

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

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<b>IN THE MATTER OF:</b>	)	
Certain Flat Hot-Rolled Carbon	)	Secretariat File No.:
Steel Sheet Products Originating	)	CDA-93-1904-07
In or Exported From the	)	
United States (Injury)	)	

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Before:                    Edward Chiasson, Q.C. - Chairperson  
                              Professor Ivan Bernier  
                              Cecil Branson, Q.C.  
                              Professor Daniel G. Partan  
                              Gary Welsh, Esq.

**DECISION AND REASONS OF THE PANEL  
18 May 1994**

**Appearances:**

Ronald C. Cheng and Gregory O. Somers of Osler, Hoskin & Harcourt on behalf of Algoma Steel Inc., Sidbec-Dosco Inc., and Ipsco Inc.

Lawrence L. Herman, Barrister and Solicitor on behalf of Stelco Inc.

John T. Morin, Q.C. of Fasken Campbell Godfrey on behalf of Dofasco Inc.

C.J. Michael Flavell, Q.C. and Geoffrey G. Kubrick of Flavell Kubrick & Associates on behalf of U.S. Steel (a Division of USX Corporation), Bethlehem Steel Export Corporation, National Steel Corporation, Acme Steel Corporation, LTV Steel Corporation and WCI Steel Incorporated.

David Attwater and Joel Robichaud of the Canadian International Trade Tribunal on behalf of the Investigating Authority.

Alain Préfontaine of the Attorney General of Canada on behalf of the Government of Canada.

**DECISION AND REASONS OF THE PANEL**

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## I. INTRODUCTION

This is a Binational Panel Review conducted pursuant to Article 1904 of the *Canada-United States Free Trade Agreement*,<sup>1</sup> the *Canada-United States Free Trade Agreement Implementation Act*,<sup>2</sup> and Part II of the *Special Import Measures Act*,<sup>3</sup> following a Request for Panel Review filed by Algoma Steel Inc.<sup>4</sup> seeking remand of a Finding issued by the Canadian International Trade Tribunal (the "Tribunal") on 31 May 1993.<sup>5</sup> The Tribunal, in accordance with SIMA subsection 43(1.1), and pursuant to SIMA subsection 43(1), found that the dumping in Canada of certain flat hot-rolled carbon steel sheet products (the "Subject Goods") originating in or exported from the United States had not caused, was not causing, and was not likely to cause material injury to the production in Canada of like goods.<sup>6</sup>

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<sup>1</sup> *Canada Treaty Series*, 1989, No. 3 (C.T.S.), signed by Canada and the United States on 2 January 1988, entered into force on 1 January 1989 (the "FTA").

<sup>2</sup> S.C. 1988, c. 65 (the "*FTA Implementation Act*").

<sup>3</sup> R.S.C. 1985, c. S-15 (as amended) ("*SIMA*").

<sup>4</sup> Both Algoma and Stelco Inc. ("Stelco") filed Complaints in this Review. Also appearing before the Panel in support of these complainants were Dofasco Inc. ("Dofasco"), Ipsco Inc. and Sidbec-Dosco Inc. The complainants and those appearing in support are hereinafter referred to collectively as the "Complainants".

<sup>5</sup> The Tribunal's original Finding was issued 31 May 1993. A Corrigendum to that Finding was subsequently issued 3 June 1993.

<sup>6</sup> Canadian International Trade Tribunal, Inquiry No.: NQ-92-008, Finding of 31 May 1993. Official notice of the Tribunal's Finding is published at *Canada Gazette*, Part I, Vol. 127, No. 24, 12 June 1993, at 1970.

## II. PROCEDURAL HISTORY

Following the receipt of a properly documented complaint, the Deputy Minister of National Revenue for Customs and Excise (the "Deputy Minister") initiated a dumping investigation into the Subject Goods on 16 September 1992.<sup>7</sup> A Preliminary Determination of dumping was issued on 29 January 1993.<sup>8</sup> Upon its receipt, the Tribunal commenced a SIMA section 42 inquiry on 2 February 1993.<sup>9</sup> The Tribunal held public and *in camera* hearings in Ottawa from 3 to 13 and 17 May 1993.

On 29 April 1993 the Deputy Minister issued a Final Determination of dumping of the Subject Goods wherein the Deputy Minister found that the Subject Goods had been or were being dumped and the actual or potential volume of dumped goods was not negligible.<sup>10</sup> U.S. Steel (a Division of USX Corporation), Bethlehem Steel Export Corporation, National Steel Corporation, Acme Steel Corporation, LTV Steel Company, and WCI Steel Inc.<sup>11</sup> filed requests for Panel Review of the Deputy Minister's final dumping determination with the Canadian Section

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<sup>7</sup> Official notice of the Deputy Minister's Initiation of Investigation is published at *Canada Gazette*, Part I, Vol. 126, No. 39, 26 September 1992, at 2997.

<sup>8</sup> Official notice of the Deputy Minister's Preliminary Determination is published at *Canada Gazette*, Part I, Vol. 127, No. 7, 13 February 1993, at 417.

<sup>9</sup> Official notice of the Tribunal's Commencement of Inquiry is published at *Canada Gazette*, Part I, Vol. 127, No. 7, 13 February 1993, at 424.

<sup>10</sup> IN THE MATTER concerning the final determination of dumping pursuant to paragraph 41(1)(a) of the *Special Import Measures Act* regarding Certain Flat Hot-Rolled Carbon Steel Products Originating In or Exported From The Federal Republic of Germany, France, Italy, New Zealand, The United Kingdom and the United States of America, File: 4258-90, Case: AD/1000, Statement of Reasons, 29 April 1993. Official notice of the Deputy Minister's Final Determination is published at *Canada Gazette*, Part I, Vol. 127, No. 20, 15 May 1993, at 1591.

<sup>11</sup> U.S. Steel, Bethlehem Steel, National Steel, Acme Steel, LTV, and WCI are hereafter referred to collectively as "U.S. Steel, et al." or the "Respondents".

of the Binational Secretariat on 7 June 1993.<sup>12</sup> Complaints were then filed by both U.S. Steel et al. and Algoma. Notices of Appearance were subsequently filed by Stelco, Dofasco Inc., Ipsco Inc., Sidbec-Dosco Inc., the Investigating Authority, and the Government of Canada.

On 31 May 1993, the Tribunal issued its Finding that the dumping in Canada of the Subject Goods originating in or exported from the Federal Republic of Germany, France, Italy, New Zealand, the United Kingdom, and the United States had not caused, was not causing, and was not likely to cause material injury to the production in Canada of like goods. On 3 June 1993, the Tribunal issued a Corrigendum to its 31 May 1993 Finding, correcting a clerical error. The Finding was separated into two parts, including a new paragraph dealing with the Subject Goods originating in or exported from the United States. The Tribunal found:

"[T]he dumping in Canada of [the Subject Goods] from the United States of America has not caused, is not causing and is not likely to cause material injury to the production in Canada of like goods."<sup>13</sup>

The Tribunal issued Reasons for its Finding on 15 June 1993.<sup>14</sup>

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<sup>12</sup> Official notice of U.S. Steel's Request for Panel Review is published at *Canada Gazette*, Part I, Vol. 127, No. 25, 19 June 1993, at 2040.

<sup>13</sup> Canadian International Trade Tribunal, Corrigendum to its Finding of 31 May 1993, Inquiry No.: NQ-92-008, at page 2. Official notice of the Corrigendum is published at *Canada Gazette*, Part I, Vol. 127, No. 24, 12 June 1993, at 1968.

<sup>14</sup> Canadian International Trade Tribunal, Statement of Reasons, Inquiry No.: NQ-92-008, 15 June 1993 (the "Tribunal's Reasons," the "Statement of Reasons," or the "Reasons").

Algoma filed a Request for Panel Review of the Tribunal's decision with the Canadian Section of the FTA Binational Secretariat on 7 July 1993.<sup>15</sup> Subsequently, Complaints were filed by both Algoma and Stelco. Notices of Appearance were filed by Aciers Francosteel Canada Inc. et al.,<sup>16</sup> U.S. Steel et al., and the Tribunal.

As a result of Requests for Panel Review being filed for review of both the Deputy Minister's Final Determination of dumping and the Tribunal's Final Determination of no injury, this Panel was constituted as a joint panel under Rule 37(1) of the *Rules of Procedure for Article 1904 Binational Panel Reviews*<sup>17</sup> to review both Final Determinations.

Pursuant to Rule 38(2) of the *Binational Panel Rules*,<sup>18</sup> this decision concerns only the Tribunal's Final Determination of no material injury.

Briefs in this injury Review were filed by the Complainants on 8 November 1993. As a result of an issue raised in one of the Complainants' Briefs, the Attorney General of Canada filed a Consent Motion requesting an extension of time in order to file a Notice of Appearance.

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<sup>15</sup> Official notice of Algoma's Request for Panel Review is published at *Canada Gazette*, Part I, Vol. 127, No. 29, 17 July 1993, at 2257.

<sup>16</sup> This Notice of Appearance was subsequently withdrawn and Aciers Francosteel Canada Inc. et al. did not submit Briefs nor did they appear before the Panel.

<sup>17</sup> *Canada Gazette*, Part I, Vol. 128, No. 7, 12 February 1994, at 1012-1052 (the "*Binational Panel Rules*"). Rule 37(1) provides:

"Where a Panel is established to review a final determination made under subsection 41(1)(a) of the *Special Import Measures Act*, as amended, that applies with respect to particular goods of the United States and a Request for Panel Review of a negative final determination made under paragraph 43(1) of that Act with respect to those goods is filed, the final determinations shall be reviewed jointly by one panel."

<sup>18</sup> Rule 38(2) provides:

"...where final determinations are reviewed jointly pursuant to rule 37, the panel shall issue its decision with respect to the final determination made under subsection 43(1) of the *Special Import Measures Act*...and where the panel remands the final determination to the investigating authority and the Determination on Remand is affirmative, the panel shall thereafter issue its decision with respect to the final determination under subsection 41(1)(a) of the *Special Import Measures Act*...."

The Panel granted the request and the Attorney General filed a Brief on 5 January 1994. U.S. Steel et al. and the Tribunal then filed Briefs on 7 January 1994. Algoma and Stelco filed Reply Briefs on 24 January 1994.

By order of 26 January 1994, the Panel directed the participants to provide further written submissions on one of the issues raised in a Complainant's Brief. Stelco, U.S. Steel et al., the Tribunal, and the Attorney General responded by filing further Pre-hearing Briefs on 4 February 1994. On 11 February 1994, the Panel issued an Order requesting further written submissions on an additional issue raised in the written materials. These were supplied immediately prior to the Panel's hearing.

The Panel held hearings in Ottawa, Canada on 15 and 16 February 1994, concerning both the Deputy Minister's Final Determination of dumping and the Tribunal's Final Determination of no material injury. In addition to the Complainants, appearing at the injury portion of the Panel's hearings were the Respondents, the Tribunal, and (with leave of the Panel) the Attorney General of Canada. Following the hearing, the Panel requested further Post-Hearing Briefs to more fully address an issue that was raised during the hearing. The Panel also directed the Canadian Secretariat to inform the Government of the United States of America that the Panel was considering an issue of natural justice that could affect the Binational Panel Roster and that the Panel would be prepared to receive a written submission on the issue. No response was received from the United States Government.

### III. THE STANDARD OF REVIEW AND SIMA SECTION 76(1)

This Panel is directed by FTA Article 1904(3) to apply:

"...the standard of review described in Article 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority."

In the case of Canada, FTA Article 1911 defines the standard of review as the grounds set forth in section 28(1) of the *Federal Court Act*.<sup>19</sup> Section 28(1) provides that the Tribunal's decisions will be reviewed on the grounds that it:

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

The Panel also must look to the general jurisprudence that would guide a Canadian court in its review of Tribunal decisions. The FTA's definition of "general legal principles" does not refer explicitly to the standard of review,<sup>20</sup> but, when invoked, binational panel review replaces review by Canada's Federal Court.<sup>21</sup> FTA Article 1904(3) directs binational panels to apply the general legal principles that a Canadian court would apply on a judicial review.

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<sup>19</sup> R.S.C. 1985, c. F-7.

<sup>20</sup> FTA Article 1911 defines "general legal principles" to include "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies."

<sup>21</sup> FTA Article 1904(1).



The question of when the Panel must defer to the Tribunal's decision is critical.

Mr. Justice Beetz summarized the basic rule in *U.E.S., Local 298 v. Bibeault*:

1. if the question of law is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;

2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review."<sup>22</sup>

There is a consensus among the participants, and the Panel agrees, that the standard of review for questions of jurisdiction, including issues of natural justice, is "correctness."<sup>23</sup> The Tribunal must be right. It is not entitled to deference when it addresses a question of jurisdiction. If the Tribunal were wrong, the Panel would remand with instructions to correct the finding.

With respect to issues of fact, the Panel will not reweigh evidence, but the Tribunal must have assessed the evidence reasonably. The Panel will remand the Tribunal's finding if "...the evidence, viewed reasonably, is incapable of supporting [the Tribunal's] finding...."<sup>24</sup>

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<sup>22</sup> [1988] 2 S.C.R. 1048, at 1086 ("*Bibeault*").

<sup>23</sup> See, for example, *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 ("*Dayco*"), at 251; *Bibeault*, *supra*, note 22, at 1086.

<sup>24</sup> *Lester (W.W.)(1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740* [1990] 3 S.C.R. 644, at 669.

On issues of law within the jurisdiction of a specialized tribunal, the permissible scope of review may be restricted explicitly by means of a "privative clause," by the Tribunal's mandate, and by those principles recognized in the pragmatic and functional test articulated by the courts. In *Canada (A.G.) v. Mossop*, Mr. Justice La Forest stated that:

"...even absent a privative clause, the courts will give a considerable measure of deference [to highly specialized bodies] on questions of law falling within the area of expertise of these bodies because of the role and functions accorded to them by their constituent Act...."<sup>25</sup>

Judicial deference to the findings of an administrative tribunal is measured in the context of the type of question entrusted to the tribunal and its nature and expertise.<sup>26</sup> This view was expressed by Mr. Justice Beetz in *Bibeault*, where he stated that a reviewing court:

"...examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal."<sup>27</sup>

Recently, in the context of a statutory arbitration protected by a clause that provided that "disputes shall be submitted for final settlement to arbitration," Mr. Justice Sopinka wrote:

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<sup>25</sup> [1993] 1 S.C.R. 554, at 584.

<sup>26</sup> *Dayco, supra*, note 23, at 268-69.

<sup>27</sup> *Bibeault, supra*, note 22, at 1088.

"Determining the appropriate standard of review, therefore, is largely a question of interpreting [the] legislative provisions in the context of the policy with respect to judicial deference.

The legislative provisions in question must be interpreted in light of the nature of the particular tribunal and the type of questions which are entrusted to it. On this basis, the court must determine what the legislator intended should be the standard of review applied to the particular decision at issue, having due regard to the policy enunciated by this Court that, in the case of specialized tribunals, decisions upon matters entrusted to them by reason of their expertise should be accorded deference."<sup>28</sup>

The Tribunal is a court of record with all of the necessary attendant powers concerning witnesses, documents, and the enforcement of its orders. Under section 16 of the Tribunal's constating legislation, the *Canadian International Trade Tribunal Act*,<sup>29</sup> it is charged with the duty to conduct inquiries on matters relating to Canada's economic, trade, or commercial interests when requested to do so by the Governor in Council and on tariff-related matters referred to it by the Minister of Finance. The Tribunal also conducts inquiries on certain complaints filed by domestic producers. In addition, SIMA authorizes the Tribunal to hear appeals on certain aspects of anti-dumping and countervailing duty orders. Under SIMA sections 42 and 43, the Tribunal has the duty to determine whether material injury to a domestic industry has been, is, or will be caused by goods found by the Deputy Minister of National Revenue to have been dumped or subsidized, and to make anti-dumping or countervailing duty orders concerning such goods.

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<sup>28</sup> *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.* [1993] 2 S.C.R. 316, at 332.

<sup>29</sup> R.S.C. 1985, c. 47 (4th Supp.) (as amended).

Parliament's confidence in the Tribunal as a highly specialized body performing an important public function is evidenced further by SIMA section 45, which authorizes the Tribunal to take into account the public interest and to report to the Minister of Finance when, in the Tribunal's opinion, the full imposition of an anti-dumping or countervailing duty would not be in the public interest. The Tribunal's tasks are not limited to interpreting domestic law. In certain circumstances, SIMA requires the Tribunal to take into account Canada's obligations under the GATT's *Anti-dumping* and *Subsidies Codes*.<sup>30</sup>

The Panel's review of the functions and roles of the Tribunal in Canadian anti-dumping proceedings leads to the conclusion that it is a specialized administrative body whose findings within its area of expertise are entitled to deference under Canadian law.

The applicable standard of review for errors of law within the specialized jurisdiction of the Tribunal is patent unreasonability. The Panel must "focus [its] inquiry on the existence of a rational basis for the decision of the [Tribunal] and not on its agreement with it."<sup>31</sup> As stated by the Panel in the *Beer* case, while referring to the Supreme Court of Canada's decision in *Bell Canada*: "[t]he patently unreasonable test gives `curial deference...to the opinion of the [Tribunal] on issues which fall squarely within its area of expertise."<sup>32</sup>

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<sup>30</sup> *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, BISD, 26S/171 (the "*Anti-dumping Code*"); and *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade*, BISD 26S/56 (the "*Subsidies Code*").

<sup>31</sup> *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.* [1989] 2 S.C.R. 983, at 1004.

<sup>32</sup> *Certain Beer Originating in or Exported from the United States*, Binational Secretariat File No. CDA-91-1904-01, Memorandum Opinion and Order of Panel, 16 August 1992 ("*Beer (Dumping)*"), at 16-17, quoting from *Bell Canada v. Canada (Canadian Radio and Telecommunications Commission)* [1989] 1 S.C.R. 1722 ("*Bell Canada*"), at 1746.

This conclusion is given support by the existence in SIMA of a privative clause. In the *National Corn Growers*<sup>33</sup> case, the Supreme Court of Canada held that the "final and conclusive" provisions of SIMA section 76(1) precluded judicial review of findings of the Tribunal's predecessor unless those findings "...cannot be sustained on any reasonable interpretation of the facts or of the law."<sup>34</sup>

On 1 January 1994, as part of the legislative package implementing the North American Free Trade Agreement, Parliament repealed and re-enacted SIMA section 76(1). As of 1 January 1994, the section reads:

"Subject to subsection 61(3) and Part I.1 or II, an application for judicial review of an order or finding of the Tribunal under this Act may be made to the Federal Court of Appeal on any of the grounds set out in subsection 18.1(4) of the *Federal Court Act*."

Among other changes, this new version of SIMA section 76(1) eliminated the provision that the Tribunal's decisions were "final and conclusive."

Before this Panel it was contended that this version of section 76(1) should apply to these proceedings. That contention is rejected. It was asserted<sup>35</sup> that section 44 of the

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<sup>33</sup> *National Corn Growers Assn. v. Canada (Import Tribunal)* [1990] 2 S.C.R. 1324 ("*National Corn Growers*")

<sup>34</sup> *Id.*, at 1369-70 (per Gonthier J.).

<sup>35</sup> Pre-Hearing Brief of the Complainant Algoma Steel Inc. and the Participants Ipsco Inc. and Sidbec-Dosco Inc., at 12-18.

