. This Panel notes, however, that it was asserted during oral hearings, and such assertion was not disputed, that the evidence on the record shows that the Commissioner's error on this issue had only a "miniscule effect" on the Final Determination. Consequently, being guided by the legal maxim *de minimis non curat lex*, this Panel will not remand on this issue as the error had only a miniscule effect. This Panel trusts that the Commissioner will take this error, which it has conceded, into account in all future calculations of duties owed.

(f) Conclusion

This Panel has carefully reviewed the complaint and written briefs filed by Camco in respect of the Final Determination, and has heard oral arguments. Having carefully considered each of the arguments raised by Camco in its complaint with respect to the Final Determination, and having

determined that, with respect to each argument, no remand was required, this Panel dismisses the complaint filed by Camco on September 8, 2001.

V. THE COMPLAINT OF WHIRLPOOL CORPORATION AND INGLIS LIMITED

In their complainants' brief, Whirlpool and Inglis ask this Panel to determine whether the Commissioner committed reviewable errors of jurisdiction, of law or of fact when it:

- (i) refused to conduct an independent analysis of the existence of other source of injurious dumping and refused to extend its investigation to all exporters of subject goods from the United States of America, including those with which the Canadian industry had corporate or commercial affiliation;
- (ii) refused to conduct a country-specific, as opposed to a company-specific, investigation;
- (iii) conducted its investigation with respect to three separate and distinct products which are not like goods and are not a "product";
- (iv) selectively employed different methodologies for the determination of export price such as to maximize the amount of dumping found;
- (v) applied amounts for profit that were not "reasonable" as required by paragraph 19(b) of the SIMA;
- (vi) made deductions from the importer's resale price for general selling and administrative expenses of the importer in calculating section 25 export prices; and
- (vii) inflated the margins of dumping for Whirlpool by not taking into consideration undumped goods.

This decision will deal with each of the above issues in turn. In their briefs and in their arguments before this Panel, Whirlpool and Inglis grouped issues (i) and (ii) above into one issue which they referred to as the "targeting issue". Similarly, this Panel will deal with issues (i) and (ii) together.

(a) Issue Estoppel, Abuse of Process, Mootness and Standing

Before dealing with the issues raised by Whirlpool and Inglis, this Panel considered several preliminary arguments raised by Camco and by the participant Maytag in respect of the complaint of Whirlpool and Inglis.

1. Issue Estoppel, Abuse of Process

As mentioned above under the heading “Administrative History and Panel Proceedings”, on April 7, 2000, Whirlpool and Inglis filed an application for judicial review in the Federal Court of Canada – Trial Division seeking to quash the Preliminary Determination of the Commissioner. In the context of their application for judicial review, Whirlpool and Inglis filed a notice of motion for interim relief seeking, *inter alia*, an interlocutory stay of the Preliminary Determination and a direction that no provisional duties be collected until the disposition of the application for judicial review. The interlocutory motion of Whirlpool and Inglis was dismissed by Madame Justice Hansen of the Federal Court after two days of oral hearings. In her decision to dismiss the motion, Madame Justice Hansen stated that she was not persuaded that Whirlpool and Inglis had raised a serious issue to be tried.¹⁸ Following the disposition of the interlocutory motion of Whirlpool and Inglis, the application for judicial review proceeded until it was discontinued by Whirlpool and Inglis on consent of the parties on September 1, 2000.

Camco argues in its brief filed in response to the complaint of Whirlpool and Inglis, and in a notice of motion filed with this Panel on April 30, 2001, that by virtue of the doctrine of issue estoppel, Whirlpool and Inglis are estopped from raising the same issues before this panel that were raised in the application for judicial review and in the interlocutory motion therein. Camco further alleges that Whirlpool and Inglis are engaging in abuse of process by relitigation by raising before this Panel the same grounds which were raised by them in their application for judicial review.

The Panel is not convinced that the rule of issue estoppel applies in this case. The preconditions to the operation of issue estoppel are as follows:

- (i) that the same question has been decided;

¹⁸ *Whirlpool Corporation and Inglis Limited v. The Commissioner of Customs and Revenue and Camco Inc.*, [2000] F.C.T.D. Court file No. T-664-00.

- (ii) that the judicial decision which is said to create the estoppel was final; and
- (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.¹⁹

Despite the many authorities relied upon by Camco as support for their argument, this Panel is not persuaded that the decision of Madame Justice Hansen in the interlocutory motion was one which finally determined the issues between the parties to the application for judicial review. The only issue before Madame Justice Hansen was whether a stay of the Preliminary Determination was warranted pending a determination on the merits of the application for judicial review. The application for judicial review continued to proceed following the dismissal of the interlocutory motion and was discontinued by Whirlpool and Inglis on September 1, 2000 before the Federal Court had an opportunity to determine the issues raised therein. Thus, the second part of the test for issue estoppel, that the judicial decision which is said to create the estoppel must be final, has not been met. Having determined that the finality aspect of the test for issue estoppel has not been met, it is not necessary for this Panel to review in any detail the other two portions of that test as all three parts of the test must be met before issue estoppel may apply.

Camco has also failed to convince this Panel that Whirlpool and Inglis have engaged in abuse of process by relitigation by requesting a NAFTA Panel review of the Commissioner's Final Determination. The discretionary jurisdiction to stay or dismiss an action on the ground that the action is an abuse of the process will only be exercised by a court, or by this Panel, in the clearest of cases where it is plain and obvious the case cannot succeed.²⁰ Given that Camco failed to address this test at all in its arguments, and given this Panel's finding that the decision of Madame Justice Hansen of the Federal Court was not determinative of the issues raised in the application for judicial review, this Panel rejects Camco's abuse of process arguments.

2. Standing

¹⁹ *Angle v. Canada (Minister of National Revenue – M.N.R.)*, [1975] 2 S.C.R. 248.

²⁰ Reply Brief of the Complainants Whirlpool Corporation and Inglis Limited, at paragraph 94. Also see *Aluma Systems Canada Inc. v. Straight Crossing Inc.*, [2000] P.E.I.J. No. 43.

Maytag raised the argument in its participant's brief that Whirlpool and Inglis have no standing to request that this Panel compel the Commissioner to expand its investigation to include exporters that Camco did not include in its original antidumping complaint.

