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

IN THE MATTER OF: CERTAIN COLD-ROLLED STEEL SHEET ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA (INJURY)	CDA-93-1904-09

Before: Bruce Aitken (Chair)
Serge Anissimoff
Ian A. Hunter
Robert E. Lutz II
Klaus Stegemann

OPINION AND PANEL DECISION

July 13, 1994

C.J. Michael Flavell, Q.C., and Paul Lalonde, of Flavell Kubrick & Lalonde, Ottawa, Ontario, appeared for Bethlehem Steel Export Corporation, U.S. Steel, National Steel Corporation, Inland Steel Company, and LTV Steel Company.

Ronald C. Cheng and Gregory O. Somers, of Osler, Hoskin & Harcourt, Ottawa, Ontario, appeared for Sidbec-Dosco Inc.

John T. Morin, Q.C., and Steve D'Arcy of Fasken Campbell Godfrey, Toronto, Ontario, appeared for Dofasco Inc.

David M. Attwater, Hugh Cheetham, and Debra Steger of the Canadian International Trade Tribunal, Ottawa, Ontario, appeared for the same.

Riyaz Dattu and Colin Baxter, of McCarthy Tetrault, Toronto, Ontario, appeared for Stelco Inc.

Worthington Steel Company filed a Brief and Ms. Martine Richard of Scott & Aylen appeared in connection with a motion.

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I. STANDARD OF REVIEW

(A) Introduction

The Canadian Deputy Minister of National Revenue for Customs and Excise made a preliminary determination of dumping on March 31, 1993 with respect to certain cold-rolled sheet steel originating from the United States and on June 29, 1993 made a final determination of dumping in respect of those goods. Arising out of such determination, the Canadian International Trade Tribunal (Tribunal), under the provisions of section 42 of the SIMA conducted an inquiry and, inter alia, concluded that the dumping in Canada of the subject goods originating in or exported from the United States was injurious to the production in Canada of like goods. The Tribunal made its findings on July 29, 1993 and gave reasons for its findings on August 13, 1993.

A Binational Panel Review was requested on behalf of Bethlehem Steel Export Corp., U.S. Steel (a Division of U.S.X. Corp.), LTV Steel Company Inc., Inland Steel Co., and National Steel Corp. (the Complainants) of the Canadian International Trade Tribunal's findings dated July 29, 1993 in this matter.

The Complainants alleged various reviewable errors on the grounds of jurisdiction, law or fact having regard to the appropriate standard of review.

By way of summary, the Complainants alleged that the Tribunal erred:

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1) in finding a causal link between the alleged dumping of the subject goods by the Complainants and the material injury alleged by the Canadian industry;

2) in failing to address and grant the exclusions sought by the Complainants;

3) in failing to properly assess the impact of importations by Dofasco;

4) in failing to properly assess the impact of other non-dumping factors on the injury alleged to have been suffered by the domestic industry.

This Panel was convened to review the Tribunal's decision. The purpose of the Rules of Procedure which govern the conduct of the Panel's review process is to secure the just, speedy and inexpensive review of these final determinations in accordance with the objectives and provisions of Article 1904 of the FTA.

The Complainants filed a Brief and Reply Briefs were filed by interested parties consisting of Sidbec-Dosco Inc., Dofasco Inc., Stelco Inc., the Canadian International Trade Tribunal and Worthington Steel Company. A Reply Brief was also filed by the Complainants.

The hearing was held in Ottawa on April 11 - 12, 1994 and all of the said parties were represented by Counsel. Counsel for Worthington Steel Company appeared for the limited purpose of bringing a motion that we denied by reason of Rule 7 of Article 1904 Panel Rules.

At the conclusion of the hearing, post-hearing briefs were requested and received with respect to the question of the state of

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the Canadian law governing the granting of exclusions and we additionally mention that each of the parties filed an Aid to Argument during the course of the oral hearing.

We have carefully considered all of the proceedings before the Tribunal and Panel including all of the Briefs and oral arguments made by the participants. We are of the unanimous view that no reviewable error has been disclosed, for the reasons which follow.

(B) The Standard of Review

The Canada - United States Free Trade Agreement[1] (FTA) read together with Part II of the Special Import Measures Act[2] (SIMA) replaces judicial review of final anti-dumping and countervailing duty determinations with Binational Panel Review. This is stipulated by Article 1904 of the FTA which only applies in respect of goods that the competent investigating authority of the importing party, applying the importing party's anti-dumping or countervailing duty law to the facts of a specific case, determines are goods of the other party. Under the FTA, the United States and Canada each reserved the right to apply their relevant national laws in respect of goods imported from the territory of the other party.

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[1] Can. T.S. 1989 No. 3.

[2] R.S.C. 1985, c. S-15 as am. S.C. 1988, c. 65.

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It is important to emphasize that the Panel's role and function is restricted to applying the applicable Canadian administrative law of judicial review to determine whether the Tribunal committed any reviewable error warranting a remand by this Panel. A review by a Panel is not in any sense a trial de novo but rather the process of judicial review to ensure that the Tribunal properly discharged its statutory mandate according to Canadian law.

Our role was recently discussed in a decision of the Extraordinary Challenge Committee.

> Panels must follow and apply the law, not create it.... They are not appellate courts. Panels must understand their limited role and simply apply established law. Panels must be mindful of changes in the law, but not create them. Panels may not articulate the prevailing law and then depart from it in a clandestine attempt to change the law.[3]

This Panel spent a considerable amount of time in considering and eliciting submissions from counsel with respect to the appropriate standard of review which we find to be as follows.

(a) Statutory Authority for the Standard of Review

The Statutory authority providing for Panel review of the Tribunal's decision is given under Part II of SIMA. Section 77.15(1) requires the Panel to conduct the review in accordance

[3] In the Matter of: Live Swine from Canada, ECC-93-1904-01USA; April 8, 1992 at 11, 14 [hereinafter Live Swine].

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with Chapter Nineteen of the FTA.

Under Article 1904(1) of the FTA, the United States and Canada replaced "judicial review of final anti-dumping and countervailing duty determination with binational panel review." Further, Article 1904(3) requires the Panel to:

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

Since Canada is the "importing party" and the Tribunal is the "competent investigating authority," Article 1904(3) requires the Panel to apply the general legal principles that a Canadian court, in this case the Federal Court (Appeal Division), would apply in reviewing the Tribunal's decision. The Panel must apply the law of judicial review which is applicable in the Federal Court (Appeal Division) using the standard or review described in Article 1911.

In Article 1911, the standard of review is defined as the grounds set forth under section 28(1) of the Federal Court Act[4] (FCA). This is incorporated into SIMA by section 77.11(4), which states that a review may only be undertaken under a section 28(1) ground.

As of January 1, 1989,[5] section 28(1) provides for the following grounds of review, namely: that the Tribunal

> (a) failed to observe the principles of natural justice or otherwise acted beyond or refused to exercise

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[4] R.S.C. 1985, c. F-7.

[5] SIMA was amended by the Canada-United States Free Trade Agreement Implementation Act. S.C. 1988, c. 65 which came into force on January 1, 1989. See also s. 77.29(c) of SIMA.

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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 to the material before it.

The exact basis for reviewing the Tribunal's decision requires an examination of the applicable administrative law for exercising judicial review on the grounds set forth under section 28(1) of the FCA.

(b) Error of Jurisdiction

(i) The Standard: Correctness

The standard of review for an error of jurisdiction is the correctness test.[6] In interpreting the jurisdiction granted to it by the statute, the tribunal must be correct. If the tribunal proceeds to make a decision on an incorrect assessment of its jurisdiction, the decision is reviewable.

What may be contentious is the determination of whether a particular error may be categorized as one of jurisdiction. An

[6] See, for example, Syndicat des employes de production du Quebec et de l'Acadie v. Canadian Labour Relations Board, [1984] 2 S.C.R. 412 [hereinafter Syndicat], U.E.S., Local 298 v. Bibeault [hereinafter Bibeault], Dayco (Canada) Ltd. v. CAW-Canada, [1993] 2 S.C.R. 230 [hereinafter Dayco], Teamsters Union v. Massicotte, [1982] 1 S.C.R. 710 [hereinafter Massicotte], CAIMWAW v. Paccar of Canada Ltd.. [1989] 2 S.C.R. 983 [hereinafter CAIMWAW], Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227 [hereinafter CUPE], Blanchard v. Control Data Canada Ltd., [1984] 2 S.C.R. 476 [hereinafter Blanchard].

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error is jurisdictional when a tribunal misinterprets those statutory provisions that grant it its essential powers. In short, the tribunal must correctly perform and discharge its legal function.

As a general proposition, the following question must be affirmatively answered for jurisdiction to exist:

> [d]id the legislator intend the question [being asked by the tribunal] to be within the jurisdiction conferred on the tribunal?[7]

In deciding when an error can be termed jurisdictional, the approach outlined by Beetz in Bibeault[8] should be used. Beetz instructs us to move beyond theoretical constructs to a functional and pragmatic analysis.

> 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.[9]

The Panel "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so."[10] Further, administrative tribunals should be given the "benefit of any doubt."[11] These are the considerations that must be taken into account when using the pragmatic and functional

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[7] Bibeault, ibid. at 1087.

[8] Ibid.

[9] Ibid. at 1088.

[10] CUPE, supra note 6 at 233.

[11] Syndicat, supra note 6 at 441.

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analysis.

The functional and pragmatic approach to jurisdiction accordingly requires that a broad view be taken of the work that the Tribunal was established to undertake. So long as the Tribunal acts within the territory defined by Beetz, an attack on jurisdictional grounds may not succeed. This functional and pragmatic approach has been followed in subsequent cases by the Supreme Court, and is the established law in Canada.[12]

(c) Error of Law

(i) The Standard When the Tribunal is Within its Area of Expertise

(1) The Standard - Deference

In exercising their powers to review decisions of administrative tribunals on the basis of an error of law, Canadian courts have evolved the doctrine of curial deference. Since tribunals have been created to fulfil an administrative function expeditiously and with expertise, curial deference has become the policy of Canadian courts.

[12] See, for example, CAIMWAW, supra note 6, Canada (Attorney General) v. Public Service Alliance of Canada, [1991] 1 S.C.R. 614 [hereinafter PSAC I], Canada (Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941 [hereinafter PSAC II], Dayco. supra note 6.

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The essential question has now become the level of deference to be given to any particular tribunal. Prior to Dickson J.'s judgment in CUPE,[13] Canadian courts generally viewed any interpretation by the tribunal of its governing statute as a jurisdictional interpretation.[14] Any such interpretation by the tribunal had to be correct if it was to stand up on judicial review. CUPE changed this approach. In CUPE, Justice Dickson reiterated the need for curial deference, not only in identifying statutory interpretation by tribunals as jurisdictional, but in the level of correctness required by tribunals in interpreting non-jurisdictional provisions.[15]

The level of deference to be accorded to a tribunal is reflected in a progression of Supreme Court decisions beginning with CUPE and culminating in the recent Dayco[16] decision.

The factors to be taken into account in determining the level of deference were enunciated in United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.[17] as being:

> the legislative provisions which govern judicial review, the wording of the particular statute conferring jurisdiction on the administrative body, and the common law relating to judicial review of administrative action

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[13] Supra note 6.

[14] PSAC I, supra note 12 at 650, per Cory, J.

[15] CUPE, supra note 10 at 235-236.

[16] Supra note 6.

[17] [1993] 2 S.C.R. 316 [hereinafter Bradco].