*Interpretation Act*,<sup>36</sup> rather than section 43, applies because there was a repeal and re-enactment of the legislation. Such an interpretation of sections 43 and 44 finds no support in the jurisprudence.<sup>37</sup> Section 44 concerns matters of procedure, not substance. As a privative clause, SIMA section 76(1) affects the standard of review applicable to the decisions of the Tribunal. The standard of review is a matter of substance rather than procedure. Section 43 applies. By it, substantive rights are preserved.

In 1988, as part of the legislative package implementing the FTA, Parliament amended SIMA section 76(1) to include a reference to SIMA Part II in the "subject to" provision of the section. Part II of SIMA deals with binational review proceedings. It was asserted before the Panel that the 1988 amendments made SIMA section 76(1) not a privative clause for the purpose of binational panel review. The Panel does not accept this assertion.

The pre-FTA text of SIMA section 76 provided that "...every order or finding of the Tribunal...is final and conclusive." Nothing in SIMA granted to the Federal Court jurisdiction to review Tribunal findings. The authority of the Federal Court to do so was contained in section 28 of the Federal Court Act which applies to all administrative proceedings "notwithstanding...the provisions of any other Act." Under the pre-FTA text of SIMA, Federal Court jurisdiction was separated from the standard of review. Jurisdiction was granted by section 28(1) of the Federal Court Act. The standard of review was derived from both the "final and conclusive" words in section 76(1) of SIMA and from the specialized nature and tasks of the Tribunal.

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<sup>36</sup> R.S.C. 1985, c. I-21.

<sup>37</sup> It is well-settled that section 43 of the *Interpretation Act* addresses substantive issues while section 44 addresses procedural ones. See, for example, *Re Bell Canada and Palmer* (1974), 42 D.L.R. (3d) 1 (F.C.A.); *Re McDoom and Minister of Manpower and Immigration* (1977), 77 D.L.R. (3d) 559 (F.C.T.D.); and *R. v. R.(E.)* (1991), 65 C.C.C. (3d) 156 (B.C.S.C.).

The *FTA Implementation Act* established binational panel review by adding Part II to SIMA. SIMA itself provided for the jurisdiction of binational panels. It was necessary for the language of SIMA section 76 and Part II of the legislation to conform with each other. SIMA section 76(1) made Tribunal findings "final and conclusive," subject to binational panel review under Part II. The inclusion of binational panel review in the "subject to" revision to SIMA section 76(1), gives to binational review panels what the phrase "notwithstanding" in section 28(1) of the Federal Court Act gives to the Federal Court of Appeal. Subjecting the Tribunal's findings to Federal Court judicial review does not alter the legislative intent that supports deference to the Tribunal's findings. Making the Tribunal's findings "subject to" binational panel review also does not alter that legislative intent.

All that the amendment to SIMA section 76(1) did was to place the review process of FTA Chapter Nineteen on the same footing as the judicial review process of the Federal Court of Appeal. Absent the "subject to" language, the privative effect of SIMA section 76(1) arguably would prevent any recourse to the new mechanism of Chapter Nineteen.

In summary, this Panel would remand the Tribunal's finding on an issue of jurisdiction, including natural justice, if the finding were incorrect. On questions of law within the Tribunal's expertise, the Panel would remand only if the Tribunal's findings were patently unreasonable. On issues of fact, the Panel would not reweigh evidence, but would remand the Tribunal's finding if there were no rational connection between the evidence and the Tribunal's finding.

#### IV. THE NATURAL JUSTICE ISSUE

The participant Stelco contends that the Tribunal's inquiry in this case is a nullity because the proceedings were tainted by a denial of natural justice: Stelco alleged that there was a reasonable apprehension of bias. This contention arises out of the fact that counsel representing other participants in the Tribunal's inquiry were members of the Roster of Panelists established under the FTA.

Roster Members are appointed to FTA Chapter Nineteen binational panels which then sit in review of decisions of the Tribunal. In these circumstances, Stelco contends that there is a reasonable apprehension that Tribunal members will give greater deference to the affected counsel and greater credence to the arguments of the participants they represent.

This contention also was advanced by Stelco in a previous Tribunal inquiry involving many of the same participants who were involved in the inquiry presently under review.<sup>38</sup> In the previous proceeding, Stelco sought an order from the Tribunal removing the affected counsel on the grounds that their involvement created a reasonable apprehension

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<sup>38</sup> *Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate*, CITT Inquiry No.: NQ-92-007.



of bias. After considering submissions, the Tribunal ruled that it did not have jurisdiction to grant the relief requested and dismissed Stelco's application.<sup>39</sup>

In the Tribunal's inquiry now under review, Stelco made no formal motion to remove Roster Members as counsel, as had been done previously, but counsel for Stelco placed his client's position on the record at the commencement of the Tribunal's oral hearing. Counsel stated:

"...I am not bringing a motion. I am simply putting on record our objection to the appearance of Chapter 19 panellists in these proceedings and we will take whatever steps we deem appropriate in the interest of my client in light of that situation. So we are placing on record that point."<sup>40</sup>

Another counsel then responded:

"...I didn't have the background of previous allegations that were made by Mr. Herman about Chapter 19 panellists...I am not quite sure what I am supposed to say to him because I don't know what his allegation is. I don't know where we are supposed to go on what he just said. I don't have the background of his previous objection in another case."<sup>41</sup>

The Presiding Member of the Tribunal then responded:

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<sup>39</sup> *Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate*, CITT Inquiry No.: NQ-92-007, Statement of Reasons, 21 May 1993, at 16.

<sup>40</sup> *Certain Flat Hot-Rolled Carbon Steel Sheet Products*, Inquiry No.: NQ-92-008, Transcript of Public Hearing of 3 May 1993 (the "Transcript"), Volume 1, at 46. The Transcript is found in the Administrative Record, Vol. 13.

<sup>41</sup> *Id.*, at 46-47.

"I wonder if I could save us all some time by suggesting you read the testimony of the pre-hearing conference in the last case. The Tribunal did rule and I respect Mr. Herman's desire to put the matter on the record. The Tribunal ruled at that time that it did not have jurisdiction this matter."<sup>42</sup>

The case under review then proceeded without further objection from any participant.<sup>43</sup>

The Briefs filed initially in this Review focused principally on the question of whether in fact there was a reasonable apprehension of bias; that is, a failure to observe a principle of nature justice. The Panel subsequently asked the participants to address the question of the jurisdiction of the Tribunal and of this Panel. There is authority which suggests that if the Tribunal were correct in its view that it does not have jurisdiction to grant the relief Stelco sought, the Panel also would have no jurisdiction.<sup>44</sup>

Counsel for U.S. Steel, relying on comments of Mr. Justice Sopinka of the Supreme Court of Canada in the case of *MacDonald Estate v. Martin*,<sup>45</sup> advanced the proposition that the Tribunal was correct because, unlike a court, it does not have the inherent jurisdiction to refuse to hear counsel. A step of such significance can be undertaken only by a court.

The focus in the *Martin* case was principally on the role of lawyers as officers of the court in the administration of justice. The issue concerned lawyers acting in a matter for one

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<sup>42</sup> *Id.*, at 47.

<sup>43</sup> *Ibid.*

<sup>44</sup> See, for example, *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)* [1991] 2 S.C.R. 22.

<sup>45</sup> [1990] 3 S.C.R. 1235 ("*Martin*").

party when previously they had been engaged by the other. Although removal and discipline of counsel generally is a matter for the provincial and territorial law societies, where the conduct of counsel in a case has the potential to undermine public respect for the administration of justice, the courts have the power to act. Mr. Justice Sopinka stated:

"The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction."<sup>46</sup>

The case before this Panel presents a different problem. The issue here is whether proceedings before the Tribunal were tainted with a denial of natural justice: that is, did the parties before the Tribunal have a fair hearing? To the extent that a statutory tribunal is not otherwise limited by its enabling statute, it has the jurisdiction to control the natural justice content of its own proceedings. This jurisdiction includes the ability to refuse to hear counsel if in hearing them a reasonable apprehension of bias would arise. In the Panel's view, the Tribunal did have jurisdiction to deal with this issue and so does this Panel.

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<sup>46</sup> *Id.*, at 1245.

In some cases it is not possible to determine whether there has been a reasonable apprehension of bias without a thorough review of a significant evidentiary record. That is not the case here. In the absence of a motion and supporting factual material, this Panel is obliged to deal with the issue solely as a matter of principle.

The test to be applied in determining whether there is a reasonable apprehension of bias is well established:

"...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information."<sup>47</sup>

The question is whether a reasonable person, adequately informed of the facts, would consider that the circumstances raised an apprehension of bias. There is a beguiling, simplistic logic in the proposition of Stelco that members of a reviewing body should not plead before an inferior body which may be the subject of its review. The rules of the various law societies, which regulate the appearance of retired judges before the courts, ostensibly support the notion of bias in the circumstances of this case. A contrary position is suggested in the case of *Ruffo v. Conseil de la Magistrature et al.*<sup>48</sup>

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<sup>47</sup> *Committee for Justice and Liberty et al. v. National Energy Board et al.* [1978] 1 S.C.R. 369, at 394 (per de Grandpré J.).

<sup>48</sup> (1992), 98 D.L.R. (4th) 176 (Q.C.A.) ("*Ruffo*"). Application for leave to appeal to the Supreme Court of Canada granted February 4, 1993.

In *Ruffo*, the Chief Judge of the Court of Quebec brought a disciplinary complaint against the appellant Judge Ruffo, a Judge of the Court of Quebec, Youth Division. Judge Ruffo then alleged that because the complaint had been brought by the Chief Judge, the Comité d'enquête, charged with reviewing the complaint, would be biased in the Chief Judge's favour. The Quebec Court of Appeal affirmed that there was no reasonable apprehension of bias in the circumstances. Rothman J.A., dissenting in part, stated:

"Appellant suggests that, quite apart from the relationship of dependence created by the statutory powers of the Chief Judge, there is an institutional dependence that arises from the regular and ongoing informal contacts between the Chief Judge and the members of the Conseil. Given the independence and professionalism of Judges, I do not believe that a well-informed bystander would see this as any reason to fear that the members of the Conseil would not act impartially.

...

The members of the Conseil and Comité, were sufficiently independent, objective and professional, so that no fear of their impartiality in deciding a complaint by the Chief Judge ought to have arisen on that account. Under normal circumstances, I do not believe a reasonable and well-informed person would have had any apprehension that the Conseil or the Comité might be biased in deciding a complaint against a judge merely because it was signed by the Chief Judge."<sup>49</sup>

It is unnecessary for this Panel to decide whether there was a reasonable apprehension of bias. Even if there were a reasonable apprehension, Parliament, through its implementation of the FTA, specifically sanctioned the situation which gave rise to it. As was

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<sup>49</sup> *Id.*, at 185.

recognized by the Supreme Court of Canada in *Brosseau v. Alberta Securities Commission*,<sup>50</sup> a reasonable apprehension of bias is vitiated when it is the direct consequence of the statutory scheme at issue. Speaking for the Court, Madame Justice L'Heureux-Dubé stated:

"Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operation.... In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping functions is authorized by statute, then, to the extent it is authorized, it will not generally be subject to the doctrine of 'reasonable apprehension of bias' *per se*."<sup>51</sup>

The FTA and its Canadian implementing legislation are replete with evidence that the legislators sanctioned specifically the situation of which Stelco now complains. One of the criteria for inclusion on the Roster of Panelists is experience in the practice of trade law.<sup>52</sup> It is well known that the members of the Bar who practice in this field in Canada are relatively few in number. The provisions of the FTA also make it clear that service as a Roster Member is to interfere as little as possible with the usual commercial and professional

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<sup>50</sup> [1989] 1 S.C.R. 301 ("*Brosseau*").

<sup>51</sup> *Id.*, at 310.

<sup>52</sup> FTA Annex 1901.2, paragraph 1.

activities of the members.<sup>53</sup> Specific ethical guidelines have been established for Panelists.<sup>54</sup> They are limited in their ability to act for clients in review proceedings and in certain other circumstances.<sup>55</sup> They are not otherwise limited.

There can be little doubt that the governments of Canada and the United States were well aware that Roster Members would carry on their usual professional endeavours, including appearing before the Tribunal. As a question of principle, any apprehension of bias created by that activity has been sanctioned by Parliament. To hold otherwise would be to emasculate the clear intention of Canada and the United States. Both Parties sought to ensure that FTA Chapter Nineteen Binational Panels included experienced practitioners in the field.

It is not necessary for this Panel to determine whether the Parties' intention extends to all circumstances. The issue raised by Stelco was a narrow question of principle. In another case, an objection to the participation of counsel brought by motion and supported by appropriate facts, could yield a different result. In the circumstances of this case, there will be no remand to the Tribunal on this issue regardless of its conclusion on its jurisdiction.

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<sup>53</sup> For example, Annex 1902.1, paragraph 10, provides that:

"Subject to the code of conduct established by the Parties, and provided that it does not interfere with the performance and the duties of such panelist, a panelist may engage in other business during the term of the panel."

<sup>54</sup> See, *Code of Conduct for Proceedings Under Chapters 18 and 19 of the Canada-United States Free Trade Agreement*, Canada Gazette, Part I, Volume 123, No. 2, 14 January 1989, at 96 to 100 (the "*Code of Conduct*").

<sup>55</sup> Annex 1902.1, paragraph 11, provides:

"While acting as a panelist, a panelist may not appear as counsel before another panel."

Part II of the *Code of Conduct*, entitled "Independence and Impartiality," provides that:

"For a period of one year after the completion of a Chapter 19 proceeding, a former member shall not personally advise or represent any participant in the proceedings with regard to anti-dumping or countervailing duty matters."

The Panel also has considered waiver. The authorities on waiver of bias are clear that a timely objection is required in order for a party to protect its right to object from the operation of waiver.<sup>56</sup> It was incumbent on Stelco to make its position known at the earliest possible moment. It did not do so. The authorities are very clear that articulation of the objection should be made at the earliest possible moment.

In this case, Stelco did not take its position until the commencement of the oral hearing stage of the Tribunal's inquiry. It knew the facts which it contends gave rise to an apprehension of bias well in advance of that time. It had taken the same position before the Tribunal in a previous case. It was incumbent on Stelco to make its position known to the Tribunal in its inquiry well in advance of the commencement of the oral hearing. It would not have been inappropriate for Stelco to take the matter to the Federal Court of Appeal which, because of the limited nature of the jurisdiction granted to binational panels under FTA Article 1904, would appear to have had jurisdiction to review the matter at that stage of the proceedings. This is particularly so where the Tribunal previously had stated that it did not have jurisdiction to grant the requested relief.

Delay creates significant practical difficulties. Stelco takes the position that the denial of natural justice rendered the proceedings before the Tribunal a nullity. The Panel was invited to remand for this reason, but also was requested to give the Tribunal directions with respect to the substance of any revised determination. To do so would be legally illogical. This

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<sup>56</sup> See, for example, *The King v. William and Others (Justices of Swansea)* [1914] 1 K.B. 608; *R. v. Nailsworth Licensing Justices (Sizer and Others)* [1953] 1 W.L.R. 1046; *The King v. Essex Justices* [1927] 2 K.B. 475; and *Re Thompson and Local 1026 of the International Union of Mine, Mill and Smelter Workers et al.* (1962), 35 D.L.R. (2d) 333.



Panel cannot direct the Tribunal as to its findings in such a situation. If the proceedings were a nullity, they would have to start afresh.

The Panel's refusal to remand on this issue in this case is not based on the timeliness of Stelco's objection. If in future such issues do arise, the practicalities of delay must be assessed by parties who ultimately may wish to seek relief in review before a binational panel. It is not necessary for this Panel here to explore a panel's ability to decline relief using the criteria applied by Canadian courts in granting prerogative relief, but FTA Chapter Nineteen directs binational panels in the review they undertake to apply the jurisprudence developed by courts.

## **V. CAUSATION**

The Complainants argue that the Tribunal applied a test of causality that, as a jurisdictional matter was incorrect or, as a matter of law, was patently unreasonable.

Algoma, Ipsco and Sidbec-Dosco (the "Algoma Complainants") contend that the Tribunal made a jurisdictional error by applying a bifurcated test in which it first determined whether the domestic industry had suffered material injury and then considered whether there was a causal link between that injury and the dumped imports. They argue that SIMA section 42 requires a reverse determination: the Tribunal must determine whether dumped imports, in and of themselves, have caused injury and, if so, whether the injury caused is material. It is asserted that because the Tribunal did not follow this process it did not inquire into whether dumping caused, causes or is likely to cause material injury; it failed to exercise its jurisdiction under section 42.

The Algoma Complainants and Stelco contend that even if the bifurcated test of causation applied by the Tribunal were not incorrect or patently unreasonable, it erred in applying the test by requiring that dumped imports be the sole, exclusive, or major cause of material injury. Citing Tribunal decisions in *Machine Tufted Carpeting*,<sup>57</sup> *Gypsum*,<sup>58</sup> and *Cold-Rolled Steel Sheet*,<sup>59</sup> Stelco argued that the Tribunal must determine only whether dumped imports were "a cause" of material injury. The Algoma Complainants, consistent with their jurisdictional argument, state that the Tribunal must decide only whether dumping was a cause of "any" material injury and that the Tribunal failed to do so.

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<sup>57</sup> *Machine-Tufted Carpeting Originating in or Exported from the United States of America*, CITT Inquiry No.: NQ-91-006, Statement of Reasons, 6 May 1992 ("*Machine-Tufted Carpeting*"), at 20-21; *Machine-Tufted Carpeting Originating or Exported From the United States of America*, Binational Secretariat File No. CDA-92-1904-02, Opinion and Order of the Panel, 7 April 1993, at 19-21; and *Machine-Tufted Carpeting Originating in or Exported from the United States of America*, CITT Inquiry No.: NQ-91-006; Determination on Remand, 25 May 1993.

<sup>58</sup> *Gypsum Board Originating in or Exported from the United States of America*, CITT Inquiry No.: NQ-92-004, Statement of Reasons, 4 February 1993 ("*Gypsum*"), at 16.

<sup>59</sup> *Certain Cold-Rolled Steel Sheet Originating in or Exported From the Federal Republic of Germany, France, Italy, the United Kingdom and the United States of America*, CITT Inquiry No.: NQ-92-009, Statement of Reasons, 13 August 1993 ("*Cold-Rolled Steel Sheet*"), at 27-28.

Dofasco argues that the critical error made by the Tribunal was its failure to consider the weakened financial condition of the domestic industry in 1992. Inherent in Dofasco's argument is the contention that a lower standard of causation should apply when a domestic industry is in a fragile economic state and more susceptible to the effects of dumping.

If, as the Algoma Complainants contend, the Tribunal's purported failure to apply the correct test of causality were an error of jurisdiction, a standard of correctness would apply. If the Panel were to conclude that the interpretation and application of causality under SIMA section 42 are matters within the jurisdiction of the Tribunal as a specialized administrative body, it would determine whether the process followed by the Tribunal patently was unreasonable.

In the *Beer (Injury)* case,<sup>60</sup> a binational panel concluded that the Tribunal exceeded its jurisdiction under SIMA section 42 by combining dumping and extraneous non-dumping factors in concluding that dumping was a cause of material injury to the domestic beer industry.<sup>61</sup> The *Beer* Panel applied the "correctness" test and remanded.

