**ARTICLE 1904**
**BINATIONAL PANEL REVIEW PURSUANT TO THE**
**NORTH AMERICAN FREE TRADE AGREEMENT**

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In the Matter of:

CERTAIN CORROSION-RESISTANT STEEL SHEET PRODUCTS ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA (Injury)

CDA-94-1904-04

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# DECISION OF THE PANEL

ON REVIEW OF THE CANADIAN INTERNATIONAL

TRADE TRIBUNAL FINDING

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**July 10, 1995**

**Before:** Mr. E. Neil McKelvey, O.C., Q.C. (Chair)
Mr. Edward C. Chiasson, Q.C.
Mr. Timothy A. Harr
Prof. Maureen Irish
Mr. Lauren D. Rachlin

**Hearings:** April 24 and April 25, 1995, Ottawa, Ontario, Canada

**APPEARANCES:**

**The U.S. Exporters' Complaint**

**The Complainants**

Mr. C. J. Michael Flavell, QC, Mr. Geoffrey C. Kubrick and Mr. Paul M. Lalonde on behalf of Bethlehem Steel Export Corp., U.S. Steel (a division of USX Corp.), I/N Kote, Inland Steel Co. and L.T.V. Steel Co. (collectively, the "U.S. Complainants").

**In Opposition to the Complainants:**

Mr. Riyaz Dattu, Mr. David I. W. Hamer and Mr. Colin S. Baxter on behalf of Stelco Inc. ("Stelco");

Mr. Ronald Cheng and Mr. Greg Somers on behalf of Sorevco Inc. ("Sorevco");

Mr. John T. Moran, QC and Mr. Steven D'Arcy on behalf of Dofasco Inc. ("Dofasco");

Mr. Darrell Pearson and Ms. Sharon Maloney on behalf of Triumph Industries, a Division of the Triumph Group Operations, Inc. ("Triumph"); and

Mr. Colin S. Baxter on behalf of Metal Koating Continuous Colour Coat Limited ("CCC").

**On Behalf of the Canadian International Trade Tribunal (the "CITT")**

Mr. Hugh J. Cheetham and Mr. Joël J. Robichaud on behalf of the CITT;

**The Stelco Complaint**

**Complainants**

Mr. Riyaz Dattu, Mr. David I. W. Hamer and Mr. Colin S. Baxter on behalf of Stelco Inc. ("Stelco").

**In Opposition to the Complainants**

Mr. C. J. Michael Flavell, QC, Mr. Geoffrey C. Kubrick and Paul M. Lalonde on behalf of Bethlehem Steel Export Corp., U.S. Steel (a division of USX Corp.), I/N Kote, Inland Steel Co. and L.T.V. Steel Co. (collectively, the "U.S. Respondents");

**In Support of the Complainants**

Mr. Colin S. Baxter on behalf of Metal Koting Continuous Colour Coat Limited ("CCC").

**On Behalf of the CITT**

Mr. Hugh J. Cheetham and Mr. Joël J. Robichaud on behalf of the Canadian International Trade Tribunal (the "CITT").

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## I. INTRODUCTION

This binational Panel was convened pursuant to Article 1904(2) of the *North American Free Trade Agreement* (NAFTA). The Panel was constituted in response to a complaint which was filed with the Canadian Secretariat on September 12, 1994 by the U.S. Complainants pursuant to Rule 39 of the *NAFTA Article 1904 Panel Rules* (the U.S. Complaint). In this complaint, it was submitted by the U.S. Complainants that the Canadian International Trade Tribunal (the CITT) had committed errors of jurisdiction, law and fact and breaches of natural justice in its finding published August 6, 1994[1] that the dumping in Canada of subject goods found by the Deputy Minister of National Revenue has caused, is causing and is likely to cause material injury to the production in Canada of like goods.

The Panel was also constituted to hear concurrently a complaint filed by Stelco (the Stelco Complaint). The Stelco Complaint took issue with the decision of the CITT to exclude certain corrosion-resistant steel sheet products produced by the electrogalvanized process for use in the manufacture of motor vehicles.

A hearing was held before the Panel on April 24 and 25, 1995 in Ottawa, Ontario, Canada, with all members of the Panel in attendance, at which argument on the U.S. Complaint and the Stelco Complaint was heard.