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including the common law policy of judicial deference.[18] These are all issues that must be addressed in answering the question, "how much deference did the legislature intend this Tribunal to receive in a review?" As Sopinka J. said in Bradco,

> [d]etermining the appropriate standard of review, therefore, is largely a question of interpreting these legislative provisions in the context of the policy with respect to judicial deference.[19]

Until recently, it was thought that a privative clause in the statute was determinative of the level of deference given to a Tribunal. Generally speaking, a privative clause refers to express language found in the enabling statute which seeks to "protect" the Tribunal's decision from review. By way of example, Section 76(1) of SIMA provides that "...every order or finding of the Tribunal under this Act is final and conclusive". (See also discussion of this clause infra). If there was a privative clause, then any legal errors a tribunal made that were within its jurisdiction were not reviewable unless the legal error was so great that it was "patently unreasonable." La Forest J. in Dayco made clear that such an approach was not necessarily correct:

> 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.[20]

A careful reading of the cases prior to Dayco indicates that

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[18] Ibid. at 331-332 per Sopinka J.

[19] Ibid. at 332.

[20] Supra note 6 at 268.

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La Forest J. was not submitting a novel proposition. In situations where there has been no privative clause, or where there has been a clause actually giving wider review powers to an appellate body, the policy has been one of giving deference to specialized tribunals in interpretations of the law.[21]

One end of the spectrum is represented by Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission).[22] In that case, there was no privative clause insulating the CRTC from review. Instead, there was an appeal clause which gave the Federal Court of Appeal the power to substitute its own reasoning for that of the CRTC,[23] a power greater than a court usually has sitting in review of an administrative tribunal. Even with this power, Gonthier J. concluded that matters falling squarely within the CRTC's area of expertise deserved curial deference to the extent that only errors that were patently unreasonable were reviewable.

This approach has been used in other cases where there was an

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[21] See Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554 [hereinafter Mossop], Bradco, supra note 25, Douglas Aircraft Co. of Canada v. McConnell, [1980] 1 S.C.R. 245 [hereinafter Douglas], Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 1 S.C.R. 644 [hereinafter Lester], Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321 [hereinafter Zurich], Alberta Union of Public Employees v. Board of Governors of Olds College, [1982] 1 S.C.R. 923 [hereinafter Olds College], Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722 [hereinafter Bell Canada], and St. Luc Hospital v. Lafrance et al., [1982] 1 S.C.R. 974 [hereinafter St. Luc].

[22] Bell Canada, ibid.

[23] Ibid.

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appeal clause, and also where there was neither an appeal clause or privative clause.[24] In Olds College,[25] a limited privative clause permitted an application for certiorari or mandamus to review the Board. Laskin C.J. still gave deference in the following terms.

> Certiorari, considered in the light of ss. 9(1) and 11, is a long way from an appeal and is subject to restriction in accordance with a line of decisions of this Court which, to assess them generally, preclude judicial interference with interpretations made by the Board which are not plainly unreasonable.[26]

Similarly, in Bradco,[27] deference also demanded a patently unreasonable standard of review. In Bradco, Sopinka J. determined that there was no operative privative clause.[28] However, the standard of review to be applied was the patently unreasonable one in view of the expertise of the arbitrator and the nature of the problem he had to decide. Thus, even in cases with express appeal clauses (Bell Canada), no privative clauses (Bradco), or limited privative clauses (Olds College), deference equal to patently unreasonable has been given.

The reason for this deference is clearly due to the expertise

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[24] See Zurich, supra note 21 (an appeal clause, although deference was not given since the issue was not within the tribunal's expertise, St. Luc, supra note 21 (no privative or appeal clause) and Olds College, supra note 21 (a limited privative clause).

[25] Supra note 21.

[26] Olds College, ibid. at 927. While Laskin, C.J. used "plainly" in Olds College, there is little or no difference between "plainly unreasonable" and "patently unreasonable."

[27] Supra, note 25.

[28] Ibid. at 339.

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the particular tribunal has in relation to the question before it. Where the question of law requiring interpretation does not relate to the Tribunal's jurisdiction and falls squarely in the expertise of a specialized tribunal, the patently unreasonable standard of deference will be used.[29]

Mossop is the most recent Supreme Court decision that outlines this approach. La Forest J. explains:

> The courts have also 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 courts 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.[30] [emphasis added]

This approach is confirmed by previous decisions. In Dayco, expertise was the deciding factor in determining the standard of review.[31] Douglas urges deference in all issues except jurisdiction and errors of law which "approximate jurisdictional

issues in the broadest sense."[32] However, the best summation was given by Wilson J. in National Corn.

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[29] See Bradco, supra note 17, Mossop, supra note 21, Dayco, supra note 6, Douglas, supra note 21, Zurich, supra note 21, Lester, supra note 21.

[30] Mossop, supra note 21 at 584.

[31] Supra, note 6 at 265-267.

[32] Supra, note 28 at 275.

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> While one may question whether the Court deliberately set out to construct a "restrictive and unified" theory of judicial review through its decisions in C.U.P.E., Volvo, Douglas and Olds College, in my view there can be no doubt that this Court made clear that is was not prepared to interfere with a specialized tribunal's interpretation of its constitutive legislation where the interpretive exercise was one that was within the tribunal's area of expertise and where the impugned interpretation was not patently unreasonable.[33]

(2) The Level of Deference

In determining what level of deference is to be given to the Tribunal, the statute must be examined. Section 76(1) of SIMA is an example of a privative clause which is one factor to consider in entitling the Tribunal to deference. Section 76(1) reads:

> 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. [emphasis added]

We do not accept the argument that section 76(1) is not a privative clause for the following reasons.

The Panel operates under Part II of SIMA, and thus the findings of the Tribunal are final and conclusive subject to Part II. "Subject to" does not mean that the privative clause no longer exists. Clearly, the words "final and conclusive" have privative effect and it would be unreasonable to ignore their presence in the statutory scheme.

The second aspect that must be examined is the expertise of

[33] National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 at 1341-1342 [hereinafter National Corn].

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the CITT. Wilson J.'s remarks in National Corn are helpful in this regard.

> More precisely, it seems to me that it is for the Tribunal, staffed by experts familiar with the intricacies of international trade relations who are in the business of dealing with a large volume of trade related cases, to decide what documents may or may not be of assistance in interpreting the Act.[34]

While National Corn dealt with the Canadian Import Tribunal (CIT) the Tribunal (CITT) is the direct successor to the CIT and, it can be assumed, staffed by similar experts. Similarly, the Tribunal's area of expertise is highly specialized.

> Faced with the highly charged world of international trade and a clear legislative decision to create a tribunal to dispose of disputes that arise in that context, it is highly inappropriate for the courts to take it upon themselves to assess the merits of the Tribunal's conclusions about when the government may respond to another country's use of subsidies. If courts were to take it upon themselves to conduct detailed reviews of these decisions on a regular basis, the Tribunal's effectiveness and authority would soon be effectively undermined.[35]

These principles strongly suggest to the Panel that the Tribunal's interpretation of the law deserves deference which serves to protect the Tribunal from review save in those cases where such interpretation is patently unreasonable.

(3) Patently Unreasonable Defined

It still remains to determine what is meant by the phrase "patently unreasonable." The original term was defined by Dickson in CUPE, and indicates that the Tribunal must be more than just

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[34] Ibid. at 1348 (emphasis added).

[35] Ibid. at 1349-1350 (emphasis added).

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"wrong."

> ... [W]as the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation ...?[36]

The test has been described as a "severe test."[37]

The test has also been phrased in different ways. For example, if the interpretation is "...not clearly irrational, that is to say evidently not in accordance with reason..it should be allowed to stand".[38] However, as La Forest J. stated in CAIMWAW,

> The emphasis should not be so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result.[39]

Sopinka J. offered another approach in determining what is patently unreasonable.

> A patently unreasonable error [of law] is more easily defined by what it is not than by what it is. This Court has said that a finding or decision of a tribunal is not patently unreasonable if there is any evidence capable of supporting the decision even though the reviewing court may not have reached the same conclusion (citing Lester) ... the court will defer even if the interpretation given by the tribunal to the collective agreement is not the "right" interpretation in the court's view nor even the "best" of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement.[40]

The Panel is of the view that deference is to be accorded to the Tribunal when it is acting within its jurisdiction and squarely

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[36] CUPE, supra note 6 at 237.

[37] Blanchard, supra note 6 at 493.

[38] PSAC II, supra note 12 at 963, per Cory, J.

[39] Supra note 6 at 1004.

[40] Bradco, supra note 17 at 340-341.

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within its area of expertise.

This deference should be of a "patently unreasonable" standard. This standard of review does not:

> extend to general questions of law .... 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 the tribunal's decisions on questions of this kind on the basis of correctness, not on a standard of reasonability.[41]

La Forest J. expanded on these remarks in Dayco:

> As I noted in Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, 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 related to 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.[42]

(d) Duty to Give Reasons

The Tribunal has a statutory duty to give reasons for its decision. Section 42(3) requires the Tribunal to prepare and distribute the reasons for making its findings. The relevance of this provision to our case relates to the Complainant's argument

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[41] Mossop, supra note 21 at 585.

[42] Supra note 21 at 269.

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that inadequate reasons were given by the Tribunal for its failure to grant an exclusion order to the Complainants (see further discussion infra).

A failure to give adequate reasons is an error of law.[43] It can also amount to a denial of natural justice (see Blanchard discussion infra).

The Panel notes that the adequacy of the reasons given by the Tribunal is not an issue that is squarely within the Tribunal's expertise. Rather, it is a general question of law and the Tribunal must be correct in its interpretation of what are sufficient reasons. How detailed the reasons must be to be adequate is a question of degree.

> Whilst it is clear that the reasons given must not disclose a legal error by the tribunal in its interpretation of the relevant legislation and that the reasons must be intelligible and adequately meet the substance of the arguments advanced before it, it is difficult to state precisely the standard of adequacy to which the Courts hold tribunals. Much must inevitably depend upon the particular circumstances and the statutory context.[44]

This imprecision is understandable. On the one hand, reasons should:

> ...enable persons whose rights are adversely affected by an administrative decision to know what the reasons for that decision were. The reasons must be proper, adequate, and intelligible. They must also enable the

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[43] R. Dussault and L. Borgeat, Administrative law, A Treatise, vol. 4, 2nd ed. (Toronto:Carswell, 1990) at 138. See also Proulx v. Public Service Staff Relations Board, [1978] 2 F.C. 133 at 145 (C.A.). Blanchard supra, note 6 at 500.

[44] J. M. Evans, De Smith's Judicial Review of Administrative Action, 4th ed. (London: Stevens and Sons Ltd., 1980) at 150-151.

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> person concerned to assess whether he has grounds of appeal.[45]

Merely stating the statutory rule under which a decision is given is not sufficient.[46]

On the other hand,

> ...a tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion.[47]

If the reasons show "why or how or upon what evidence the delegate reached its conclusion"[48] any statutory requirement will be satisfied. When the decision is one where the Tribunal is entitled to use its expertise, the specificity of those reasons is further reduced.[49]

(C) Error of Fact

Section 28(1)(c) of the FCA establishes several conditions which must be met before a decision of the Tribunal can be attacked on the ground of an error of fact.

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[45] Dome Petroleum Ltd. v. Public Utilities Board (Alberta), 2 A.R. 453 at 472 (per Sinclair, J.A.), aff'd [1977] 2 S.C.R. 822.