Unlike the *Beer (Injury)* case, it is not asserted in this review that the Tribunal went outside its jurisdiction to consider "extraneous" factors not specified in its governing statute. The Algoma Complainants raise the question: was the approach to causation applied by the Tribunal in this case correct under the governing language of SIMA section 42(1)(a). The Panel concludes that this is a question of statutory interpretation. It raises an alleged error of law.

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<sup>60</sup> *Certain Beer Originating in or Exported from the United States of America*, Binational Secretariat File No. CDA-91-1904-02, Opinion and Order of Panel, 26 August 1992 ("*Beer (Injury)*").

<sup>61</sup> *Id.*, at 24-39.

In its Reasons, the Tribunal explained its method of inquiry as follows:

"...the Tribunal must first decide if the domestic industry has suffered from or is threatened with material injury. Secondly, the Tribunal must be satisfied that there is a causal link between the injury observed or threatened and the dumped imports. It must be satisfied that the injury is not attributable to other factors present in the marketplace."<sup>62</sup>

The Algoma Complainants argue that this bifurcated analysis is not supportable under SIMA section 42(1)(a) because it fails to consider the impact of dumping *per se* on the domestic industry and whether that impact amounts to material injury.

SIMA section 42(1)(a) provides:

"The Tribunal...shall make inquiry with respect to such of the following matters as is appropriate in the circumstances:

(a) in the case of any goods to which the preliminary determination applies, as to whether the dumping...of the goods

(i) has caused, is causing or is likely to cause material injury...."

SIMA section 2(1) defines "material injury" to mean:

"...in respect of the dumping...of any goods, material injury to the production in Canada of like goods...;"

There is nothing in the language of section 42(1)(a) or the definition of "material injury" which prohibits the Tribunal from determining whether material injury exists before analyzing whether dumping has caused, is causing, or is likely to cause such injury. If there were insufficient evidence to support any determination of material injury based on relevant economic indicators, there could be no material injury caused by dumping.

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<sup>62</sup> Statement of Reasons, at 19.

The bifurcated analysis employed by the Tribunal in this case appears to be consistent with the approach taken by the Tribunal in other inquiries. It is also one of the traditional approaches employed by the United States International Trade Commission.

Although not determinative, the approach taken by the Tribunal is not inconsistent with Article 3:4 of the *Anti-dumping Code* which requires only that it be "...demonstrated that dumped imports are, through the effects of dumping, causing injury within the meaning of [the] Code." There is nothing in the *Anti-dumping Code* which precludes the Tribunal from first determining whether there is material injury before determining whether the effects of dumping caused, are causing, or are likely to cause such injury.

The Panel concludes that it is not an error *per se* for the Tribunal to approach causation by first determining material injury and then determining whether there is a causal link between that material injury and dumping.

The approach to causation urged by the Algoma Complainants logically should not produce a different result than the test applied by the Tribunal. In each case the Tribunal ultimately must determine whether dumping caused, is causing, or is likely to cause material injury.

Stelco and the Algoma Complainants each contend that the Tribunal applied a causal link which required that dumping be the sole, exclusive, or at least a major cause of material injury and that this required linkage was patently unreasonable or was unreasonable.

They base their argument on several statements by the Tribunal in its Reasons which indicate that it applied an incorrect "sole cause" test. For example, the Tribunal states that "price is the necessary nexus if one is to establish that the dumped imports, and not some other factor or combination of factors, caused the injury suffered."<sup>63</sup> The Complainants cite this and other statements as indicating that the Tribunal required that dumping be the sole, exclusive, or major cause of material injury.

The Tribunal's Reasons on the issue of causality are not a model of clarity. For example, the Tribunal's conclusion that factors such as customer pressure, relocation of demand, strikes, and the high value of the Canadian dollar "were...the major causes behind the difficulties faced by the domestic industry"<sup>64</sup> can be construed as suggesting that dumping must be a major factor. The Panel's task is not to analyze individual words or statements in isolation, but to review the whole text and determine the context in which words were used. The applicable standard of review mandates intervention by the Panel only if the Tribunal's approach to causation was patently unreasonable. When viewed as a whole, there is sufficient indication in its Reasons that the Tribunal did not require that dumping be the sole, exclusive, or major cause of material injury.

The Tribunal's finding was that the dumping of the Subject Goods "...has not caused, is not causing and is not likely to cause material injury to the production in Canada of like

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<sup>63</sup> *Id.*, at 29.

<sup>64</sup> *Id.*, at 30.

goods."<sup>65</sup> There is no indication in this finding of the application of a sole, exclusive, or major cause requirement. It was expressed to be based upon the Tribunal's conclusions that, in its opinion, there was no credible evidence which established material injury caused by dumping.

Its inquiry was directed at determining whether there was positive evidence that could establish a causal link between the dumped imports and the material injury. The Tribunal made this clear in the section of its Reasons entitled "Causality." There, it stated:

"Pursuant to Article 3 of the Code, a determination of injury must be based on positive evidence and involve an examination of both the volume of the dumped imports and their effect on prices in the domestic market for like goods and the consequent impact of these imports on the domestic producers of such goods. The domestic industry focused its allegations on the price-eroding effects of dumped imports and lost sales to these imports. In determining whether there was a causal link between the material injury suffered by the domestic industry and the cumulative impact of the dumped imports from various subject countries, the Tribunal concentrated its analysis on these commercial market transactions.

In the Tribunal's opinion, the evidence did not establish the necessary nexus between the material injury suffered by the domestic industry and the dumped imports."<sup>66</sup>

In analyzing the information presented to it by: (i) the domestic industry; (ii) buyers and end-users of the subject products; and (iii) its own staff in several surveys, the Tribunal reasoned correctly that in order to find material injury caused by dumping, it had to have some reliable evidence establishing a causal nexus between dumped imports and lost sales or forced

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<sup>65</sup> *Id.*, at 31.

<sup>66</sup> *Id.*, at 28.

price declines in the domestic market. This method of analysis is consistent with Article 3:4 of the *Anti-dumping Code* and its requirement of a causal link between dumped imports and material injury "through the effects of dumping", which effects are demonstrated through "underselling," which one Panelist has described as "...the *sine qua non* of injury by reason of dumping."<sup>67</sup>

Based on the record, the Tribunal was unable to find evidence which, in its judgement, established a direct link between dumped imports and material injury through the price effects of dumping. For the Tribunal the missing link was the absence of reliable evidence establishing that sales had been taken away from the domestic industry by dumped imports or that they had forced price declines in the domestic market.<sup>68</sup> Whether there is a rational connection between such conclusions and the evidence before the Tribunal, is an issue that this Panel must turn to in due course, but the Tribunal did not act patently unreasonably in its approach to the causal link between the dumped goods and material injury. Its method was reasonable.

SIMA itself does not specify the required degree of causal relationship between dumping and material injury or exactly what must be considered in a causal analysis. In past decisions, the Tribunal, or its predecessor, found that dumped imports constituted a

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<sup>67</sup> *Beer (Injury)*, *supra*, note 60, Concurring Opinion of Chairman Greenberg, at 49 (quoting from the Tribunal's decision in *Certain Dumped Integral Horsepower Induction Motors Originating in or Exported From the United States of America*, Statement of Reasons (1991), 4 T.C.T. 7065, at 7087).

<sup>68</sup> Statement of Reasons, at 29.



"significant"<sup>69</sup> or "direct"<sup>70</sup> cause of injury or that a "significant proportion"<sup>71</sup> of material injury was attributable to the effects of dumping. More recently, in *Machine-Tufted Carpeting*,<sup>72</sup> the Tribunal found that dumped imports must be "a cause" of material injury. There is no single administrative standard against which to judge the Tribunal's analysis of causality in this case. To a certain extent, this may be inevitable because the Tribunal's analyses are driven largely by economics and market analyses of various products and industries, which may dictate that different weight must be given to different factors in different cases.

Measured against the requirements of SIMA section 42(1)(a), the Tribunal's requirement that there be positive evidence demonstrating a causal relationship between dumping and material injury was not patently unreasonable. Its focus on evidence of underselling, lost sales, and forced price reductions was a reasonable application of SIMA section 42(1)(a).

Although not addressed as such in the briefs submitted to the Panel, concerns were raised at the oral hearing as to whether the Tribunal had imposed an excessive burden of proof on the domestic industry on the issue of causation. Of particular concern was the following passage in the Tribunal's Reasons:

"In initiating an inquiry of this nature, a complainant is enjoined with an evidentiary burden to support its allegation of injury due to dumping. The Tribunal is

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<sup>69</sup> *Certain Wide-Flange Steel Shapes Originating in or Exported from Spain*, CIT-I-85, Statement of Reasons, 7 June 1985, (1986), 9 C.E.R. 175, at 184.

<sup>70</sup> *Drywall Screws Originating in or Exported from Taiwan*, CIT-I-86, Statement of Reasons, 10 June 1986, (1987), 12 C.E.R. 16, at 24.

<sup>71</sup> *Gypsum*, *supra*, note 58, at 18.

<sup>72</sup> *Supra*, note 57, at 21.

prepared to accept various forms of evidence used to substantiate these claims. As occurred in this case, the Tribunal will assist in ascertaining the facts through such means as its questionnaires and pricing surveys. However, it is ultimately the domestic industry that must make its case.<sup>73</sup>

In *Magnasonic Canada Limited v. Anti-dumping Tribunal*,<sup>74</sup> the Federal Court of Appeal was called upon to decide whether a decision of the former Anti-dumping Tribunal was invalid because the applicant Magnasonic had not been given the opportunity to be heard before that tribunal's decision was made. The Court entered into a lengthy discussion of the nature of the process before the tribunal. It stated:

"Against this view, it is said that the object of the *Anti-dumping Act* is 'to protect the Canadian public interest from dumped goods which may materially cause injury or retard production in Canada of like goods' and, therefore, the inquiry is 'essentially an investigatory one and does not involve a contest between opposing parties.'"<sup>75</sup>

The object of the legislation here under consideration is to protect the Canadian public interest from dumped goods which may cause material injury or retard production in Canada. In this context, the inquiry is not, as such, a contest between opposing parties.

The Court went on to explain that the reason for the creation of the Tribunal was Parliament's desire to keep out dumped goods when their importation causes material injury. It did not wish to stop the provision to Canadian consumers of cheaper goods which do not cause

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<sup>73</sup> Statement of Reasons, at 30.

<sup>74</sup> [1972] 2 F.C. 1239 ("*Magnasonic*").

<sup>75</sup> *Id.*, at 1247.

harm. If Parliament were not concerned with the danger of keeping out dumped goods unnecessarily, the statute simply would have prohibited all importations of dumped goods.

One method that Parliament could have adopted to determine whether the dumping of a particular class of goods should be prohibited would have been to entrust the duty to an executive department of government with all the necessary powers to gather information and to proclaim its findings. There then would have been no right in any "party" to be heard. Parliament instead chose to establish a court of record to make a decision as a result of a hearing which includes those with economic interests that are affected vitally on both sides of the question. The most effective way of ensuring the right conclusion was to open the door to opposing parties whose economic interests were at stake, so that they could, by adducing evidence and by making submissions, ensure that all sides of the question were revealed fully to the Tribunal. As the Federal Court of Appeal noted:

"Certainly, our experience in common law countries has shown that such method of inquiry has substantial advantages over the sort of result that can be obtained by individuals going out and gathering information by interviews and inspections."<sup>76</sup>

The *Magnasonic* decision generally is considered as having had a profound effect on the Anti-dumping Tribunal, whose status as a "court of record" was emphasized and whose approach to decision-making rapidly became more formal. In the case of *In re Sabre International Ltd.*,<sup>77</sup> the Federal Court of Appeal confirmed the quasi-judicial status of the Anti-

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<sup>76</sup> *Id.*, at 1248.

<sup>77</sup> [1974] 2 F.C. 704, at 706-07.

dumping Tribunal, and in *Sarco Canada Limited v. Anti-dumping Tribunal*,<sup>78</sup> the Court cited with approval the *Magnasonic* case.

There is very little in textbooks and articles on Canadian administrative law or in reported Canadian decisions that bears upon the onus of proof before quasi-judicial bodies such as the Tribunal. Typically, the onus is said to rest with the plaintiff where the procedure followed is adversarial, as indicated by the rules governing the order in which hearings are conducted.

Was the statement of the Tribunal indicative of a mistaken conception of its role and of the improper placing of the onus or burden of proof on the Complainants? The statement that a complainant which initiates an inquiry "...is enjoined with an evidentiary burden to support its allegations of injury due to dumping" has the potential to give a distorted view of the burden of proof and of the role of the Tribunal. The burden of proof in court proceedings operates as follows:

"...onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered."<sup>79</sup>

In this case, this principle was neither appropriate nor was it applied.

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<sup>78</sup> [1979] 1 F.C. 247, at 261-65.

<sup>79</sup> *Robins v. National Trust Co., Ltd., et al.* [1927] 2 D.L.R. 97 (P.C.), at 101.

The Tribunal came to a "determinant conclusion." It found that the evidence produced both by the Complainants and by its own staff did not establish the necessary nexus between dumping and material injury. The specific allegations made by the Complainants were not supported by the evidence. The question of an overall burden of proof did not arise. Comments that could be construed as referring to that burden were unnecessary for the Tribunal's decision.

The Tribunal does not have a purely passive role. It did not act passively in this case. For example, independent of the participants the Tribunal circulated its own questionnaires, conducted its own pricing surveys, and called its own witness. If there were circumstances where the evidence was "so evenly balanced that it can come to no conclusion," the Tribunal would be obliged to resolve the balance. A finding of no material injury may not be based merely upon the failure of a complainant to tip an otherwise even balance.

The Tribunal's statement concerning the evidentiary burden of a complainant must be interpreted in the light of another comment made earlier in the Reasons where the Tribunal stated what it expects from the domestic industry:

"The Tribunal appreciates the difficulty that the industry experiences in producing commercial intelligence of the sort that the Tribunal requires to understand the pricing behaviour in the marketplace.... However, the Tribunal would also expect that price reductions at individual accounts are only undertaken on the authority of sales or marketing managers who are satisfied that the reductions are necessary in order to keep the business. This requires a knowledge of the source of the competition and details about the prices and volumes involved...;it is not available to the Tribunal from other sources. And it is this type of information, frequently supplemented by the testimony of purchasers of the

subject goods that have themselves switched to or received offers from imported sources, on which the Tribunal depends to form the crucial link between dumped imports and injury to the domestic industry."<sup>80</sup>

In the context of the Complainants' assertion of lost sales and forced price reductions, the Tribunal was justified to speak of the onus of proof being on a claimant. In *Pleet v. Canadian Northern Quebec R. Co.*,<sup>81</sup> Ferguson J.A. wrote:

"No doubt the general rule is that he who asserts must prove, and that the onus is generally on the plaintiff, but there are two well-known exceptions:-

- (1) That where the subject-matter of the allegation lies particularly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character...;
- (2) That he who relies on an exception to the general rule must prove that he comes within the exception...."<sup>82</sup>

Although the statement of the Tribunal at page 30 of its Reasons might be construed as a mistaken interpretation of its role, the Panel is satisfied that, in this case, the Tribunal acted correctly.

The Algoma Complainants also contend, relying on the binational panel's decision in *Machine-Tufted Carpeting*,<sup>83</sup> that the Tribunal acted in a patently unreasonable manner by failing to conduct a segregated analysis of whether dumping, as a separate factor, caused material

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<sup>80</sup> Statement of Reasons, at 29.

<sup>81</sup> (1922), 64 D.L.R. 316 (O.C.A.).

<sup>82</sup> *Id.*, at 319.

<sup>83</sup> *Supra*, note 57, at 19.

injury. This argument is not borne out by the Reasons, which shows an extensive analysis of whether there was a causal nexus between the dumped imports and material injury.<sup>84</sup> Whether the Tribunal analyzed this causal relationship before or after its analysis of other factors is immaterial, as long as it analyzed the effects of dumping and whether they caused material injury.

Dofasco's argument that the Tribunal failed to take into account the weakened condition of the domestic industry derives no support from an analysis of the Tribunal's Reasons. To the extent that any such consideration is appropriate to its analysis, it is committed to the Tribunal's discretion in the exercise of its expertise. The Reasons indicate throughout that the Tribunal was well aware of the domestic industry's weakened condition as a result of declines in demand, strikes, the shift of production to the United States, and other factors.<sup>85</sup> As found by the Federal Court of Appeal in *Sacilor Acieries et al. v. Anti-Dumping Tribunal et al.*: "It is the function of an expert tribunal such as this one to weigh and balance those factors and to decide the importance to be given to each."<sup>86</sup> It is not the task of a reviewing Panel to direct the Tribunal as to the appropriate weight to be given to such factors.

In summary, the Tribunal's approach to causation was not patently unreasonable or unreasonable. As recognized by the Federal Court of Appeal in the *Sacilor* decision:

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<sup>84</sup> Statement of Reasons, at 19 through 30.

<sup>85</sup> *Id.*, at 6 to 7 and 19 to 23.

<sup>86</sup> (1985), 60 N.R. 371 (F.C.A.) ("*Sacilor*"), at 374.

"In law, as opposed to metaphysics, the study of causes is the examination of the potency of certain facts in the production of certain results. Realistically this is a question of fact."<sup>87</sup>

Still to be resolved is the question whether there was a rational connection between the Tribunal's conclusions on causation and the evidence before it.

The Tribunal concluded that there was no positive evidence before it that established material injury by reason of dumping.<sup>88</sup> Its conclusion was based upon pricing data supplied both by the Complainants and by its own staff. In the opinion of the Tribunal, these data failed to show that any underselling, lost sales, or forced price reductions were due to dumped imports.

With the encouragement of the domestic industry, the Tribunal concentrated its analysis on price effects, because underselling, lost sales, forced price reductions, and price suppression are the most reliable indicators of a causal link between dumped goods and material injury. Underselling is the *sine qua non* of injury by reason of dumping. In this case, the Tribunal found that the pricing data did not provide adequate evidence of material injury caused by dumped imports.

A careful reading of the Tribunal's Reasons shows that it focused on all of the issues and all of the evidence that related to those issues. Its conclusion is stated clearly: the

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<sup>87</sup> *Ibid.*

<sup>88</sup> Statement of Reasons, at 28-30.



evidence did not establish a causal connection between dumped imports and material injury.

There is no basis upon which it can be asserted that there was no rational connection between the Tribunal's conclusion and the evidence before it. An examination of the Tribunal's Reasons and of the evidence referred to in those Reasons shows that the evidence viewed reasonably is capable of supporting the conclusions reached by the Tribunal.

It is asserted by the Complainants that the Tribunal ignored relevant evidence submitted by them and preferred data gathered by the Tribunal's staff. An examination of the record does not support that contention. It is not the approach articulated by the Tribunal. The Tribunal stated:

"Central to the case made by the complainants is that dumped imports eroded prices, putting Canadian producers in the position of having to meet lower prices or lose sales. However, Canadian producers brought little verifiable evidence of import price offerings or sales to Canadian accounts that would have allowed the Tribunal to conclude that dumped imports played an important role in the price declines that occurred between 1989 and 1992...[T]he Tribunal was forced to rely on information collected by the Tribunal's staff to ascertain the pricing behaviour of imports and domestic products during the period of inquiry."<sup>89</sup>

"The Tribunal reviewed all of the allegations submitted by the industry of lost sales and price erosion due to the dumping of the subject imports."<sup>90</sup>

The Tribunal reviewed carefully the evidence presented to it by the Complainants. That evidence did not establish the causal connection between dumped imports and material

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<sup>89</sup> *Id.*, at 21.