The subject matter of these complaints is corrosion resistant steel sheet coated with zinc or zinc iron alloy commonly called galvanized steel, which was defined by the Deputy Minister as:

> ... flat-rolled steel sheet products of a thickness not exceeding 0.176 in. (4.47 mm), coated or plated with zinc or an alloy wherein zinc and iron are the predominant metals, excluding auto-exposed qualities used in the manufacture of outer body components for motor vehicles, originating in or exported from Australia, Brazil,

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[1] *Canada Gazette*, Part I, Vol. 28, No. 32, August 6, 1994, p. 3575

France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom and the United States of America.[2]

The Deputy Minister conducted an investigation in respect of the subject goods, made a preliminary determination of dumping and in June, 1994, made a final determination[3]. In the result, the Deputy Minister's investigation found that exporters from all the countries concerned have dumped the subject goods with various margins of dumping. Out of 33 exporters investigated, only two were found not to have dumped. The following was found in relation to the U.S. Complainants:

| Exporter | Goods Dumped % | Weighted Average Margin of Dumping % |
|---|---|---|
| Bethlehem Steel Export Corporation | 0.0 | 0.0 |
| Inland Steel Company/I/N Kote | 94.7 | 8.1 |
| L T V Steel Co. Inc. | 83.5 | 13.2 |
| USX Corporation, U.S. Steel Group | 5.0 | 4.2 |

Following the Deputy Minister's dumping determination, the CITT undertook an injury inquiry. The CITT found that with respect to all the countries and exporters investigated, the dumping has caused, is causing and is likely to cause material injury to the production in Canada of like goods. In its reasons supporting the finding of material injury[4], the CITT provided a review and analysis of the evidence, with references to Section 42 of the *Special Import Measures Act* (SIMA), the *Antidumping Code (1980)* (Antidumping Code), *Canadian International Trade Tribunal Rules*[5], court, panel and tribunal decisions. The CITT made several exclusions to its injury findings, the only

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2 *Finding*, CITT NQ-93-007

3 *Canada Gazette*, Part I, Vol. 128, No. 29, July 16, 1994, p. 3324

4 *CITT Statement of Reasons*, pp. 15-43

5 *Canada Gazette*, Part II, Vol. 125, No. 18, August 28, 1991, p. 2912

one relevant to these proceedings covering corrosion-resistant steel sheet products, produced by the electrogalvanizing process, for use in the manufacture of motor vehicles.

The U.S. Complainants applied for a panel review seeking an order remanding the matter to the CITT, with directions to take such actions as may be necessary to determine the issues of material injury and causality in a manner consistent with the principles set forth in the U.S. Complaint. In opposition to the U.S. Complaint, Stelco, Sorevco, Dofasco, Triumph and CCC filed notices of appearance, as well as other subsequent documents and briefs, and made oral representations at the hearing.

Stelco also applied concurrently for a panel review seeking an order remanding this matter to the CITT for reconsideration of the exclusion granted to electrogalvanized products for use in the automotive industry, with instructions to the CITT regarding evidence on substitutability and compatibility between domestically produced hot-dipped and imported electrogalvanized products; instructing the CITT not to exclude electrogalvanized products for use in the automotive industry or, in the alternative, remanding and instructing the CITT regarding limited exclusions for such products. In response to the Stelco Complaint, documents in opposition were filed by the U.S. Complainants and oral argument made. CCC filed a brief and made oral argument in support of Stelco's Complaint.

The CITT also filed notices of appearance, filed briefs and made representations at the hearing.

## II. **STANDARD OF REVIEW**

The relevant provisions of NAFTA and the *Federal Court Act* are the following:

NAFTA Article 1904(3):

> The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party

otherwise would apply to a review of a determination of the competent investigating authority.

NAFTA Article 1911:

> **General legal principles** includes principles such as standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies;

NAFTA Annex 1911:

> **standard of review** means the following standards, as may be amended from time to time by the relevant Party:
>
> (a) in the case of Canada, the grounds set out in subsection 18.1(4) of the *Federal Court Act*, as amended, with respect to all final determinations;

*Federal Court Act*, R.S.C. 1985 c.F-7, ss. 18.1(4):

> **Grounds of review** - The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

**Questions of Jurisdiction**

It is common ground that the standard of review for questions of jurisdiction is "correctness". The Panel, in that situation, must only consider whether the CITT's decision is or is not correct. If found to be incorrect, the Panel must remand, with instructions for the CITT to correct the error. A distinction must be drawn between those questions which go to jurisdiction and those which do not. Questions of law and fact within a tribunal's jurisdiction are subject to the standards of review discussed below.

