NORTH AMERICAN FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL REVIEW

IN THE MATTER OF:	)	
Certain Prepared Baby Food	)	Secretariat File No.:
Originating in or Exported	)	CDA-USA-98-1904-01
From the United States	)	
of America (Injury)	)	

Before: Edward C. Chiasson, Q.C. - Chairman
Serge Anissimoff
Professor Barry E. Carter
Professor Kevin C. Kennedy
Brian E. McGill

DECISION AND REASONS OF THE PANEL
November 17, 1999

Appearances:

Paul Léger on behalf of Gerber (Canada) Inc.

Brenda Swick-Martin and Patricia Harrison on behalf of the Commissioner of Competition

Randall Hofley and Susan Hutton on behalf of the H.J. Heinz Company of Canada Ltd.

Gerry Stobo and Philippe Cellard on behalf of the Canadian International Trade Tribunal

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DECISION AND REASONS OF THE PANEL

TABLE OF CONTENTS

1. Introduction 1

2. Procedural History 1

3. The Standard of Review 3

4. Issues Related to Alleged Errors of Fact 9

5. Issues concerning the Appropriate Injury Test 11

6. Conclusion 14

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1. Introduction

This is the decision in a Binational Panel Review conducted pursuant to Article 1904 of the North American Free Trade Agreement ("NAFTA") and Part I.1 of the *Special Import Measures Act*,[1] following Requests for Panel Review filed by Gerber (Canada) Inc. ("Gerber") and the Director of Investigation and Research of Canada's Competition Bureau,[2] seeking the remand of a Finding of the Canadian International Trade Tribunal (the "CITT") issued 29 April 1998. The CITT, in accordance with SIMA subsection 43(1.1), and pursuant to subsection 43(1), found that dumping in Canada of certain prepared baby food (the "Subject Goods") originating in or exported from the United States has caused material injury to the domestic industry.[3]

2. Procedural History

Following the receipt of a properly documented complaint, the Deputy Minister of National Revenue for Customs and Excise (the "Deputy Minister") initiated an investigation into dumping of the Subject Goods on 3 October 1997.[4] A preliminary determination of dumping was issued by the Deputy Minister on 30 December 1997.[5]

Upon receipt of the Deputy Minister's preliminary determination, the CITT commenced an inquiry under SIMA section 42 on 2 January 1998.[6] On 22 January 1998, the Commissioner filed a Notice of Appearance (Party) to participate in the CITT inquiry and thereafter participated fully in the CITT's proceeding.

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1 R.S.C. 1985, c. S-15, as amended ("SIMA").

2 On 14 April 1999, counsel for the Director filed a notice with the NAFTA Secretariat that the name of the Director had been changed to the Commissioner of Competition pursuant to an amendment to the *Competition Act*. As a result we hereafter refer to him as the "Commissioner".

3 Canadian International Trade Tribunal, Inquiry No.: NQ-97-002, Finding of 29 April 1998. Official notice of the CITT's Finding was published at *Canada Gazette*, Part I, Vol. 132, No. 19, 9 May 1998, at 1062. The Reasons of the CITT in NQ-97-002 were subsequently issued on 14 May 1998.

4 Official notice of the Deputy Minister's initiation of the investigation was published at *Canada Gazette*, Part I, Vol. 131, No. 42, 18 October 1997, at 3327.

5 Official notice of the Deputy Minister's preliminary determination of dumping was published at *Canada Gazette*, Part I, Vol. 132, No. 3, 17 January 1998, at 80.

6 Official notice of the CITT's Inquiry was published at *Canada Gazette*, Part I, Vol. 132, No. 2, 10 January 1998.

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The CITT conducted public and *in camera* hearings in Ottawa from 30 March to 2 April 1998. On 29 April 1998, the CITT issued its Finding that dumping in Canada of the Subject Goods has caused material injury to the domestic industry. The Tribunal issued Reasons for its Finding on 14 May 1998.[7]

Pursuant to SIMA section 77.011 and sub-rule 34(1) of the *Rules of Procedure for Article 1904 Binational Panel Reviews* (the "Panel Rules"), on 5 June 1998 Gerber filed a first Request for Panel Review. The Commissioner filed a second Request for Panel Review, also on 5 June 1998. Complaints were subsequently filed with the NAFTA Secretariat by both Gerber and the Commissioner on 6 July 1998.