<sup>90</sup> *Id.*, at 25.

injury. The Tribunal then looked to data assembled by its own staff to determine if they provided support for the domestic industry's contention. In the opinion of the Tribunal, those data also did not establish the necessary causal link.

The Tribunal considered the evidence presented to it and took steps to obtain further relevant information on the issues. It cannot be said that there is no rational connection between the evidence and the conclusion of the Tribunal, or that the evidence viewed reasonably is incapable of supporting the Tribunal's conclusions.

## **VI. CUMULATION**

Stelco argues that where there are several named sources of dumping, the Tribunal is required to cumulate the effects of dumping from all sources and to assess the injurious impact of dumping collectively, without distinction as to source. It asserts that the Tribunal broke down the effect of dumping from the United States and other countries and erroneously assessed the individual impact of each. It also asserts that the Tribunal failed or refused to consider as part of the cumulative effects of dumping those dumped imports from the United States exporting mills not represented by witnesses at the hearing as well as the numerous other exporters and brokers identified in the Preliminary and Final Determinations. Stelco further contends that the Tribunal's review of the evidence on a country-by-country basis amounted in substance to a disaggregation of the effects of dumping from all named sources and a betrayal of the principle of cumulation. In the submission of Stelco, by

proceeding with a separate assessment of the effects of dumping from individual countries, the Tribunal was led to de-cumulate the global impact of dumping. Stelco says that there is no direct or indirect indication in the Tribunal's Reasons affirming the rule expressed in *Polyphase Induction Motors*.<sup>91</sup> It submits that while the Tribunal may have asserted that it was applying the cumulation rule, there is nothing in the Statement of Reasons to indicate that the Tribunal made any analysis of the effects of the dumping *en masse*.

The Tribunal, in its Brief on this Panel Review answers that it did consider the cumulative effect of injury caused by dumped imports from all countries. In support of that claim, it quotes two passages from the Reasons:

"For purposes of reviewing the evidence led by the industry and that submitted by the importers, the Tribunal's observations on the various allegations are organized according to the alleged country of origin of the imports. This approach is merely for ease of presentation and is not a country-by-country analysis of the question of injury. It remains the practice of the Tribunal to assess the cumulative impact of injuriously dumped imports on domestic production."<sup>92</sup>

And:

"In determining whether there was a causal link between the material injury suffered by the domestic industry and the cumulative impact of the dumped imports from the various subject countries, the Tribunal concentrated its analysis on these commercial market transactions."<sup>93</sup>

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<sup>91</sup> *Polyphase Induction Motors Exceeding 200 HP*, CIT-5-88, Statement of Reasons, 12 May 1989, (1990), 1 T.T.R. 58 ("*Polyphase Induction Motors*"), at 77.

<sup>92</sup> Brief of the Canadian International Trade Tribunal (the "CITT Brief") at page 24, quoting from the Statement of Reasons, at 25.

<sup>93</sup> CITT Brief, at 24, quoting from the Statement of Reasons, at 28.

Stelco's argument on cumulation essentially raises two questions: first, is there a rule or principle of cumulation that is binding on the Tribunal and, if so, what is the exact nature of the rule or principle; second, to the extent that such a rule or principle exists, did the Tribunal, by presenting the evidence on a country-by-country basis, fail to comply?

Stelco admits that SIMA does not contain a mandatory cumulation rule. It argues that Article 3:1 of the *Anti-dumping Code* requires that the effects of all dumped imports be looked at collectively and not separately according to the sources of imports. Stelco submits that such a cumulation rule giving effect to the requirements of the *Anti-dumping Code* has been enshrined in the U.S. legislation,<sup>94</sup> and also has been adopted by the Tribunal in *Polyphase Induction Motors*, and referred to with approval in *Cold-Rolled Steel Sheet*.<sup>95</sup>

The *Anti-dumping Code* does not speak of "cumulation" as such and does not require its members to include in implementing legislation a rule on cumulation. The Tribunal has stated in the past that the *Anti-dumping Code* does recognize:

"...the potential for an aggregate analysis of the effects of dumped...imports from more than one country on a domestic industry; the [Code does] not require country-by-country findings on injury and causation for each country under investigation and simply refer[s] to a causal relation between dumped...imports and injury, without specifying that such imports be from a single country."<sup>96</sup>

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<sup>94</sup> Provisions of *Trade and Tariff Act of 1984*, which added section 1677(7)(C)(iv) to the *Tariff Act of 1930*, require mandatory cumulation in most cases.

<sup>95</sup> *Supra*, note 59, at 28.

<sup>96</sup> *Polyphase Induction Motors*, *supra*, note 91, at 79.

In that same case, the Tribunal went on to address the "principle of cumulation" in the following terms:

"The principle of cumulation is a well known principle, generally recognized and applied in the administration of anti-dumping and countervailing legislations by the nations actively applying the Codes in international trade. Indeed, one of these countries has specifically incorporated this principle in its trade legislation."<sup>97</sup>

The so-called principle of cumulation refers to a common practice of many of the signatories to the *Anti-dumping Code* whereby dumped imports from all subject countries are considered cumulatively for the purpose of establishing their impact on domestic production. Behind that practice there is a simple and convincing argument: even when dumped imports from certain sources are small and cannot be considered alone to have contributed significantly to the plight of the domestic producers, viewed cumulatively they may have caused material injury.<sup>98</sup> This Panel need not rule here on the consistency of the Tribunal's practice of cumulation with Canada's obligations under the *Anti-dumping Code*. Suffice it to say here that the practice is not imposed by the *Anti-dumping Code*. Even if it were, there is considerable doubt that it would be applicable to this Panel review. SIMA has only limited references to the *Anti-dumping Code*, none of which are applicable to cumulation.

If this Panel were wrong in its conclusion that the Tribunal is not obliged legally to cumulate, it would be necessary to deal with the second question raised by Stelco: whether the

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<sup>97</sup> *Id.*, at 79.

<sup>98</sup> See *Cold-Rolled Steel Sheet*, *supra*, note 59, at 28; and *Polyphase Induction Motors*, *supra*, note 59, at 79-80.

Tribunal's review of the evidence on a country-by-country basis amounted to a disaggregation of the effects of the dumping from all named sources and a betrayal of the principle of cumulation as alleged by the Complainants. Or, to put it into the Tribunal's language as used in *Polyphase Induction Motors*, whether the approach followed by the Tribunal effectively amounted to a vertical severance of its analysis in order to isolate the effects of the dumping from the various subject countries.

Manifestly, the Tribunal was aware that the approach it had chosen to follow for reviewing the industry's allegations of lost sales and price erosion could be interpreted as a betrayal of the practice of cumulation. In its Reasons, the Tribunal explained that the approach was merely for ease of presentation and was not a country-by-country analysis of the question of injury. It remained the practice of the Tribunal to assess the cumulative impact of dumped imports on domestic production.<sup>99</sup> This is indicative of its intention not to stray from previous practice, but may not establish that it did not do so. It is necessary to consider more closely the overall approach followed by the Tribunal.

The Reasons clearly indicate that the Tribunal, in looking at the causal relationship between the dumped imports and material injury, did not reach separate conclusions based on separate analyses for each subject country.

The Tribunal did not distinguish between individual subject countries except, in accordance with SIMA section 43(1.1), for the United States. Its conclusion in both cases was

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<sup>99</sup> See, for example, Statement of Reasons, at 25.

the same. In the reasoning that leads to the conclusion, there are numerous references to "imports from the named countries,"<sup>100</sup> "subject country imports,"<sup>101</sup> "dumped imports from the subject countries,"<sup>102</sup> and "dumped imports," without reference to a specific country.<sup>103</sup> In the section on causality, the expression "dumped imports," without reference to a specific country, is used many times. Before addressing the issue of future injury, the Tribunal found that "the dumping of the subject imports had not caused and is not causing material injury...."<sup>104</sup> In dealing with the threat of future injury, the Tribunal looked at the factors that could justify such a conclusion in the United States as well as in all other named countries, lumping them together.<sup>105</sup> In presenting the economic indicators, the volume of imports, as well as the market share captured by those imports, are considered collectively. The only part of the decision which contains a country-by-country review is that which deals with the domestic industry's allegations of lost sales and price erosion. The Tribunal explicitly states that the approach is merely for ease of presentation and is not a country-by-country analysis.

A close examination of the Tribunal's Reasons does not lead to the conclusion that it made two or more findings that are separate in substance, arrived at on the basis of a vertical severance of the overall injury analysis. The contention that the Tribunal betrayed the principle of

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<sup>100</sup> *Id.*, at 21.

<sup>101</sup> *Id.*, at 22.

<sup>102</sup> *Id.*, at 23.

<sup>103</sup> *Id.*, at 24-25.

<sup>104</sup> *Id.*, at 30.

<sup>105</sup> *Ibid.*

cumulation and thereby committed a patently unreasonable error of law is rejected. It acted reasonably.

## **VII. PRICE SUPPRESSION**

Stelco argues that the Tribunal erred in law by refusing to examine evidence of price suppression in this case. Stelco's argument is based on two premises, one factual and one legal. Stelco's factual premise is that it presented the Tribunal with evidence on price suppression. Stelco's legal premise is that once it raised the factual issue of price suppression, the Tribunal was bound by the *Anti-dumping Code* to make a separate legal finding on this issue and its failure to do so was patently unreasonable.

The Tribunal's position was that it was aware of the industry's allegations of price suppression and that it considered the evidence presented in support thereof. At the hearing, the Panel was referred to four paragraphs in the Reasons where the Tribunal specifically considered the question of price suppression. The Tribunal contended that, since the industry tendered the same evidence for price erosion and price suppression, the two issues were reviewed together. Stelco argued that while price suppression was addressed by the Complainants as a separate cause of injury, it was dealt with by the Tribunal only incidentally and lumped with price erosion. The argument advanced by Stelco raises the following questions: (i) did the Tribunal have to deal separately with price suppression; and (ii) if so, did it do so?



The Complainants invoke Article 3 of the *Anti-dumping Code* and Rule 61 of the CITT Rules<sup>106</sup> to justify their allegation that the Tribunal should have addressed separately the issue of price suppression instead of treating it together with price erosion.

Article 3:2 of the *Anti-dumping Code* provides:

"With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance."

Rule 61 of CITT Rules provides:

"In considering any issue of material injury or retardation, the Tribunal may, at any time, direct a party to an inquiry to produce information in respect of the following matters:

- (a) the actual and potential volume of the dumped...goods imported into Canada and the effect of the dumped...goods on the prices of like goods in the domestic market, including  
...
  - (iii) whether the effect of the importation into Canada of the dumped...goods has been
    - (A) to depress significantly the prices of like goods produced and sold in Canada, or
    - (B) to limit to a significant degree increases in the price of like goods produced and sold in Canada...."

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<sup>106</sup> Canadian International Trade Tribunal Rules, SOR/91-499, *Canada Gazette*, Part II, Vol. 125, No. 18, 28 August 1991, at 2912-57 (as amended) (the "CITT Rules").

It is clear that price suppression is treated as distinct in both the *Anti-dumping Code* and the CITT Rules.

While price erosion and price suppression both fall within the broad category of price effects, the two concepts reflect two different realities. Price erosion refers to a situation where dumped goods depress domestic prices. Price suppression refers to a situation where dumped goods limit price increases. In its Brief, the Tribunal defines price suppression as "...an inability to increase prices in the face of increased costs relative to revenues."<sup>107</sup>

To determine whether the Tribunal's finding on price suppression was patently unreasonable, this Panel must first determine whether, in fact, Stelco presented information on price suppression separate and apart from the evidence it presented on price erosion.

The Panel has reviewed the evidence referred to by Stelco in its Brief, and the arguments presented by Stelco at the Tribunal's hearing. While Stelco recited price suppression as an indication of injury on several occasions and presented evidence of price erosion which its said was indicative of both price erosion and price suppression, it did not present separate evidence of price suppression. This is perhaps clearest in Stelco's citation in its Brief to a statement by Stelco's Sales Manager, Tom E. Witter, who stated that a 1991 price increase by Stelco "...did not

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<sup>107</sup> CITT Brief, at 25, paragraph 43.

hold, however, as Canadian prices continued to plummet, due to the low prices being quoted by imports."<sup>108</sup> Stelco's case was that it could not raise prices because prices were being eroded.<sup>109</sup>

In its Reasons, the Tribunal referred a number of times specifically to price suppression:

"Specifically, the Tribunal must consider whether there has been significant price undercutting and whether the effect of dumping has been to depress prices or to prevent price increases."<sup>110</sup>

"Dofasco was not able to establish or maintain a single price increase for the subject goods after January 1, 1990, notwithstanding increases in costs."<sup>111</sup>

"Any impact from dumped imports [in the auto sector] would, therefore, have to be in the form of price erosion or suppression and would, furthermore, be confined to U.S. product."<sup>112</sup>

In addition, at page 7 of its Reasons, the Tribunal referred to the decline in pre-tax margins, which evidences an inability to increase prices.

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<sup>108</sup> Statement by Tom E. Witter, 13 April 1993, at 5. Mr. Witter's Statement appears as Exhibit A-3 to the Administrative Record, Volume 9.

<sup>109</sup> In addition to Mr. Witter, Stelco cites statements by Mr. Peter Benne of Samuel, Son & Co. and Mr. Michael Makagon of Maksteel. Mr. Benne's statement largely concerns the impact of slab rollings and brokers, which is raised as a separate issue by Stelco and dealt with as a separate issue by the Panel. The central point made by Mr. Benne was that slab offerings had "...done more than anything else to drive the price down." (Transcript, Vol. 5, at 546, Administrative Record, Volume 13D) Mr. Makagon's testimony also concerned the eroding effects of prices being offered by U.S. brokers, and presented no separate evidence on price suppression, except for his reference to a "...marketplace where the automotive industry has been unwilling and unprepared to accept a price increase." (Transcript, Vol. 7, at 1000, Administrative Record, Volume 13F.) The Tribunal itself, as several points in its decision referred to the effect of the automotive industry in suppressing prices. (See, for example, Statement of Reasons, at 24-25.)

<sup>110</sup> Statement of Reasons, at 10 (summarizing Stelco's allegations).

<sup>111</sup> *Id.*, at 12 (summarizing Dofasco's allegations).

<sup>112</sup> *Id.*, at 25 (buyers' evidence).

At the end of its Reasons, while dealing with the question of future material injury, the Tribunal stated:

"...while the subject imports have been found to be dumped and the industry has suffered material injury, the industry's evidence on lost sales, price erosion and price suppression failed to establish a casual link between the dumping and the industry's injury."<sup>113</sup>

In summary: the Tribunal notes in its Reasons the price-suppression arguments advanced by the Complainants; these arguments were based entirely on the effects of price erosion; the Tribunal refers specifically to price suppression in the context of the auto industry; it found price erosion, which logically circumscribes the ability to raise prices; it concluded that the price erosion was not caused by dumping; and in turning to future material injury, it noted that it had not found price suppression caused by dumping. The Panel is satisfied that the Tribunal considered appropriately the evidence pertaining to the issue of price suppression.

## **VIII. THREAT OF FUTURE MATERIAL INJURY**

In its Brief, Algoma submitted that the Tribunal erred in its determination that there was no evidence to support the likelihood of material injury occurring in the future as a result of dumped imports. According to Algoma, the Tribunal's decision that there was no threat of future injury was based primarily on the conclusion that the "...industry's evidence on lost sales, price erosion and price suppression failed to establish a causal link between the dumping and the

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<sup>113</sup> *Id.*, at 30.

industry's injury."<sup>114</sup> The Tribunal also relied upon an assessment of several economic indicators which led it to conclude that 1992 showed signs of improvement.

Regarding the conclusion that future dumping was unlikely to cause material injury when past and present circumstances did not demonstrate material injury, Algoma asserted that:

"Given the submissions of the complainant herein with respect to the fundamental errors in the evidence relied upon by the Tribunal in preference to the evidence of price suppression and price erosion adduced by the domestic producers, and given also the submissions of the complainants with respect to the causal link between the dumping of U.S. subject goods, and the material injury being experienced by the domestic industry...we submit that the Tribunal can no longer rely upon a finding of no causal link between past dumping and past injury to support its finding of an absence of threatened injury."<sup>115</sup>

Regarding the observation that the industry's slight 1992 upturn evidenced a drop in the likelihood of future material injury, Algoma answered that it was unreasonable for the Tribunal to rely on increases in production, employment, and capacity use statistics when the bulk of the producers' evidence of material injury indicated clearly a drop in tons produced. Algoma asserted that the upturn found by the Tribunal related to production volumes, export volumes, sales volumes, market share, employment, and capacity use, absent any comments on the financial performance of the domestic industry. At page 19 of its Reasons, the Tribunal found that the industry was injured in terms of sales returns, financial results, and revenue terms. Algoma submitted:

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<sup>114</sup> Confidential Brief of the Complainant Algoma and the Participants Ipsco Inc. and Sidbec-Dosco Inc. (the "Algoma Brief"), at 97, para. 222 (quoting from the Statement of Reasons, at 31).

<sup>115</sup> *Id.*, at 98, para. 223.

"...to say that there is an upturn or less likelihood of future injury, when past injury related to financial performance and future upturn relates to production volume, is, in our submission, patently unreasonable."<sup>116</sup>

Counsel for Algoma underlined the fact that the Tribunal stated at page 21 of its Reasons that prices continued to fall throughout 1992, until early 1993. Counsel submitted that if this Panel were to remand to the Tribunal the past or present material injury issue, the future material injury finding ought to be remanded as well, since the Tribunal based its future material injury finding on the existence of no past or present material injury.

Neither Dofasco nor Stelco addressed the issue of threat of future material injury and the Tribunal's Brief makes no reference to the question. In their Brief, U.S. Steel et al. cite Article 3:6 of the *Anti-dumping Code*, which provides:

"A determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent."

U.S. Steel et al. then submitted that the case put by the Canadian industry could not support a past or present finding of material injury because no evidence had been adduced that would indicate a future different from the circumstances which existed in the past. They added that

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<sup>116</sup> In the Matter of Hot-Rolled Sheet Steel (Injury), Binational Secretariat File No.: CDA-93-1904-07, Transcript of Public Hearing (the "Transcript of Public Hearing"), Vol. 1, at 137.

"...there is ample evidence in the record of economic recovery, and a decline in the value of the Canadian dollar which would reduce the possibility of future injury."<sup>117</sup>

SIMA Section 42 effectively requires the Tribunal to determine whether the dumping of subject goods is likely to cause future material injury. In looking at the question of future material injury, the Tribunal can take guidance not only from Article 3:6 of the *Anti-dumping Code*, but also from the October 1985 Recommendation concerning Determination of Threat of Material Injury, adopted by the Committee on Anti-dumping Practices, which is an agreed interpretation of Article 3:6 of the *Anti-dumping Code*.<sup>118</sup> In the *Machine-Tufted Carpeting* case, the Tribunal, in its Determination on Remand, directed the Panel to the Committee Recommendation.<sup>119</sup> The Committee Recommendation states:

"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 the additional exports;

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<sup>117</sup> Non-Confidential Participant's Brief of U.S. Steel et al. ("U.S. Steel Brief") at 58, para. 151.