[46] Hannley v. Edmonton (1978), 7 Alta. L.R. (2d) 394 (C.A.). See also S. Blake, Administrative Law in Canada (Toronto: Butterworths, 1990) at 56.

[47] Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association (1974), 41 D.L.R. 3d 6 at 13, [1974] 1 W.W.R. 653 at 659 (Sask. C.A.).

[48] Jones and de Villars, Principles of Administrative Law (Toronto: Carswell, 1985) at 234.

[49] Evans, supra note 45 at 328.

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a. The Tribunal must be found to have made an "erroneous" finding of fact;

b. the erroneous finding of fact must have been made

   i. in a perverse or capricious manner, or

   ii. without regard for the material before it; and

c. the decision must have been based on the erroneous finding of fact.[50]

These requirements are further restricted by the view that findings of fact should only be disturbed in the most exceptional circumstances.[51]

Sarco Canada Ltd.[52] indicated one of the exceptional circumstances.

> [T]he Court will not interfere with such a finding unless there was a complete absence of evidence to support it or a wrong principle was applied in making it.[53]

Additionally, findings of fact should not be reviewed "unless a particular result is so inevitable on the facts that any other conclusion would be perverse"[54].

In summary, the standard of review for any factual error is very high and we must be guided by the above factors when invited

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[50] Rohm & Haas Canada Ltd. v. Anti-Dumping Tribunal (1978), 22 N.R. 175 at 176-77.

[51] See Rohm, ibid. at 177, Lester. supra note 21 at 687-688, National Corn, supra note 33 at 1381.

[52] Sarco Canada Limited v. Anti-Dumping Tribunal, [1979] 1 F.C. 247 (C.A.).

[53] Ibid. at 254.

[54] Wiebe Door Services Ltd. v. Minister of National Revenue, [1986] 3 F.C. 555 (C.A.).

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to review questions of fact. Having set out the appropriate standard of review, it is now possible to examine each of the errors that were alleged by the Complainants.

II. CAUSATION

(A) Introduction

With respect to the Tribunal's finding that the dumping of U.S. imports caused material injury to the production in Canada of cold-rolled steel sheet, the Complainants allege a number of errors. First, the Complainants, in effect, argued in their brief[55] and oral argument that the Tribunal made an error of law in analyzing the causal link between the dumping of cold-rolled steel sheet into Canada and material injury to the Canadian industry, on the basis of cumulation of U.S. imports. This is distinguishable from the issue also raised by complainants regarding the Tribunal's error in not excluding the U.S. Five, which addresses the question of producer exclusion based on an alleged lack of causation by the "U.S. Five".[56] Complainants asserted at the hearing that they did not contest the findings of the Tribunal with respect to the United

[55] Complainants' Brief, at 37.

[56] See infra at page 51.

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States as a whole, [57] but argued that the Tribunal erred in determining injury on the basis of an analysis by cumulation, rather than determining whether Complainants, the U.S. Five, caused injury. Consequently, the Panel has framed this issue for review in the following way: did the Tribunal make an error of law in analyzing causation on the basis of cumulation of imports from the United States?

Second, the Complainants allege errors with respect to the Tribunal's findings on volume and pricing. The errors alleged regarding the Tribunal's findings on pricing and market share relate exclusively to the Complainants, the U.S. Five. In this category of errors, Complainants contend that the Tribunal failed to consider that average prices of imports of the U.S. Five were consistently higher than the price of domestic producers, that the Tribunal ignored that there was no price undercutting by the U.S. Five, and that the Tribunal's findings were erroneous in light of the small and declining market share of the U.S. Five. The Panel's review of these allegations of error will address the question of whether the Tribunal erred in finding causation with respect to pricing and market share for the United States as a whole.

Third, while the Complainants, as indicated above, did not contest the findings of the Tribunal with respect to the United States as a whole, [58] they contended that the Tribunal made various

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[57] Transcript of Public hearing, Flavell, vol. I, at 73.

[58] Transcript of Public Hearing, Flavell arg., at 73.

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errors of fact and law by its refusal to consider non-dumping factors. [59] This indirectly attacks the Tribunal's finding of causation with respect to the United States as a whole. The specific non-dumping factors alleged to have caused the injury are: (1) rationalization and productivity improvement of U.S. mills; [60] (2) the economic recession in 1990 and 1991; [61] (3) strikes at domestic producers Algoma and Stelco in the latter part of 1990; [62] (4) the effect of tariff reductions under the Canada-United States Free Trade Agreement; [63] (5) a shift from cold-rolled to corrosion resistant steel sheet; [64] and (6) fluctuations in the exchange rate of the Canadian dollar. [65] The Panel's review of these allegations of error will address the question of whether the Tribunal erred in finding causation with respect to non-dumping factors (rationalization, recession, strikes, FTA, shift from cold-rolled to corrosion-resistant steel, and fluctuations in currency) for the United States as a whole.

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[59] Complainants' Brief, at 48.

[60] Complainants' Brief, at para. 74.

[61] Complainants' Brief, at 51-54.

[62] Complainants' Brief, at 48-51.

[63] Complainants' Brief, at 24.

[64] Complainants Brief, at 54-55.

[65] Complainants' Brief, at 55-57.

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(B) Cumulation

The Tribunal concluded "that the dumping in Canada of cold-rolled steel sheet originating in or exported from the United States of America has caused, is causing and is likely to cause material injury to the production in Canada of like goods. . ." [66] In concluding this, the Tribunal assessed the cumulative effect of the dumped goods from all subject countries. [67] The Complainants, on the other hand, argue that the Tribunal should have "deal[t] specifically with Complainants and their detailed case for an exclusion based on the particular facts of their participation in the market," which, they contended, indicated a lack of underpricing and other factors with respect to the U.S. Five that should have exculpated them from liability. [68] Because of these factors, Complainants contend, the Tribunal erred in its determination that cumulated imports (including those of the U.S. Five) caused material injury to the Canadian industry. Thus, Complainants raise the issue of whether the Tribunal made an error of law in analyzing causation on the basis of cumulation of imports from the United States. In reviewing this question of law, the Panel, as discussed above, [69] will determine whether the Tribunal's interpretation of the law was patently unreasonable.

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[66] Statement of Reasons, at 32.

[67] Ibid.

[68] Complainants' Brief, at 23.

[69] See supra at page 1.

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SIMA 42(1)(a)(i) requires the Tribunal to establish "[w]hether the dumping or subsidizing of subject goods...has caused, is causing, or is likely to cause material injury." Neither SIMA nor the GATT Anti-dumping Code [70] expressly require the Tribunal to determine causation on the basis of individual sources or on the basis of cumulating dumped imports from all sources under investigation. Thus, the decision to cumulate is left by law to the discretion of the Tribunal.[71]

Furthermore, the determination of causation through cumulation analysis is deeply rooted in the practice of the Tribunal. In Hitachi v. Anti-dumping Tribunal, [72] the Supreme Court of Canada held that the CITT is not required to relate its findings of material injury to each exporter, and that it can properly make a finding of material injury in respect of all goods from a given country irrespective of whether, in the case of some, there was no

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[70] See discussion of the relevance of GATT, infra at page 27.

[71] Complainants' Reply Brief, at 66.
The Complainants even conceded in their reply brief and in oral argument that,

> the Tribunal may, and often does cumulate. However, cumulation is not obligatory; it is not required by SIMA or the Gatt Anti-dumping Code. Cumulation is the name given to what the Tribunal does, in the exercise of its discretion, when considering the impact of injury-causing imports globally rather than on a source by source basis.

The Complainants further acknowledge that after causation based on cumulation is found, the Tribunal may consider "properly presented" cases for exclusion.

[72] (1979), 1 S.C.R. 93, 93-94.

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evidence before it of injury or likely injury. Tribunals have consistently rejected arguments of de minimis impact (e.g., zero margins of dumping, very low volumes of imports, or lack of evidence of lost sales) made by individual importers in their finding of material injury and causation.[73] The Tribunal stated that "Even when dumped imports from certain sources are small and 'cannot be found to have contributed significantly to the plight of the domestic producers when considered separately,' it is their cumulative impact combined with all other imports which is to be assessed in considering the question of material injury."[74]

As the Tribunal stated, "[It] assessed the cumulative effect of all imports from the named countries. . . [O]nly after the cumulative effect of the dumped goods from all subject countries has been analyzed that exclusions, if any, can be envisaged.'"[75]

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[73] Sacilor Acieres, et al. v. Anti-Dumping Tribunal, et al. (1985), 9 C.E.R. 210 (C.A.); Wide Flange Steel Shapes Originating in or Exported from Spain (1988), 15 C.E.R. 241, Inquiry No. Cit-7-87; Oil and Gas Well Casing Originating in or Exported from Aregentina, Austria, the Federal Republic of Germany, the Republic of Korea and the United States of America (1986), 11 C.E.R. 213, Inquiry No. CIT-15-85.

[74] Statement of Reasons, at 28, citing Certain Carbon and Alloy Plates Originating in or Exported from Belgium, Brazil, Czechoslovakia, the Federal Republic of Germany, France, the Republic of South Africa, the Republic of Korea, Romania, Spain and the United Kingdom (1983), 6 C.E.R. 21 at 33-34; Anti-dumping Tribunal Inquiry No. ADT-10-83, Statement of Reasons, December 29, 1983, at 9-10.

[75] Statement of Reasons, at 28.

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Accordingly, the Panel finds that the decision to cumulate with respect to individual countries is within the Tribunal's discretion and no reviewable error has been committed.

(C) <u>Pricing and Volume</u>

As indicated above, this appellate claim also involves the issues of pricing and market share (volume). The Complainants urge us to review whether or not the Tribunal erred in finding causation with respect to pricing and market share (volume). [76]

(a) Pricing

Complainants argue that the prices at which goods of the U.S. Five were sold were consistently higher than the prices prevailing in Canada at the time. Thus, they allege that the Tribunal erred in law by ignoring evidence that the Complainants were not undercutting the Canadian competitors, which they claim is mandated by the Anti-dumping Code, Art. III (2). [77] The Complainants also allege "failure of the Tribunal to appreciate that the Complainants' higher prices could not have caused lost sales due to price suppression or price erosion was a finding of fact made 'without regard for the material before [it]' and therefore

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[76] <u>Complainants' Brief</u>, at 48.

[77] <u>Anti-Dumping Act</u>, R.S.C. 1970, c. A-15, ss. 16(3).

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deserving of review and remand."[78] They argue that the evidence provided by the Tribunal staff's pricing survey failed to support the finding that price undercutting caused injury because imports from the U.S. Five were consistently higher than the prices prevailing in Canada during the period of inquiry, 1989-1992.

(i) Error of Law with Respect to the GATT Anti-dumping Code, Art. 3(2)

Complainants' claim of legal error involves the question of whether the Tribunal properly considered instructive GATT provisions when determining causation. In particular, they argue that the following provision was not appropriately applied by the Tribunal:

> 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. GATT Anti-dumping Code, Art. 3 (2).

As discussed <u>infra</u>,[79] GATT obligations are Canadian law and are to be applied by the Tribunal and this Panel only if they are implemented into domestic law. Otherwise they may be referred to in interpreting ambiguous terminology intended to implement

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[78] <u>Complainants' Brief</u>, at 23, citing Federal Court Act section 28(1)(c).

[79] See <u>infra</u> at page 27.