The Supreme Court of Canada has endorsed a pragmatic and functional analysis to distinguish jurisdictional questions from those within a tribunal's jurisdiction. This analysis examines the wording of the enactment conferring jurisdiction, the purpose of the statute creating the tribunal, the reasons for its existence, the area of expertise of its members and the nature of the problem before the tribunal.[6] The goal is to determine whether the legislature intended that the question in issue be ultimately decided by a tribunal acting within the scope of its authority, or by the courts.[7]

On antidumping matters, the constituting legislation for the CITT is SIMA and the *Canadian International Trade Tribunal Act*[8] and amendments thereto. Decisions made by the CITT pursuant to Section 42 of SIMA as to whether the dumping of goods into Canada has caused, is causing or

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[6] *U.E.S. Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at p. 1088

[7] *Canadian Broadcasting Corporation v. The Canadian Labour Relations Board et al*, Supreme Court of Canada, January 27, 1995, unreported, at pp. 15-16

[8] *Canadian International Trade Tribunal Act*, R.S.C. 1985, c.47 (4th Supp.)

is likely to cause material injury to the production in Canada of like goods are within the CITT's jurisdiction and expertise.[9]

The Panel will, therefore, apply a standard of correctness, using a pragmatic and functional analysis of the legislation, in determining questions of jurisdiction.

**Questions of Law**

In determining the applicable standard of review on applications relating to decisions of an administrative tribunal, including applications under subsection 18.1(4) of the *Federal Court Act*, Canadian courts have adopted a spectrum that ranges from a standard of patent unreasonableness to that of correctness. At the patent unreasonableness end of the spectrum are cases where a tribunal is protected by a privative clause and is deciding a matter within its jurisdiction, in which case the standard is whether the decision is patently unreasonable. On the correctness end of the spectrum are cases where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal, and where the tribunal has no greater expertise than the court on the issue. Even where there is a statutory right of appeal, curial deference is shown to decisions of specialized tribunals on matters which fall within their jurisdiction; the concept is one of specialization of duties which requires that the court defer to the expertise of the specialist tribunal.[10]

The present case is somewhere between the two ends of the spectrum. On the one hand, there is no privative or finality clause and, on the other, there is no statutory right of appeal. The powers of the Panel are limited to a review of the CITT's decision on the grounds prescribed in Subsection 18.1(4) of the *Federal Court Act*, while recognizing that the CITT is a tribunal with specialized expertise and discretion.

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[9] *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at p. 1346

[10] *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at pp. 590-2; *Canadian Broadcasting Corporation v. The Canada Labour Relations Board et al*, supra, (at footnote no. 7) at pp. 14-15.

In a recent decision involving a statutory appeal from a specialized tribunal[11], the Court held that a standard of "considerable deference" is warranted. Such a standard is warranted in this case as well since the CITT is clearly a tribunal with specialized expertise[12].

The U.S. Complainants submit that, in view of the legislative history of Subsection 76.1 of SIMA, which provides for judicial review by the Federal Court of Appeal of an order or finding of the CITT, a decision of the CITT must be given a lesser degree of deference than in the past. The original anti-dumping legislation in 1968[13] contained a finality clause as well as a true privative clause. When that Act was replaced by SIMA in 1984, the privative clause was removed and the finality clause remained. When SIMA was again revised in 1993 (effective January 1, 1994), the finality provisions were removed entirely.

The U.S. Complainants' argument overlooks the concurrent evolution of jurisprudence in Canada on appeals from and reviews of the decisions of specialized tribunals. The decisions cited above have established that considerable deference is accorded to specialized tribunals, even in the absence of a privative or finality clause.

On questions of law, the Panel will, therefore, not interfere with the CITT if it has a reasonable basis for its interpretation of the law and will apply a standard of a high degree of deference which the courts have described as "considerable deference".

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[11] *Pezim*, supra, (at footnote no. 10) at pp. 598-9

[12] See the analysis of the CITT's functions in *Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating in or Exported from the United States* (Injury), 1994, CDA-93-1904-07

[13] *Anti-dumping Act*, R.S.C. 1970 c.A-15

**Questions of Fact**

In determining the reasonableness of a decision of a tribunal, a high degree of deference is also accorded on findings of fact, especially findings of fact where a tribunal like the CITT has specialized expertise and discretion. Applying that standard, the Panel will not interfere with findings of fact of the CITT unless the evidence, viewed reasonably, is incapable of supporting the finding in question.[14]

**Natural Justice/Procedural Fairness**

In a leading authority in the Supreme Court of Canada[15], it was stated that principles of natural justice and fairness in application to individual cases will vary according to the circumstances of each case. The underlying question which the courts have sought to answer in the cases dealing with natural justice and with fairness is: Did the tribunal on the facts of the particular case act fairly towards the person claiming to be aggrieved?