Subsection 77.011(2) of the SIMA provides as follows:

(2) Any person who, but for section 77.012, would be entitled to apply under the *Federal Court Act* or section 96.1 of this Act, or to appeal under section 61 of this Act, in respect of a definitive decision may, in accordance with paragraph 4 of Article 1904 of the North American Free Trade Agreement, file with the Canadian Secretary a request that the definitive decision be reviewed by a panel.

Subsection 96.1(3) of the SIMA reads as follows:

(3) Subject to subsection 77.012(2), an application may be made under this section by **any person directly affected by the determination, decision, order or finding** by filing a notice of the application in the Federal Court of Appeal within thirty days after the time the determination, decision, order or finding was first communicated to that person by the Commissioner or the Tribunal, or within such further time as the Federal Court of Appeal or a judge thereof may, before or after the expiration of those thirty days, fix or allow. [emphasis added]

It is clear that Whirlpool and Inglis are parties directly affected by the Final Determination. They are, therefore, entitled to utilize the complaint process set out in the SIMA to request a review of that Final Determination. Having determined that Whirlpool and Inglis are entitled to request a review, they are free to request that this Panel review the Final Determination based on any of the aforementioned grounds set out in subsection 18.1(4) of the *Federal Court Act*. In asking this Panel to compel the Commissioner to expand its investigation to include exporters that Camco did not include in its antidumping complaint, Whirlpool and Inglis have suggested, *inter alia*, that the Commissioner failed to observe procedural requirements under law or that it otherwise erred in law, two grounds explicitly set out in subsection 18.1(4) of the *Federal Court Act*.

3. *Mootness*

Camco has also argued that the complaint of Whirlpool and Inglis became moot in light of the findings of the Canadian International Trade Tribunal (the "CITT") during its injury inquiry following the Final Determination.

This Panel points out that the statutory right to request a review of the Final Determination exists notwithstanding, and without reference to, any decision of the CITT following the injury inquiry. This Panel's review of the Final Determination has not become moot, and Whirlpool and Inglis have not lost their statutory right to request a review of the Final Determination because of the decision of the CITT in the subsequent injury inquiry.

(b) The Targeting Issue -- Scope of the Investigation, Improper Targeting and Abdication of Investigative Responsibility

Whirlpool and Inglis have challenged the manner in which, according to their allegations, the Commissioner confined the scope of its investigation to the four corners of Camco's dumping complaint, without any independent investigation of other potential sources of injurious dumping. Whirlpool and Inglis allege that the Commissioner's focusing of its investigation to the specific companies set out in Camco's complaint is contrary to the Commissioner's obligation to initiate a country-specific investigation rather than a company-specific investigation. Specifically, Whirlpool and Inglis have asked this Panel to decide whether the Commissioner has committed reviewable errors of jurisdiction, of law or of fact when, according to Whirlpool and Inglis, it:

- (i) refused to conduct an independent analysis of the existence of other source of injurious dumping and refused to extend its investigation to all exporters of subject goods from the United States of America, including those with which the Canadian industry had corporate or commercial affiliation; and
- (ii) refused to conduct a country-specific, as opposed to a company-specific, investigation.

As discussed above, in their briefs and in their arguments before this Panel, Whirlpool and Inglis grouped issues (i) and (ii) above into one issue which they referred to as the "targeting issue". This Panel will deal similarly with these two issues and will refer to them together as the "targeting issue".

In support of their arguments in respect of the targeting issue, Whirlpool and Inglis point to the SIMA, the SIMR and the SIMA Handbook as well as the Commissioner's past and contemporary practice, Canada's international obligations and their own interpretation of certain amendments to the SIMA passed by the Canadian Parliament in 1994.

Among the provisions in the SIMA upon which Whirlpool and Inglis rely is subsection 41(1) which deals with Final Determinations. Subsection 41(1) of the SIMA reads as follows:

41. (1) Within ninety days after making a preliminary determination under subsection 38(1) in respect of goods of a country or countries, the Commissioner shall

(a) if, on available evidence, the Commissioner is satisfied, in relation to the goods of that country or countries in respect of which the investigation is made, that

(i) the goods have been dumped or subsidized, and

(ii) the margin of dumping of, or the amount of subsidy on, the goods of that country or any of those countries is not insignificant,

make a final determination of dumping or subsidizing with respect to the goods after specifying, in relation to each exporter of goods of that country or countries in respect of which the investigation is made...

(b) where, on the available evidence, there is no exporter described in paragraph (a) with respect to whom the Commissioner is satisfied in accordance with that paragraph, cause the investigation to be terminated with respect to the goods.

Whirlpool and Inglis, in their briefs, have argued that subsection 41(1) of the SIMA requires the Commissioner to conduct a country-specific rather than company-specific investigation. They argue that the references in subsection 41(1) of the SIMA to “goods” of a “country or countries” can only be interpreted to mean that the Commissioner must conduct an investigation into all goods of a country or countries and not just those goods of a particular exporter from that country or countries. This Panel is not convinced that the narrow interpretation of subsection 41(1) of the SIMA advocated by Whirlpool and Inglis is necessary, nor that such a limited reading should be extended to the SIMA generally. In fact, the way in which the words “country or countries” are used throughout subsection 41(1) seems to be just as, or more consistent with the concept of limiting the outside scope of the Commissioner’s investigation, rather than defining the investigation’s starting point. In other words, subsection 41(1) of the SIMA provides a ceiling, but not a floor. A reading of paragraph 41(1)(b) of the SIMA implies that paragraph 41(1)(a) is describing investigations in respect of particular exporters rather than particular countries. Rather than requiring that a “country” be the minimum unit of reference when initiating an investigation, this Panel believes that the better interpretation of subsection 41(1) of the SIMA, or at least an interpretation of subsection 41(1) which is equally as

plausible as that put forward by Whirlpool and Inglis, is that it requires that a “country” be the maximum unit of reference when initiating an investigation.