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Canada's obligations, or to guide the promulgation of domestic legal rules to implement them. [80] Thus, in reviewing this challenge, the Panel is not required to apply the requirements of Article 3(2), only those aspects of it, if any, that are contained in domestic legislation or administrative rules. This Panel, accordingly, will decide whether the Tribunal's consideration of price was patently unreasonable in light of the applicable legislation and administrative regulations.

The Tribunal rejected using average prices as an indicator of material injury and noted that there were "drawbacks of average prices as an indicator, particularly for import prices." [81] The Tribunal noted that average U.S. prices were high, but stated that "differences in average prices are clearly due to different product mixes, which was confirmed during testimony." [82] Further, the Tribunal noted the "[a]verage prices for sales of imports, particularly those from the United States, do not represent prices for all sales made in the market." [83] It is clear that the Tribunal relied primarily on a finding of price erosion and price suppression, supported by account specific evidence of lost sales and low price offerings, and some evidence of undercutting. [84] The

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[80] See e.g., Canadian International Trade Tribunal Rules, SOR/91-499, Canada Gazette Part II, August 28, 1991.

[81] Statement of Reasons, at 25.

[82] Statement of Reasons, at 17.

[83] Statement of Reasons, at 17 n. 11.

[84] Statement of Reasons, at 17 and 24.

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Tribunal found that the allegations of the domestic industry were corroborated by the testimony of end-users and information provided in response to questionnaires. [85] Thus, the Tribunal did consider price as the necessary nexus -- primarily low price offerings-- but also lost sales due to low prices causing price erosion.[86] In view of the Tribunal's explanation, therefore, we do not find an error of law.

(ii) Error of Fact with Respect to Pricing

The second alleged error asserts that the Tribunal erred in properly evaluating the evidence with respect to the causation of pricing factors to injury. While Complainants have attempted to have us review the evidence supporting or not supportive of causation against the U.S. Five, the Tribunal made its findings with respect to the U.S. industry as a whole, and we have already indicated that the Tribunal had discretion to do so. [87]

The Panel reviews here whether the Tribunal's finding of causation with respect to the United States as a whole is reasonably supported by the evidence before the Tribunal. In this case, the domestic industry participants substantiated their

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[85] Statement of Reasons, at 26.

[86] Statement of Reasons, at 25-27.

[87] See supra, at page 25.

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allegations of lost sales and low-priced offerings obtained from questionnaires, internal memos, field reports and written quotations, purchase orders and invoices. [88] The evidence supports the Tribunal's findings of the role that the steel service centres and automotive purchasing sector played on the industry. [89] Dofasco and Stelco both offered testimony from independent automotive sector witnesses and documented sales and purchaser questionnaires evidencing lost sales and low-priced offers of American imports occurring during the investigative period. [90] There was also evidence that service centres sold low-priced steel from various U.S. sources, and evidence of lost sales and undercutting responses by Canadian producers to compete with dumped imports. The Tribunal analyzed "specific market-sector evidence and the allegations of <u>lost business</u> and <u>price erosion</u> filed by the participants to verify what role dumping played in the erosion of prices." [91] and concluded:

> The evidence showed that the most significant price erosion took place in those segments of the market where imports were present, e.g. steel service centres and the automotive, tubing and strapping industries. In most of these segments, the quality of the goods and technical support services are less crucial. On the other hand, prices declined only marginally in the appliance sector, where import penetration was limited and where the domestic industry has a long, established presence based on high level of service. Thus, a significant correlation exists between the extent of price erosion on the

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[88] <u>Statement of Reasons</u>, at 26.

[89] <u>Statement of Reasons</u>, at 25-26.

[90] <u>Statement of Reasons</u>, at 26.

[91] <u>Statement of Reasons</u>, at 25 (emphasis added).

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one hand, and the level of imports on the other.[92]

The Tribunal noted steel service centres impacted industry prices and the distribution of cold-rolled steel sheet as the largest collective buying segment of the subject market. As the largest buyers, they were the main focus for import competition. [93] More significant is the fact that this market sector increased its share of imports from one quarter to one third between 1989 to 1992. [94]

The effect that steel service centres had on market prices further illustrates the Tribunal's reasoning not to use average price as the nexus to find causation. The Tribunal acknowledged average prices increased between 1991 and 1992, but these prices did not reflect the depressive effect that U.S. import prices had on the market since these average prices were based only on 60 percent of the imports. [95] The Tribunal indicated:

> the average price data for sales of U.S. imports exclude sales by numerous small steel service centres and traders whose sales account for roughly 40 percent of imports from the United States, which witnesses characterized as being disruptive in their marketing in Canada. [96]

Service centres purchased U.S. imports and paid lower prices than those available from the domestic mills. [97] The Tribunal noted the effect of import purchases at low prices were pervasive

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[92] <u>Statement of Reasons</u>, at 25.

[93] <u>Statement of Reasons</u>, at 25.

[94] <u>Ibid.</u>

[95] <u>Statement of Reasons</u>, at 24.

[96] <u>Ibid.</u>

[97] <u>Statement of Reasons</u>, at 25.

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throughout the entire market because the service centres, in turn, passed the low prices to end-users, thus contributing further to the price depression and pressure on the domestic industry to lower its prices for direct sales to end-users. [98]

The Tribunal heard evidence that, during the review period, this sector was subjected to low-priced import offerings from the U.S. and that these offerings contributed to price erosion by establishing a floor price which the domestic producers were forced to meet. [99] The Tribunal found that "(t)he testimony of witnesses confirmed that offerings from brokers and agents, often operating with . . . facsimile machine[s] and telephone[s] were particularly disruptive in the marketplace" as they continually set prices through low-priced offerings. [100] These offerings were evident in 1989-1990 and continued in 1991-92.[101]

Domestic producers filed evidence and confirmed their allegations with testimony of witnesses from the steel service centres. Illustrating that the steel service centres were regularly receiving very low-priced import offerings from various brokers and potential exporters from U.S. suppliers. The domestic producers demonstrated they were forced to submit lower bids and

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[98] Ibid.

[99] Ibid.

[100] Ibid.

[101] Ibid.

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reduce prices in order to compete with prices established in the market by the low-priced offerings in 1990-92 even in instances where no sale was made.

The Tribunal concluded that it "is convinced that the domestic industry has demonstrated that, in the period from mid-1991 through 1992, both sales and offerings of low-priced imports from the subject countries were driving prices down in Canada." [102] We find no error of fact in the Tribunal's conclusion concluded that the evidence confirmed imports from the U.S. played an important role in the price erosion over the analysis period. "While average prices of U.S. imports were higher in 1992 than in 1990 or 1991, such prices were found to be dumped, and it was to these depressed price levels that Canadian producers were forced to react." [103] Thus, the Tribunal's conclusion was supported by specific evidence of lost sales and low-priced offerings.

(b) Market Share

The Complainants also allege the Tribunal erred both in law and fact in finding causation based on the domestic industry's lost market share during the period under investigation. [104] The Complainants assert the Tribunal erred in law when it did not apply

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[102] Statement of Reasons, at 27.

[103] Statement of Reasons, at 26.

[104] Complainants' Brief, at 28.

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the terms of the GATT art. 3(2) concerning a finding of causation based on volumes of dumped imports. [105] The Complainants also allege that the Tribunal erred in fact when finding causation was due to their exports when evidence revealed that the total market share for the U.S. Five was approximately 2.7% and had declined significantly in 1992, the year in which material injury was found. [106]

Again, the Panel will review allegations of error of law and fact by applying the appropriate standards of review, as indicated above. [107] The Panel will not consider the arguments of the Complainants in isolation, but will review whether the finding against the U.S. as a whole is in error.

The GATT Anti-dumping Code art. 3(2) requires causation based on the volume or market share of dumped imports to be significant. The provision states:

> With regard to volume of the dumped imports the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country.

As we have previously indicated,[108] this GATT provision is not itself directly applicable. Rather, to the extent it is

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[105] Ibid.

[106] Complainants' Brief, at 27-31.

[107] See infra at page 1.

[108] [Adam: cite to previous discussion of GATT in the pricing/causation part of my discussion]

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implemented into Canadian law, e.g. at CITT Rule 61, it is applicable. [109]

Generally, the Tribunal noted "[t]here was no dispute that Canadian producers' financial performance declined over the period reviewed . . . cover[ing] the years from 1989 to 1992." [110] But the Tribunal did articulate specific findings of material injury suffered by the domestic industry due to the volume of dumped imports. Pertaining to market share, the Tribunal focused on "indicators relating to sales in the domestic market . . . includ[ing] trends and levels of imports and market shares, prices and financial performance." [111] The Tribunal concluded "this case is about volumes lost to imports over a good part of the period, but especially about the decline in prices of cold-rolled steel

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[109] The words contained in Rule 61 are quite similar to GATT, art. 3(2), however it is noteworthy that the Rule refers to "information to be provided by parties."

"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 on the prices of like goods in the domestic market, including
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> > (i) whether there has been a significant increase in the importation into Canada of the dumped . . .goods, either absolutely or relative to the production or consumption in Canada of like goods. (CITT Rule 61.).

[110] Statement of Reasons, at 19.

[111] Ibid.

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sheet that characterized the period."[112]

The Tribunal found that:

> [t]otal sales revenues declined further in 1992, as slightly increased sales volumes were more than offset by a further decline of $25 in average revenue per net ton. The Tribunal considers the losses experienced in 1992 to constitute material injury to the domestic industry. As such, the Tribunal felt it unnecessary to address the injury suffered prior to this period.[113]

The Tribunal noted that:

> The market for cold-rolled steel sheet totalled some 1.1 million net tons in 1992, roughly the same level as in 1991. However, the market was 20 percent smaller than in 1989, the biggest drop occurring in 1990 (11 percent). Domestic producers' share of sales to the market dropped by 8 percentage points over the 1989-91 period, but increased by 2 percentage points in 1992. The combined share of the market held by sales of imports from the subject countries increased from 5 percent in 1989 to 13 percent in 1991. In 1992, their share decreased to 11 percent, roughly twice the share held in 1989.[114]

Furthermore, the Tribunal found that "[i]mports from the United States more than doubled between 1989 and 1991, but declined in 1992.[115]

These findings cannot be understood in isolation, but must be analyzed in conjunction with the rest of the Tribunal's findings. According to the Tribunal, U.S. imports declined in 1992 because the domestic industry undercut prices to regain lost sales and

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[112] Statement of Reasons, at 20.

[113] Statement of Reasons, at 28.

[114] Statement of Reasons, at 16.

[115] Ibid.

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compete with the United States' low priced offers. [116] The Tribunal based this finding on evidence of market trends for the period.

The Tribunal considered it significant that the Deputy Minister found such a large number of U.S. importers dumping into Canada during the investigation period. [117] 108 of the 117 importers dumping were from the U.S. The Tribunal found the U.S. held the largest share of imports during the inquiry period and the weighted average margin of dumping for the United States for "'sampled and non-sampled exporters making a voluntary submission' was 17 percent." [118] The Tribunal noted that the "magnitude of this margin of dumping constitutes a substantially unfair price advantage in a commodity product such as cold-rolled steel sheet." [119] Furthermore, the Tribunal directed its attention to the U.S. Five when evaluating market share and material injury. There was evidence submitted by domestic producers that Complainants made up 30-43% of U.S. imports into Canada between 1989 and 1992. [120] Although several of them were found to have 0 per cent dumping margin, most of their sales were to small steel service centres and brokers who were the most disruptive to the price stability of

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[116] Statement of Reasons, at 28.

