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

IN THE MATTER OF

AN INQUIRY MADE BY THE CANADIAN INTERNATIONAL TRADE TRIBUNAL	:	Secretariat File
PURSUANT TO SECTION 42 OF THE SPECIAL IMPORTS MEASURES ACT	:	No. CDA-92-1904-02
RESPECTING MACHINE TUFTED CARPETING ORIGINATING IN OR	:	
EXPORTED FROM THE UNITED STATES OF AMERICA (INJURY)	:	

Panel: John D. Richard, Chairperson
Jean-Gabriel Castel
James Chalker
Michael D. Sandler
Martin J. Ward

PANEL DECISION FOLLOWING
REVIEW OF A DETERMINATION ON REMAND

January 21, 1994

Peter Magnus, Smith Lyons Torrance Stevenson & Mayer, appeared for the Carpet & Rug Institute.

James L. Shields, Soloway Wright, appeared for the World Carpets Inc.

Brian J. Barr appeared for the Canadian Carpet Institute.

Hugh Cheetham and Debra Steger appeared for the Canadian International Trade Tribunal.

OPINION AND ORDER OF THE PANEL

Table of Contents

I. INTRODUCTION

This Binational Panel ("Panel") was constituted pursuant to Chapter 19 of the *Canada-United States Free Trade Agreement* ("FTA") to review the final determination of injury by the Canadian International Trade Tribunal ("CITT" or "Tribunal") respecting the dumping of machine tufted carpeting originating in or exported from the United States of America dated May 6, 1992 (Inquiry NQ-91-006).

On April 7, 1993, the Panel, in Canadian Secretariat File No. CDA-92-1904-02, acting pursuant to its authority under section 77.15 of the *Special Import Measures Act*, remanded, in part, the finding of the CITT in Inquiry No. NQ-91-006.

First, the Panel remanded the Tribunal's determination that dumping has "caused" past and present material injury, and directed the Tribunal on remand to determine whether dumping in and of itself caused material injury and to demonstrate the rational basis for such determination by detailed analysis including but not limited to each of the following:

(a) An analysis in detail of the 30 to 32 accounts involving lost sales allegations referred to in the post-hearing briefs of the CITT and the Canadian Carpet Institute ("CCI") before the Panel, including an analysis of whether they are quantitatively (by volume) or qualitatively significant, and how (if at all) they reasonably support a determination of causation;

(b) An analysis in detail of the staff's price study in CST Vol. 4, Public Staff Report at 1.46 to 1.48 and CST Vol.6, Confidential Staff Report at 66 to 77, and how (if at all) it reasonably supports a determination of causation. In this regard, the Tribunal should analyze (1) how dumping margins and volumes found by the Deputy Minister relate to price movements identified in the staff's study and (2) how other non-dumping factors (both price and non-price) relate cumulatively to those price movements and/or lost sales or market share shifts;

(c) An analysis in detail of the staff finding of a 13 cent decline in the domestic average price per square metre over the course of 1991 referred to in CST Vol. 4, Public Staff Report at 1.214.82, and how (if at all) it reasonably supports a determination of causation.

Second, the Panel remanded the Tribunal's determination that dumping is likely to "cause" future material injury, and directed the Tribunal on remand to

determine whether dumping in and of itself is likely to cause material injury (and whether such determination depends on the existence of dumping as a cause of past injury) and to demonstrate the rational basis for such determination by detailed analysis of the evidence in the Record.

A. The CITT's Determination on Remand ("DOR")

On May 25, 1993, the CITT, pursuant to section 77.16 of the *Special Import Measures Act* issued a Determination on Remand ("DOR") in which it found that the dumping of certain machine tufted carpeting originating in or exported from the United States of America has caused and is causing material injury to the production in Canada of like goods. It also found that the dumping of the subject goods is likely to cause material injury to the production in Canada of like goods.

On June 9, 1993, the Carpet & Rug Institute ("CRI") filed a Notice of Motion indicating that it would challenge the CITT's DOR and requested a hearing so that the Panel could hear oral submissions. On June 17, 1993, the Panel considered both the CRI's motion and a motion by the CCI requesting that a hearing regarding the DOR be denied. Pursuant to Rule 75(4) of the Panel Rules, the Panel ordered a review of the Tribunal's DOR and set the hearing date for July 22, 1993.