In further support of their arguments that the SIMA mandates a country-specific rather than a company-specific investigation by the Commissioner, Whirlpool and Inglis point to a series of amendments to the SIMA passed by the Canadian Parliament in 1994²¹ and which came into force in 1995. Whirlpool and Inglis rely on these amendments as conclusive evidence of Parliament’s intention to require that the Commissioner perform only country-specific investigations. However, aside from pointing to the amendments themselves, Whirlpool and Inglis have failed to provide any evidence of Parliament’s intentions. This Panel was not directed to any evidence of commission reports, legislative debates, briefs or other materials forming part of the legislative history of the amendment upon which it could reasonably base an opinion as to Parliament’s intent. This Panel believes that if Parliament’s intention had truly been to prevent the Commissioner from performing company-specific investigations, something that the Commissioner had done on multiple occasions, it would have made such intention explicit, or in the very least, Parliament would have made its intention much more evident than can be found in the amendments upon which Whirlpool and Inglis rely. In the absence of any additional evidence as to Parliamentary intention, this Panel does not accept the submission that the 1994/1995 amendments to the SIMA were intended by Parliament to require country-specific investigations.

Whirlpool and Inglis also argue that the Commissioner committed a reviewable error by abdicating its jurisdiction through its reliance on Camco’s dumping complaint to dictate the scope of the investigation and by, according to Whirlpool and Inglis, refusing to conduct an independent analysis of the existence of other source of injurious dumping and refusing to extend its investigation to all exporters of subject goods from the United States of America. In response, Camco and the Commissioner have referred this Panel to subsection 31(1) of the SIMA as authority for the

²¹ S.C. 1994, c. 47.

proposition that once the Commissioner receives a properly documented complaint, it is required to launch an investigation into the dumping or subsidizing that is the subject of the complaint. Subsections 31(1) and 31(2) of the SIMA read as follows:

31. (1) The Commissioner shall cause an investigation to be initiated respecting the dumping or subsidizing of any goods and whether there is a reasonable indication that such dumping or subsidizing has caused injury or retardation or is threatening to cause injury, forthwith on the Commissioner's own initiative or, subject to subsection (2), where the Commissioner receives a written complaint respecting the dumping or subsidizing of the goods, within thirty days after the date on which written notice is given by or on behalf of the Commissioner to the complainant that the complaint is properly documented, if the Commissioner is of the opinion that there is evidence

(a) that the goods have been dumped or subsidized; and

(b) that discloses a reasonable indication that the dumping or subsidizing has caused injury or retardation or is threatening to cause injury.

(2) No investigation may be initiated under subsection (1) as a result of a complaint unless

(a) the complaint is supported by domestic producers whose production represents more than fifty per cent of the total production of like goods by those domestic producers who express either support for or opposition to the complaint; and

(b) the production of the domestic producers who support the complaint represents twenty-five per cent or more of the total production of like goods by the domestic industry.

The Commissioner contends that it had no discretion under subsection 31(1) once it determined that Camco's dumping complaint was properly documented and that it was required to launch an investigation into the dumping disclosed in Camco's complaint. This Panel agrees with the Commissioner that it is required to cause an investigation upon receipt of a properly documented complaint that meets all of the requirements of subsection 31(1) of the SIMA. This Panel does not, however, agree that subsection 31(1) mandates that the Commissioner limit the scope of its investigation to the scope of the properly documented complaint.

The scope of the investigation to be performed pursuant to subsection 31(1) of the SIMA is a matter of some discretion on the part of the Commissioner, based on the evidence contained in the complaint and upon other evidence that it gathers of its own accord. The investigation could, for example, be launched with a scope that is broader than that which is found in the properly

documented complaint. Nevertheless, the SIMA does not oblige the Commissioner to expand that scope.

On this issue, Camco and the Commissioner referred this Panel to the decision of the Federal Court of Canada in *Hyundai Motor Co. v. Canada (Attorney General)*²². The *Hyundai* case dealt with a complaint with respect to dumping of automobiles imported into Canada by Hyundai Motor Co. The complaints of Hyundai Motor Co. included allegations that the then Deputy Minister of National Revenue for Customs and Excise had committed reviewable errors by (i) failing to inform Hyundai Motor Co. prior to deciding to launch an investigation, (ii) by deciding to initiate an investigation only against the goods of Hyundai Motor Co. without including those of other importers or without including all automobiles imported from Korea, the country of origin for the goods of Hyundai Motor Co., and (iii) by relying heavily on the terms of the complaint for the purpose of defining the subject-goods and for the information upon which the Deputy Minister relied to launch the investigation. The parallels to the present situation are significant. Whirlpool and Inglis have argued that the decision in *Hyundai* is no longer persuasive by pointing out that it was handed down prior to the 1994/1995 amendments to the SIMA. Whirlpool and Inglis have argued that, through those amendments, Parliament has expressed a contrary intention to that of the Federal Court in *Hyundai*. As stated above, this Panel is not persuaded of that interpretation of the 1994/1995 amendments to the SIMA and is not convinced that they were intended by Parliament to require country-specific investigations. Therefore, this Panel finds that the decision of the Federal Court in *Hyundai* is binding and persuasive on the proceedings herein.

The decision of this Panel that the Commissioner has some amount of discretion in launching an investigation is supported by the decision in *Hyundai*. Strayer J. wrote in *Hyundai* that:

...the decision whether or not to launch an investigation is a “threshold” decision for the Deputy Minister, an administrative act in respect of which he can fix his own procedure subject to any requirements of the Act.²³

This Panel adopts the reasoning of Strayer J in the above passage and finds that the Commissioner had discretion as to the scope and subject of the investigation. The Commissioner had no statutory obligation to perform any research or supplemental investigation prior to launching the investigation

²² [1988] 1 F.C. 333 (hereinafter “*Hyundai*”).

²³ *Hyundai, supra*, at 337.

and the Commissioner had no obligation to request submissions from Whirlpool or Inglis prior the launching of the investigation.

Further support for this Panel's decision on this issue can be found within subsection 31(2) of the SIMA. Subsection 31(2) requires, as a precondition to the launching of an investigation, that the complaint is supported by domestic producers whose production represents more than fifty per cent of the total production of like goods by those domestic producers who express either support for or opposition to the complaint, and the production of the domestic producers who support the complaint represents twenty-five per cent or more of the total production of like goods by the domestic industry. No person or company would be in a better position to determine the existence and effects of dumping in the Canadian market than the Canadian domestic producers themselves. If producers of at least twenty-five per cent of the total production of like goods in the Canadian domestic industry support the dumping complaint, the complaint carries with it a certain level of credibility that it may not otherwise have. As it was put by Strayer J. in *Hyundai*:

It is not entirely surprising that an investigation was launched on the basis of the particular complaint which has been made. The whole purpose of the investigation is to determine whether the complaint is supportable in fact and law...