[117] Statement of Reasons, at 26.

[118] Statement of Reasons, at 27-28.

[119] Statement of Reasons, at 28.

[120] Statement of Reasons, at 11.

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cold-rolled steel, especially in 1990, who subsequently exported to Canada at dumped prices. [121]

The record and the findings must be read and understood in their entirety. The Tribunal did not analyze each fact in a vacuum but considered their effect on each other. In doing so, the Tribunal could find that before the domestic industry had decided on price reductions, the United States market share was higher. Once the domestic producers decided to compete with the low prices and low-priced sales, then the U.S. market share decreased as a result of price erosion which in turn caused material injury to the domestic industry. Under this analysis, we cannot find that the Tribunal committed a reviewable error.

(D) Non-Dumping Factors

Complainants allege that the Tribunal "failed to properly assess the importance of non-dumping factors in this case and has committed reviewable errors in this regard." [122] They assert that non-dumping factors--including rationalization, strikes, recession, shift from cold-rolled steel to corrosion-resistant, the FTA, and fluctuations in the exchange rate of the Canadian dollar were the cause for injury to Canadian cold-rolled steel sheet producers. This Panel is therefore called upon to determine whether the

[121] Ibid.

[122] Complainants' Brief, at 48-57.

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Tribunal properly considered the effect of such non-dumping factors, as well as whether the evidence cited by the Tribunal for its findings with respect to many of the alleged non-dumping factors reasonably supports the Tribunal's findings that such factors did not cause the injury alleged.

(a) General

Complainants allege that the Tribunal "failed to properly assess the importance of non-dumping factors in this case." [123] In determining whether dumping has caused injury to a Canadian industry, the Tribunal applies SIMA which was "designed to implement Canada's GATT obligations." [124] Thus, SIMA section 42 prescribes that material injury to a domestic industry be "caused" by the dumping of goods. This provision means that factors that may also be causing material injury to the domestic industry ("non-dumping factors") are to be separated from the dumping factors. The GATT Anti-Dumping Code Art. 3(4) to which Canada is a party [125] speaks to this point:

> "It must be demonstrated that the dumped imports are, through the effects... of dumping, causing injury within

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[123] Complainants' Brief, at 48.

[124] National Corn, supra note 33 at 1371.

[125] Anti-Dumping Act, R.S.C. 1970, c. A-15, ss. 16(3).

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> the meaning of this Code. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports."

While this Panel appreciates that the Code itself cannot create domestic legal obligations independent of Canadian implementing legislation, it may be used to clarify ambiguities in such domestic laws [126] as well as guide judicial and administrative understandings of domestic law implementing Canada's international GATT obligations.[127]

Consistent with the law and this guidance, the Panel concludes that the CITT considered the non-dumping factors when evaluating causation. It weighed and balanced the dumping and non-dumping factors, and decided what importance to give to each. [128] The Statement of Reasons describes how the Tribunal proceeded:

> The Tribunal believes that most of these [non-dumping] factors have played a role, but that their relative importance has varied over time. To understand fully how they affected the industry and the market, the Tribunal has reviewed them chronologically, starting in the 1980's, and concluding with the year in which dumping was found. The objective of the Tribunal's analysis has been to determine the importance to be given to each of the factors and, especially, to circumscribe the time period in which these factors had their primary impact on the industry.[129]

After evaluating each of the non-dumping factors, the Tribunal discounted the effect of these factors and stated:

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[126] See National Corn Growers, supra.

[127] E.g., CITT Rule 61.

[128] Statement of Reasons, at 19-25.

[129] Statement of Reasons, at 20.

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> The Tribunal has no doubt that the dumping of cold-rolled steel sheet has caused and is causing material injury to Canadian producers of cold-rolled steel sheet. Canadian producers chose not to match low-priced import offers, particularly in 1991 when they were first faced with import competition, thereby losing substantial market share. In 1992, the domestic industry endeavoured to recapture part of the market share that it had lost. It was relatively unsuccessful in meeting competition from imports from the subject European countries. Imports continued to increase through 1992 as the domestic industry could not meet their prices. It was more successful in meeting competition from the United States, but this was achieved only by severely reducing prices. Had it not reduced its prices, the domestic industry's market share would have continued to decline. The evidence and testimony demonstrate that the low prices required to obtain sales were the direct cause of the industry's losses of $44 million in 1992.... The Tribunal considers the losses experienced in 1992 to constitute material injury to the domestic industry.[130]

While non-dumping factors may have effected the domestic industry at an earlier time, the Tribunal found that they had become unimportant by 1992:

> Based on this positive evidence, the Tribunal is convinced that the domestic industry has demonstrated that, in the period from mid-1991 through 1992, both sales and offerings of low-priced imports from the subject countries were driving prices down in Canada. There may have been lingering effects of certain other factors that the Tribunal recognized as having negatively affected the industry earlier, but, by this time, the effects of these factors had become much less significant and clearly unimportant, compared to the effects of low-priced imports from the subject countries.... To summarize, the Tribunal finds that the factors other than dumping do not explain the decline in domestic prices in the period from mid-1991 to 1992.[131]

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[130] Statement of Reasons, at 28 [footnotes omitted].

[131] Statement of Reasons, at 27 (footnote omitted).

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(b) Specific Factors

Despite this general consideration of non-dumping factors required by the law, Complainants have further alleged that the Tribunal has committed reviewable error by failing to draw conclusions that specific non-dumping factors caused injury to the Canadian industry, and that in some instances of alleged significant non-dumping factors, the Tribunal made erroneous findings of fact. The Panel will look at each non-dumping factor to determine whether there is reviewable error.

(i) Rationalization

Complainants allege that the Tribunal failed to recognize that over the last decade the rationalization and productivity improvement of U.S. mills producing cold-rolled steel sheet resulted in reduced costs which in a competitive market resulted in reduced prices. [132] The Tribunal noted that major rationalization efforts occurred in the steel industry in the 1980's. [133] These rationalization efforts included cutting employment by 80 percent between the years of 1983-88, which reduced production capacities by 40 percent. [134] Additionally, the Tribunal acknowledged that

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[132] Complainants' Brief, at para. 74.

[133] Statement of Reasons, at 21.

[134] Id.

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the Canadian market lagged behind U.S. rationalization efforts and a price discrepancy in favour of the U.S. industry emerged in the late 1980's in Canada. [135]

Despite these productivity gains and rationalization efforts, the Tribunal also found that the U.S. steel industry was plagued during 1989-1992 with declining prices and profitability due to overcapacity. [136] Evidence further indicated that the U.S. industry turned to the Canadian market at this time. Thus, this Panel determines that the Tribunal could reasonably find that low prices were not due to rationalization, but to dumped imports in the face of a declining domestic market.

(ii) Recession

Complainants allege that the Tribunal made reviewable errors in failing to properly assess the impact of the economic recession on the injury alleged by the domestic industry. The Tribunal acknowledged "[s]oon after the Canadian industry felt the effects of increased imports and low prices from the United States, the North American market experienced an economic recession. "(The

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[135] Ibid.

[136] Ibid.

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recession) affected demand and prices in both countries through 1990 and into 1991."[137] However, the Tribunal ultimately concluded that the continued price erosion was due to the fact that the domestic industry was competing with the U.S. importers' low-priced offerings in order to regain lost sales and not with the effects of the recession.[138] Tribunals have discounted the effects of a recession when faced with continual downward pricing trends during the same time frame. In Stainless Steel Plate,[139] the Tribunal noted that the recession had contributed to the domestic's injury, but that it did not explain the price erosion which took place at the same time. The Tribunal stated:

> It is acknowledged on all sides that the deep economic recession of 1982 contributed to an important degree to the present depressed state of the domestic industry concerned. The market for plate is heavily dependent on new capital-spending projects... With the cancellation or deferral of projects which occurred in late 1981 and throughout 1982, demand for stainless steel plate declined dramatically. However, of equal importance, in the estimation of the industry is to explain the poor financial performance in late 1981 and more significantly in 1982, was the effect of the price suppression and erosion caused by dumped imports in the domestic market and the loss of significant market share.[140]

Likewise in the instant case, the Tribunal determined that U.S. producers "more than doubled [their imports] to Canada between

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[137] Statement of Reasons, at 21.

[138] Statement of Reasons, at 24.

[139] (1984), 5 C.E.R. 266, at 274.

[140] Ibid.

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1989 and 1991."[141] Indeed, the recession paralleled a time when there was a significant decrease in price, attributed to dumped goods. For instance, the Tribunal noted the domestic industry's price decreased by 11 percent in 1990 and by a further 8 percent between 1989-91.[142] The Tribunal also recognized that:

> As the industry moved through 1991, it was faced with a relatively depressed market and low prices. . . . From mid-1991 onward, producers' average selling prices continued to decline. Average quarterly prices for each domestic producer decreased overall between 7.5 and 13.0 percent from the second quarter of 1991 to the fourth quarter of 1992.[143]

The Tribunal reasoned that this continued decrease in price during the post-recessionary period evidenced that the recession did not have an effect on "the continued drop in domestic producers' prices between the second half of 1991 and the end of 1992."[144] Based on the information of pricing trends in the record and that other non-dumping factors were insignificant, this Panel finds that the Tribunal made no error of fact in concluding that the recession was not a significant factor of injury in this case.

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[141] Statement of Reasons, at 16.

[142] Statement of Reasons, at 22.

[143] Statement of Reasons, at 24.

[144] Statement of Reasons, at 24.

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(iii) Strikes

Complainants allege that the Tribunal committed reviewable errors in failing to properly assess the impact of the strikes at Algoma and Stelco. The Tribunal did consider the effects of the domestic producers' strikes on the market. The strikes at Stelco and Algoma lasted over three months beginning in August 1990. The Tribunal noted that the strikes were "an important factor in further enhancing the entry of imports into Canada".[145] Yet domestic producers not engaged in the strikes also experienced a decline in market share in 1991.[146] More importantly, there was the downward price trend beginning in 1989 through the second quarter of 1990, and it continued in spite of a restricted domestic supply.[147] The Tribunal attributed this decline to low-priced imports, "primarily from the United States."

Thus, the Tribunal's determination that there were downward pricing trends even though there was a restricted domestic supply of product allowed it to reasonably conclude that the strikes were not significant factors of the material injury.

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[145] Statement of Reasons, at 22.

[146] Ibid.

[147] Ibid.

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(iv) Free Trade Agreement

Complainants allege both error of law and fact with respect to the effect of the FTA on prices. [148] They argue that the Tribunal equated pressures resulting from lower prices in the United States with injurious dumping, and therefore committed an error of law. They also argue that a reviewable error of fact was made with respect to the price effects of the FTA.

The Tribunal acknowledged the implementation of the FTA in 1988 had an effect on the Canadian steel industry. [149] Although the Tribunal stated a need for more conclusive evidence to assess volume effects of the FTA, it focused on the FTA's impact on prices since the domestic industry's case was based upon price erosion and suppression. [150] The Tribunal acknowledged that the FTA would effect price and aid in lowering Canadian prices to U.S. levels because Canadian end users would pressure the domestic industry to compete with U.S. prices.[151]

However, the Tribunal found the FTA did not have a significant effect on prices. First, Canadian prices already paralleled U.S.

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[148] Complainants' Brief, at 24.

[149] Statement of Reasons, at 22.

[150] Statement of Reasons, at 23.

[151] Ibid.