On July 22, 1993, one of the Panelists, James McIlroy, withdrew from the Panel. On October 29, 1993, Jean-Gabriel Castel was named to the Panel to replace Mr. McIlroy. A Notice of Resumption of the review and hearing was therefore issued. The Panel set a new date, December 20, 1993, for the hearing on remand and set January 21, 1994 as the date for its decision. The hearing on remand was held on December 20 with counsel for the CRI, the CCI and the Tribunal making written and oral submissions to the Panel.

B. Position of the Participants

CRI challenges the DOR and seeks a written decision pursuant to Rule 75(5):

(a) That the DOR fails to respond to the specific directions of the Panel to demonstrate, through a detailed analysis of the Administrative Record, a rational basis for its finding of causation of past, present and future injury;

(b) That the finding of the CITT, in its DOR, that "dumping, in and of itself, has caused, is causing and is likely to cause material injury to Canadian production of the subject goods" is unsupported by evidence on the Record; and

(c) That the case be further remanded to the CITT with a direction to dispose of the matter in a manner consistent with the CITT's failure to establish that the evidence on the Record supports a finding that dumping has caused, is causing and is likely to cause material injury.

Both the CITT and the CCI request that the DOR be affirmed in all respects. In their Response, they contend that:

(a) The Tribunal did not commit a patently unreasonable error of law or fact in its DOR when it concluded that the dumping of certain machine tufted carpeting, originating in or exported from the United States of America, in and of itself, has caused and is causing material injury to the production in Canada of like goods;

(b) The Tribunal did not commit a patently unreasonable error of law or fact in its DOR when it concluded that the dumping of certain machine tufted carpeting, originating in or exported from the United States of America, in and of itself, is likely to cause material injury to the production in Canada of like goods;

(c) And more specifically that the manner in which the Tribunal responded to each of the directions of the Panel in its DOR was not inconsistent with the directions of the Panel.

II. STANDARD OF REVIEW BY THE PANEL

As was stated by the Panel *In the Matter of Certain Beer Originating in or Exported from the United States of America by G. Heilman Brewing Company, Inc., Pabst Brewing Company, and the Stroh Brewing Company for Use or Consumption in the Province of British Columbia (Injury)*, CDA-91-1904-02, decided on February 8, 1993, the scope of a Panel's inquiry in a review of a DOR is much narrower than the scope of its review of the Tribunal's original Determination. It is not open to the Panel to revisit the original Determination with respect to any issue not covered by the Remand. "The Panel's inquiry in reviewing the DOR is thus limited to deciding whether the Tribunal addressed the question[s] that the Panel directed to it, followed

the Panel's instructions, and in so doing reached a result that is not patently unreasonable and is supported by at least some evidence in the Tribunal's investigative record" (at pp. 2-3).

The present Panel applies this standard of review, as set out in this section, and as further articulated in these Reasons.

III. PANEL DECISION

For the reasons more fully set forth in its Opinion, on the basis of the Administrative Record, the applicable law, the written submissions of the parties, and the public hearing held in Ottawa on December 20, 1993, the Panel: *Affirms* in part and *Remands* in part.

A. Causation of Past and Present Injury

As to the first analysis which the Panel called for, relating to the thirty to thirty-two accounts involving lost sales allegations, referred to in the post-hearing briefs of the CITT and CCI, the Tribunal stated:

> The Tribunal notes that, in quantitative terms, these accounts, which were intended simply to be illustrative of the effects of dumping, were not significant. What is qualitatively significant about the 32 accounts is that almost all of them involve an admission of almost dumping of some sort by one or more U.S. exporters. However, the Tribunal's original analysis and its subsequent detailed analysis further to this remand indicate that, even where dumping has been admitted, the volumes of dumped goods and the margins of dumping involved are relatively insignificant.
>
> ... the Tribunal did not base its decision on the specific claims of the lost sales advanced in evidence by the Canadian industry. The Tribunal has nothing more to say about the allegations relating to lost accounts.
>
> CITT's Determination on Remand (DOR) at page 11.