At most, what the applicants have demonstrated is that the Deputy Minister might have defined the class of goods differently or might have taken into account other evidence, some of which was inconsistent with the evidence he apparently relied on and some of which was not really inconsistent... But he clearly had some evidence before him upon which he could base his conclusion that an investigation should be initiated and there was certainly no basis for saying that he acted on clearly irrelevant considerations.²⁴

In the present situation, Camco is the only Canadian producer of the subject goods. Camco's dumping complaint, therefore, met the threshold tests of subsections 31(1) and 31(2) of the SIMA. The Commissioner was required to launch an investigation into the alleged dumping activities. The scope of the investigation was subject to the discretion of the Commissioner, and it was not unreasonable for the Commissioner to limit the investigation to the alleged dumping activities and to the companies set out in the properly documented complaint.

In respect of the arguments of Whirlpool and Inglis that a company-specific investigation is contrary to the Commissioner's past and contemporary practices, a number of cases have been raised

²⁴ *Hyundai, supra*, at 339 to 343.

by Camco and the Commissioner in which, they argue, the Commissioner has launched company-specific rather than country-specific investigations. Again, Whirlpool and Inglis rely on the argument that the cases raised in this regard are distinguishable from the present situation in light of the 1994/1995 amendments to the SIMA. It is not necessary for the Panel to restate its opinion in respect of the 1994/1995 amendments to the SIMA except to say that it is not convinced that the cases cited by Camco and the Commissioner are distinguishable from the present case simply by reason of those amendments. While this Panel notes that a number of the cases cited by Camco and the Commissioner are in fact distinguishable from the present case on their facts and circumstances, and as such this Panel did not rely on all of the cases so cited, the cases cited by Camco and the Commissioner do establish enough of a history to convince this Panel that company-specific investigations, while not standard practice, are not uncommon.

Whirlpool and Inglis, in their briefs and in argument before this Panel, have gone to great lengths to point out that if Canada allows company-specific dumping investigations, it is alone or in the minority in doing so among other industrialized countries. Whirlpool and Inglis have also pointed to Canada's international obligations as a source of authority for their assertion that a country-specific investigation is mandatory. However, as each of Camco and the Commissioner has pointed out, the Commissioner is bound by the laws of Canada currently in effect. Likewise, this Panel is required by NAFTA Article 1911 to rely on Canadian domestic statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of Canada would rely on such materials in reviewing a final determination of the Commissioner²⁵. Therefore, this Panel must work on the basis that Canadian anti-dumping laws are the foremost authority and it may only look to Canada's international obligations to the extent that they have been incorporated into Canadian statute, or to the extent that they do not conflict with or limit the application of existing Canadian laws.

To summarize this Panel's decision on the targeting issue raised by Whirlpool and Inglis, this Panel finds that there was no obligation in Canadian law for the Commissioner to launch a country-specific rather than a company-specific investigation, and the reliance by the Commissioner on the terms of Camco's complaint was within its discretion and, thus, this Panel will not remand on this issue.

²⁵ NAFTA Article 1904(2).

(c) The Scope of the Investigation, Definition of Subject Goods

The second major issue raised by Whirlpool and Inglis is their submission that the Commissioner committed a jurisdictional error or alternatively, erred in law, in conducting a single investigation and issuing a single Preliminary Determination and Final Determination with respect to three disparate products, namely top-mount refrigerators, dishwashers and dryers. Whirlpool and Inglis argue that the Commissioner is required to limit its dumping investigations to a single product, defined as narrowly as possible.

In the alternative, Whirlpool and Inglis argue that if the Commissioner is permitted to group three disparate goods into one dumping investigation, the Commissioner should have determined one margin of profit to be applied to all subject goods, rather than determining separate profitability factors for each of refrigerators, dishwashers and dryers.

This Panel will deal with the main argument of Whirlpool and Inglis first and then will turn to the alternative argument.

Whirlpool and Inglis argue that the Commissioner was required to conduct a separate investigation into each of the three subject goods. However, they have failed to point to a single Canadian legislative or other binding authority that, in the view of this Panel, supports their position in this regard. Whirlpool and Inglis rely on provisions in the SIMA Handbook and the WTO Anti-Dumping Agreement to support their arguments. Specifically, in the SIMA Handbook, Whirlpool and Inglis rely on section 4.1.3.1 which provides as follows:

The product covered by the complaint must be clearly defined for the purpose of the investigation. It is important that the product description be well defined in order to avoid any ambiguity or uncertainty in the course of the investigation, should one be initiated. Product definitions that are too broad or are ambiguous will inevitably lead to difficulties in the investigation as well as in the CITT's examination of injury.

Similarly, under the WTO Anti-dumping Agreement, Whirlpool and Inglis point to Article 5.2 which provides as follows:

...a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question.

This Panel would not interpret either provision as prohibiting the Commissioner from conducting a single investigation into more than one distinct product. The two provisions relied upon by Whirlpool and Inglis are more akin to instructions to potential complainants in dumping cases that they should be careful to clearly define the allegedly dumped goods. If the definition of the allegedly dumped goods set out in a dumping complaint is not clear, the Commissioner may have difficulty in establishing the scope of the investigation. These provisions do not prevent the Commissioner from launching one investigation if it is reasonable to do so following the receipt of a single dumping complaint that alleges dumping in respect of three separate categories of clearly defined goods.

In the present case, there was good reason for Camco to frame its complaint in respect of the three separate goods, and there was equally good reason for the Commissioner to combine those goods into one investigation. As Camco points out in its respondent's brief, these three goods are often sold together as part of a package of appliances and all three categories of subject goods were sold through the same channels of distribution by the same companies and the same importers.