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prices by 1991.[152] Specifically, witnesses for domestic industry testified "from a strategic planning standpoint, there is a single North American market for cold-rolled steel sheet."[153] Second, the Tribunal explained the evidence showed "market players made their strategic decisions prior to or soon after the implementation of the FTA."[154] Finally, the Tribunal rejected Complainant's argument that tariff reductions had a significant impact on prices. Most-favoured-nation (MFN) tariff reductions totalling 0.8 percent a year represent a fraction of the decline in prices since 1989, and many US imports already entered at lower than MFN rates or duty-free.[155]

This Panel finds no error with respect to the Tribunal's consideration of the FTA non-dumping factor; the Tribunal had evidence on which to conclude that the implementation of the FTA did not significantly impact prices on cold-rolled steel.

(v) Shift from Cold-rolled to Corrosion-resistant Steel

Complainants alleged that the Tribunal committed a reviewable error of fact in failing to properly assess the impact of the shift

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[152] Statement of Reasons, at 23.

[153] Statement of Reasons, at 22.

[154] Statement of Reasons, at 22-23.

[155] Statement of Reasons, at 23.

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from cold-rolled to corrosion-resistant steel sheet. [156] However, the Tribunal rejected arguments presented by Complainants that the shift from cold-rolled steel to corrosion-resistant steel caused the domestic industry injury. [157] The Tribunal stated "any shift from cold-rolled to corrosion-resistant steel sheet would not affect total production", because cold-rolled is a substrate of corrosion-resistant steel sheet. [158] Furthermore, there is substantial evidence that the domestic industry is positioning itself to take advantage of that market.

In Stainless Steel Plate, [159] non-dumping factors were determined to be the cause of injury. Much of the domestic industry's lost sales were due to the fact that they could not meet demand for wide-plate. [160] However, in this case, the Tribunal found no evidence to support the proposition that an increased demand for corrosion-resistant had replaced the demand for cold-rolled.[161] Therefore, the Tribunal made no error when it found that the shift in products did not cause the domestic industry

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[156] Complainants' Brief, at para. 167.

[157] Statement of Reasons, at 23.

[158] Ibid.

[159] Certain Stainless Steel Welded Pipe Originating in or Exported from Taiwan (1991), 4 T.C.T. 3323. Inquiry No. NQ-91-001.

[160] Ibid., at 274-275.

[161] Statement of Reasons, at 23.

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harm.

(vi) Fluctuations in Currency Exchange Rate

The Complainants argue that the Tribunal, in failing to properly assess the impact of fluctuations in the exchange rate of the Canadian dollar, committed a reviewable error.[162]

The Tribunal determined that fluctuations in currency did not contribute to the domestic industry's injury where there was no correlation between the U.S. exchange rate and U.S. imports. [163]

> "..[T]he Tribunal concludes that there has not been a close relationship between exchange rate changes and the prices and volumes of imports from all the subject countries. With respect to the United States in 1992, however, some exporters have adjusted their prices, with consequent effects on volume. Many other U.S. exporters continued to price or make offers at prices that did not reflect exchange rate changes. It was in 1992, that Revenue Canada found that imports from the United States had been dumped at an average margin of dumping of at least 17 percent, and clearly, the price-suppressive effects of dumping greatly outweighed any theoretical price-enhancing effects of a weaker Canadian dollar."[164]

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[162] Complainants' Brief, at 55.

[163] Statement of Reasons, at 23-24.

[164] Admin. Rec., v.2 at 150 and 154.18.

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Thus, this Panel finds no reviewable error with respect to the Tribunal's assessment of the impact of fluctuations in the exchange rate.

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III. FAILURE TO ADDRESS AND GRANT THE PRODUCER EXCLUSIONS SOUGHT BY THE COMPLAINANTS

(A) Introduction

The allegation that the Tribunal erred in failing to address and grant producer exclusions sought by the Complainants is one of five issues presented in the Complainants' Brief.[165] The list of five issues was repeated in the Complainants' Reply Brief and during Oral Argument. However, it became apparent early in the Oral Argument that the exclusions issue dominated all others. This was one of the reasons why the panel requested all parties that wished to respond to submit post-hearing briefs on the narrow issue of the legal standard under Canadian law for granting producer exclusions.[166]

The Complainants allege that the Tribunal, with respect to its decision not to grant producer exclusions for the five U.S. producers, "committed an error of jurisdiction, a patently unreasonable error of law and an egregious error of fact".[167] According to the Complainants, the Tribunal committed errors of jurisdiction and law at two stages. First, in the process of dealing with the requested exclusions. "Further, once

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[165] Complainant's Brief, at 8.

[166] Transcript of Public Hearing, at 410.

[167] Complainant's Brief, para 113.

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appropriately engaged in the exercise of jurisdiction, the Tribunal is required by its enabling statute and administrative law principles to give reasons for the decisions it makes; failure to do so is also an error of jurisdiction and an error of law."[168] In what follows below, we will first consider each of the three alleged errors as they concern the Tribunal's decision not to grant the requested producer exclusions and then turn to the allegation that the Tribunal failed to give reasons for its decision.

(B) Alleged Errors of Jurisdiction

The Tribunal's jurisdiction to grant exclusions from an affirmative anti-dumping order is based on subsection 43(1) of SIMA which states:

> (1) In any inquiry referred to in section 42 in respect of any goods, the Tribunal shall...make such order or finding with respect to the goods to which the final determination applies as the nature of the matter may require, and shall declare to what goods, including, where applicable, from what supplier and from what country of export, the order or finding applies. [Emphasis added.][169]

The Complainants argue that the Tribunal failed to exercise its jurisdiction with respect to the exclusions sought when it "summarily lumped the Complainants' submissions with a miscellany

[168] Complainants' Reply Brief, para 177.

[169] SIMA, supra note 2, s. 43(1).

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of requests not specifically dealt with".[170] In support they cite the following paragraph from the Tribunal's Statement of Reasons:

> For the balance of the requests, the Tribunal was not persuaded that exclusions were warranted. In several instances, the goods for which an exclusion was requested are available in Canada. As for the proprietary steels exported to Canada from Inland, no evidence was provided to demonstrate that domestically made product could not be substituted for the proprietary grade in question. As to the requests for an exclusion for an exporter or a country made by the participants represented at the hearing, the Tribunal notes that its injury determination was made on the basis of total imports from their subject countries. [Emphasis added.][171]

Counsel for the Complainants elaborated in Oral Argument why he thought that the final sentence of the cited paragraph (which is underlined in the quotation) constituted evidence of the Tribunal's failure to exercise its jurisdiction. In essence, Counsel concluded on the basis of this sentence that the Tribunal had not "moved from cumulation to dealing with the question of an exclusion and to looking at all the facts that have been put forward on that".[172]

The Panel does not agree with this conclusion. The Tribunal's Statement of Reasons, in a three-page section on "Requests for Exclusions" first lists all individual exclusions sought with a brief summary of the grounds on which exclusions were requested.[173]

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[170] Complainant's Brief, para 112.

[171] Statement of Reasons, at 32.

[172] Transcript of Public Hearing, at 107-108; see also Complainants' Post-Hearing Brief, para 7.

[173] Statement of Reasons, at 29-31.

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The list consists of three requests for producer exclusions (the collective request for the five integrated U.S. producers, plus British Steel and Preussag), two requests for inward processing arrangements (including one for NSC), and numerous requests for product exclusions that concerned essentially eight product categories (including three requests on behalf of two of the Complainants). The Statement of Reasons then presents the Tribunal's individual decisions for exclusions granted, which were for the two inward processing arrangements and three of the eight product categories.[174] Then, in the paragraph cited above, the Statement of Reasons gives the Tribunal's decision for the "balance of requests".[175] This paragraph first states that the Tribunal was not persuaded that any of the other requested exclusions were warranted. The next sentence makes a summary statement about the product exclusions that were not granted, followed by a specific reference to the request by Inland Steel. And then comes the sentence underlined in the above citation; this sentence refers to the producer exclusions sought collectively by the five integrated U.S. producers, as well as British Steel and Preussag. Counsel for these producers all had argued that their clients should be excluded because they had not caused material injury to the production of like goods in Canada.[176] The Tribunal did not accede to this argument, noting that: "its injury determination was made on the basis of total imports from the subject countries".[177] This

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[174] Ibid., at 31-32.

[175] Ibid., at 32.

[176] Ibid., at 12-13 and 29-30.

[177] Ibid., at 32.

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statement echoes "the law" on cumulation and exclusions that is asserted in two places earlier in the Statement of Reasons with case references.[178] Thus, the Tribunal made a decision having considered the requested producer exclusions, and it did exercise its jurisdiction in this regard based on the law.

In the alternative to an error of jurisdiction, the Complainants submit that the Tribunal made an error of law. However, in their Brief they also attempt to graft an error of jurisdiction onto an alleged error of law. After dealing at length with the argument why this Panel should find that the Tribunal committed an error of law when it denied the request for producer exclusions, the Complainants submit that:

> in failing to properly address the request put before it, the Tribunal also made a reviewable error of jurisdiction. ...In not properly addressing the Complainants' request, the Tribunal failed to exercise the jurisdiction conferred upon it by subsection 43(1) of SIMA ...[179].

The panel does not agree that the Tribunal committed a reviewable error of law when it denied the requested producer exclusions.

(C) Alleged Errors of Law and Fact

The question as to whether the Tribunal made an error of law when refusing the Complainants' requests for producer exclusions has been approached in two essentially different ways by participants in this review. To argue that an error of law

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[178] Ibid., at 28, first paragraph under "Material Injury", and at 29, first paragraph under "Requests for Exclusions".

[179] Ibid., paras 131 and 132.

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occurred that would be reviewable under paragraph 28(1)(b) of the Federal Court Act, the Complainants use subsection 42(1)(a) of SIMA, legislative intent, the GATT Anti-dumping Code, as well as past decisions where producer exclusions were granted. Counsel for the Tribunal, on the other hand, has responded with the argument that its decisions concerning exclusions are fact-specific in nature.[180] As questions of fact, they would be reviewed under paragraph 28(1)(c) of the Federal Court Act. The briefs and post-hearing briefs of Canadian producers supporting the Tribunal address both the error of law and error of fact arguments.[181] This panel believes that the Tribunal's decisions on exclusions should be reviewed only under paragraph 28(1)(c) as an alleged error of fact.

(a) Alleged Errors of Fact

The Tribunal's power to grant exclusions is derived from subsection 43(1) of SIMA as quoted above. This provision does not impose a legal standard by which exclusions are to be evaluated. Thus, the decision to grant or deny an exclusion is left to the discretion of the Tribunal and it is a question of fact. This interpretation of the statute was confirmed by the Federal Court of

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[180] Brief of the CITT, para 53; Transcript of Public Hearing, at 355-358; and most distinctly in the Post-hearing Brief of the CITT, paras 3-10.

[181] Post-Hearing Brief of Dofasco, Post Hearing Brief of Sidbec-Dosco and Post Hearing Brief of Stelco.

