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

IN THE MATTER OF:	)	
FINAL DETERMINATION OF DUMPING MADE BY REVENUE CANADA, CUSTOMS AND EXCISE, REGARDING CERTAIN MACHINE TUFTED CARPETING ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA	)	Secretariat File CDA-92-1904-01

Before: Robert J. Pitt (Chairperson)
Gail T. Cumins
Timothy A. Harr
Mark D. Herlach
Ross Stinson

PANEL DECISION AND REASONS
FOLLOWING A DETERMINATION ON REMAND
SEPTEMBER 28, 1993

Peter A. Magnus of Osler, Hoskin & Harcourt, Ottawa, Ontario, argued on behalf of the complainants the Carpet & Rug Institute (U.S.A.) and Shaw Industries, Inc.

Robert P. Hynes of the Department of Justice of Canada, argued for the Minister of National Revenue for Customs and Excise.

Brian J. Barr, Barrister and Solicitor, of Ottawa, Ontario, argued on behalf of the Canadian Carpet Institute.

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INTRODUCTION

A Binational panel Review in the matter of the Final Determination of Dumping made by Revenue Canada, Customs and Excise, regarding Certain Machine Tufted Carpeting Originating in or Exported from the United States of America was held pursuant to Article 1904 of the *Canada-United States Free Trade Agreement*, and section 77.15 of the *Special Import Measures Act*, Revised Statutes of Canada 1985, Chapter S-15, as amended ("SIMA").

The unanimous decision of the Panel was issued on May 19, 1993. In summary, the Panel:

1. remanded to Revenue Canada that aspect of its final determination of dumping that relates to the reasonable period of time for recovery of costs;

2. remanded to Revenue Canada that aspect of its final determination of dumping that relates to like goods; and

3. affirmed all other aspects of Revenue Canada's determination at issue before the Panel.

The Determination on Remand was issued on June 30, 1993. In response to the two remanded issues, Revenue Canada through the Deputy Minister of National Revenue:

1. Confirmed that the originally selected period of three months for the recovery of all costs other than general, selling and administrative expenses was an appropriate reasonable period of time;

2. Redetermined normal values (which were previously calculated under Section 19 of

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SIMA) pursuant to Section 15 of SIMA based on the normal value of the carpet style deemed to be most similar or comparable to the carpet style shipped to Canada.

Following the issuance of the Determination on Remand, the Carpet & Rug Institute, a trade association representing certain United States of America exporters of carpet, and Shaw Industries Inc. made a formal request for a further Binational Panel Review through a Notice of Motion filed on July 15, 1993. Replies to the Notice of Motion were filed by the investigating authority and by counsel for The Canadian Carpet Institute on July 22, 1993. By order dated July 26, 1993 this Panel ordered that a review would be conducted of the Determination on Remand pursuant to Rule 75 of the Article 1904 Panel Rules, directed the filing of written submissions and held a hearing thereon in Ottawa on September 13, 1993.

STANDARD OF REVIEW

The standard of review applied by the Panel in this review of the Determination on Remand is as fully set forth at pages 2 to 8 of the Opinion and Panel Decision dated May 19, 1993. That analysis is adopted and incorporated in this decision. In particular, on the remanded issues, the Panel is obligated to uphold the Determination on Remand unless the investigating authority "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."

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DECISION

After full consideration of the arguments and evidence presented by the parties in their written submissions and at the hearing this Panel affirms all aspects of Revenue Canada's Determination on Remand.

REASONS

A. Reasonable Period of Time for Recovery of Costs

In its preliminary and final determinations of dumping, Revenue Canada had used a three month period of investigation and, without providing any reasons, used the same three month period for recovery of all costs other than general, selling and administrative. On remand by the Panel the Deputy Minister was directed to address and determine the appropriate reasonable period based on the administrative record, provide an explanation explicitly discussing the grounds for the determination and, if necessary, recalculate the pertinent normal values. The Determination on Remand on this issue complies with the terms imposed by this Panel.[1]

1 Generally, the view of this Panel is that the Deputy Minister could have simplified the resolution of the issues before the Panel by providing more detailed explanations and supporting reasons in its final determination of dumping for the findings underpinning the determination.

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In written submissions and oral arguments counsel for the complainants was unable to provide any substantive evidence to convince this Panel that the three month period was unreasonable.[2] When asked by the Panel, counsel for the complainants was unable to point to any evidence which would have supported the argument that a longer period of time would have resulted in the recovery of certain costs.[3] Further, when asked to suggest a reasonable period of time for recovery of costs, counsel for the complainants could only suggest some period of greater than three months to be based on data in the administrative record, data which varied on an exporter-by-exporter basis.

Based on the standard of review governing the proceedings before this Panel, there is no basis on which this Panel can alter Revenue Canada's determination and impose a different period of time for recovery of costs.

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2 Immediately prior to the commencement of the hearing, counsel for the complainants tabled copies of voluminous extracts from the administrative record. The vast majority of the materials were not referred to during the original hearing and were not referenced in the written submission of the complainants dated August 18, 1993. The Panel notes that all of this information was available to the complainants prior to the original hearing and should have been cited in the original submissions. Further, counsel should restrict argument to matters referenced in the written submissions.

In any event, this Panel determined that while the figures contained in these materials may have illustrated some evidence of higher overhead costs during the three month period they did not establish the necessity for the Deputy Minister to use a longer period to assess whether costs would be recovered.

3 Although counsel for the complainants resiled from the position in his written submission, the submission on recovery of costs stated:

> "The point of these submissions is not, of course, to argue that a longer cost recovery period is necessarily appropriate in this case, but that this Panel obtains no assistance from even the confidential version of the Determination on Remand in assessing whether sufficient evidence exists on the record to justify the period relied upon by the Deputy Minister."

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B. Calculation of Normal Values for Like Goods

Based on the March 19, 1993 decision of the Canadian International Trade Tribunal in the *Fletcher Leisure Group Inc.* case, this Panel had required Revenue Canada to calculate normal values for like goods pursuant to Section 15 of SIMA. In its final determination of dumping, where Revenue Canada had excluded identical goods under Section 16(2)(b) of SIMA, Revenue Canada had then calculated normal value under Section 19 of SIMA. The Determination on Remand complied with the decision of this Panel and the only real issue raised by the complainants was the question of determination of like goods. In its Determination on Remand the Deputy Minister calculated normal values based on the normal value of the carpet style deemed to be most similar or comparable to the carpet style shipped to Canada, and the following criteria were applied when selecting the most similar style:

(a) be from the same "product line" (e.g. commercial, residential) and from the same corporate division of the exporter;

(b) be made of the same fibre type, e.g. nylon;

(c) have the same or the closest face weight; and

(d) have the same backing material.

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In the written submission, counsel for the complainants argued that the criteria used was not appropriate and that additional criteria should include branding and warranty. In oral argument, counsel for the complainants focused on the fact that the criteria did not include the method of carpet "construction".

This Panel has absolutely no evidential basis to question whether the criteria selected and applied by the Deputy Minister was unreasonable. Clearly, other criteria could have been used but the criteria used by the Deputy Minister were fair and reasonable. The criteria were not selected in a perverse or capricious fashion and absolutely no evidence was presented to suggest that the application of the criteria was prejudicial to one or more manufacturers or exporters.

Signed in the original by:

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Robert J. Pitt (Chairperson)

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Gail T. Cumins

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Timothy A. Harr

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Mark D. Herlach

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Ross Stinson

Issued on this 28th day of September, 1993.

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