It was not argued before this Panel that the single investigation into three categories of subject goods directly resulted in any error in calculations or otherwise. In fact, Whirlpool and Inglis acknowledge at paragraph 140 of their complainants' brief that the Commissioner and the CITT effectively managed to conduct three separate investigations in one.²⁶

Given the failure by Whirlpool and Inglis to point to a single Canadian authority that, in the opinion of this Panel, supports their position, this Panel finds that the Commissioner's combination of these three goods into one investigation is not a reviewable error of law. There is nothing unreasonable or illegal about the Commissioner's investigation of these three goods under the "umbrella" of a single investigation so long as the Commissioner was able to segregate each of the goods within the investigation and perform all of the processes involved in parallel for each good. This is what appears to have been done by the Commissioner, and later by the CITT, in this instance.

The Panel also considered the alternative argument of Whirlpool and Inglis that if the Commissioner is permitted to conduct an investigation into three disparate goods, it must apply a

²⁶ Complainants Brief of Whirlpool and Inglis, at paragraph 140.

single margin of profit to all subject goods, rather than determining separate profitability factors for each of refrigerators, dishwashers and dryers. Whirlpool and Inglis suggest that the only way in which the Commissioner could investigate into dumping in respect of refrigerators, dishwashers and dryers under one investigation would be to define those three goods as “like goods”. If the three goods are “like goods”, Whirlpool and Inglis argue, the SIMA and the SIMR require that the Commissioner generate a single margin of profit to be applied to all.

Whirlpool and Inglis have argued that the SIMR only provides for the use of one amount of profit. They rely on paragraph 11(1)(b) of the SIMR which reads as follows:

(b) the expression "a reasonable amount for profits", in relation to any goods, means an amount equal to...

Whirlpool and Inglis suggest that the reference to “a” reasonable amount for profit in the above referenced paragraph is conclusive evidence that only one amount for profit must be used. This Panel is not convinced that paragraph 11(1)(b) of the SIMR could not be used to calculate “a” reasonable amount for profit for each of the three separate goods that were the subject of the Commissioner’s investigation in this case. Again, that appears to be exactly what the Commissioner did, by the admission of Whirlpool and Inglis themselves.

Whirlpool and Inglis have not convinced this Panel that if three separate categories of subject goods are combined under one investigation they must be “like goods” and that a single amount for profit must be used.

This Panel finds that the combination of three categories of subject goods into one investigation, and the use of three separate sets of calculations in respect of those goods, including three different amounts for profit, are not reviewable errors by the Commissioner and this Panel will not remand on this issue.

(d) Selective Use of Different Methodologies for the Determination of Export Price

Whirlpool and Inglis have argued that the Commissioner made inappropriate use of section 25 of the SIMA. Where sales of subject goods occur between associated exporters and importers, the Commissioner subjects the export price determined under section 24 of the SIMA to a so-called

“reliability test” which, depending on its outcome, could result in the export price being determined by an alternate method set out in section 25 of the SIMA.

Subparagraph 25(1)(b)(i) of the SIMA provides that where, in respect of goods sold to an importer in Canada, the Commissioner is of the opinion that the export price, as determined under section 24, is unreliable by reason that the sale of the goods for export to Canada was a sale between associated persons, the export price is to be determined in an alternative method which is set out in the remainder of section 25. Under the “reliability test”, when the export price as calculated under section 25 of the SIMA is lower than the result obtained using section 24 for 20 per cent or more of the sales to Canada, the Commissioner normally will form the opinion that the section 24 export price is unreliable.

In the present case, the Commissioner examined the reliability of the export prices for each of the subject goods separately and went even further to examine the reliability of the export prices for separate models within each category of subject goods. In respect of more than one category of subject goods, the Commissioner determined that the export prices determined under section 24 of the SIMA were reliable for particular models and unreliable for others. In respect of those models for which the Commissioner determined that the section 24 export prices were unreliable, the Commissioner proceeded to use the process set out in section 25 of the SIMA in an attempt to calculate a more reliable export price.

Whirlpool and Inglis argue that the Commissioner’s alternate use of export prices as determined under section 24 and section 25 of the SIMA for different models of the same good is not permitted by the legislation. Whirlpool and Inglis suggest that the Commissioner is required to make a determination as to the reliability of the export prices of a category of subject goods as a whole and is not permitted to pick and choose reliable numbers from among the different models of a subject goods. They would argue that once it is determined that the export prices as calculated under section 24 of the SIMA are unreliable under the “reliability test”, the Commissioner is required to use the procedures set out in section 25 to determine the export prices for all goods within the category of subject goods.

The Commissioner argues that although it found that the export prices as determined under section 24 of the SIMA were unreliable for certain models, it did have “reliable” export price data for the remaining models. There was no reason, the Commissioner submits, for it to go through the

process set out under section 25 of the SIMA to determine a reliable export price for those models for which it had already determined a reliable export price using section 24.

This Panel agrees with the thrust of the submissions of the Commissioner on this issue. In determining this issue, the Panel considered the legislative purpose behind sections 24 and 25 of the SIMA. It seems that, in all cases, the driving purpose behind the regime set out in sections 24 and 25 is to allow the Commissioner to come up with the best, most reliable and most accurate export prices for the subject goods upon which the Commissioner will base its calculations in determining whether dumping has occurred. The process set out under section 25 of the SIMA exists to allow the Commissioner to come up with a more reliable and accurate export price when there is some question about the reliability of the price as determined under section 24. If, as was the case here, the Commissioner has the data available to enable it to focus on individual models and thereby narrow the application of the calculations under section 25 of the SIMA to only those models for which the export price determined under section 24 is deemed unreliable, it would seem to be in keeping with the legislative purpose of the SIMA for the Commissioner to do so. If it can be determined, using data supplied by the importer itself, that the export price for certain models as determined under section 24 of the SIMA is reliable, to then force the Commissioner to go through the second set of calculations set out under section 25 in respect of those models would be a most artificial exercise. By breaking down the data and only performing the second set of calculations for those models for which it is deemed necessary, the resulting export prices for the entire category of subject goods are all the more accurate.

For the reasons set out above, this Panel is not convinced of the arguments of Whirlpool and Inglis and will not remand on this issue.