<sup>118</sup> Committee on Anti-dumping Practices, *Recommendation concerning Determination of Threat of Material Injury*, adopted by the Committee on 21 October 1985 (ADP/25), BISD 32S/182 (the "Committee Recommendation").

<sup>119</sup> *Machine-Tufted Carpeting Originating in or Exported From the United States of America*, Binational Secretariat File No.: CDA-92-1904-02, Panel Decision Following Review of a Determination on Remand, 21 January 1994, at 8.

- 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 none of these factors by itself can necessarily give decisive guidance but the totality of factors considered must lead to the conclusion that further dumped exports are imminent and that unless action is taken, material injury would occur."<sup>120</sup>

The Committee Recommendation also states:

"...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."<sup>121</sup>

The Panel must determine whether the Tribunal was patently unreasonable in finding that it had "no basis to conclude that the domestic industry will be confronting an imminent threat of injury due to dumping in the foreseeable future."<sup>122</sup> The Tribunal was aware of the excess production capacity in the named countries and their propensity to dump the Subject Goods.<sup>123</sup> Despite the presence of these factors, the Tribunal, on the basis of its finding that the dumping of the Subject Goods was not a cause of past and present material injury, and on the basis also of the fact that, beginning in 1992, there was an upturn in production, exports, domestic

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<sup>120</sup> Committee Recommendation, at 183-84.

<sup>121</sup> *Id.*, at 183.

<sup>122</sup> Statement of Reasons, at 30.

<sup>123</sup> *Ibid.*



sales and market share, employment, and production capacity use, concluded that there was no threat of future material injury.

It was not patently unreasonable for the Tribunal to consider that if dumping were not a cause of past and present material injury, there would be no reason to believe that it could be a cause of future injury, absent a clear indication to the contrary. Such reasoning accords with the requirements of Article 3:6 of the *Anti-dumping Code* and the Committee Recommendation.

In the review of the *Machine-Tufted Carpeting (Injury)* case,<sup>124</sup> the binational panel was of the view that it was unclear whether the Tribunal had determined that causation of likely future material injury was independent of its analysis of causation of past material injury. In view of these uncertainties and because the panel was remanding on the issue of causation of past material injury, it required the Tribunal to clarify the point and to provide an analysis of the evidence in the record regarding causation of future injury. The situation is different in the present case, as the Panel affirms the Tribunal's finding on the issue of past injury.

The evidence also showed that after a two-year decline in the market, demand for the Subject Goods recovered by 13 percent in 1992. Domestic producers supplied all of this additional business. The subject imports fell by 19,000 net tons, or 8 percent.<sup>125</sup> Algoma's argument that it was unreasonable for the Tribunal to rely on increases in production, employment, and capacity use statistics, when the bulk of the producers' evidence of injury clearly

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<sup>124</sup> *Machine-Tufted Carpeting Originating in or Exported From the United States of America*, Binational Secretariat File No. CDA-92-1904-02, Opinion and Order, 7 April 1993, at 33.

<sup>125</sup> Statement of Reasons, at 20.

indicated a drop in tons produced and that the industry was injured in terms of sales returns and financial results, misses the point made by the Tribunal.

The Tribunal simply found that a new trend more favourable to the domestic producers was apparent since the beginning of 1992. The fall in imports was not compatible with a finding that there existed "a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importations thereof" (which is one of the indicators of future material injury provided by the Committee). Whether that in itself was enough to conclude that there was no likelihood of future material injury is a matter of appreciation which is within the expertise of the Tribunal. It was not patently unreasonable for the Tribunal to so conclude.

## **IX. PERIOD OF INVESTIGATION**

Algoma alleges that the Tribunal erred in concluding that there was no evidence that the Subject Goods were sold at dumped prices in 1990, which effectively precluded the domestic industry from establishing that material injury had been caused by dumping in 1990, or for that matter, in 1989. The Tribunal, according to Algoma, erroneously disregarded evidence simply because it fell outside of the period of investigation.

The position of the Tribunal on the subject is not devoid of ambiguity. In its analysis of market indicators, the Tribunal, after reviewing developments in 1990, concluded that "[w]hile imports increased their presence in the Canadian market in that year, there is no evidence

that they were sold at dumped prices."<sup>126</sup> It is beyond the jurisdiction of the Tribunal to determine whether or not dumping has taken place. It was asserted that this statement could be interpreted as meaning that the Deputy Minister's period of investigation was the sole evidence that the Tribunal had of dumped imports. From that point of view the statement may be considered as correct. The difficulty that it raises is that it appears to preclude any finding that the domestic industry could have been materially injured by dumped imports on the basis of evidence not related to the Deputy Minister's period of investigation.

The Tribunal stated:

"...Canadian producers brought little verifiable evidence of import price offerings or sales that would have allowed the Tribunal to conclude that dumped imports played an important role in the price declines that occurred between 1989 and 1992."<sup>127</sup>

This statement clearly indicates that the Tribunal might have found that dumped imports played an important role in the price declines that occurred between 1989 and 1992 had verifiable evidence of import price offerings or sales been adduced. It also shows, contrary to Algoma's assertions, that the Tribunal effectively considered the evidence brought by the domestic industry and the conditions in the industry over a period of time prior to the period investigated by the Deputy Minister. The question that is raised is: can the Tribunal's conclusion regarding the domestic industry's evidence for the years prior to 1992 be reconciled with its interpretation that goods sold during those years legally could not be considered as dumped?

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<sup>126</sup> Statement of Reasons, at 20.

<sup>127</sup> *Id.*, at 21.

It is the Panel's view that it was not unreasonable for the Tribunal to look at the importations of the Subject Goods and the conditions of the domestic industry during a period prior to the Deputy Minister's period of investigation in order to establish pre-existing price and quantity trends. This is the practice usually followed by the Tribunal. In doing so, it must be careful not to reach conclusions that go beyond its own jurisdiction. In the present case, although the Tribunal used language that was somewhat ambiguous and did not indicate clearly how the domestic industry's evidence for the years prior to 1992 was considered in light of the fact that dumping for those years had not been established, there is no indication that the Tribunal failed to consider the evidence adduced by the domestic industry or exceeded its mandate. It cannot be said that the Tribunal was patently unreasonable.

## **X. SLAB ROLLINGS, BROKERS, AND OTHER FACTUAL ISSUES**

Stelco submits that the Tribunal committed an error of fact in that:

"[d]espite the substantial and corroborated evidence of the phenomenon of imports of U.S. slab rollings and their direct effect on suppressing Canadian prices of like goods, and despite the obvious importance of this factor in the Canadian market, the Tribunal made no reference to this phenomenon in its assessment of material injury from U.S.-origin goods."<sup>128</sup>

It further argues that the Tribunal erred in failing to consider the impact of imports from brokers and the United States producers and exporters not appearing at the hearing. Stelco submits that there was substantial evidence of the impact of brokers on the market and that two witnesses

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<sup>128</sup> Non-Confidential Brief of the Complainant Stelco Inc. ("Stelco Brief"), at 46, paragraph 122.

testified that the impact of brokers was the driving force behind price declines. It is asserted that no mention or any analysis was made by the Tribunal of this evidence.

The Tribunal's Reasons show that it did consider evidence of slab rollings and brokers, but that it rejected it as not establishing price erosion caused by dumped imports. For example, the Tribunal stated:

"Samuel's representative contended that U.S. steel service centres and brokers were shipping secondary and excess prime product to Canada at dumped prices. This witness' evidence included price offers from certain U.S. steel service centres. However, for the most part, the price offers were not supported by sales invoices relating to any domestic producer's account. One of the offers was provided to Samuel Son International in the United States and related to prices being offered to U.S. buyers. Samuel's representative testified that the company does not import from Samuel Son International in the United States."<sup>129</sup>

"The preponderant share of the U.S. imports, possibly as high as 70 percent, appears to have come from steel brokers, steel service centres and fabricators, for which the Tribunal had little evidence. During the hearing, they were referred to as the "mystery tons" which were alleged to have caused price erosion in the marketplace. The only evidence presented was some price offers made by certain U.S. steel service centres and steel brokers. There was no evidence as to where these volumes went and at what prices."<sup>130</sup>

The Tribunal concluded that the evidence did not establish that the activities of the brokers compelled the Canadian firms to reduce their prices.

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<sup>129</sup> Statement of Reasons, at 24.

<sup>130</sup> *Id.*, at 26.

It is not the role of this Panel to reweigh evidence. Its role when reviewing a question of fact is limited to determining whether there is a rational basis for the decision of the Tribunal or whether the evidence viewed reasonably is capable of supporting the decision. Such is the case here. The contention that the Tribunal failed to consider the evidence of slab rollings and United States brokers is rejected.

There were a number of other issues raised by the Complainants. These included the use by the Tribunal of average price data and exchange rate data. The Panel has examined carefully the Tribunal's Reasons and is satisfied that its approach to these matters was not unreasonable. Insofar as they involve issues of fact, the Tribunal's conclusions are consistent with the evidence viewed reasonably. For example, with respect to the average price data used by the Tribunal, the Reasons refer to contentions advanced by participants and the Tribunal's sensitivity to the short-comings of using average data.

With respect to average price data used by the Tribunal, the Panel does not accept Algoma's allegation that the Tribunal ignored the significant body of evidence of specific price offerings. It is clear from the Tribunal's Reasons that it reviewed the evidence tendered by the domestic industry. Having found it to be insufficient to support a finding of material injury by reason of dumping, the Tribunal was forced to rely on the information generated by its own staff. The Tribunal's Reasons make it clear also that the Tribunal was aware of the significant effect that product mix had on average prices and, in order to permit price comparisons that were sensitive to the product mix, conducted a supplementary survey. It also noted the limited response rate and small volumes of like goods reported in the responses to the second staff survey and took that

factor into consideration. The Complainants have alleged an error of fact. The Panel rejects that allegation. It cannot be said that the evidence viewed reasonably does not support the Tribunal's conclusion.

## **XI. CONCLUSION**

Guided by the standard of review applicable to the proceedings, the Panel has concluded that the final determination of the Tribunal is not incorrect with respect to matters of jurisdiction, is neither patently unreasonable nor unreasonable with respect to issues of law within the specialized jurisdiction of the Tribunal and that its findings of fact are supported by the evidence viewed reasonably. These conclusions are based upon an examination of the Tribunal's Reasons as a whole, that is, an appreciation of what the Tribunal did rather than an analysis of its mode of expression of what it did. The latter has made our task more difficult.

Expressions such as "no evidence" and "failing evidence" are legal terms of art and must be used with caution. A statement that "factors other than dumping were the major factors" can be construed as suggesting that dumping must be a major factor. References to issues such as price suppression which are not dealt with specifically in the Tribunal's Reasons require a potentially unnecessary analysis by the reviewing authority. Concepts such as the burden of proof should be addressed only when essential and with great care.



It is this Panel's hope that its observations will be of assistance to the Tribunal and to participants in future proceedings before the Tribunal.

Signed in the original by:

Edward Chiasson\_\_\_\_\_

Edward Chiasson, Q.C.

Ivan Bernier\_\_\_\_\_

Professor Ivan Bernier

Gary Welsh\_\_\_\_\_

Gary Welsh, Esq.

Issued on the 18th of May, 1994.

## **XII. DECISION OF CECIL BRANSON, Q.C., CONCURRING IN PART AND DISSENTING IN PART**

### **A. Background**

This Binational Panel review involves certain flat hot rolled carbon steel sheet products (the "Subject Goods") originating in or exported from the United States. As a result of a complaint filed in September, 1992 that the Subject Goods were being dumped into Canada, the Deputy Minister of National Revenue for Customs and Excise (the "Deputy Minister") conducted an investigation which resulted in a Preliminary Determination of dumping issued on 29 January 1993. A Final Determination followed on 29 April 1993.

The Canadian International Trade Tribunal (the "CITT" or the "Tribunal") on 2 February, 1993 commenced its inquiry under section 42 of SIMA. This provision charges the Tribunal with the responsibility of inquiring into whether the dumping of goods as found by the Deputy Minister has caused, is causing, or is likely to cause, material injury to the production in Canada of like goods. Its Statement of Reasons was issued 15 June, 1993. The Tribunal concluded that:

"In accordance with subsection 43(1.1) and pursuant to subsection 43(1) of SIMA, the Tribunal finds that the dumping in Canada of certain flat hot-rolled carbon steel sheet products originating in or exported from the United States has not caused, is not causing and is not likely to cause material injury to the production in Canada of like goods."<sup>131</sup>

A Request for Review of the Tribunal's decision was filed with the Canadian section of the Binational Secretariat, and this Panel was engaged. We heard all interested parties and intervenors on 15 and 16 February, 1994 and reserved decision until this date.

I have had the benefit of reviewing in draft form the other Statement of Reasons of my colleagues and am in agreement with what they have written on the issues of natural justice, cumulation, slab rollings, brokers, and other factual issues. Therefore nothing more need be said by me about these matters.

## **B. Standard of Review**

Elsewhere in these reasons under the heading Standard of Review and SIMA section 76(1) I express my opinion that section 76(1) of SIMA as it stood prior to 1 January 1994 is not to be read as a privative clause. If this is correct there can be no argument of which I am aware that the patent unreasonability test must apply, given the language of section 76(1) at the operative time for consideration by us. I must still discuss the extent of curial deference, if any, which applies in this case.

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<sup>131</sup> Statement of Reasons, at 31.

Since the late 1970's, certain basic principles of administrative law in Canada have undergone a metamorphic transformation the effects of which have not yet been fully understood. This is in part due to the resulting principles not yet having taken their final form. What is clear is that compartmentalization of the functions of governmental authorities into judicial, quasi judicial and administrative units has been cast aside in favour of a more pragmatic and functional approach. In the seminal case of *Nicholson v. Haldimand - Norfolk Regional Police Commissioners*<sup>132</sup>. Laskin, C.J. speaking for the majority of the Supreme Court of Canada ("the Court"), said that:

"The classification of statutory functions as judicial, quasi judicial or administrative, is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work an injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question."<sup>133</sup>

This prompted Dickson J. (as he then was) in *Martineau v. Matsqui Institution disciplinary Board #2*<sup>134</sup> to place the functions of administrative bodies on a spectrum within which the review of their decisions can be fairly examined for procedural safeguards:

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<sup>132</sup> [1979] 1 S.C.R. 311.

<sup>133</sup> *Id.*, at 325.

<sup>134</sup> [1980] 1 S.C.R. 602.

"Between the judicial decisions and those which are discretionary and policy oriented will be found a myriad [of] decision making processes with a flexible gradation of procedural fairness through the administrative spectrum."<sup>135</sup>

Thus, in so far as determining whether the rules of natural justice have been broken, and therefore whether certiorari should apply, a spectrum or continuum of functions are now used. The decisions of the Court in *Old Saint Boniface v. Winnipeg*<sup>136</sup> and *Save Richmond Farmland Society v. Richmond*<sup>137</sup> are illustrative of the application of this new approach. In both cases, the Court had under consideration whether municipal council members should be disqualified from participating in public hearing for rezoning on the ground of bias. In the first case, the councillor in question had *ex parte* discussions with the developer, while in the second the councillor, in the midst of public rezoning hearings, expressed strong opinions in favour of the rezoning outside of the hearing. What he said could well be understood as meaning he had made up his mind prior to the public submissions being heard. The Court in both cases interpreted the principles of bias against the backdrop of the continuum, holding that the rules of natural justice vary, depending on the nature of the task to be performed and the type of decision to be made. In doing so, they applied different standards to an elected councillor than what one would expect from others involved in a function elsewhere on the continuum.

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<sup>135</sup> *Id.*, at 629.

<sup>136</sup> [1990] 3 S.C.R. 1170.

<sup>137</sup> [1990] 3 S.C.R. 1213.

In *CUPE v. New Brunswick Liquor Corporation*<sup>138</sup> the Court took a new direction in yet another area of administrative law, that of the standard of review. In *Nicholson v. Haldimand Norfolk*<sup>139</sup> the approach was more intrusive in that it allowed more decisions to be reviewed. The effect of *CUPE v. New Brunswick*<sup>140</sup> was to narrow the grounds for judicial review. In delivering the judgment of the Court, Dickson J. (as he then was) introduced a new principle:

"...was the Board's interpretation so patently unreasonable that it's construction cannot be rationally supported by the relevant legislation and demands intervention by the Court upon review?"<sup>141</sup>

The law relating to the question of procedural fairness and that involving standard of review have developed apace. A further gloss was put on *CUPE* in *Bell Canada v. Canada (CRTC)*.<sup>142</sup> Gonthier J. delivering the judgment of the Court said:

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<sup>138</sup> [1979] 2 S.C.R. 227.

<sup>139</sup> *Supra*, note 132.

<sup>140</sup> *Supra*, note 138.

<sup>141</sup> *Supra*, note 137, at 237.

<sup>142</sup> *Supra*, note 32.

"...within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on *issues which fall squarely within its area of expertise*."<sup>143</sup> (emphasis added)

In *Union des Employés de Service, Local 298 v. Bibeault*, the Court gave expression to what has become known as the "pragmatic and functional" approach to the review of decisions from expert Tribunals:

"The formalistic analysis of the preliminary or collateral question theory is giving away to a pragmatic and functional analysis, hitherto associated with the conception of the patently unreasonable error. At first sight it may appear that the functional analysis applied to cases of patently unreasonable error is not suitable for cases in which an error is alleged in respect of a legislative provision limiting a Tribunal's jurisdiction. The difference between these two types of error is clear: only a patently unreasonable error results in an excess of jurisdiction when the question at issue is within the tribunal's jurisdiction, whereas in the case of a legislative provision limiting the tribunal's jurisdiction, a simple error will result in a loss of jurisdiction. It is nevertheless true that the first step in the analysis necessary in the concept of a "patently unreasonable" error involves determining the jurisdiction of the administrative tribunal. At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal."<sup>144</sup>

In *CAIMAW v. Paccar*<sup>145</sup> seven Justices heard the appeal but only six took part in the judgment due to the retirement of McIntyre J. L'Heureux-Dubé and Wilson J.J. dissented,

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<sup>143</sup> *Id.*, at 1746.

<sup>144</sup> *Supra*, note 22, at 1088.

<sup>145</sup> *Supra*, note 31.

leaving four Justices in the majority. Dickson C.J. and LaForest J. wrote a combined set of reasons, as did Lamer and Sopinka J.J. Both sets of reasons focus closely upon the reasoning of the tribunal below. LaForest J., and Dickson C.J. put it this way:

"The Courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result."<sup>146</sup>

The approach of Sopinka, and Lamer J.J. differed:

"Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits. Reasonableness is not a quality that exists in isolation. When a Court says that a decision under review is "reasonable" or "patently unreasonable", it is making a statement about the logical relationship between the grounds of the decision and premises thought by the Court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made.

I share LaForest J.'s opinion of the importance of curial deference in the review of specialist Tribunals decisions. But, in my view, curial deference does not enter the picture until the Court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness."<sup>147</sup>

While the approach of the two sets of judges is different, the ultimate focus in both reasons remains on the rational basis of the grounds of the decision, not the result.

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<sup>146</sup> *Id.*, at 1004.

<sup>147</sup> *Id.*, at 1017-18.