With regards to the second analysis ordered by the Panel, the Tribunal instead conducted a new study, limiting the number of exporters to Canada and the number of Canadian manufacturers. This new study will be addressed below.

Concerning the third analysis ordered by the Panel in its Opinion and Order, that is, an analysis of the staff finding of a 13 cent decline in the domestic average price per square metre over the course of 1991, and how it reasonably supports a determination of causation, the Tribunal stated at page 11 of the DOR:

> However, in the Tribunal's judgment, the values contained in the unit income statement, by themselves, do not reveal anything definitive about the effects of dumping compared to the effects of other factors in causing price declines.

In short, the Tribunal did not perform any of the analyses called for by the Panel in its Opinion. However, as referenced above, the Tribunal did a new analysis of its data (1993 Price Study). Consequently, the Tribunals DOR will be acceptable only if its 1993 Price Study establishes the critical nexus between injury and dumping.

In discussing the second analysis called for by the Panel, that is, an analysis of the staff's price study and how it reasonably supports a determination of causation, the Tribunal stated as follows on page 3 of the DOR:

> The amalgamated price data included in the original examination reflected a vast array of different carpet styles and qualities produced by numerous U.S. and Canadian manufacturers with different marketing strategies and, in some cases, significantly different operating efficiencies and cost structures. In reviewing this examination of prices on remand, the Tribunal considers that a revealing comparison of actual price movements of imported and domestic carpet can be derived from the same data by focusing on certain companies that are comparable, rather than on the full range of companies included in the original examination. To this end, as directed by the Panel, the Tribunal has conducted a detailed price analysis and has based it on a subset of the information contained in the original price examination. This subset focusses on sales to the 10 largest accounts of 2 exporters and 4 domestic producers.

The two exporters selected were Shaw Industries, Inc. ("Shaw") and Queen Carpet Corporation ("Queen"). The four Canadian firms selected by the Tribunal were Peerless Carpet Corporation, Kraus Carpet Mills Limited, Richmond Carpet Mills, and Venture Carpets Limited. The Tribunal found that the Canadian firms chosen were among the most stable and efficient producers. In the 1993 Price Study the Tribunal found that both average domestic and average import prices declined between 1990 and 1991. Moreover, the Tribunal stated, in 1990 average import prices were below average domestic prices by 43 cents. This price differential favouring U.S. imports remained relatively constant in 1991, despite declining U.S.

prices between 1990 and 1991, because Canadian prices fell by approximately the same amount as import prices over this period.

To determine the effect of dumping on prices, the Tribunal estimated an average per unit dollar value for dumping on the basis of the average prices for Shaw and Queen. The prices it had arrived at, earlier noted, were netted to their F.O.B. Dalton, Georgia values. The dumping values were then derived using these F.O.B. prices and the weighted average dumping margins for Shaw and Queen, as determined by the Deputy Minister in his final determination or adjusted downward to reflect the volume of undumped goods exported to Canada by these producers. The result was a combined weighted average dumping value of 33 cents per square metre and 35 cents per square metre in 1990 and 1991, respectively. Adding these values to the actual prices found for Queen and Shaw in 1990 and 1991 reduced the gap between a non-dumped import price and domestic price to 10 cents in 1990 and 6 cents in 1991.

However, in the Written Submissions of the CRI, challenging the CITT's DOR, the CRI stated, at paragraphe 6.4.2, that the results of the Tribunal's new analysis "are fundamentally flawed in that the analysis is based on erroneous data. The results, therefore, *do not* and *cannot* support a finding of causation of material injury."

At the hearing held on December 20, 1993, counsel for CRI referred to the letter of February 25, 1992, from James L. McCormick, Jr., Director, Sales Administration and Market Research for Shaw Industries, Inc., to the Secretary, Canadian Trade Tribunal, to which letter was attached "an amended response to the Importer's Questionnaire on Machine Tufted Carpeting." The letter went on to state: "Please replace the submission mailed to you on January 22, with this one." Counsel for CRI, at the Remand Hearing before the Panel, indicated that the new information provided in the submission of February 25, 1992 was provided to the Tribunal since Shaw had discovered that the information that it had previously provided did not account for terms of sale. This, counsel stated, caused an error of approximately 30% in pricing information originally presented to the Tribunal. Thus, according to counsel, the new figures, referred to as the corrected figures, would demonstrate a higher price for Shaw's goods in Canada than the Canadian manufacturers' prices for like merchandise.