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Appeal in Hetex Garn A.G. v. Anti-dumping Tribunal.[182] At the time, the Tribunal's power to grant exclusions was based on subsection 16(3) of the Anti-dumping Act.[183] With respect to this provision, the Court held:

> As I read section 16(3), the Tribunal may make its order in respect of all or any of the "goods to which the preliminary determination ... applies" and it was for the Tribunal, if requested to make the order in respect of some, and not all, of such goods, to decide, as a matter of fact or discretion, (a) whether or not there should be any exclusion, and (b) if it decided that there should be an exclusion, what portion or portions of the goods should be excluded. Whether regarded as a matter of fact or discretion, neither question is a question of law falling within section 28(1)(b) of the Federal Court Act.[184]

This passage was quoted with approval by the same Court in Sacilor Aciéries, et al. v. Anti-dumping Tribunal, et al.[185]

Accepting that the test of paragraph 28(1)(c) of the Federal Court Act should be used, the question is whether the Tribunal, in deciding not to grant the sought producer exclusions, committed a reviewable error of fact. Paragraph 28(1)(c) provides that the decision of a tribunal may be reviewed where it:

> (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.[186]

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[182] Hetex Garn A.G. v. Anti-Dumping Tribunal, [1978] 2 F.C. 507 (hereinafter "Hetex").

[183] Anti-Dumping Act, supra note 77, s. 16(3).

[184] Hetex, supra note 185 at 508.

[185] Sacilor, supra note 72 at 215.

[186] Paragraph 28(1)(c) of Federal Court Act, supra note 4; see discussion of paragraph 28(1)(c) at page 19.

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The Complainants claim that the Tribunal committed "an egregious error of fact" when it failed to deal in detail with the five U.S. producers' requests for exclusions.[187] However, the Complainants have not submitted evidence to support an error that meets the standard of paragraph 28(1)(c).[188]

(b) Alleged Error of Law

Although this panel believes that the Tribunal's decisions should be reviewed only under paragraph 28(1)(c) as an error of fact, we will also consider the error-of-law route under paragraph 28(1)(b) which the Complainants have suggested. It turns out that, in this case, the result is the same.

The Complainants have built an elaborate argument attempting to establish that the Tribunal committed an error of law when it refused to grant producer exclusions to the five U.S. producers. This argument is set out most clearly in the Complainants' Post-Hearing Brief which supplements their earlier briefs and Oral

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[187] Complainant's Brief, para 113.

[188] The Complainants may not have attempted this because they do not follow the approach which leads to the application of the test in paragraph 28(1)(c), as they concentrated on claiming errors of jurisdiction and errors of law. See "Aid to Argument" distributed by Counsel for Complainants during Oral Argument, at 2, where errors of fact are not listed for the exclusions issue, though Counsel also conceded that the Tribunal's decision to grant or refuse producer exclusions is a fact-based determination if properly engaged in, Transcript of Public Hearing, at 393-394.

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Argument. The Complainants acknowledge, with reference to Hetex, that the decision to grant or deny exclusion requests is committed to the Tribunal's discretion. But to this they add a legal standard:

> When the Tribunal exercises its jurisdiction with respect to producer exclusions, it must be guided by the principles in this regard set out in SIMA, the GATT Anti-dumping Code and the jurisprudence.[189]

This approach poses two questions. First, does any of the three named sources constitute a legal standard that converts the Tribunal's fact-specific decisions concerning producer exclusions into a law determined decision that is reviewable under paragraph 28(1)(b) of the Federal Court Act? Second, if so, did the Tribunal commit an error or law?

As concerns legislation, the Complainants start with subsection 42(1)(a) of SIMA which reads:

> 42. (1) The Tribunal, forthwith after receipt by the Secretary pursuant to subsection 38(3) of a notice of a preliminary determination of dumping or subsidizing in respect of goods, 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 or subsidizing of the goods (i) has caused, is causing or is likely to cause material injury or has caused or is causing retardation, or (ii) would have caused material injury or retardation except for the fact that provisional duty was imposed in respect of the goods;...

From this, the Complainants conclude:

> It follows that if a producer proves that it is not causing material injury, there should be no injury

[189] Post-Hearing Brief of the Complainants, para 9.

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> finding against this producer. The Complainants, therefore, submit that the intent of SIMA is such that the Tribunal should grant exclusions to countries and producers whose dumping "in and of itself" does not cause or contribute to the material injury suffered by the domestic industry.[190]

This passage is followed by a reference to Machine Tufted Carpeting Imported or Exported from the United States of America.[191] This reference concerns the "in and of itself" rule that the Tribunal must apply in determining causation, but the Carpeting panel decision says nothing about producer-specific exclusions. During Oral Argument, Counsel for the Complainants went to great length to recall how during the Tribunal's investigation he had attempted to demonstrate that the five integrated U.S. Steel producers had not caused material injury to domestic production of like goods in Canada, and he claimed that, therefore, the five Complainants were "entitled" to producer exclusions.[192] However, the Complainants have not demonstrated that this is the law in Canada. Subsection 42(1)(a) of SIMA requires the Tribunal to make an inquiry for "any goods to which the preliminary determination applies" (as cited above). It is only the description of the goods in National Revenue's preliminary determination of dumping which sets the limits for the Tribunal's inquiry; the investigation is not limited to the individual sources for which actual dumping has been

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[190] Post-Hearing Brief of the Complainants, para 11.

[191] Machine Tufted Carpeting Originating in or Exported from the United States of America, CDA-92-1904-02 at 19.

[192] Transcript of Public Hearing at 113.

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found.[193] In this case, the description included all imports of subject goods from all U.S. exporters, as well as several other countries.[194] The Tribunal is entitled to cumulate material injury from all sources covered by the description of the goods as set out under Section II of this decision. The Tribunal is not required to exclude any exporters from an affirmative material injury finding even if in the case of individual exporters there was no evidence of their having caused material injury or likelihood of future injury. This was established in a 1978 decision by the Supreme Court of Canada in the Hitachi case.[195] Thus, subsection 42(1)(a) of SIMA does not constitute a legal basis for the Complainants to establish an error of law concerning the Tribunal's refusal to grant the requested producer exclusions.

To establish such an error, the Complainants also rely on the legislative intent of SIMA and cite government officials to the effect that exporters who are not dumping or not causing material injury should not be caught by the implementation of anti-dumping measures.[196] Binational panels have a mandate to review determinations of national authorities in accordance with the applicable national law. Legislative intent could be relevant to the interpretation of an ambiguous legal provision. In this case there is no ambiguity in the statute.

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[193] Japan Electrical Manufacturers Association v. Anti-Dumping Tribunal, [1982] 2 F.C. 816.

[194] Admin. Record, Vol. 1, at 133.

[195] Hitachi, et al. v. Anti-Dumping Tribunal et al., [1979] 1 S.C.R. 93.

[196] Reply Brief of the Complainants, para 102; Transcript of Public Hearing, at 133-135.

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Furthermore, the Complainants try to establish an error of law by arguing that it is appropriate to seek guidance from relevant portions of the GATT Anti-dumping Code in order to interpret the provisions of SIMA.[197] To establish the relevance of the GATT Anti-dumping Code, the Complainants refer to the judgment written by Gonthier J. of the Supreme Court of Canada in National Corn.[198] The issue in that case was whether it was patently unreasonable for the Tribunal to make reference to the GATT Subsidies and Countervailing Duties Code for the purpose of interpreting section 42 of SIMA. Gonthier J. commented as follows:

> I share the appellants' view that in circumstances where the domestic legislation is unclear it is reasonable to examine any underlying international agreement. In interpreting legislation which has been enacted with a view towards implementing international obligations, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations. Second, and more specifically, it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation.[199]

As mentioned, the issue was whether the Tribunal may refer to an

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[197] Complainants' Brief, paras 52 and 121; Complainants' Reply Brief, paras 178-179; Post-Hearing Brief of Complainants, paras 13-14.

[198] National Corn, supra note 33.

[199] Ibid., at 1371.

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international agreement in interpreting its statute, not whether it has to do so. Thus the National Corn opinion does not say that the GATT Anti-dumping Code is directly applicable law in Canada. Only domestic legislation can establish an obligation for the Tribunal to follow any specific course of action. Also, the relevance of the Code is limited to cases where there exists an ambiguity in the domestic legislation. In this case, the statute is not ambiguous. Even if the statute were ambiguous, the GATT Anti-dumping Code could not assist in the interpretation because the Code is silent on the matter of producer exclusions.

As their final attempt to establish an error of law, the Complainants refer to cases in which the Tribunal did grant producer exclusions.[200] They submit that "generally"

> these cases demonstrate that the Tribunal will grant producer exclusions where producers demonstrate that they should be distinguished from other producers or countries in that their behaviour in the market is not injurious to the domestic industry.[201]

Even if this were generally true for cases where participants sought producer exclusions, individual fact-specific decisions would not establish a legal standard. Having reviewed numerous cases drawn to its attention by various participants in this review, the Panel accepts the Tribunal's submission that in "exercising its discretion to grant exclusions, the Tribunal and its predecessors have never developed rigid rules or articulated immutable conditions under which producer exclusions will be

[200] Post-Hearing Brief of the Complainants, paras. 16-31.

[201] Ibid., para 16.

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granted."[202] Producer exclusions have been granted very rarely, and the circumstances of each case are sufficiently different to preclude the development of a set of binding precedents.

(D) Alleged Insufficiency of Reasons

We now turn to the Complainants' allegation that the Tribunal committed an error of jurisdiction or, alternatively, an error of law by failing to give reasons for its decision not to grant the requested producer exclusions.[203] The Tribunal's obligation to articulate reasons for an order or finding stems from subsection 43(2) of SIMA:

> 43. (2) The Secretary shall forward by registered mail to the Deputy Minister, the importer, the exporter and such other persons as may be specified by the rules of the Tribunal
>
> (a) forthwith after it is made, a copy of each order or finding made by the Tribunal pursuant to this section; and
>
> (b) not later than fifteen days after the making of an order or finding by the Tribunal pursuant to this section, a copy of the reasons for making the order or finding. [Emphasis added.]

The Complainants' Brief alleges that "the Tribunal did not provide adequate, indeed any, reasons" for refusing to grant the exclusion sought collectively by the five U.S. producers.[204] In light of the discussion above, we find that the Tribunal did give some reasons. The remaining issue is whether the Tribunal's reasons

[202] Post-Hearing Brief of the CITT, para 8.

[203] Complainants' Brief, paras 133-138; and Reply Brief of the Complainants, paras 147-151.

[204] Complainant's Brief, para 133.

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are adequate. This question must be decided on the basis of the Canadian jurisprudence for other administrative tribunal decisions.[205]

In Blanchard, the Supreme Court of Canada had to decide whether a labour arbitrator's decision should be regarded as void for lack of sufficient reasons. The Court held that a deficiency in the reasons could not affect the arbitrator's jurisdiction,

> except to the extent that the insufficiency of the reasons is so great that it amounts to an infringement of the rules of natural justice.[206]

In the Blanchard case, there was no total absence of reasons, and the Court concluded:

> Even if as respondent suggests the decision was not very well worded, the arbitrator's reasons are intelligible and it is possible to understand the basis for his decision. Such a wording is far from amounting to an infringement of the rules of natural justice.[207]

This Panel's task would have been easier had the Tribunal specifically and in greater detail addressed the request for producer exclusions. However, using the Supreme Court's standard in Blanchard, this Panel has concluded that the Tribunal's reasons for its decision not to grant the requested producer exclusions, while terse and extremely brief, are intelligible and it is

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[205] See "Standard of Review" section at pages 17 and 18.

[206] Blanchard, supra note 6 at 500.

[207] Ibid., at 501. In addition, the Court held: "In any case, even assuming that the reasons were insufficient, this is an error of law apparent of (sic) the face of the record. Where there is a privative clause such errors are generally beyond judicial review." Ibid., at 478.