(e) Reasonableness of Amounts for Profit in Calculation of Normal Value

In circumstances described in the SIMA, and which apply in this case, the Commissioner uses a “constructed value” methodology in determining a “normal value” for goods, sold on the exporter’s domestic market, that are “like” to the goods exported to Canada. As part of the prescribed methodological analysis for determining normal value, the Commissioner is required to calculate a “reasonable amount for profits”. The SIMA read in conjunction with the SIMR contains detailed methodologies for undertaking such profit analysis.

Whirlpool and Inglis argue that by mechanical application of a formula the Commissioner derived amounts for profit for Whirlpool dishwashers and dryers that did not meet the reasonableness requirement of paragraph 19(b) of the SIMA. Whirlpool and Inglis suggest that the Commissioner could have obtained a more reasonable amount for profit for dishwashers and dryers had it “pooled” the amounts deemed for the three products separately. For reasons outlined above in the section entitled “The Scope of the Investigation, Definition of Subject Goods”, the Panel has determined that the combination of three categories of subject goods into one investigation, and the use of three separate sets of calculations in respect of those goods, including three different amounts for profit, are not reviewable errors by the Commissioner and are not unreasonable in the present case. Accordingly the Panel accepts that the Commissioner acted reasonably in calculating a reasonable amount for profit for the three categories of subject goods treated separately and therefore, this Panel will examine the arguments put forward by Whirlpool and Inglis as they apply to dishwashers and dryers considered separately.

According to the facts presented to this Panel in the present case, the Commissioner exercised the option under section 19 of the SIMA to use the “constructed value” provisions of paragraph 19(b) rather than the provisions of section 15 of SIMA. The Commissioner may exercise this option when it is of the opinion that the number of sales of like goods that comply with all the terms and conditions referred to in section 15 of the SIMA or that are applicable by virtue of subsection 16(1) of the SIMA are insufficient to permit a proper comparison with the sale of the goods to the importer.

Under paragraph 19(b) of the SIMA, the normal value of the goods shall be determined as the aggregate of the cost of production of the goods, a reasonable amount of administrative, selling and all other costs, and a reasonable amount of profits. In determining a reasonable amount for profits under paragraph 19(b) of the SIMA, the Commissioner had recourse to the methodology set forth in subparagraph 11(1)(b)(i) of the SIMR which provides for the calculation of profit in circumstances where goods sold by the exporter in the domestic market are “like” goods to those exported. Paragraph 11(1)(b) of the SIMR reads, in part, as follows:

(b) the expression "a reasonable amount for profits", in relation to any goods, means an amount equal to

(i) where the exporter has made in the country of export a number of sales of like goods for use in the country of export, and where those sales when taken

together produce a profit and are such as to permit a proper comparison, the weighted average profit made on the sales, ...

Section 13 of the SIMR clarifies the scope of the “like” goods to be considered by the Commissioner in making its calculations under paragraph 11(1)(b) of the SIMR. Section 13 of the SIMR reads as follows:

13. For the purposes of paragraph 11(1)(b),

(a) sales that are such as to permit a proper comparison are sales, other than sales referred to in paragraph 16(2)(a) or (b) of the Act, that satisfy the greatest number of the conditions set out in paragraphs 15(a) to (e) of the Act, taking into account subsection 16(1) of the Act;

(b) the price of like goods shall be adjusted in the manner provided for in sections 3 to 10; and

(c) the price of goods of the same general category or of goods of the group or range of goods that is next largest to the category referred to in subparagraph 11(1)(b)(iv) shall be adjusted in the manner provided for in sections 3 to 10, and for that purpose the expression "like goods" shall be read as "goods of the same general category" or "goods of the group or range of goods that is next largest to the category referred to in subparagraph 11(1)(b)(iv)", as the case may be, wherever that expression occurs in those sections.

Paragraph 13(a) of the SIMR identifies categories of sales of the exporter in the domestic market that the Commissioner is required to disregard in calculating “amounts for profits”. In this instance, the Commissioner excluded from its profit calculations categories of sales covered in paragraphs 16(2)(a) and 16(2)(b) of the SIMA, notably sales to a single purchaser and sales at below cost.

Using the same methodology for all three categories, the Commissioner calculated “an amount for profit” separately for subject refrigerators, dishwashers and dryers. The amounts calculated were, in the case of Whirlpool, significantly higher for dishwashers and dryers than for refrigerators.

The Commissioner argues that its approach was appropriate and entirely consistent with the legislation. The Commissioner explained the basis of its calculations under subparagraph 11(1)(b)(i) of the SIMR as follows:

- (i) The Commissioner accepted as reasonable, the costs and sales data provided by Whirlpool in its response to the “Request for Information” for a selected group of major domestic customers;
- (ii) The Commissioner then conducted the profitability test called for under paragraph 16(2)(b) of the SIMA and excluded those sales that were found “below cost”;
- (iii) The Commissioner next excluded certain sales made to a single purchaser as provided for in paragraph 16(2)(a) of the SIMA; and
- (iv) The remaining sales met the requirements of sub-paragraph 11(1)(b)(i) of the SIMR and were used to determine a “reasonable amount for profit”.

In their written and oral representations to the Panel, Camco and WCI supported the position of the Commissioner.

In its essence, the complaint of Whirlpool and Inglis is that the “amount for profits” derived by the Commissioner as a result of the application of the methodology prescribed in the SIMR manifestly failed to meet a standard of “reasonable” as incorporated in the SIMA itself.

Whirlpool and Inglis argue that if the calculations conducted under paragraph 11(1)(b) of the SIMR result in a manifestly “unreasonable” amount, the Commissioner is obliged to use some alternative method of calculating profit to achieve the purposes of the reasonableness requirement of paragraph 19(b) of the SIMA. In oral argument, counsel for Whirlpool and Inglis argued that subparagraph 11(b)(i) of the SIMR constitutes a guideline to follow and that it does not take away the basic obligation that the result be reasonable. In other words, subparagraph 11(b)(i) provides the Commissioner with a methodology to follow to develop a reasonable number, but the number still has to be reasonable given the ordinary meaning of the word.