Counsel for both the CITT and CCI argued that the Tribunal did not strike the original submission by Shaw from the record; and, therefore, was free to choose whichever figures it chose to rely upon. Counsel for both the CITT and CCI stated that neither Shaw nor counsel for the CRI explained the substitution of data by Shaw.

Counsel for the CRI directed the Panel's attention to the list of exhibits for the CITT's hearing on this issue. The list of exhibits contain many references to amended exhibits or statements. Counsel also noted that during almost two days of testimony before the Tribunal, Mr. McCormick was not questioned or cross-examined about the submission of the new figures.

The Tribunal, in its DOR, did not explain why it did not rely upon the figures submitted in February of 1992 by Shaw in conducting its 1993 Price Study. Certainly, if the figures submitted by Shaw in February of 1992 are correct and the Tribunal routinely allowed corrections to be made, the failure to rely upon them in conducting its price study could result in a patently unreasonable finding. The Tribunal should explain why it failed to use the corrected figures submitted by Shaw.

Accordingly, the Panel remands the DOR to the Tribunal with instructions to conduct another price study using the corrected figures submitted by Shaw. The Tribunal may also do a study separating Shaw from Queen.

B. Causation of Future Injury

In the Opinion and Order of the Panel on April 7, 1993, the Panel was of the view that it was unclear whether the Tribunal actually determined that causation of likely future injury was independent of its analysis of causation of past injury. In view of these uncertainties, and since the Panel was remanding on the issue of causation of past injury, it also directed that the Tribunal clarify this point and provide an analysis of the evidence in the Record regarding causation of future injury.

Accordingly, the Panel remanded the Tribunal's determination that dumping is likely to "cause" future material injury, and directed the Tribunal on remand:

> [T]o determine whether dumping in and of itself is likely to cause material injury (and whether such determination depends on the existence of dumping as a cause of past injury) and to demonstrate the rational basis for such determination by detailed analysis of the evidence in the record.

In its DOR made on May 25, 1993, the Tribunal confirmed its finding that dumping is likely to cause material injury. Its DOR on this issue reads as follows:

Future Injury

The Tribunal confirms its finding that dumping is likely to cause material injury. In addition to the reasons provided in the finding, the Tribunal adds that, given the competitive nature of U.S. and Canadian carpet prices, it is clear that anti-dumping duties are necessary to help offset the advantage conferred by dumping. This advantage has helped U.S. carpet imports to surge into Canada in unprecedented volumes, despite ongoing weak market conditions in Canada, especially in 1990 and 1991.

This surge northward by U.S. producers at dumped prices reflects, among other things, soft demand conditions in the United States, large U.S. carpet manufacturing overcapacity, as well as the production imperative dictated by the need to keep huge U.S. plants, such as those owned by Shaw and Queen, operating round-the-clock to achieve maximum operational efficiencies. In the judgment of the Tribunal, these conditions are likely to persist for some time and to create the basic conditions that will lead to continued dumping in the future, in the absence of the price discipline imposed by anti-dumping duties.

The Tribunal further notes that CUSFTA provided for a 10-year transition period, beginning in 1989, during which the Canadian industry could gradually adjust to lower tariffs. In the opinion of the Tribunal, the effect of continued dumping at the levels established by the Deputy Minister would be to virtually eliminate the remaining portion of this transition period. As the Tribunal observed in its statement of reasons, "[d]umping has further reduced the time required by the Canadian industry to make the necessary adjustments to compete effectively in a North-American free-trade environment."

For greater certainty having regards to the specific direction in the remand, the Tribunal considers that this determination does not depend solely on the existence of dumping as a cause of past injury, for the reasons given above.