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possible to understand the basis for the Tribunal's decision. In addition to what has been said on this when the relevant portions of the Tribunal's Reasons were reviewed earlier in this section, the Panel has considered that the adequacy of reasons should be judged by viewing a particular decision in the context of the Tribunal's practice. The Tribunal usually determines material injury on a cumulative basis. Any exclusion left to the Tribunal's discretion is an anomaly. Producer exclusions are a greater anomaly. If exclusions are granted, the Tribunal gives more detailed reasons to justify the anomalies; it gives only minimal reasons when a decision conforms with the generally expected outcome. The Tribunal has set out its approach to requests for exclusions in its Reasons,[208] and it is possible for the participants to understand the basis for the Tribunal's decision.

IV. FAILURE TO PROPERLY ASSESS IMPORTATIONS BY DOFASCO

(A) Introduction

Counsel for the Complainants submitted that the Tribunal committed a reviewable error by failing adequately to address importations of cold-rolled steel by Dofasco. By failing to address importations by Dofasco, the Complainants submitted that the Tribunal failed to act in accordance with the terms of subsection 42(3) of SIMA and paragraph 1(i) of Article 4 of the

[208] Statement of Reasons, at 28-32.

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GATT Anti-dumping Code.[209] Counsel for the Complainants contended that the Tribunal's alleged failure to properly take such importations into account constituted jurisdictional error, or, in the alternative, a reviewable error of law.

Counsel for the members of the domestic industry submitted that the Tribunal did fulfil the obligations under Article 4, paragraph 1 of the GATT Anti-dumping Code which is expressly incorporated into SIMA by subsection 42(3). The members of the domestic industry contended that the Tribunal adequately addressed importation by Dofasco in its Statement of Reasons. Accordingly, the Tribunal had not committed any error in its interpretation or application of subsection 42(3) of SIMA or the GATT Anti-dumping Code.

(B) The Statutory Framework

Subsection 42(3) of SIMA states that the Tribunal:

> ... shall take fully into account the provisions of (a) in a dumping case, paragraph 1 of Article 4 of the Agreement ... on Implementation of Article VI of the General Agreement on Tariffs and Trade ...

Paragraph 1 of Article 4 of the GATT Anti-dumping Code states:

> In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that

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[209] Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade, [1980] B.I.S.D. 26th supp. (hereinafter "GATT Anti-dumping Code").

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> (i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the industry may be interpreted as referring to the rest of producers ...

It is noted that paragraph 1 of Article 4 of the GATT Anti-dumping Code allows the Tribunal to define the domestic industry for the purposes of an injury determination exclusive of those members of the domestic industry who are importers of the allegedly dumped product. Counsel for the Complainants also conceded that paragraph 1 of Article 4 of the GATT Anti-dumping Code is discretionary, not mandatory. Counsel for the Complainants conceded, consistent with the decision of the Binational Panel in Machine Tufted Carpeting[210], that the Tribunal had discretion as to whether or not to include Dofasco in the domestic industry. The Complainants argued, however, that the Tribunal failed to exercise the discretion expressly mandated by subsection 42(3) of SIMA and the GATT Anti-dumping Code. As a result, it is necessary to examine the Statement of Reasons in order to determine whether the Tribunal did fail to exercise the statutory discretion.

(C) The Tribunal's Statement of Reasons

Subsection 43(2)(b) of SIMA specifies that the Tribunal "shall forward ... a copy of the reasons for making the order or finding".

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[210] supra note 194.

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Where a Tribunal is required to give reasons, the reasons "... must be proper, adequate and intelligible".[211] In the present case, it must be determined whether the reasons given by the Tribunal are sufficient.

The Tribunal, in its Statement of Reasons, made both express and implied reference to Dofasco's importation and to its obligation under subsection 42(3) of SIMA. In the first paragraph on page 19 of the Statement of Reasons, the Tribunal stated:

> In assessing injury, the Tribunal must be satisfied that the domestic injury, which forms the subject of its inquiry, constitutes, at least, a major proportion of the total domestic production of cold-rolled steel sheet products.

As authority for the above proposition, the Tribunal expressly stated in footnote 12 on page 19:

> Pursuant to paragraph 42(3)(a) of SIMA, the Tribunal must take fully into account paragraph 1 of Article 4 of the GATT Anti-dumping Code ...

Therefore, the Tribunal expressly referred to the obligation imposed upon it through subsection 42(3) of SIMA.

In the first paragraph of page 19, the Tribunal stated:

> For its injury analysis, the Tribunal has relied on production figures, prices, market shares and financial data. Theses indicators include the entire domestic industry except for the financial data, which did not include CMP. As such the requirement to assess injury against at least the major proportion of the total domestic production of like goods has been satisfied. [emphasis added].

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[211] Dome Petroleum v. Public Utilities Board, 2 A.R. 451 at 472 (Alta. S.C.).

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On page 6 of its Statement of Reasons, the Tribunal expressly states that the domestic industry consists of: Dofasco, Stelco, Sidbec-Dosco and Algoma. The Tribunal said this with a clear recognition that Dofasco was "a principal importer" of cold-rolled steel.[212] Having expressly recognized that fact, it is also clear that the Tribunal considered the effect of such importation on domestic markets.[213] Information with respect to imports, both quantum and purpose, was disclosed in the Record.

Having considered Dofasco's position as importer, along with other relevant factors, the Tribunal concluded[214] that the drop in domestic producer prices in the relevant period "cannot be attributed" to such factors. Rather, the Tribunal found that:

> ... factors other than dumping do not explain the decline in domestic prices in this period ... the only compelling reason for the decline was low price imports which drove prices to even lower levels.[215]

Under the heading Material Injury[216] the Tribunal explicitly stated that, in reaching its conclusions, it had " ... assessed the cumulative effect of all imports from the named countries".

Throughout its Statement of Reasons, the Tribunal also made implied references to the obligation imposed upon it by subsection

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[212] Statement of Reasons, at 8 and 12.

[213] Statement of Reasons, inter alia, pages 10, 11 and 20.

[214] Ibid., at 24 and 25.

[215] Ibid., at 27.

[216] Statement of Reasons, page 28.

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42(3) of SIMA. These references also support the conclusion that the Tribunal turned its mind to the question of importation by Dofasco.

On page 8 of its Statement of Reasons, the Tribunal stated:

> Roughly seventy percent of U.S. imports are accounted for by the top twelve importers. The principal importers include G.M. Canada, Direct Steel Inc., Dofasco, and Karmax Heavy Stamping -- a division of Cosma International Inc.

On page 12 of its Statement of Reasons, the Tribunal makes reference to the Complainants' argument concerning imports received by Dofasco. The Tribunal stated:

> Counsel argued that ... Dofasco imported much steel from the United States, as it chose to have Bethlehem cold-reduce steel for it, as Stelco could not provide the quality nor do the job according to the technical requirements of Dofasco.

(D) Analysis of the Tribunal's Statement of Reasons

The issue before this Panel is whether the references which are set out above are sufficient to satisfy the Tribunal's obligations under Section 42(3) of SIMA. Did the Tribunal direct its mind to the issue of Dofasco's importation, and did it give sufficient reasons for including Dofasco in the domestic industry?

The Tribunal made express reference to Section 42(3) of SIMA. It is possible that this express reference satisfies its obligation under subsection 42(3) of SIMA. On the other hand, as Professors Jones and de Villars state: "Merely parroting the matters which a

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delegate is required to consider does not constitute a reason for his action."[217] Under this principle, it must be shown that the Tribunal applied, rather than merely recited, the provisions of Article 4(1) of the GATT Anti-dumping Code.

While the Tribunal's Statement of Reasons do not reveal detailed examination of Article 4(1) of the GATT Anti-dumping Code, the additional references to importation by Dofasco which have been set out above demonstrate that the Tribunal certainly turned its mind to the issue. It should be noted that the Tribunal is not required to expressly set out each constituent step in reaching its determination on this, or any other, issue. The Supreme Court of Canada in Service Employees' International Union, Local 33 v. Nipawin Union Hospital[218] held that a Board required to examine factors leading to a decision need not give written reasons covering each constituent element of its process. As Dickson J. stated:

> The reasons for decision of the Board do not state the number of persons employed by S.R.N.A. and the Board did not expressly find that S.R.N.A. was an employer or employer's agent, but I do not regard this as fatal to the Board's jurisdiction. A tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion.[219] [emphasis added]

Also, in Orlowski v. Attorney General of British Columbia et

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[217] D.P. Jones and A.S. de Villars, supra note 48 at 234.

[218] (1975) 1 S.C.R. 382.

[219] Ibid., at 391.

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al[220], the British Columbia Court of Appeal held that a tribunal need not make express findings on subordinate matters leading to a final determination:

> In my judgment these decision-makers, whether they be judges of first instance or tribunals such as the review board, cannot be expected to articulate every subsidiary decision leading to a final decision or disposition unless it is foundational to that final decision.[221]

It should also be noted that subsection 42(3) of SIMA, as conceded by the Counsel for the Complainants, merely gives the Tribunal a discretion to exclude members of the domestic industry who import subject goods. Subsection 42(3) of SIMA does not impose a mandatory obligation upon the Tribunal to exclude members of the domestic industry from an injury determination. In determining whether the Tribunal committed a reviewable error, we note that the matter is one which is within both the Tribunal's discretion and its area of expertise. As Professor Evans has noted: "...when the tribunal has to form an opinion for which it is entitled to use its expertise, it may not be required to set out its reasoning process with much specificity."[222]

The Tribunal exercised its discretion to include Dofasco within the domestic industry in assessing injury. The Tribunal had discretion to do so. It exercised its discretion with full

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[220] (1992) 75 C.C.C. (3rd) 138 (B.C.C. of A.).

[221] Ibid., at 147.

[222] J.M. Evans et al., supra note 44 at 328.

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awareness of its obligation under subsection 42(3) of SIMA and Article 4(1) of GATT Anti-dumping Code as demonstrated by its references, both express and implied, to these provisions. As subsection 42(3) involves a discretionary determination, the Tribunal was not required to devote any significant portion of its reasons to that determination. Accordingly, we conclude that the Tribunal did not commit any reviewable error with respect to Dofasco importation and subsection 42(3) of SIMA.

V. CONCLUSION

This Panel AFFIRMS the Tribunal's decision. The Panel directs the Canadian Secretary to issue a Notice of Final Panel Action pursuant to Rule 79A of Article 1904 Panel Rules.

SIGNED IN THE ORIGINAL BY:

Bruce Aitken
BRUCE AITKEN, Chairperson

Serge Anissimoff
SERGE ANISSIMOFF

Ian A. Hunter
IAN A. HUNTER

Robert E. Lutz
ROBERT E. LUTZ

Klauss Stegemann

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KLAUS STEGEMANN

Issued on this 13th day of July, 1994.

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SEPARATE VIEW OF PANELISTS BRUCE AITKEN AND ROBERT E. LUTZ

In view of the effort it took several of the Panelists to agree on the adequacy of reasons that the Tribunal articulated for its decision to deny the requested producer exclusions, we feel compelled to express our opinion that brevity of reasons can be a risk factor in a process that depends on binational panel review. Some panelists, while having experience with the trade law of their own jurisdiction, perform the role of ascertaining and reviewing the application of foreign law for the first time. They need reasons set out in greater detail than may be necessary for domestic jurisprudence, especially when the issues are legally important and commercially significant.

Signed in the original by:

Bruce Aitken
Bruce Aitken

Robert E. Lutz
Robert E. Lutz

July 13, 1994

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