One of the universally recognized principles of natural justice (one raised in this matter) is that no one be condemned unheard (*audi alteram partem*). A tribunal must listen fairly to both sides, giving the parties a fair opportunity for correcting or contradicting any relevant statement prejudicial to their views. A tribunal must not hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Parties must know what evidence has been given and what statements have been made affecting them; and they must be given a fair opportunity to correct or contradict them. Evidence must not be heard or representations received from one side behind the back of the other.[16]

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[14] *Lester v. U.I.J.A.P.P.I, Local 790*, [1990] 3 S.C.R. p. 644 at p. 669

[15] *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602 at pp. 630-1

[16] *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105 at pp. 1113-1114

The appropriate standard of review, which the Panel will apply where a breach of natural justice is alleged, is whether the CITT violated these principles.

## III. **THE ISSUES**

Following are the issues identified by the Panel as being important to its decision on the complaint of the U.S. Complainants:

1. Did the CITT err in finding injury with respect to all goods from all exporters, irrespective of whether there is evidence that some of these exporters have or have not contributed to the injury or likely injury to the domestic industry?

2. Did the CITT err in using cumulation to find that dumping has been the cause of material injury to the domestic industry where an exporter or exporters present evidence that it or they have not contributed to the injury?

3. Did the CITT err in finding that the following non-dumping factors did not derogate from its conclusion that dumped imports have caused and are causing material injury to the domestic industry:

   a. the recession;

   b. the entry of Sorevco, Z-Line and DNN into the market;

   c. fluctuations in exchange rates; or

   d. the closure of Dofasco's ingot stream and pension and retirement costs.

and in not considering the following nondumping factors:

   a. the sale of excess prime materials; or

   b. tariff reductions under Canada U.S. Free Trade Agreement (CUFTA) and NAFTA from 8% to 4%.

4. Did the CITT breach natural justice in making post-hearing analyses of the effect of Z-Line and DNN on Stelco and Dofasco and of the effect of an increase in the proportion of non-prime products and in failing to send a questionnaire to Z-Line and DNN? Did the failure to send the questionnaires constitute jurisdictional error?

5. Did the CITT err in its refusal to grant the exclusions sought by the U.S. Complainants?

6. Did the CITT err in including the U.S. Complainants within its finding of a likelihood of future injury?

With respect to the Stelco Complaint, supported by CCC, there are two issues as follows:

7. Did the CITT err in granting an exclusion for subject goods produced by the electrogalvanizing process and used in the manufacture of motor vehicles?

8. Did the CITT breach natural justice by failing to call evidence concerning CCC as to the electrogalvanized product exclusion or by giving inadequate attention to the potential injurious effects of such an exclusion on CCC?

**Decision on U.S. Complainants' Issues**

**Issues No. 1 and 2**

> **Did the CITT err in finding injury with respect to all goods from all exporters, irrespective of whether there is evidence that some of these exporters have or have not contributed to the injury or likely injury to the domestic industry?**
>
> **Did the CITT err in using cumulation to find that dumping has been the cause of material injury to the domestic industry where an exporter or exporters present evidence that it or they have not contributed to the injury?**

In determining whether the domestic industry has suffered from, or is threatened with, material injury, the CITT analyzed the cumulative effect of imports from all subject countries, the so-called cumulation methodology. In doing so, it took cognizance of Article 3 of the Antidumping Code and CITT Rule 61, and considered the factors therein listed.[17]

After defining the characteristics of the market for the subject goods, it conducted an analysis of economic indicators. It found that by 1992, almost all market sectors were being offered substantial price discounts and in spite of a general improvement in transaction prices in 1993 and 1994, substantial discounts from book prices remained in place in certain parts of the market. The CITT also found that as a result of these discounts and allowances, the industry's average revenues earned on sales of the subject goods decreased in 1991 and 1992 before increasing marginally in 1993, resulting in decreased profits for domestic exporters. It noted a 73% fall in profitability of the domestic market from 1990 to 1993, which it found might nevertheless understate the amount of injuries suffered. Since a production line known as the DNN line, in which Dofasco was a partner, and a line known as the Z-Line, established by Stelco, entered the market during the period in question, the CITT consolidated the financial results of these lines with Dofasco and Stelco and found that the impact on industry income statements was minimal.[18]

The CITT considered whether there was a causal link between the material injuries suffered by the domestic industry and the dumped imports, noting that the injury stems from losses and low profitability related to reduced average unit revenues. It analyzed the evidence on a "macro" level and found that the correlation between dumped prices and price suppression established a causal connection between the dumped imports and the suppressed prices in the Canadian industry. It then considered causality at a "micro" level and referred to witness statements of those having knowledge of the market place and documents containing price information. It concluded that the subject imports contributed significantly to the unstable, eroded and suppressed prices in the Canadian

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[17] *CITT Statement of Reasons*, supra, p.24

[18] *CITT Statement of Reasons*, supra, pp. 13-15, 20-21

market. It then gave particular attention to the automotive sector and found that Canadian mills had to progressively lower their prices to keep themselves competitive.[19]

Consequently, the CITT found that the dumped imports have caused and are causing material injury to the domestic industry and that there was a clear causal link between the dumping and the injury.