In *National Corn Growers*<sup>148</sup> the Court focuses both on the necessity for examining in detail the manner in which the Tribunal arrived at its conclusion, particularly the reasons underlying the interpretation of the enabling statute, and the effect of privative language. In respect of the former, Gonthier J. had this to say:

"...understanding of the issues raised by the appellants herein as to the reasonableness of the tribunal's decision requires some analysis of the relevant legislation and the way in which the tribunal has interpreted and applied it to the facts."<sup>149</sup>

Justice Gonthier could not understand how a conclusion can be reached as to the reasonableness of a Tribunal's interpretation of its enabling statute without considering the reasoning underlying it.<sup>150</sup>

*Lester v. U.A. Local 740*<sup>151</sup> is illustrative of the degree of curial deference that will be allowed a specialized administrative tribunal when dealing with a question of law. McLachlin J. on behalf of the majority (Lamer C.J.C., LaForest, Sopinka, and Gonthier J.J. concurring) assumed for the purpose of the judgment that the Labour Board in this case had jurisdiction to consider whether or not there had been a sale, lease, transfer or other dispositions of a business or a part of a business under the Labour Relations Act of Newfoundland. Absent common employer provisions in the Newfoundland legislation she was left with the question of whether there was

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<sup>148</sup> *Supra*, note 33.

<sup>149</sup> *Id.*, at 1383.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Supra*, note 24.

any evidence upon which the majority of the Board could have found that a transfer, lease, sale or other disposition occurred in the sense of an identifiable conveyance of assets, work, or other aspects of the business of the unionized company to the non-unionized company. She concluded that there was no evidence of any such disposition. Dickson, C.J. Wilson and Cory J.J., in dissent, found that the expertise of the two principals of the company and their ability to move between the two companies lay at the very heart of the double breasting scheme thereby allowing the Board to interpret the phrase "otherwise disposes of" so as to include this type of transfer. The majority thought this conclusion could only be brought about by construing the Act in an unprecedented and unjustified manner,<sup>152</sup> which they were not prepared to do.

In *Canada (Attorney General) v. P.S.A.C.*,<sup>153</sup> Sopinka J., speaking for the majority comprised of Lamer C.J.C., LaForest, L'Heureux-Dubé J.J., Gonthier and McLachlin J.J., (Cory J. dissenting) applied the pragmatic and functional approach of *Bibeault* to the interpretation of the word "employees" in the *Public Service Staff Relations Act*. The question at issue was whether all teaching employees at a federal penitentiary, including those provided by a private company, were employees of the Government. First, it

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<sup>152</sup> *Id.*, at 693.

<sup>153</sup> [1991] 1 S.C.R. 614.

had to be determined whether this question was within the jurisdiction of the Board or not.

Sopinka J. said:

"In determining whether there has been a simple error in interpreting a provision conferring or limiting jurisdiction, as in determining whether jurisdiction has been exceeded by a patently unreasonable error, a pragmatic, functional approach must be adopted."<sup>154</sup>

The majority came to the conclusion that Parliament did not intend to confer jurisdiction on the Board with respect to the labour relations of employees who are not members of the Public Service. Having, by an error of law, assumed jurisdiction it was not intended to have, the Board's decision was founded to be reviewable.<sup>155</sup> The standard of review was then addressed. Sopinka J. reasoned that Parliament intended to enable the Board to resolve any question of whether an employee or class of employees is or is not included in a bargaining unit by expressly defining "employee" in the legislation. This, he said, showed a clear intention that Parliament has decided the category of employee over which the Board is to have jurisdiction. He concludes:

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<sup>154</sup> *Id.*, at 629.

<sup>155</sup> *Id.*, at 639.

"In providing a clear definition of the employees and other employers who are subject to the Board's jurisdiction, it was not the intention of parliament to rely on the expertise of the Board to extend the reach of this definition. Indeed, the source of the Board's error is its reliance on its general labour expertise which led it to rely on criteria developed under other different labour legislation when it ought to have applied the clear definition of 'employee' provided by Parliament."<sup>156</sup>

In *Canada, (AG) v. Mossop*,<sup>157</sup> six of nine judges found a Human Rights Tribunal not entitled to curial deference in respect of findings of law in which the Tribunal was found to have no particular expertise. The principal reasons are those of LaForest J. who, in dealing with the standard of review, states:

"The Courts have...been willing to show deference to administrative Tribunals for reasons of relative expertise. This is in addition to the normal deference of reviewing courts in respect of questions of fact. But the position of a human rights tribunal is not analogous to a labour board (and similar highly specialized bodies) to which, even absent a privative clause, the Court will give *a considerable measure of deference* on questions of law falling within the area of expertise of these bodies *because of the role and functions accorded to them by their constituent Act in the operation of the legislation.*"<sup>158</sup> (emphasis added)

On this same issue his Lordship says:

"The superior expertise of a human rights tribunal relates to fact finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The Courts cannot abdicate this duty to the tribunal. They must, therefore, review

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<sup>156</sup> *Id.*, at 635.

<sup>157</sup> *Supra*, note 25.

<sup>158</sup> *Id.*, at 584.

the Tribunal's decisions on questions of this kind on the basis of correctness, not on a standard of reasonability."<sup>159</sup>

In the first extract from *Mossop*, I have italicized the phrase "a considerable measure of deference" as it infers that there are degrees of deference accorded to administrative Tribunals after the threshold question of whether "patent unreasonability" rather than "correctness" will be the test applied. The degree of deference will depend on the location within the functional and pragmatic spectrum of the matter before the reviewing Court. This has sometimes been referred to as the extent to which the Tribunal is within its "home territory" in dealing with the matter at hand.<sup>160</sup>

The attention paid by the Court last year to judicial review is exemplified by the fact that no less than seven decisions were handed down by it in the first half of 1993. I do not propose to deal with all of them, although together they present a reasonably cohesive unit channelling the flow of thought enunciated in the decisions since CUPE.

*Dayco (Canada) Ltd. v. CAW*,<sup>161</sup> may be the most authoritative of the 1993 decisions due to the intensity of its focus upon the expertise question coupled with the effect of a so-called privative clause. At issue was whether retired workers benefits had been terminated after a company had gone out of business. The employer and union had negotiated a shut-down agreement which, while including provision for termination of insurance for active employees,

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<sup>159</sup> *Id.*, at 585.

<sup>160</sup> *Dayco, supra*, note 23, at 251.

<sup>161</sup> *Supra*, note 23.

made no mention of retirees. The decision under review was that of an arbitrator appointed under the provisions of Section 44 of the *Labour Relations Act of Ontario* which provided that:

"...the arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties..."

LaForest J.'s reasons were also those of Sopinka, Gonthier, and Iacobucci, J.J. In addition, Lamer C.J. concurred in these reasons except as regards the effect of the "final and binding" clause. Seven judges sat on the appeal.

Dealing with the "final and binding" clause, LaForest J. expressed grave doubts about the merits of an approach dependent on the particular preclusive phraseology used in the legislation "to elevate statutory words to a prohibitive status not intended by the legislature." While recognizing that in *National Corn Growers* "final and conclusive" language was held to be prohibitive, he found that case to involve different words in a different statutory setting:

"One could quibble over the distinctions between the phrases "final and conclusive" and "final and binding", and to me, the latter phrase does import less privative effect. But the important point is that the driving factor in that decision was not the cause alone but *deference to the relative expertise of the administrative Tribunal over the specialized questions involved*. I do not think that decision precludes a determination that S.44 of the Act in this case does not have a privative effect."<sup>162</sup> (emphasis added)

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<sup>162</sup> *Id.*, at 264-65.

On the same subject, he states:

"I cannot accept that Courts should mechanically defer to a Tribunal simply because of the presence of a "final and binding" or "final and conclusive" clause. These finality clauses can clearly signal deference but they should also be considered in the context of the type of question and the nature and expertise of the Tribunal."<sup>163</sup>

Thus, the effect of preclusive language is dealt with through a pragmatic and functional approach with emphasis upon the deference to be paid to the relative expertise of the administrative Tribunal. The applicability of the spectrum analysis is emphasized:

"In short, an arbitration board falls toward the lower end of the spectrum of those administrative tribunals charged with policy deliberations to which the Court should defer. Similarly, tribunals vested with the responsibility to oversee and develop a statutory regime are more likely to be entitled to judicial deference."<sup>164</sup>

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<sup>163</sup> *Id.*, at 268.

<sup>164</sup> *Id.*, at 266.

The Tribunal is a Court of Record which undertakes inquiries on matters relating to Canada's economic trade or commercial interests when requested to do so by the Governor in Council and on tariff related matters referred to it by the Minister of Finance, conducts inquiries and complaints filed by domestic producers, in addition to hearing appeals under SIMA regarding anti-dumping and countervailing duty orders and, under section 42 (being the case here) has the duty to determine whether material injury consequent upon dumping has occurred. Furthermore, by virtue of section 45 of SIMA, the Tribunal is authorized to take into account the public interest and to report to the Minister of Finance when in its opinion the full imposition of an anti-dumping or countervailing duty would not be in the public interest. There can be no doubt that the CITT is a specialized administrative body; but this is not the end of the matter, for the general expertise of the administrative body is by no means the sole factor looked at in the application of the pragmatic and functional test. This is clear from the judgment of LaForest J.:

"In my view, the present case is like *Bibeault*. Here, the question to be decided requires consideration of concepts that are analogous to certain common law notions - 'vesting' and accrued contractual rights - that fall outside the Tribunal's field of exclusive expertise. I do not wish to suggest that arbitrators are not competent to apply common law concepts - they obviously tap into common law principles every day in the course of their decision making. But in these matters the arbitrator has no exclusive or unique claim to expertise."<sup>165</sup>

LaForest J. was speaking for five of the seven judges who heard the matter and concluded that the functional analysis of the jurisdiction of the labour arbitrator leads to the conclusion that the test is one of correctness rather than patent unreasonableness. LaForest J. concludes his analysis of the standard of review in the following manner:

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<sup>165</sup> *Id.*, at 267.



"As I noted in *Canada (Attorney General) v. Mossop*...while Courts will defer to arbitrators or other Tribunals on certain determinations of law having regard to their relative expertise or to the role or functions accorded to them under their constituent legislation (including issues relating efficiency), other more general questions of law unrelated to these factors *do not call for the same level of judicial deference*. For the purpose of deciding whether a question is one on which deference should be shown, the Courts may have recourse to many of the same factors that have been used in a pragmatic and functional approach to jurisdiction."<sup>166</sup> (emphasis added)

Again, we have recognition of a gradation of judicial deference similar to *Mossop* above.

While Mr. Justice Cory found himself "in substantial agreement with the excellent reasons of Justice LaForest" and would dispose of the appeal in the same manner that he has suggested, he differed on the approach that should be taken by the Courts in reviewing the decisions of the Boards, Tribunals and arbitrators "*acting in the field of labour relations*," believing this field to be unique in a number of ways.

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<sup>166</sup> *Id.*, at 269.

The spectrum approach to so-called privative clauses is repeated in *United Brotherhood v. Bradco Construction Ltd.*<sup>167</sup> where Sopinka, J. speaking for the Court addresses the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause.<sup>168</sup>

The governing statute in this case required that all labour disputes "shall be submitted for final settlement to arbitration."

I have found the above review to be helpful as a backdrop against which my consideration of the standard of review in the case before this Binational Panel can be considered.

The starting point of most analyses of the applicable standard of review is a determination of whether the question goes to jurisdiction or whether it is within jurisdiction and therefore can be categorized as an error of law or one of fact. In either of these latter instances the test is said to be one of patent unreasonableness. However, this can only be a starting point as the seemingly simplistic language is difficult to apply to many cases.

The justices of the Court when explaining patent unreasonability go through the same analysis as one would apply to reasonableness. See, for instance, Gonthier J. in *National Corn Growers* where he uses the phrase "cannot be supported on any reasonable interpretation of

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<sup>167</sup> *Supra*, note 28.

<sup>168</sup> *Id.*, at 335.

the facts or law" interchangeably with the term "patently unreasonable".<sup>169</sup> In his view they mean that Courts will only interfere with the findings of a specialized tribunal when it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law.

None have, to my knowledge, ever defined the two differently. I would be surprised if anyone could do so logically. To be unreasonable implies a logical breakdown, something beyond being simply not the best choice of a range of possible choices but rather reasoning which is demonstrably wrong. For something to be patent implies that it is immediately obvious. If something is demonstrably wrong, how can it benefit from being wrong in a way that is not immediately obvious, but rather requires careful analysis? Despite this, as long as the reasons under review can be supported on a reasonable interpretation of the facts or law they ought not to be subjected to remand. It is not good enough that we do not agree with the reasoning.

If a tribunal errs in the interpretation of a provision conferring or limiting its jurisdiction the decision cannot be allowed to stand. It must be correct. However, if it makes any other error of law or fact it must be a patently unreasonable one before the result can be overturned. In respect of these latter errors curial deferences will be afforded to the decision of the Tribunal. One may ask why it is necessary to overlay the concept of curial deference on that of patent unreasonableness. The answer, I suggest, lies in the spectrum of pragmatic and

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<sup>169</sup> *Supra*, note 33, at 1369-70.

functional criteria within which administrative tribunals operate. This has been recognized in the recent authorities of the Court referenced above, particularly *Mossop, Dayco, and Bradco*.

That there is no one single standard of patent unreasonability which applies to every case, but rather degrees of curial deference arises in part from the range of factors within the pragmatic and functional test. These extend at one end from exceeding jurisdiction by a patently unreasonable error<sup>170</sup> through those within the jurisdiction of the tribunal, but not strictly within its expertise, to those both strictly within its jurisdiction and its expertise. The measure of deference which courts give to decisions of tribunals will be more or less, depending on their position on the spectrum of pragmatic and functional criteria mentioned above.

### **C. The Standard of Review and SIMA Section 76(1)**

Two arguments were advanced before the Panel to support a conclusion that the Tribunal's decision under review is not protected by a privative clause. First, it was contended that the 1 January 1994 amendment to SIMA section 76(1), which *inter alia* deleted the words "final and conclusive" was applicable to these proceedings. The second argument advanced involves the construction of the pre-1 January 1994 version of SIMA section 76(1). That version came into effect with the implementation of the FTA in 1988, and reads as follows:

"Subject to this section, subsection 61(3), paragraph 91(1)(g), section 96(1) and Part II, every order or finding of the Tribunal under this Act is final and conclusive."

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<sup>170</sup> Mentioned by Sopinka J. in *Canada (AG) v. P.S.A.C.*, *supra*, note 153, at 629.

The submission made to the Panel was that because Part II (the part of SIMA which provides for binational panel review) was within the "subject to" clause of section 76(1), the Tribunal's decisions are not final and conclusive, so far as *inter alia* Part II binational panel review is concerned.

The Majority rejects the first argument, concluding that the standard of review is a matter of substance rather than procedure. I agree with their conclusion and with their reasoning; I too reject the first argument.

The Majority also rejects the second argument, concluding that Part II was included within the "subject to" clause to place binational panel review on the same footing as Federal Court of Appeal judicial review. I am unable to agree with this conclusion.

The Majority reasons that there would be an internal inconsistency if SIMA said in section 76(1) that Tribunal decisions are final and conclusive and in Part II that binational panels shall review Tribunal decisions in accordance with Chapter Nineteen of the FTA. A similar inconsistency would exist between SIMA section 76(1) and Federal Court of Appeal judicial review, if it were not for section 28 of the Federal Court Act, which grants the Federal Court of Appeal the power to review all administrative proceedings, "notwithstanding...the provisions of any other Act."

The essence of SIMA section 76(1), according to the reasoning of the Majority, is the expression of legislative intent that Tribunal findings be accorded deference on review. The

Majority expresses the analogy by observing that the fact that the Tribunal's findings are subject to Federal Court judicial review does not alter the legislative intent that supports deference to the Tribunal's findings. Similarly, making the Tribunal's findings "subject to" binational panel review does not alter the legislative intent supporting the Panel's need to show deference to the Tribunal's findings.

I am unable to agree with the reasoning adopted by the majority. While I agree that the Tribunal's findings are entitled to deference. As I have said elsewhere in these Reasons when discussing the standard of review, although the Tribunal's findings are entitled to deference this can vary from case to case and issue to issue depending on the factors applicable under the pragmatic and functional test. Nor do I see a significant difference between my understanding of how the Court views patently unreasonable and unreasonable.

I agree that there would be an internal inconsistency if SIMA section 76(1) said that the Tribunal's findings were "final and conclusive" and Part II of SIMA placed a duty on binational panels to review those same findings. The Majority resolve this inconsistency by interpreting the "subject to" clause of section 76(1) as providing Part II binational panels the jurisdiction to review Tribunal findings notwithstanding their "final and conclusive" status.

The inconsistency is also resolved if section 76(1) is interpreted as only granting "final and conclusive" status to the Tribunal's findings to a limited degree. It is my opinion that this interpretation of section 76(1) flows directly from the language chosen by Parliament, without resort to an analysis of the underlying legislative intent. As a simple matter of grammar, "subject to" implies an exception to or qualification of the quality which follows. This plain language interpretation finds support in the interpretation which Justice Gonthier accorded to the same section in the *National Corn Growers* case:

"...Section 76 of SIMA provides that the Tribunal's decision, *with certain limited exceptions, is final and conclusive*. Given this provision, this Court, therefore, will only interfere with the Tribunal's ruling if it acted outside the scope of its mandate by reason of its conclusions being patently unreasonable.<sup>171</sup> (emphasis added)

At the time that the *National Corn Growers* case was decided, SIMA section 76(1) read:

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<sup>171</sup> *Supra*, note 33, at 1369.

"Subject to *this section and paragraph 91(1)(g)* every order or finding of the Tribunal is final and conclusive."<sup>172</sup> (emphasis added)

Clearly, Gonthier J. is referring to the portion of section 76(1) which I have emphasized above when he refers to "certain limited exceptions." In my opinion, when section 76(1) was amended in 1988 by expanding the elements within the scope of the "subject to" clause, the result was that the number of exceptions to the "final and conclusive" quality of the Tribunal's decisions grew.

I have not seen or heard anything that persuades me that I should prefer the first of these ways to resolve the potential inconsistency over the second. It is suggested that Parliament intended to place binational panel review on the same footing with Federal Court judicial review. There are three reasons why I reject this suggestion.

First, I cannot discern a motive underlying the intention imputed to Parliament. I can see no inherent or automatic reason why Parliament should desire to place on the same footing two bodies which are fundamentally different. Binational panels are themselves administrative tribunals, albeit with a review jurisdiction, made up of persons with specialized expertise in the same area as the Tribunal they are to review. I do not suggest that this factor indicates a legislative intent not to grant Tribunal decisions "final and conclusive" status, merely that it makes less likely an inference of legislative intent to create a same footing.

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<sup>172</sup> *Special Import Measures Act*, S.C. 1984, c.25.



Second, I am troubled by two inconsistencies which I perceive in the "same-footing" interpretation of the "subject to" clause. The interpretation fails to explain the purpose or meaning of the "subject to" clause as it stood prior to the 1988 amendment. Prior to the 1988 amendment, the "subject to" clause made reference to provisions of SIMA which allowed the Tribunal itself to reconsider its own findings. I can think of no reason for Parliament to put the Tribunal, reviewing its own decision, on the same footing as the Federal Court of Appeal. It is more probable, as the reasoning of Gonthier J. in the *National Corn Growers* case acknowledges, that Parliament intended to make the Tribunal's powers to reconsider its own findings an exception to their "final and conclusive" quality.