In its challenge to the DOR, the CRI alleged that with respect to the Panel's direction concerning future injury, the Tribunal:

(a) failed to determine whether dumping in and of itself is likely to cause material injury;

(b) failed to determine the extent to which its finding of future injury depended on the existence of dumping as a cause of past injury and the

significance of its finding on past injury in imputing future injury and causation; and

(c) failed to demonstrate a rational basis for confirming its original finding of April 21, 1992 concerning future injury by detailed analysis of the evidence on the record.

In its response, the Tribunal directed the Panel to the Recommendations concerning Determination of Threat of Material Injury adopted by the Committee on Anti-Dumping Practices on October 21, 1985 (which is an agreed interpretation of Article 3:6 of the Anti-Dumping Code). The CADP Recommendations state:

> In making a determination regarding threat of material injury, with due regard to Article 3 of the Anti-Dumping Code, the administering authority should consider *inter alia* such factors as:
>
> - a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importations thereof;
>
> - sufficient freely disposable capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing country's market taking into account the availability of other export markets to absorb any additional exports;
>
> - whether exports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further exports; and
>
> - inventories in the importing country of the product being investigated.
>
> It is understood that no one of these factors by itself can necessarily give decisive guidance but that the totality of factors considered must lead to the conclusion that further dumped exports are imminent and that unless protective action is taken, material injury would occur.[1]

The CADP Recommendations also state:

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[1] Committee on Anti-Dumping Practices, *Recommendations Concerning Determination of Threat of Material Injury*, adopted by the Committee on 21 October, 1985 (ADP/25), *BISD*, 32nd, Supp., Geneva, March 1986, at p. 182-184, at paragraph 9 ("*CADP Recommendations*").

> However, as the Anti-Dumping Code provides, anti-dumping relief based on the threat of injury must be confined to those cases where the conditions of trade clearly indicate that material injury will occur imminently if demonstrable trends in trade adverse to domestic industry continue or clearly foreseeable adverse events occur.[2]

Counsel for the Tribunal submitted that the Tribunal in its DOR considered a number of the factors set out in paragraph 9 of the CADP Recommendations, for instance, with regard to increases in the rate of dumped imports, with respect to over capacity in the United States, with respect to the price suppressing or price depressing effect of U.S. imports on domestic prices as well as other factors germane to the issue of threat of injury such as the competitive nature of the market for the subject goods, soft demand conditions in the United States and the impact dumping was having on the adjustments being made by the Canadian industry in response to the changing competitive conditions.

At the December 20, 1993 hearing on the review of the DOR, the Panel directed counsel for the Tribunal as well as counsel for the CCI, if it wished, to provide in writing with specific references to the administrative record only, and without argument, references identifying the evidence supporting the Tribunal's following future injury findings on remand:

(1) soft demand conditions in the United States;

(2) large U.S. carpet manufacturing over-capacity;

(3) the production imperative dictated by the need to keep huge U.S. plants, such as those owned by Shaw and Queen, operating round the clock to achieve maximum operational efficiencies.

The CRI was given a similar opportunity. Both the Tribunal and the CRI filed a list of specific evidence in the administrative record in response to the Panel's request under each of the three headings.

Following its review of the Administrative Record, the Panel concludes that there was evidence in the Administrative Record on which the Tribunal could make a finding of soft demand conditions in the United States, large U.S. carpet manufacturing over-capacity, as well as the production imperative dictated by the need to keep huge U.S. plants, such as those owned by Shaw and Queen, operating

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[2] *Ibid.* at paragraph 5.

round-the-clock to achieve maximum operational efficiencies. The Panel is also satisfied that there is evidence on the record to support the finding of a surge of imports of the subject goods into Canada from the United States.

The Panel is of the opinion that there was evidence on the Administrative Record to support the Tribunal's finding of future injury and that its finding of future injury was not patently unreasonable[3] or clearly irrational[4] in the circumstances. The Panel therefore affirms the Tribunal's finding of future injury in this case.

[3] *National Corn Growers Association v.Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1367.

[4] *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963-4.

IV. ORDER

For the reasons stated above, the Panel hereby:

AFFIRMS the Tribunal's determination that dumping is likely to cause future material injury.