Whirlpool and Inglis base their arguments, in part, on the doctrine that regulations are subordinate to and must be applied in a manner consistent with the purposes of their enabling statute. In accordance with this view, if the application of methodology permissible under a regulation results in a determination that, on its face, conflicts with the provisions of the enabling statute, the latter must prevail. In the present case, Whirlpool and Inglis would argue, if the SIMR calculations result

in an amount for profit that is not reasonable, the provisions of the SIMA that require a “reasonable” amount must override the mechanical calculations set out in the SIMR. Camco disputes the representation of the relationship between the SIMA and the SIMR put forward by Whirlpool and Inglis. This Panel does not find it necessary in this context to enter a discussion on the hierarchical relationship between SIMA and the SIMR. The Panel has instead addressed the merits of the argument in the context of the total statutory organization and finds the following features of the SIMA and the SIMR relevant:

(i) Paragraph 97(1)(e) of the SIMA empowers the Governor in Council to make regulations defining the expression “a reasonable amount for profits” for the purpose of paragraph 19(b) of the SIMA;

(ii) Subsection 11(1) of the SIMR reads, in part, as follows:

11. (1) For the purposes of paragraph 19(b) and subparagraph 20 (1)(c)(ii) of the [SIMA],

...

(b) the expression “a reasonable amount of profits”, in relation to any goods, means the amount equal to

[emphasis added];

(iii) Neither the SIMA nor the SIMR identify any other standards of reasonableness that could constitute a yardstick for assessing the correctness of a determination under subparagraph 11(1)(b)(i) of the SIMR; and

(iv) No alternative method for determining “a reasonable amount for profits” appears in either the SIMA or the SIMR.

From the legislative organization, it is clear that the only possible meaning of “reasonable amount for profits” for the purposes of the SIMA is the amount derived from the proper application of the statutorily prescribed methodology itself.

Having been left unconvinced by the arguments of Whirlpool and Inglis, the Panel declines to remand on this issue.

(f) Consideration of Inappropriate Costs in Calculating Export Prices under Section 25 of SIMA.

As discussed in the preceding section, the Commissioner computed the export price of subject goods according to the constructed price method prescribed in section 25 of the SIMA. Because subject goods were sold by importer Inglis to arms-length purchasers in the same state as they were imported, the Commissioner employed the methodology of paragraph 25(1)(c). Under this provision, the Commissioner determines a “constructed” price for exports by deducting from the arms-length sales prices of the importer, those costs incurred by the exporter and importer that are additional to those incurred in sales of like products in the domestic market of the exporter.

Whirlpool and Inglis, raise two distinct issues in relation to the “constructed” “sales price minus” methodology employed by the Commissioner. Whirlpool and Inglis argue that:

- (i) The Commissioner exceeded its statutory jurisdiction in deducting general selling and administrative expenses incurred by Inglis; and
- (ii) The Commissioner incorrectly applied the law in the allocation of general selling and administrative expenses of Inglis to “subject” goods.

Whirlpool and Inglis argue that, because general selling and administrative expenses are not identified in the list of costs enumerated in paragraph 25(1)(c) of the SIMA, the Commissioner erred in including them in the aggregate amount of costs.

Whirlpool and Inglis contrast the wording of paragraph 25(1)(c) of the SIMA, which applies to goods which are sold in Canada in the same condition in which they are imported and which does not explicitly refer to selling and administrative costs, with the wording of paragraph 25(1)(d) applying to goods that are further processed in some way after importation and which explicitly refers to selling and administration costs. Whirlpool and Inglis argue that, according to the rules of statutory interpretation, the textual differences between paragraphs 25(1)(c) and 25(1)(d) must reflect an intention of Parliament to allow for the deduction of general selling and administrative expenses when conducting the analysis prescribed in paragraph 25(1)(d), but not when conducting the analysis

prescribed in 25(1)(c). At the very least this difference in wording would, in the view of Whirlpool and Inglis, suggest that not all selling and administrative costs should be deducted.

The Commissioner, supported in this instance by Camco, argues that the deduction of Inglis' general selling and administrative costs is implicitly contemplated in the language of subparagraph 25(1)(c)(i) of the SIMA which refers to "all costs" incurred on or after importation of the goods and on or before their sale by the importer, or resulting from their sale by the importer.

The Panel considered the argument by Whirlpool and Inglis that the textual differences between paragraphs 25(1)(c) and 25(1)(d) of the SIMA indicated Parliamentary intention to prescribe distinct methodologies for constructing an "export sales price" for products sold in the same condition in which they were imported and those that had been processed in some way before sale to an arms-length purchaser. The Panel notes that because they deal with different situations, it is to be expected that the wording of paragraphs 25(1)(c) and 25(1)(d) would differ. Cost deductions made under paragraph 25(1)(d) would need to capture the additional costs incurred and profit realized by the vendor in the processing of the imported goods. These additional costs and this profit are covered in subparagraphs 25(1)(d)(i) and 25(1)(d)(ii) which reflect the fact that the vendor would incur distinctive sales and administrative costs arising from processing and, consequently, derive profits therefrom. Aside from those differences, the additional costs incurred by the exporter in exporting and the general selling and administrative costs arising for the importer should be the same and are covered in almost identical terms in paragraphs 25(1)(c) and 25(1)(d).

Whirlpool and Inglis suggest that an interpretation that allows for an all inclusive nature of the costs referred to in subparagraph 25(1)(c)(i) of the SIMA would have the effect of reading out all the words in clauses 25(1)(c)(i)(A) and 25(1)(c)(i)(B) and that this would be contrary to the intent of Parliament which chose to add the limiting language of clauses 25(1)(c)(i)(A) and 25(1)(c)(i)(B). This Panel is not convinced of this conclusion. In its arguments, Camco does not rely uniquely on the term "all costs" to support the inclusion of selling and administrative costs. Camco explicitly incorporates the qualifying language of 25(1)(c)(i)(A) and 25(1)(c)(i)(B) in the statutory references that it relies on to justify the Commissioner's deduction of the importer's selling and administrative costs. This Panel likewise considers that the Commissioner's inclusion of importer's selling and administrative costs in the deductions to be made under 25(1)(c)(i) is fully consistent with a deduction of "all costs" even when this is qualified by the text of clauses 25(1)(c)(i)(A) and 25(1)(c)(i)(B) of the SIMA.

In summary, this Panel is not convinced by the arguments of Whirlpool and Inglis regarding the deductibility of selling and administrative costs under paragraph 25(1)(c) of SIMA. This Panel finds no reason to remand on this issue.