The U.S. Complainants allege that Subsection 42(1) of SIMA requires a causal nexus between dumping and injury for particular exporters that cannot be supplied by the operation of the cumulation approach alone. They allege that the determination of causality in Subsection 42(1) is a matter of law touching on jurisdiction. They claim there must be evidence connecting their exports to the injury. They allege that if an exporter presents positive evidence that it did not contribute to any injury to the domestic industry, the CITT must consider that evidence and, if the evidence is sufficient, find that the exporter did not contribute to that injury. Accordingly, they claim that the CITT was wrong in law and failed to exercise its jurisdiction by not considering evidence, particularly as to pricing and market share, that they did not contribute to injury.

Opposing participants support the CITT's application of the cumulation methodology and refer to the decision in the *Hitachi*[20] case in support of their position. They support the CITT's conclusion that all of the dumped imports, taken cumulatively, had attained a sufficient share of the Canadian market to warrant a finding of material injury. They also contend that the evidence supports a finding that the U.S. Complainants contributed to the injury. They argue that all questions involved in these issues are questions of fact and that there is sufficient evidence to support the CITT's conclusion.

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[19] *CITT Statement of Reasons*, supra, pp. 20-30.

[20] *Hitachi Limited v. The Anti-dumping Tribunal*, [1979] 1 S.C.R. 93, (1978), 24 N.R. 601.

The panel considers that the decision of the Supreme Court of Canada in the *Hitachi* case is a complete answer to issue No. 1. In that case, the Court upheld a finding of future injury despite an absence of evidence of underselling by certain exporters. The cumulation methodology, while not obligatory[21], is a common practice of the CITT in inquiries to consider whether dumped imports have caused injury to domestic industry.[22]

Causation is largely a question of fact within the jurisdiction of the CITT[23]. As the CITT's decision has adequate support in the evidence[24], the Panel will not interfere with it.

The U.S. Complainants are in error in arguing that "cause" is a question of ordinary vocabulary to be reviewed on a correctness standard.[25] In accordance with the pragmatic and functional approach endorsed by the Supreme Court[26], it is clear that the determination of cause under Section 42 of SIMA is within the jurisdiction entrusted to the CITT and at the centre of the CITT's expertise.

Section 42 of SIMA does not compel the CITT to make a finding that certain exporters have not caused injury where they show by positive evidence that they have not done so. The argument

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[21] *Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Heat-Treated or not, Originating in or Exported from the U.S.A. (Injury),* 1994, CDA-93-1904-06.

[22] *Polyphase Induction Motors originating in or exported from Brazil, France, Japan, Sweden, Taiwan, UK, USA* (1989) Inquiry No. CIT-5-88 (CITT)
*Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating in or Exported from the United States (Injury), 1994*, CDA-93-1904-07
*Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States (Injury)* 1994, CDA-93-1904-09.

[23] *Sacilor Acieries et al v. The Anti-dumping Tribunal et al* (1985), 9 C.E.R. 210
*National Corn Growers v. Canada (Import Tribunal)*, supra, at footnote no. 9.

[24] *CITT Statement of Reasons*, supra, pp. 24-30

[25] *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554

[26] *Bibeault*, supra, (at footnote no. 6)

of the U.S. Complainants is flawed because it is based on the proposition that injury must be determined on an exporter by exporter basis. Nothing requires the CITT to review the evidence on an exporter by exporter basis in making its initial finding of injury.

**The Panel therefore finds** that the CITT did not err with respect to issues Nos. 1 and 2. The questions raised in these issues are matters within the jurisdiction of the CITT and are matters on which it has a high degree of expertise.

If it were shown that certain U.S. Complainants did not cause any injury, the question then would become whether an exclusion should be made in their favour, not whether they are included in the initial finding of injury. This is really a claim for producer exclusions.