REMANDS the Tribunal's determination that dumping has caused past and present material injury and directs the Tribunal on remand as follows:

1. To explain, why it failed to use the corrected figures submitted by Shaw.

2. To conduct another price analysis using the corrected figures submitted by Shaw.

3. The Tribunal may also prepare a price analysis in which it deals separately with Shaw and Queen.

DIRECTS the Tribunal to issue its Determination on Remand within 21 days of the date of this decision.

SIGNED IN THE ORIGINAL BY:

JOHN D. RICHARD, Chairperson

JAMES CHALKER

JEAN-GABRIEL CASTEL

MARTIN J. WARD

Issued on this 21st day of January, 1994.

OPINION OF PANELIST MICHAEL D. SANDLER
CONCURRING IN PART AND
DISSENTING IN PART

I concur in the decision and opinion of the majority of the Panel with respect to the determination of past and present injury. I dissent from the majority's decision with respect to future injury.

The Tribunal's Determination on Remand, as it concerns future injury, placed me in a difficult position. The Opinion and Order of the Panel of April 7, 1993 directed the Tribunal on remand "to determine whether dumping in and of itself is likely to cause material injury . . . and to demonstrate the rational basis for such determination *by detailed analysis of the evidence in the record*." Opinion and Order of the Panel at 39 (emphasis added). In contrast with its treatment of past and present injury, the Tribunal's Determination on Remand regarding future injury did not include any "detailed analysis of the evidence in the record" — or, indeed, cite any evidence in the record. It did, however, purport to base the future injury determination on certain factual conclusions or findings:

> This surge northward by U.S. producers at dumped prices reflects, among other things, soft demand conditions in the United States, large U.S. carpet manufacturing overcapacity, as well as the production imperative dictated by the need to keep huge U.S. plants, such as those owned by Shaw and Queen, operating round-the-clock to achieve maximum operational efficiencies. In the judgment of the Tribunal, *these conditions are likely to persist for some time* and to create the basic conditions that will lead to continued dumping in the future, in the absence of the price discipline imposed by anti-dumping duties.

Determination on Remand at 12 (emphasis added).

In essence, these factual conclusions or findings are that there were certain past conditions (a surge northward, soft U.S. demand conditions, large U.S. overcapacity, and a production imperative) and, in addition, that *all* of these past conditions "are likely to persist for some time." Since the Tribunal did not tell us whether any of these factual conclusions or findings were not essential to its

decision, I found it necessary to proceed on the basis that the future injury determination was based on all of them.

Under the "patently unreasonable" standard of review, each factual conclusion or finding essential to the determination being reviewed must be based on evidence in the administrative record — evidence logically *capable* of supporting the particular factual conclusion or finding to which that evidence relates.[5]

As the majority's opinion notes, the absence of any citation to particular evidence in the "future injury" portion of the Determination on Remand made it difficult for us to assess whether there was evidence logically capable of supporting the Tribubal's factual conclusions. For that reason, we asked that the parties immediately after the Panel's December 20 hearing file a list of citations and excerpts of evidence in the record supporting each of these factual conclusions (except the conclusion regarding the "surge northward" which was supported by evidence in the Tribunal's original decision).

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[5] The Panel's Opinion and Order of April 7, 1993 stated the following summary of the standard of review:

1. Courts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or the law.

2. A reviewing panel today must review "how" a tribunal reached any challenged finding or decision to determine whether it has a rational basis, and it must make at least such "evaluation of the merits" so as to satisfy itself that there is a "logical relationship between the grounds of the decision and the evidence supporting it. *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at 1004, 1018.

3. A reviewing panel today may have to perform "an in-depth analysis" in analyzing the manner in which a tribunal arrived at its findings and decision and their logical ties to the evidence. *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1370.

4. In performing this analysis, if a reviewing panel finds that "there is any evidence supporting" the finding or conclusion--that is, evidence that provides the logical relationship to the finding or conclusion--it will not be deemed patently unreasonable. *Lester (W.W.) v. U.A.J.A.P.P.I., Local 740*, [1990] 3 S.C.R. 644 at 687-688.

5. On judicial review, the courts in Canada are free to examine not only the findings and observations made by the Tribunal in its reasons, but also the entire administrative record. The *Federal Court* Act and its Rules as well as the provisions of Chapter 19 of the FTA and its Rules, expressly provide that the administrative record will be provided. Such an examination of the record was performed in the *Lester* case.