In their reply brief and in oral proceedings, Whirlpool and Inglis, argued in the alternative that certain of Inglis' general selling and administrative costs were unrelated to importation and should not have been considered by the Commissioner in calculating a constructed export price for subject goods, and even where such attribution was permissible, the Commissioner erred in the proportion of costs actually attributed to subject goods. Counsel for Whirlpool and Inglis suggested that the expense of carrying costs for Inglis' headquarters in Mississauga, Ontario, depreciation on that building, the salary of the company's President and costs related to the employee cafeteria were included and should not have been.

Whirlpool and Inglis argued that the Commissioner should have limited deductions under paragraph 25(1)(c) of the SIMA to those costs of importers that confer a benefit on the arm's length purchaser. Such "benefit" being defined as the saving to the purchaser of expenditures that it would incur in importing directly from the exporter Whirlpool rather than purchasing imported Whirlpool products from the importer Inglis. The argument here implies that the arm's length purchaser enjoys no cost savings when purchasing from Inglis at prices that reflect Inglis' selling and administrative costs that, accordingly, should be disregarded by the Commissioner in its "re-sale price minus" analysis.

The Commissioner indicates that it verified and accepted data provided by Inglis in allocating general selling and administrative expenses to the subject goods. Whirlpool and Inglis suggest that the Commissioner relied only upon the information provided by Inglis in response to the Commissioner's initial request for information and should have sought further information in a format more amenable to precise allocation of costs between subject goods and other products handled by Inglis. Whirlpool and Inglis do not however point to any evidence in the record to support their allegations that the cost data provided in the initial request for information failed to meet the needs of the Commissioner in conducting the analysis required under paragraph 25(1)(c) of the SIMA, or that the actual allocation of selling and administrative costs by the Commissioner to subject goods was unreasonable or resulted in prejudice to Whirlpool and Inglis.

In considering this issue, this Panel accepted that as Inglis sells a wide range of appliances and manufactures certain cooking products, subject goods represent only a portion of total sales and that it is incumbent upon the Commissioner to ensure that deductions for general selling and administration costs result from a proper attribution of these costs to subject goods. The Panel finds unconvincing the economic rationale for the “benefit to purchaser” line of reasoning. Inglis’ selling and administrative costs are incurred on activities of Inglis that, if profitable, will be incorporated in the sales price to an arm’s length purchaser. Moreover, this Panel has been provided with no authority which supports the argument that the Commissioner undertake a “benefit to purchaser” analysis when determining costs to be deducted under paragraph 25(1)(c) of the SIMA.

Having said that, this Panel was not directed to any evidence on the record that the Commissioner actually attributed improper costs to subject goods, or that anything other than a *de minimis* result occurred if the Commissioner did so. Accordingly this Panel is not convinced of the need for a remand on this issue.

(g) Consideration of Undumped Goods – the “Zeroing Issue”

Whirlpool and Inglis, in their complainants’ brief and in oral argument before this Panel, alleged that the Commissioner committed errors in calculating the margins of dumping for the subject goods. Subsection 30.2(1) of the SIMA reads as follows:

30.2 (1) Subject to subsection (2), the margin of dumping in relation to any goods of a particular exporter is zero or the amount determined by subtracting the weighted average export price of the goods from the weighted average normal value of the goods, whichever is greater.

Whirlpool and Inglis argue that the Commissioner erred when it, according to their submissions, calculated the margin of dumping for each subject product without offsetting transactions where export price was greater than normal value against those transactions where export price was less than normal value. Whirlpool and Inglis assert that the sales where the export price was greater than normal value should have been included in calculating the margin of dumping in respect of the category of subject goods as a whole. They argue that the “zeroing” called for by subsection 30.2(1) of the SIMA only occurs if the aggregate margin of dumping determined for the category of subject goods as a whole is less than zero.

During oral hearings, counsel for Camco pointed out to this Panel that Whirlpool and Inglis had not raised the “zeroing” issue in their complaint filed on September 11, 2000, and that the first reference to the issue appeared in the complainants’ brief filed by Whirlpool and Inglis on or about March 29, 2001. Pursuant to section 7 of the Rules of Procedure, this Panel’s review of the Final Determination shall be limited to the allegations of error of fact or law, including challenges to the jurisdiction of the Commissioner, that are set out in the complaints filed in the panel review and procedural and substantive defenses raised in the panel review. During oral hearings, the Panel reserved judgment as to whether this matter was properly before it and heard oral arguments on the issue from all parties.

On an in depth review of the complaint filed by Whirlpool and Inglis on September 11, 2000 and of the Rules of Procedure, the Panel has decided that the “zeroing” issue was not raised by Whirlpool and Inglis prior to the filing of their complainant’s brief with this Panel. Moreover, there does not appear to be any method under the Rules of Procedure or otherwise that would permit Whirlpool and Inglis to amend their complaint.

The Panel has decided that, despite its receiving thorough written and oral argument on the matter, the “zeroing” issue was not properly before it as it was not raised in the original complaint filed by Whirlpool and Inglis and, consequently, this Panel will not deliver a decision on the issue.

(h) Conclusion

This Panel has carefully reviewed the complaint and written briefs filed by Whirlpool and Inglis in respect of the Final Determination, and has heard oral arguments on behalf of Whirlpool and Inglis. Having carefully considered each of the arguments raised by Whirlpool and Inglis in their complaint with respect to the Final Determination, and having determined that, with respect to each, no remand was required, this Panel dismisses the complaint filed by Whirlpool and Inglis on September 11, 2000.

VI. DECISION OF THE PANEL

In light of the conclusions of this Panel, made in respect of each of the issues set out above, the Panel hereby dismisses the complaints filed by each of Camco and Whirlpool and Inglis, and declines to order a remand in respect of any aspect of the Final Determination. The Panel directs the Canadian Secretary of the NAFTA Secretariat to issue a Notice of Final Panel Action pursuant to Rule 77 of the NAFTA Rules of Procedure for Article 1904.

SIGNED IN THE ORIGINAL BY:

Serge Anissimoff, Chairman
Serge Anissimoff, Chairman

Prof. William P. Alford
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