**Issue No. 3**

**Did the CITT err in finding that the following non-dumping factors did not derogate from its conclusion that dumped imports have caused and are causing material injury to the domestic industry:**

**a. the recession;**

**b. the entry of Sorevco, Z-Line and DNN into the market;**

**c. fluctuations in exchange rates; or**

**d. the closure of Dofasco's ingot stream and pension and retirement costs.**

**and in not considering the following nondumping factors:**

**e. the sale of excess prime materials; or**

**f. tariff reductions under CUFTA and NAFTA from 8% to 4%.**

The CITT considered factors other than dumping which, in its opinion, could have caused the price erosion and suppression. It gave consideration to the effect of the recession, the capacity additions of Z-Line, DNN Line and Sorevco, the sale of non-prime products at substantial discounts, the effect of fluctuations in exchange rates and the effect on the industry of the closure of an ingot stream by Dofasco and an increase in its pension and retirement costs. It acknowledged that factors other than dumping had some effect on the price of the subject goods in the Canadian market, but was not convinced that these other factors explained the magnitude of the price erosion and suppression which caused the reduced profitability experienced by the domestic industry.[27]

The U.S. Complainants allege that the CITT was in error in failing to conclude that the decline in prices in the Canadian market was caused by the above-listed factors, including its failure to consider items e. and f., and not by dumping.

Opposing participants maintain that the CITT has properly considered all non-dumping factors.

**The Panel finds** that the CITT did not err with respect to issue No. 3. The question of whether injury to the domestic industry is caused by dumping or by some other factors is a matter clearly within the jurisdiction and specialized expertise of the CITT in carrying out its duties under Section 42 of SIMA. This is a question of fact and the evidence is reasonably capable of supporting the findings of the CITT in this instance.

**Issue No. 4**

> **Did the CITT breach natural justice in making post-hearing analyses of the effect of Z-Line and DNN on Stelco and Dofasco and of the effect of an increase in the proportion of non-prime products and in failing to send a questionnaire to Z-Line and DNN? Did the failure to send the questionnaires constitute jurisdictional error?**

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[27] *CITT Statement of Reasons*, supra, pp. 21-24 and 30-34.

In response to a request by the U.S. Complainants that the CITT consider sales of non-prime products, the CITT did a post-hearing analysis of whether the domestic industry's profitability was adversely affected by a higher incidence of non-prime products being sold at a loss, and concluded such sales would have a minimal effect on the financial position of the industry.[28]

The U.S. Complainants alleged that the statistics used by the CITT were insufficient without including the financial results reported by the Z-Line and the DNN Line. The CITT agreed that its analysis should include the results of those operations and accordingly did a post- hearing analysis consolidating the financial results of the Z-Line and the DNN Line on the financial results of Stelco and Dofasco. It concluded that the impact of this exercise on the industry income statement was minimal.

The U.S. Complainants allege that in making these analyses, the CITT used information not in the record. They also allege that, not having had access to these analyses, they could not determine the methodology used and were deprived of the opportunity to comment on them. They allege there was a breach of natural justice.

The U.S. Complainants also allege that the CITT committed jurisdictional error or breach of natural justice by failing to send a questionnaire to Z-Line and DNN and/or obtain other evidence about them and that the failure to do so was failure was contrary to Subsection 42(3) of SIMA and Article 4.1 of the Antidumping Code (1980).

Opposing participants reply that the analyses were based only on material in the record and that it is not an error for the CITT to make any post-hearing analyses it considers necessary in order

[28] *CITT Statement of Reasons*, supra, pp. 21-23, 31-33

to arrive at its decision, provided they are based on the evidence. On the matter of the questionnaire, they replied that the record contains all relevant information about Z-Line and DNN.

The Panel is satisfied that the analyses in question were supported by information on the record. Any tribunal must be free to do whatever analyses it requires to come to its decision, provided it does not use information not on the record and not available to the parties. Although it might have been better for the CITT to have distributed the analyses to the participants for their comment, the fact that it did not do so is not an error or a breach of natural justice.

**The Panel therefore finds** that issue No. 4 discloses no breach of natural justice either as to the post-hearing analyses or as to the questionnaire.

**The Panel also finds** that using a pragmatic and functional approach to jurisdiction, the CITT has not committed jurisdictional error[29]. If there was an error in not sending questionnaires to Z-Line and DNN, it was cured by the evidence presented about Z-Line and DNN and the fact that the U.S. Complainants had the opportunity at a hearing to cross-examine witnesses or request that additional evidence be obtained. The CITT did not err in treating Z-Line and DNN as part of Stelco and Dofasco.