More significantly, the "same-footing" interpretation does not take into account the presence within the "subject to" clause, as amended in 1988, of provisions which relate to Federal Court of Appeal review. Section 96.1, for example, reads:

"An application may be made to the *Federal Court of Appeal to review and set aside*

- (a) a final determination of the Deputy Minister under paragraph 41(1)(a);
- (b) a decision of the Deputy Minister under paragraph 41(1)(b) to cause an investigation to be terminated;
- (c) a decision of the Deputy Minister under subsection 53(1) to renew or not to renew an undertaking;
- (d) *an order of the Tribunal under subsection 76(3.1);*
- (e) *an order of the Tribunal under subsection 76(4);*
- (f) *an order or finding of the Tribunal under subsection 76(4.1) respecting a review pursuant to subsection 76(2.1);* or
- (g) *an order or finding of the Tribunal under subsection 91(3).*" (emphasis added)

The legislative intention to place those things within the "subject to" clause on the same footing with the Federal Court of Appeal is inconsistent with the inclusion within the "subject to" clause of provisions allowing for *inter alia* application to the Federal Court of Appeal to review decisions of the Tribunal. The preferable interpretation is that the reason for placing certain provisions within the "subject to" clause is to put them on a different footing.

The third reason which prevents me from accepting the same footing interpretation is that, assuming that the interpretation does correctly state the legislative intent, there is a more obvious way of implementing that intention. If it was desired to place binational panels on the same footing as the Federal Court of Appeal, a "notwithstanding" provision could have been added to Part II.

For all of these reasons I am unable to conclude that section 76(1), as it applies to this Panel review, is a privative clause.

#### **D. Causation**

I have had the benefit of seeing the reasons of my colleague, Professor Partan, in draft form, dealing with the question of causation. I am in agreement with them except in two areas. I do not agree that the overall standard of causation is one which falls within the special expertise of the Tribunal, nor do I agree that the remand to the Tribunal be at large, without any guidance as to the acceptable standards of causation.

I specifically agree with everything my colleague Professor Partan has said about the failure of the Tribunal to comprehensively articulate a standard against which the evidence should be measured and that this makes their conclusions patently unreasonable and therefore subject to remand. Without a rational articulation of the standards employed by a Tribunal, no binational panel is able to determine whether the standard is patently unreasonable or, if it is not, that the standard has been applied to the evidence in a rational manner.

Under section 42 of the *SIMA*, the Tribunal is responsible for inquiring into whether the dumping of goods as found by the Deputy Minister has caused, is causing, or is likely to cause, material injury to the production in Canada of like goods.

The process used by the Tribunal to arrive at its decision is set out in its Statement of Reasons commencing at page 19 through to their conclusion at page 31. The Tribunal commences by addressing the subject of material injury in this manner:

"In conducting its inquiry, the Tribunal must first decide if the domestic industry has suffered from or is threatened with material injury. Secondly, the Tribunal must be satisfied that there is a causal link between the injury observed or threatened and the dumped imports. It must be satisfied that the injury is not attributable to other factors present in the market place."

It was evident to the Tribunal that the industry had suffered material injury in the form of a substantial deterioration in sales revenue and financial performance. However, the economic recession, labour disruptions at Stelco and Algoma, and various other developments were also cited as possible explanations for the poor performance of Canadian producers over the period of inquiry.

I believe that the Tribunal erred when it asserts that it must first decide the domestic injury has suffered from or is threatened with material injury. However, that does not mean that its decision will be subject to remand for this error, standing alone. In a case where there is a real question whether there was material injury the approach could be helpful. But where the material injury is so patently obvious that anyone could see the industry was haemorrhaging there is a danger to such an approach. That danger is exemplified in this case where, as Professor Partan has said, "the thrust of the Tribunal's Reasons is that injury to the Canadian industry resulted from various non-dumping factors". By finding that so many other factors contributed in such a large degree to the injury found the Tribunal was distracted from its

sole jurisdictional mandate, which was to determine if the dumping in and of itself caused any material injury.

The factors which are material in determining whether dumped goods have caused material injury are well within the expertise of the CITT; as such the weight to be given to these factors is for the Tribunal, and not us, to judge. But, I cannot see where the Tribunal has identified the material factors and weighed them against a predetermined standard.

In my view the issue of the legal meaning of "cause" in all of the tenses in which it is used in SIMA section 42(1)(a) is one that must be addressed on the basis of fundamental common law concepts. As was the case in *Lester*, *Mossop*, *Dayco*, and *Bradco* this kind of question is not one of law falling strictly within the area of expertise of the Tribunal. Like the questions in these decisions the legal meaning of the words under scrutiny involve basic common law principles which are within the general purview of the Courts to decide. The same can be said of the issue relating to onus of proof.

Like Professor Partan, I am critical of the Tribunal's indication that it applied a "sole cause" test in one place and in others stated that non-dumping factors were "the

major factors" or the "major causes" that led to the injury to the Canadian industry,<sup>173</sup> but I do not stop there. Elsewhere, the Tribunal indicates it must be satisfied that the injury is not attributable to other factors present in the marketplace,<sup>174</sup> that there was intense competition in that same marketplace which was "largely fuelled by the actions of the Canadian producers themselves"<sup>175</sup> without any discussion of why the Canadian producers were driven to such intense competition, and when it indicated that "Algoma's aggressive pricing in 1992 arose from its desire not only to compete with dumped goods" but also from other factors<sup>176</sup> without giving any indication of whether it weighed the causative effect of its aggressive pricing brought about by this desire.

At page 29 of its Statement of Reasons the Tribunal took the position that:

"Lacking either evidence of low import sales or offers to individual accounts or general market data that showed lower import prices, it is *impossible* to conclude that dumped imports caused the injury to domestic producers." (emphasis added)

In addition to it being incorrect to say that it is impossible, lacking the identified evidence, to conclude that dumped imports caused material injury to production in Canada of like goods, there was such evidence. Mr. Makagon, a witness called by the U.S. producers who testified about the impact of imports coming into Canada through brokers, said "it would certainly

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<sup>173</sup> Decision of Professor Daniel G. Partan, Concurring in Part and Dissenting in Part, *infra*, at 116-123.

<sup>174</sup> Statement of Reasons, at 19.

<sup>175</sup> *Id.*, at 21.

<sup>176</sup> *Id.*, at 21.

be one of the factors that has contributed to driving prices down in that time frame that we are talking about."<sup>177</sup>

I have already stated that our role as a Binational Panel is not to weigh the evidence. Nor is it to speculate about what the reasoning of the Tribunal may have been when this is not readily ascertainable. In the final result, the reasons must be those of the Tribunal and not ours. Once we begin to speculate as to what was meant we are in danger of creating reasons with which at least some of the Tribunal may not have agreed. Written reasons are sometimes the composite of differing views among the members of a Tribunal in an attempt to reflect disparate positions. Some of these positions we may not think reasonable, while others we may. The danger inherent in speculating which is to prevail is obvious.

The Tribunal under paragraph 43(2)(b) of *SIMA* is required to give reasons for its finding. It is not good enough that the reasons conclude with the bold assertion that "my reasons are that I think so."<sup>178</sup>

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<sup>177</sup> U.S. Producers Evidence, Volume 13, at 984.

<sup>178</sup> *Northwestern Utilities Limited v. Edmonton* [1979] 1 S.C.R. 683, at 706 (per Estey J).

I am in agreement with what Messrs. Macdonald and Lametti have written in their informative article, *Reasons for Decision in Administrative Law* about the minimal requirements of reasons:

"To begin, while reasons may be brief and need not canvass every argument, mere conclusions are not sufficient; 'full and complete' reasons imply that the three elements of the decision making syllogism are explicitly presented. The reasons offered cannot simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion; 'partitas affirmations' are no substitute for statements of fact, analysis, inference and judgment. Reasons also must be responsive to the proofs and arguments advanced before the decision maker, so that the decision maker's reasoning process can be 'replicated' by others; to be replicable reasons must explain any contested interpretations of legislative text, and must show why, or how, where upon what evidence the decision is based. Moreover, the idea that decision makers attorn to the factual features of the case before them suggests, at least in adjudicative processes, that reasons for decision must address all plausible issues of law raised by the parties, and where specific facts are in dispute, must fully report any factual findings; agencies are entitled to interpret legislative rules and factual data, but must not make such interpretations opaque by omitting evidence upon which certain calculations are based. Finally, these minimal requirements will not suffice in institutionally complex cases and in most non-adjudicative settings; thus, where a decision maker makes a claim of expertise, or asserts an agency policy, these claims and their rationale must also figure in reasons it gives for its decision."<sup>179</sup>

In reviewing the CITT's decision in *Machine-Tufted Carpeting*, another Binational Panel stated:

"The Tribunal, in its DOR, did not explain why it did not rely upon the figure 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

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<sup>179</sup> Macdonald and Lametti, "Reasons for Decision in Administrative Law," 3 C.G.A.L.P. 123, at 139-40.



Tribunal should explain why it failed to use the correct figure submitted by Shaw."<sup>180</sup>

If it is not apparent that the Tribunal has weighed the relevant evidence in a rational manner, a direction should be made to ensure that this is done. The way in which the Tribunal considered the issue of causality has given me trouble, as it has Professor Partan. When explaining why, in the Tribunal's opinion the evidence did not establish the necessary nexus between the material injury suffered by the domestic injury and the dumped imports, it identified a sizeable share of U.S. imports exported from sources other than those examined by the Deputy Minister "for which no evidence beyond the most superficial anecdotal sort was adduced concerning the origin, the destinations or the transaction prices of such imports."<sup>181</sup> This large volume of imports was identified earlier in the factual findings of the Tribunal's Statements of Reasons as having been "corroborated by oral evidence provided by representatives of Canadian steel service centres that were competing against these imports. Since the specific importers and destination of these imports remained unknown, they came to be known as the "mystery tonnes". These U.S. brokers, steel service centres and fabricators, for which marketing practices may be different from U.S. producers of the subject goods, were not investigated by Revenue Canada and therefore,

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<sup>180</sup> Panel Decision following Review of a Determination on Remand, *supra*, note 119, at 6.

<sup>181</sup> Statement of Reasons, at 28.

there were no specific margins of dumping determined for these exporters."<sup>182</sup> It is likely that the critical evidence here would be circumstantial. The domestic producers are not in a position to give direct evidence of the nexus between dumping and prices. Evidence of conversations with customers who are prepared to discuss such things, bearing in mind that their interests are not coincident with those of the domestic producers, would be hearsay. This fact is not one within the exclusive control of the domestic participants and therefore there can be no onus on them on this basis. The Tribunal appeared to understand the difficulties faced by Canadian producers in their presentation of this evidence:

"The Tribunal appreciates the difficulty that the industry experiences in producing commercial intelligence of the sort that the Tribunal requires to understand the pricing behaviour in the marketplace. After all, the industry's business is to make and sell steel, not to prepare for anti-dumping cases."<sup>183</sup>

It is therefore surprising that the Tribunal should conclude its discussion of causality in the following manner:

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<sup>182</sup> Statement of Reasons, at 9.

<sup>183</sup> *Id.*, at 29.

"In initiating an inquiry of this nature, a complainant is enjoined with an evidentiary burden to support its allegations of injury due to dumping. The Tribunal is prepared to accept various forms of evidence used to substantiate these claims. As occurred in this case, the Tribunal will assist in ascertaining the facts through such means as its questionnaires and pricing surveys. However, it is ultimately the domestic industry that must make its case."<sup>184</sup>

There can be little doubt that the Tribunal was talking about the overall burden imposed on the principal parties in civil proceedings. By definition, the material injury which the Tribunal is charged with examining is to the production in Canada of like goods. Evidence should not be addressed by the Tribunal for the purpose of supporting allegations of injury to the particular complainant who happens to lead that evidence. Neither the material injury suffered by Algoma, nor any other Canadian producer ought to be the statutory focus of the CITT. Material injury to the production in Canada of like goods is a wider, more public interest based, concept.

There is no legal requirement that the domestic participants have any onus upon them to link the material injury to their production, either individually or cumulatively. Nor does it matter that the domestic participants happen to be the major or even all of the producers in Canada of like goods. This is so because the Tribunal is charged with the protection of the public interest, and not that of the domestic participants.

Onus of proof, in a civil context, where there are parties adverse in interest, was explained in the leading Anglo-Canadian case of *Robins v. National Trustco*:

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<sup>184</sup> *Id.*, at 30.

"Onus is always on a person who asserts a proposition or fact which is not self-evident...In conducting any inquiry, the determining tribunal, be it Judge or Jury will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as is often expressed, that in certain circumstances the onus shifts. The onus as a determining factor of the whole case, can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered."<sup>185</sup>

The Tribunal is invested with plenary, investigatory and prosecutorial authority and may lead and otherwise produce evidence. It is also given the sole authority to decide whether the material injury has or is likely to be caused by the dumping. The overall onus of proof throughout remains the obligation of the Tribunal to determine on all the evidence before it.

"Against this view, it is said that the object of the *Anti-Dumping Act* is 'to protect the Canadian public interest from dumped goods which may materially cause injury or retard production in Canada of like goods' and, therefore, the inquiry is 'essentially an investigatory one and does not involve a contest between opposing parties.'"<sup>186</sup>

I agree with counsel for Stelco, who submitted that the Tribunal erroneously, improperly and unreasonably seemed to be requiring the domestic producers to show a smoking gun and to demonstrate if a sale was lost or a price reduced at a particular account, thus requiring a domestic producer to bring forward evidence to show that there was a competing U.S. product sourced by that account.

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<sup>185</sup> *Supra*, note 79, at 100-01.

<sup>186</sup> *Magnasonic*, *supra*, note 74, at 1247.

The question of where the evidentiary burden lies is a matter of law not within the special expertise of the CITT. As such, it is not a matter in respect of which curial deference is owed. As the concept expressed by the Tribunal is incorrect there should be a remand for the Tribunal to reconsider this matter without imposing any onus upon the participants.

In this case the evidence discloses that the total production of domestic producers between 1989 and 1990 went from 2,000,000 tonnes down to 1,300,000 tonnes, a substantial drop in anybody's language. When, also, it is proven that over the course of this period of time, U.S. product more than doubled its market share from 4% to 9%, while domestic sales lost 7% of market share, from 94% to 87%, along with the quantity of dumped goods provides *prima facie* evidence of causality:

"The second criterion that must be met before a finding of past and present injury can be made is the existence of a clear causal link between the injury...and the dumped imports. In the Tribunal's view, other things being equal, the situations of simultaneously declining domestic production and large increasing volumes of imports, a high proportion of which had been dumped at significant margins of dumping, provides *prima facie* evidence of causality."<sup>187</sup>

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<sup>187</sup> *Stainless Steel Welded Pipe*, CITT Inquiry No.: NQ-91-001 (1991), 7 T.T.R. 172, at 183.

With the reasonableness of the analysis of the issues by administrative Tribunals assuming the importance which they have in judicial review it is necessary that their reasons disclose that analysis in a transparent rather than an opaque manner. Otherwise, the reviewing authority may be denied the ability to uphold an award which it may otherwise think erroneous. This does not require in every case a lengthy concatenation of all evidence rationally probative of a material fact in issue. What it does require is a logical progression towards the conclusion reached such as to allow the reviewing body to understand the underlying rationale. If that underlying rationale is shown to be patently unreasonable or is so opaque as to be unclear, the matter should be remanded, with the necessary directions.

"With respect, I do not understand how a conclusion can be reached as to the reasonableness of a Tribunal's interpretation of its enabling statute without considering the reasoning underlying it..."<sup>188</sup>

The above is not meant to be a council of perfection, far from it. The Statement of Reasons of the Tribunal need not be a model of clarity. Nor do I suggest a detailed analysis of individual words or statements in isolation, quite the contrary. Words often take their meaning from the context in which they appear, but not always.

Like my colleague, Professor Partan, I would remand to the Tribunal to determine the appropriate causation standard and to apply that standard as the basis for its findings on causation, provided that the standard must lie between any cause and one which is significant and direct, if indeed these are different.

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<sup>188</sup> *National Corn Growers*, *supra*, note 33, at 1383.

Signed in the original by:

Cecil Branson \_\_\_\_\_

Cecil Branson, Q.C.

Issued on the 18th of May, 1994.

### **XIII. DECISION OF PROFESSOR DANIEL G. PARTAN, CONCURRING IN PART AND DISSENTING IN PART**

While I agree with much of the Panel's Decision, I do not agree with the Panel's ruling on causation. In my view the matter should be remanded to the Tribunal with instructions to determine the appropriate causation standard and to apply that standard as the basis for its findings on causation.

I join in the following parts of the Panel's Decision: Part III, The Standard of Review and SIMA Section 76(1); Part IV, The Natural Justice Issue; Part VI, Cumulation; Part VII, Price Suppression; and Part X, Slab Rollings, Brokers, and Other Factual Issues. My views on causation, the period of investigation, and the threat of future material injury (Panel Decision Parts V, IX, and VIII) are set forth in this separate opinion.

The Panel finds that causation is an issue of law within the specialized jurisdiction of the Tribunal. I concur. SIMA section 42(1)(a) treats causation as integral to the injury inquiry in the sense that the Tribunal's injury inquiry must focus on causation: where there is no causal link to dumping, SIMA provides no relief for injury to Canadian industry. Indeed, the Tribunal makes "injury" findings only where it also finds causation. Injury caused by dumping is the trade-related finding that is entrusted to the Tribunal by SIMA; both the injury and the causation aspects of that finding fall within the specialized expertise of the Tribunal. Hence the legal standard applied by the Tribunal to the causation finding is a matter within the Tribunal's specialized jurisdiction, whose ruling is not to be disturbed unless found by this Panel to be patently unreasonable.



Binational panel review of the Tribunal's findings concerning injury caused by dumping has two essential features. Considering that the causation standard lies within the Tribunal's specialized jurisdiction, the Panel's first task is to determine whether the legal standard applied by the Tribunal is a reasonable interpretation of the governing statute. The Panel's second task is to determine whether the evidence, viewed reasonably, rationally supports the Tribunal's causation finding. On these basic principles of binational panel review I am in full agreement with Part III of the Panel's Decision. My disagreement is with the Panel's application of these principles to the issue of causation.

In my view, the Tribunal's decision failed to articulate the legal standard of causation that the Tribunal applied in finding that dumping has not caused, is not causing, and is not likely to cause material injury. Since the Tribunal has not articulated the causation standard that it applied, the Panel cannot determine whether that standard is a reasonable interpretation of SIMA. The Panel also cannot determine whether the Tribunal's causation findings under that standard are rationally supported by the evidence.

As my colleague Cecil Branson states in his separate opinion, it is not the task of the Panel to speculate about the reasoning of the Tribunal:

[T]he reasons must be those of the Tribunal and not ours. Once we begin to speculate as to what was meant we are in danger of creating reasons with which at least some of the Tribunal may not have agreed.<sup>189</sup>

As a binational panel, we must be careful to confine our review within our jurisdiction. Our role is to determine whether the Tribunal's standard of causation is reasonable and whether its findings are rationally supported by the evidence. Just as curial deference forbids us to substitute our views on causation for the views of the Tribunal, curial deference confines our review of the Tribunal's causation findings to the legal standards of causation applied by the Tribunal.