6. The purpose of the "patently unreasonable" standard is to assure curial deference to the expertise of specialized tribunals with respect to matters within their expertise and jurisdiction, and a reviewing panel is not to attempt to substitute its findings in these matters for those of the tribunal. *Bell Canada* v. *Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] S.C.R. 1722 at 1746.

There may be situations where a reviewing panel is asked to consider evidence in the administrative record that has not been ostensibly analyzed in the expert tribunal's decision and which may, upon expert analysis, be found to provide a logical relationship to the tribunal's findings (and thus capable of supporting those findings). Curial deference leads to the conclusion that the reviewing panel itself *not* perform that analysis, but that the expert tribunal do so on remand.

Having reviewed the citations and excerpts the parties submitted after the December 20 Panel hearing, I, like the majority of the Panel, saw evidence in the record capable of supporting the *past* existence of each of the conditions embodied in the Tribunal's factual conclusions (or findings) regarding future injury. I, however, could not find evidence capable of supporting the additional conclusions that *all* of these conditions "are likely to persist for some time."

In particular, the uncontroverted evidence cited to us following the December 20 Panel hearing was that there was "soft U.S. demand" during the first quarter 1991 caused by the Gulf War and U.S. recession. There was also evidence, apparently uncontroverted, that U.S. shipments had noticeably increased afterwards, in late 1991 and early 1992 before the Tribunal issued its original decision. Looking at what was cited to us following the Panel's hearing ("Post-Hearing Citations") — and in the absence of any analysis of *evidence* in the Determination on Remand itself — I could not find evidence logically capable of supporting the factual conclusion that soft U.S. demand was "likely to persist for some time."

I found ambiguous the evidence regarding whether "large U.S. carpeting manufacturing overcapacity" would be likely to persist for some time. The Post-Hearing Citations refer to "chronic" (not large or continuous) overcapacity in both the U.S. and Canadian industries. No evidence was cited regarding the magnitude of U.S. overcapacity during the period of investigation (there was evidence from 1987), or regarding how any overcapacity was affected by subsequent U.S. plant closures. I found myself in the awkward position of having to make my own inferences about what the word "chronic" meant and about other evidence cited, without the benefit of the Tribunal's own analysis of the evidence (including specific discussion of the inferences it made).

This is not a case where we are weighing evidence of the Canadian industry against conflicting evidence of U.S. exporters. That is not permitted under the "patently unreasonable" standard. My problem was in how to review a Determination on Remand, which cited four conditions as *jointly* "likely to persist for some time" and which did not give me any guidance as to whether the determination was still supportable if I did not find evidence capable of supporting the continuing persistence of one or more of those conditions. As noted above, I did not find evidence capable of supporting the continuing persistence of soft U.S. demand.[6]

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[6] The majority's opinion does not clarify (1) whether all members of the majority found evidence in the record "capable of supporting" all of the Tribunal's factual conclusions (including that "soft U.S. demand" was likely to persist) -- or (2) whether the majority was deciding that not all of the factual conclusions need be backed by such evidence and that the unsupported conclusions were not essential to the "future injury" determination. In my view, the Tribunal's decision is "patently unreasonnable" unless either (i) each factual conclusion on which the decision is purportedly based is backed by evidence logically capable of supporting it, or (ii) unless the expert

Under these circumstances and since we are remanding in any event the determination on past and present injury, I believe the appropriate course would have been to remand also the future injury determination to the expert tribunal and direct it

(1) to state which of its factual conclusions is essential to its determination of future injury, and

(2) to analyze for us the *evidence* in the record supporting each of those essential factual conclusions and either (i) if the evidence supports each such conclusion, to state how it does so, and (ii) if it does not support each such conclusion, to issue a negative determination on future injury.

SIGNED IN THE ORIGINAL BY:

MICHAEL D. SANDLER

DATED: January 21, 1994.

tribunal on remand clarifies that any unsupported factual conclusions are not essential to its decision and the remaining supported factual conclusions are legally capable of sustaining the decision.