**Issue No. 5**

**Did the CITT err in its refusal to grant the exclusions sought by the U.S. Complainants**?

In considering the request of the U.S. Complainants for producer exclusions in their favour, the CITT stated that it will only grant exporter exclusions in exceptional circumstances and declined to grant the exclusions requested. The CITT noted that the U.S. Complainants represented approximately 60% of the total exports from the United States in 1993 and that all of them, except

[29] *Bibeault*, supra, at footnote no. 6

for Bethlehem Steel Export Corporation, were found to have dumped a high percentage of their exports in Canada at weighted average margins of dumping which had an effect on the pricing of the subject goods by the domestic industry.[30]

The U.S. Complainants allege that there should have been an exclusion in their favour because the evidence shows that they did not contribute to material injury. They allege that this is an error of jurisdiction and of law.

Opposing participants claim that this question involves findings of fact and whether to grant exclusions is completely within the jurisdiction of the CITT.

The Panel notes that Bethlehem Steel Export Corporation was found not to have dumped. There is no law requiring a producer exclusion in these circumstances; zero dumping does not necessarily mean an exclusion should be granted[31]. Whether to do so is within the discretion of the CITT.

**The Panel finds** that the CITT did not err in failing to grant the exporter exclusions requested. The determination of whether exclusions should be granted is a matter within the specialized expertise and discretion of the CITT. The CITT considered the factors raised by the U.S. Complainants. It exercised its discretion and, there being no identified wrong principle associated with the exercise of that discretion, the Panel will not interfere.

**Issue No. 6**

**Did the CITT err in including the U.S. Complainants in its finding of a likelihood of future injury?**

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[30] *CITT Statement of Reasons*, supra, pp. 42-43.

[31] *Cold Rolled*, supra (at footnote no. 22)
*Sacilor*, supra, (at footnote no. 23)

In coming to the conclusion that there was a likelihood of future material injury, the CITT considered many factors. It noted that the steel industry's future well-being has become increasingly tied to galvanized products so that depressed prices could have a greater impact in future than at present. It cited the 1993 U.S. International Trade Commission finding which restricted access to the U.S. market, creating a risk of trade diversion to Canada. It referred to major investments creating a need for high utilization rates. It noted that although the automotive sector was strong, it was very competitive and that users are able to take advantage of the lowest possible price, including dumped prices. It found that the construction sector was soft and uncertain, with mills operating at about 75% capacity. It then turned to Europe and Japan and found that depressed prices in those markets gave every reason to believe they would concentrate on export markets, including Canada. As to Canada, the CITT noted that low-priced imports have continued to act as a drag on prices, notwithstanding the decline in the value of the Canadian dollar, and concluded that the evidence of persistent underselling and generally high margins of dumping revealed a risk of continuing instability in the Canadian market. Finally, it noted that Canadian price increases have been less than 50% of U.S. price increases, but that the Canadian industry is still obliged to offer substantial discounts to many customers.

The CITT concluded that if antidumping duties are not in place, the domestic industry would continue to have difficulty achieving prices that would provide reasonable returns, and would thereby suffer future material injury.[32]

The U.S. Complainants challenge the CITT's decision as it applies to them. They allege that the CITT has committed errors of jurisdiction and of law and has made findings of fact without regard to the material before it.

Opposing participants reply that the determination of whether dumping is likely to cause material injury in future is a question within the jurisdiction of the CITT, that it made no error in

[32] *CITT Statement of Reasons*, supra, pp. 34-39

coming to the conclusion that there was a likelihood of future injury, and that the CITT was not required to find a likelihood of injury caused specifically by the U.S. Complainants.

**The Panel finds** that the CITT did not err with respect to issue No. 6.[33] The CITT has considered sufficient factors to warrant its conclusion and there is evidence to support its decision. Its decision is consistent with Article 3.6 of the Anti-dumping Code and the recommendations concerning determination of threat of material injury adopted by the Committee on Anti-dumping Practices.[34]

[33] Panelist Irish concurs in affirming the CITT decision on threat of material injury, but believes that the reasoning of the CITT discloses an error of law that cannot be supported under the review standard of considerable deference. She would find that the CITT erred in taking account of the cyclical nature of the steel industry (*CITT Statement of Reasons*, p. 34). She would hold that this analysis misinterprets the requirement of material injury in SIMA, read in consonance with GATT Antidumping Code, Article 9.1 (*National Corn Growers v. Canada (Import Tribunal)*, supra at footnote no. 9, pp. 1371-72). In the result, however, Panelist Irish concurs in affirming the CITT decision as a finding of fact because it is reasonably supported by other evidence.