My colleagues have addressed the objections raised by the Algoma Complainants to the "bifurcated" approach taken by the Tribunal. The Tribunal's approach was first to decide whether the domestic industry had suffered material injury; only then did it examine whether "there is a causal link between the injury observed or threatened and the dumped imports."<sup>190</sup> This approach creates a risk of confusion. The Tribunal's initial focus on injury alone and not on injury integrated with causation could easily lead to over- or under-attribution of injury to the effects of dumping. As my colleague Cecil Branson has found, examination of injury without a clear focus on causation may distract the Tribunal from its sole jurisdictional mandate, which is to determine whether dumping has caused injury.

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<sup>189</sup> Decision of Cecil Branson, Q.C., Concurring in Part and Dissenting in Part, *supra*, at 98.

<sup>190</sup> Statement of Reasons, at 19.

The integration of causation in the injury inquiry is in effect required by the *Anti-dumping Code*. Article 3:1 of the *Code* provides that a determination of injury requires examination of "the volume of dumped imports and their effect on prices" and the "impact of [dumped] imports on domestic producers." The *Code* is clear that dumped imports must be shown to cause injury "through the effects of dumping,"<sup>191</sup> but there is no *Code* requirement that the administering agency may address injury only in conjunction with causation.

While I might think it preferable to adopt a unitary approach that examines injury only in conjunction with causation, I agree with the majority of the Panel that SIMA does not require the Tribunal to adopt such an approach. This issue is within the specialized jurisdiction of the Tribunal. It was not patently unreasonable for the Tribunal to employ a "bifurcated" analysis so long as the Tribunal was careful both to examine all proper causation evidence and to avoid attributing to dumping such injury as was in fact caused by factors other than dumping.

In the present case the Tribunal seems to have met the latter requirement. Since the Tribunal's ultimate finding was that dumping of the Subject Goods from the United States "has not caused, is not causing and is not likely to cause material injury,"<sup>192</sup> there can be no risk that the Tribunal wrongly attributed to dumping injury that was caused by other factors.

The Algoma Complainants argue that the Tribunal's "bifurcated" approach had the opposite result: the Tribunal failed to consider causation evidence relating to periods prior to the

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<sup>191</sup> *Anti-dumping Code*, Article 3:4.

<sup>192</sup> Statement of Reasons, at 31.

Deputy Minister's dumping investigation. Specifically, Algoma points to the Tribunal's analysis of market developments in 1990, in which the Tribunal found that imports had increased, but that "there is no evidence that they were sold at dumped prices."<sup>193</sup> Algoma asserts that the Tribunal should have treated the 1990 increased imports as dumped goods and accordingly determined whether those dumped goods caused injury to Canadian producers.<sup>194</sup>

The Tribunal has no jurisdiction to determine that goods have been dumped; that is the province of the Deputy Minister. Nevertheless, the Tribunal typically includes in its injury inquiry periods prior to the period of the Deputy Minister's dumping investigation, that is, periods for which there is no dumping finding. This raises two questions: First, may the Tribunal consider injury and causation evidence relating to the period prior to the Deputy Minister's investigation? Second, must it do so?

The Tribunal's analysis of market indicators, price erosion, and buyers' evidence,<sup>195</sup> which covered the entire period of the Tribunal's inquiry (1989-1992), implied in some passages that the impact of dumped imports was addressed throughout this period. For example, with regard to price erosion the Tribunal found "little verifiable evidence of import price offerings or sales to Canadian accounts that would have allowed it to conclude that dumped imports played an important role in the price declines that occurred between 1989 and 1992."<sup>196</sup> This price erosion

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<sup>193</sup> *Id.*, at 20.

<sup>194</sup> Algoma Brief, at 90-96.

<sup>195</sup> Statement of Reasons, at 19-25.

<sup>196</sup> *Id.*, at 21.

finding implies that a larger quantum of causation evidence might have led the Tribunal to find that injury had been caused by dumped imports even if that evidence had related to periods prior to the Deputy Minister's period of investigation. In other words, the price erosion finding implies that the Tribunal would be competent to find that dumping was a cause of injury even though the causation evidence, e.g., price erosion, related to periods which the Deputy Minister did not investigate and for which there was no finding of dumping. This raises the question of whether the Tribunal is competent to regard imports as dumped where the imports occurred prior to the Deputy Minister's period of investigation.

SIMA allocates the dumping determination to the Deputy Minister and the injury and causation determination to the Tribunal. The Tribunal has no jurisdiction to determine dumping: when it finds causation, the Tribunal operates on the basis of the Deputy Minister's dumping determination. While the Tribunal is not authorized to make dumping determinations, it may be entitled to infer from the Deputy Minister's dumping determination that dumping was causally related to injury even though the injury occurred in periods prior to or after the period examined by the Deputy Minister.<sup>197</sup> This is a question of the meaning and application of SIMA section 42(1)(a).

The reasoning might be as follows: The Deputy Minister's finding establishes the fact of dumped imports in the period that he investigates. The Tribunal may be entitled to infer from the Deputy Minister's finding that dumping was present and was a cause of injury in some portion of the larger period examined in the Tribunal's inquiry. Certainly the Tribunal may infer

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<sup>197</sup> See *Japan Electrical Mfrs. Ass'n v. Anti-dumping Tribunal* [1982] 2 F.C. 816.

from the Deputy Minister's dumping finding that past and present dumping will continue and is likely to cause future injury. Equally, the Tribunal should have authority to infer from the Deputy Minister's dumping finding that dumping was present and caused injury in periods prior to the Deputy Minister's period of investigation. As with any other factor in the Tribunal's inquiry concerning injury caused by dumping, the effect to be given to the Deputy Minister's dumping finding lies within the Tribunal's specialized expertise. Therefore, a determination of the temporal extent to which the Deputy Minister's dumping finding is relevant to the Tribunal's causation finding would fall within the specialized expertise of the Tribunal.

Considering that the Tribunal found that dumping was not a cause of injury over the Tribunal's entire period of inquiry, the Tribunal may have considered that it was not necessary for it to address either the legal standard that it applied to causation evidence in the period prior to the Deputy Minister's period of investigation or the way in which it applied that legal standard. The difficulty is that such an approach does not allow for judicial review. Since the Panel is not informed as to the legal standard applied by the Tribunal to injury and causation evidence relating to the period prior to the Deputy Minister's period of investigation, we cannot determine whether the Tribunal's legal standard is reasonable or whether the Tribunal's finding under that standard has a rational basis in the evidence.

One reading of the Tribunal's Statement of Reasons is that no weight can be given to the Deputy Minister's dumping finding with respect to injury and causation evidence for the period prior to the Deputy Minister's investigation. Statements by the Tribunal's counsel at the oral hearings before the Panel appear to reinforce this view. In response to questions by the Panel, counsel stated:

Because we have no evidence on dumped imports in a period prior to the period investigated by the Deputy Minister, I don't think it is proper to say that the injury is causally linked to dumping.

What we try to do is look for trends, to look at what is happening in the market and tie things into the period investigated by the Deputy Minister.<sup>198</sup>

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<sup>198</sup> Transcript of Public Hearing, Vol. 2, at 378.

The Tribunal's counsel did not explain how trends were tied into the Deputy Minister's period, but he stated that the Tribunal does not disregard injury that occurred prior to the Deputy Minister's investigation. However, since there had been no explicit dumping finding as to that prior period, the Tribunal "just can't definitively say" that injury was caused by dumped imports.<sup>199</sup> Counsel stated that the Tribunal cannot assume that imports prior to the Deputy Minister's investigation are dumped imports: "They have to consider what is happening in the market and they have to tie things to" the period investigated by the Deputy Minister.<sup>200</sup> This may mean that the Tribunal will not find dumping a cause of injury based on causation evidence for periods prior to the Deputy Minister's period of investigation.

I express no view as to whether counsel's explanation is a reasonable interpretation of SIMA, or indeed whether counsel's explanation accurately reflects the view taken by the Tribunal in the present case. I observe only that I am unable to tell from the Statement of Reasons what legal standard the Tribunal applied to injury and causation evidence for periods prior to the Deputy Minister's dumping determination. Therefore I cannot tell what weight, if any, the Tribunal gave to the Deputy Minister's dumping determination. Consequently I would remand to the Tribunal with instructions to determine what legal standard applies to Complainants' injury and causation evidence for 1989 through 1991, and to explain how the Tribunal applied that standard.

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<sup>199</sup> *Id.*, at 381.

<sup>200</sup> *Id.*, at 386.



As noted in the Panel's majority opinion, Stelco and the Algoma Complainants each contend that the Tribunal applied a causal link standard which required that dumping be the sole, exclusive, or at least a major cause of material injury, and that this required linkage was patently unreasonable. They base their argument on statements by the Tribunal in its Reasons which may indicate that it applied an incorrect causation test. For example, in its conclusion on causality, the Tribunal referred to a need to "establish that the dumped imports, and not some other factor or combination of factors, caused the injury suffered."<sup>201</sup> The Tribunal also stated several times that non-dumping factors were "the major factors" or "the major causes" that led to the injury to the Canadian industry.<sup>202</sup> These statements may imply that the Tribunal applied an incorrect "sole cause" or "major cause" test.

I agree with my colleagues that the Panel's task is not to analyze individual words or statements in isolation, but to review the whole text of the Tribunal's Reasons to determine the process followed by the Tribunal and the context in which its words were used. For this reason, I think it is not appropriate to accord controlling effect to the Tribunal's ultimate finding that "the dumping of the subject imports has not caused and is not causing material injury to the production in Canada of like goods."<sup>203</sup> Viewed in isolation, there is no indication in this finding of the application of a sole, exclusive, or major cause requirement. Nevertheless, we must examine the Reasons as a whole to determine whether to sustain the Tribunal's ultimate finding.

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<sup>201</sup> Statement of Reasons, at 29.

<sup>202</sup> *Id.*, at 20, 21, and 29-30.

<sup>203</sup> *Id.*, at 30.

Review of the Tribunal's Reasons as a whole shows that the thrust of the Tribunal's Reasons is that injury to the Canadian industry largely resulted from various non-dumping factors: non-dumping factors were described as "the major factors" or "the major causes" leading to injury.<sup>204</sup> The Tribunal found explanations for price and sales declines in non-dumping factors, including "excess domestic production capacity and drastic declines in end-user demands" in a "time of deepening recession," the relocation of certain steel users to the United States, strikes at Algoma and Stelco mills, and the high value of the Canadian dollar compared to the U.S. dollar.<sup>205</sup> In the Tribunal's view, these non-dumping factors were "the major causes" of injury to the domestic industry.<sup>206</sup> The Tribunal correctly considered that injury caused by increased imports that resulted from non-dumping factors "cannot be attributed to the effects of dumping."<sup>207</sup> The difficulty with the Tribunal's Reasons is two-fold: First, the Tribunal has not conclusively shown that there was no evidence of a causal relation between the injury and dumped imports; and second, assuming that there was evidence of a causal relationship, the Tribunal has not set forth the causation standard that it applied in reaching its ultimate conclusion that dumped imports did not cause material injury.

If the Tribunal could find that there was in fact no evidence that dumping caused injury, it would not be necessary for the Tribunal to determine a legal standard of causation. In such circumstances, the Tribunal could observe that, lacking any evidence that dumping caused injury, it need not specify the quantum of evidence that would be required to determine causation.

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<sup>204</sup> *Id.*, at 20, 21, and 29-30.

<sup>205</sup> *Id.*, at 29.

<sup>206</sup> *Id.*, at 30.

<sup>207</sup> *Id.*, at 20.

In other words, whatever the legal causation standard, that standard cannot be met where the Tribunal has no evidence of causation.

That is not the case here. Although the Statement of Reasons centres on non-dumping factors as causes of injury, the Tribunal's analysis fails to exclude the possibility that dumped imports may also have been a cause of injury.

For the year 1990, the Tribunal's analysis of market indicators found squarely that increased imports had resulted from non-dumping factors and "cannot be attributed to the effects of dumping."<sup>208</sup> But the force of this finding is undercut by the further finding that "there is no evidence" that increased imports "were sold at dumped prices" in that period.<sup>209</sup> If there were no dumped imports in 1990, it is of course true that injury could not be attributed to dumping. But, as shown above, the Tribunal did not explain how it reached its conclusion that 1990 imports were not sold at dumped prices. This conclusion also seems contradicted by the Tribunal's later discussion of auto industry sales, which implied that dumped imports were a factor in 1990.<sup>210</sup> If some imports were dumped in 1990, we are not told by what legal causation standard the Tribunal determined that injury cannot be attributed to the effects of dumping in that year.

For the year 1991, the Tribunal found that continued deterioration of prices was "fuelled by the severe drop in demand," but there was no separate finding with respect to the price

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<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*

<sup>210</sup> *Id.*, at 24.

impact of dumped imports.<sup>211</sup> Hence we do not know whether and by what legal standard the Tribunal considered that dumping was not a causation factor in 1991.

For the year 1992, the Tribunal found "intense price competition...largely fuelled...by the actions of the Canadian producers themselves."<sup>212</sup> The Tribunal acknowledged that dumped imports were a factor in price erosion in 1992: "Algoma's aggressive pricing in 1992 arose [in part] from its desire...to compete with dumped imports."<sup>213</sup> Although it found that non-dumping factors were "the major factors behind the price erosion" in 1992,<sup>214</sup> the Tribunal did not explicitly evaluate the importance of dumped imports. There is no finding as to the extent to which dumped imports were a factor in price erosion during 1992; for all we know from the Statement of Reasons, dumped imports could have been a minor factor, an insignificant factor, or no factor at all.

The Tribunal's review of the injury and causation evidence thus does not show that there was no evidence of causation. The Tribunal's review also does not establish the causation standard that the Tribunal applied in reaching its ultimate conclusion that dumped imports did not cause material injury.

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<sup>211</sup> *Ibid.*

<sup>212</sup> *Id.*, at 21.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

With respect to price erosion, the Tribunal found "little verifiable evidence of import price offerings or sales to Canadian accounts that would have allowed [it] to conclude that dumped imports played an important role in the price declines."<sup>215</sup> This statement implies a causation standard that requires an "important role" for dumped imports. Later in the same section, the Tribunal's discussion of the supplementary staff pricing survey seems to imply a different standard: the Tribunal said that the pricing survey should show an "overall picture" of domestic producers "consistently" either "reducing their prices to maintain accounts or being displaced by lower import prices."<sup>216</sup> The Tribunal's conclusion was that there was "little in the material collected by the staff" to attribute price declines to dumped imports,<sup>217</sup> but the Tribunal does not say whether it had dismissed the small quantum of causation evidence because it was "unimportant," or because it was "not consistent," or for some other reason.

With regard to sales to the auto industry, the Tribunal found "virtually no evidence of producers reducing their selling prices in response to dumped imports."<sup>218</sup> This finding does not exclude the possibility that some evidence showed that dumped imports had caused price erosion. The Tribunal did find that "Canadian mills respond less" to the "downward pressure" of dumped imports on prices "than to the very strong price-setting powers that auto manufacturers enjoy."<sup>219</sup> The latter finding may imply a "major factor" causation test, but it is contradicted (in

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<sup>215</sup> *Ibid.*

<sup>216</sup> *Id.*, at 22.

<sup>217</sup> *Id.*, at 23.

<sup>218</sup> *Id.*, at 24.

<sup>219</sup> *Id.*, at 25.

the same paragraph) by the further finding that price erosion in the automotive sector not only results from "the strong price-setting power of the large auto manufacturers," but that the auto manufacturers' price-setting power was exerted "irrespective of the availability of imports at dumped prices."<sup>220</sup> The latter determination apparently relates to the entire period of the Tribunal's inquiry.

There is no doubt that the Tribunal believed that non-dumping factors were the major causes of injury to the Canadian industry. The Tribunal's ultimate finding is also clear: the Tribunal found that there was insufficient evidence to link injury to dumped imports. But we cannot tell from the Statement of Reasons whether the Tribunal believed that there was any causal evidence linking injury to dumped imports and, if so, by what legal standard the Tribunal considered such evidence to be insufficient.

In my view, the standard of causation applied by the Tribunal is central to binational panel review of the Tribunal's findings. Since we do not know what causal standard the Tribunal has applied, and how that standard was applied throughout the Tribunal's period of inquiry, we cannot determine whether that standard is a reasonable interpretation of the governing statute. And since we lack a clear causal standard, we cannot determine whether the Tribunal's findings in application of that standard are rationally supported by the evidence.

As my colleagues have observed, SIMA itself does not specify the required degree of causal relationship between dumping and material injury or exactly what must be considered in

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<sup>220</sup> *Ibid.*

a causal analysis. In past decisions, the Tribunal, or its predecessor, found that dumped imports constituted a "significant"<sup>221</sup> or "direct"<sup>222</sup> cause of injury, or that a "significant proportion"<sup>223</sup> of material injury was attributable to the effects of dumping. More recently, in *Machine-Tufted Carpeting*,<sup>224</sup> the Tribunal found that dumped imports must be "a cause" of material injury. There is no single administrative standard against which to judge the Tribunal's analysis of causality.

In the present case, the Tribunal's Statement of Reasons does not establish the causality test applied by the Tribunal. There is also language that implies that the Tribunal may have employed a "sole cause" or a "major cause" test, which I believe the Panel would consider to be a patently unreasonable interpretation of SIMA section 42(1)(a). Since the Statement of Reasons does not show that there was a total absence of evidence of causation, it was incumbent upon the Tribunal to articulate the legal standard that it applied to the causation evidence. Because it failed to do so, I would remand the matter to the Tribunal with instructions to determine the appropriate causation standard and to apply that standard as the basis for its findings on causation.

Since I would remand for reconsideration of the Tribunal's findings with respect to past and present injury, I would also remand for reconsideration of the Tribunal's finding that the dumping of the Subject Goods from the United States is not likely to cause future material injury.

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<sup>221</sup> *Certain Wide-Flange Steel Shapes Originating in or Exported from Spain*, *supra*, note 69, at 184.

<sup>222</sup> *Drywall Screws Originating in or Exported from Taiwan*, *supra*, note 70, at 24.

<sup>223</sup> *Gypsum*, *supra*, note 58, at 18.

<sup>224</sup> *Supra*, note 57, at 21.

The Tribunal based its finding of no threat of future material injury at least in part on its flawed finding that dumping had not caused past or present injury. After concluding that the evidence failed to establish a causal link between dumping and past or present injury, the Tribunal added that in the face of "an upturn in the industry's production, exports, domestic sales and market share, employment, and production capacity utilization, the Tribunal has no basis to conclude that the domestic industry will be confronting an imminent threat of injury due to dumping in the foreseeable future."<sup>225</sup>

The Tribunal's reliance on an upturn in the domestic industry is a reasonable interpretation of the requirements of SIMA section 42(1)(a), and I am satisfied that there is a rational connection between the evidence, viewed reasonably, and the Tribunal's conclusion in this respect. Standing alone, the Tribunal's upturn finding may be sufficient to support a conclusion of no threat of future material injury. Nevertheless, we cannot tell from the Reasons whether the Tribunal found no threat of future injury because it had already (improperly) found that dumping had not caused past or present injury, or because the evidence of an upturn showed that there was no imminent threat. Accordingly, I would remand to the Tribunal to redetermine the basis for its finding with respect to future material injury.

Signed in the original by:

Daniel G. Partan

Professor Daniel G. Partan

Issued on the 18th of May, 1994.

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<sup>225</sup> Statement of Reasons, at 30.