[34] 21 October 1985, ADP/25, (BISD) 32nd. supp. Geneva, March 1986 at 182-184

**Decision on Stelco Complaint Issues**

**Issue No. 7**

**Did the CITT err in granting an exclusion for subject goods produced by the electrogalvanizing process and used in the manufacture of motor vehicles?**

At the request of the U.S. Complainants, the CITT granted an exclusion for corrosion-resistant steel sheet products produced by the electrogalvanized process for use in the manufacture of motor vehicles. It stated that the CCC is the only producer of electrogalvanized corrosion-resistant steel sheet products in Canada and it found there was no evidence that it sold any of those products to the automotive sector during the period of inquiry or that its electrogalvanizing line is capable of producing products for that market. Accordingly, it found that these products for use in the manufacture of motor vehicles are not produced in Canada.[35]

The CITT then dealt with submissions by Stelco arguing that hot-dipped products produced by it are substitutable for electrogalvanized products. It found, *inter alia*, that, although there was evidence that Stelco had succeeded in replacing electrogalvanized products with hot-dipped products in certain automotive parts, there was substantial evidence that automotive manufacturers still insist on using electrogalvanized products for many unexposed automotive parts and that this is not about to change quickly. It concluded against Stelco's argument that this exclusion should not be granted.[36]

Stelco alleges that the onus is on a party seeking an exclusion and an exclusion will not be granted where, *inter alia*, there is domestic production of non-identical competing goods which are substitutable for those for which an exclusion is sought. Stelco claims the CITT should have held that hot-dipped products are substitutable for unexposed automotive applications, and that the matter should be remanded to the CITT with instructions to deny an exclusion for electrogalvanized

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[35] *CITT's Statement of Reasons*, supra, p. 40.

[36] *CITT Statement of Reasons*, supra, pp. 39-42.

products for use in the manufacture of motor vehicles. In the alternative, Stelco requests a remand to the CITT with instructions to specify the applications where hot-dipped products are substitutable.

Opposing participants deny the substitutability of hot-dipped products and claim that customer preference favours the use of electrogalvanized products, in some cases exclusively.

The Panel notes that the CITT found that there are physical differences between hot-dipped products and electrogalvanized products and that consumers are prepared to pay a premium for electrogalvanized products. It also noted that there are physical differences between electrogalvanized products used in the automotive sector and those used in the non-automotive sector. While the domestic producers argue that an increase in the price spread between the products would enable them to convince the consumer to buy hot-dipped products rather than electrogalvanized products, the CITT is not obligated to grant an exclusion on this ground, even if it is the case. The CITT has broad discretion to limit the scope of antidumping relief.

**The Panel therefore finds** that the CITT did not err with respect to issue No. 7. As stated above, whether to grant an exclusion is a matter within the specialized expertise and discretion of the CITT.[37] It considered the issue and did not proceed on any wrong principle.

[37] *Hetex Garn A.G. v. Anti-dumping Tribunal*, [1978] 2 F.C. 507.

**Issue No. 8**

**Did the CITT breach natural justice by failing to call evidence concerning CCC as to the electrogalvanized product exclusion or by giving inadequate attention to the potential injurious effects of such an exclusion on CCC?**

CCC alleges that since it is the sole producer of electrogalvanized product in Canada, information should have been requested from it relevant to this exclusion. It is alleged that the decision was made without regard to the potential injurious effects on CCC and that the CITT should have recognized that there was a danger of diversion of electrogalvanized product coming into Canada for automobile uses to areas of the market where CCC competes.

The Panel notes that CCC is the only producer of electrogalvanized product in Canada, that there is no evidence it sold that product to the automotive sector, or that its product has the characteristics required for the automotive sector[38]. Thus, it is apparent that there was sufficient evidence to support a conclusion of the CITT that CCC's business would not be affected by the exclusion. As to possible diversion, it was stated before the Panel that Stelco, not CCC, had put this point to the CITT. The CITT exercised its discretion and there being no identified wrong principle associated with the exercise of that discretion, the Panel will not interfere.

**The Panel therefore finds** that the CITT did not err with respect to issue No. 8. It is a matter within the CITT's specialized expertise and there is evidence to support its conclusion.

[38] *CITT Statement of Reasons*, p. 40

## IV. **CONCLUSION**

**The Panel hereby orders** that the finding of the CITT in this matter be and it is hereby affirmed.

SIGNED IN THE ORIGINAL BY:

E. Neil McKelvey, O.C., Q.C. (Chair)
E. Neil McKelvey, O.C., Q.C. (Chair)

Edward C. Chiasson, Q.C.
Edward C. Chiasson, Q.C.

Timothy A. Harr
Timothy A. Harr

Maureen Irish
Maureen Irish

Lauren D. Rachlin
Lauren D. Rachlin

Issued on the 10th day of July, 1995.