On 2 October 1998 Gerber filed with the NAFTA Secretariat a document dated 1 October 1998 entitled "Notice of Withdrawal of Complaint". On 6 November 1998, Heinz filed a motion "…for an Order of the Binational Panel dismissing the Panel Review on the basis that the other Complainant, the Commissioner…does not have the statutory authority nor standing to request such a Review."

The within proceeding was suspended by Canada and the United States on 19 November 1998. It subsequently was resumed and this Panel was constituted on 24 December 1998.

On 21 January 1999, Gerber filed a motion "to reinstate…Gerber…as a Complainant in the Binational Panel Review." Briefing schedules for both the Heinz and the Gerber motions were established by the Panel and a hearing was held in Ottawa, Canada on 16 April 1999 at which oral submissions were made on both motions, albeit separately. On 29 April 1999 the Panel issued an order dismissing Heinz's motion. This was followed on the same day by an order allowing Gerber`s motion on terms. Reasons for the Panel's decisions on the motions were issued on 6 July 1999.

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[7] Canadian International Trade Tribunal, Statement of Reasons, Inquiry No.: NQ-97-002, 15 May 1998 (the "Reasons").

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The Panel subsequently held a hearing in Ottawa, Canada on the merits of the Complaints on 13 and 14 October 1999.

3. The Standard of Review

Pursuant to NAFTA Article 1904(3), this Panel is directed to 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."

In the case of Canada, Annex 1911 defines the standard of review as being those grounds set out in subsection 18.1(4) of the *Federal Court Act*.[8] Subsection 18.1(4) provides that the CITT's decisions may be reviewed on grounds that it:

> "…
>
> (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 or fraud, or perjured evidence; or
>
> (f) acted in any other way that was contrary to the law."

This Panel also must look to the general jurisprudence that would guide a Canadian court in its review of CITT decisions. NAFTA's definition of "general legal principles", found in Article 1911, does not refer explicitly to the standard of review,[9] but, when invoked, binational panel review replaces review by Canada's Federal Court.[10]

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8 R.S.C. 1985, c. F-7, as amended.

9 Article 1911 defines "general legal principles" to include principles such as standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies.

10 NAFTA Article 1904(1).

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NAFTA Article 1904(3) directs binational panels to apply the general legal principles that a Canadian court would apply in a judicial review.

In undertaking a review of a CITT decision, the question of when the Panel must defer to the CITT is critical. Under Canadian law, and based on the provisions of subsection 18.1(4) of the *Federal Court Act*, the degree of deference to be extended to the CITT by this Panel will depend upon the nature of the error being alleged. In this regard, the Supreme Court of Canada, in *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*[11] provides guidance to assist in the characterization of alleged errors in a decision being judicially reviewed. The Court commented that:

> "The central inquiry in determining the standard of review…is the legislative intent of the statute creating the tribunal whose decision is being reviewed. More specifically, the reviewing court must ask: '[W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?'…"[12]

(a) Alleged Errors of Jurisdiction

With respect to alleged errors concerning jurisdiction, in the *Pushpanathan* case the Supreme Court referred to the development of a "pragmatic and functional approach" to issues concerning jurisdiction and noted that:

> "Although the language and approach of the 'preliminary', 'collateral', or 'jurisdictional' question has been replaced by [a] pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others…it is still appropriate and helpful to speak of 'jurisdictional questions' which must be answered correctly…But…a question that 'goes to jurisdiction' is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, 'jurisdictional error' is simply an error on an issue with respect to which, according to the outcome of the pragmatic

[11] [1998] 1 S.C.R. 982.

[12] *Id*., at 1004.

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and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown."[13]

It is clear that the standard of review for alleged errors of jurisdiction remains "correctness". The CITT must be right. It is not entitled to deference when it addresses a question of jurisdiction. If the CITT were wrong, the Panel would remand with instructions to correct the Finding.

(b) Alleged Errors of Fact

With respect to alleged errors of fact, the Panel will not reweigh evidence, but the CITT must have assessed the evidence reasonably. The Panel will remand the Tribunal's finding if "…the evidence, viewed reasonably, is incapable of supporting [the CITT's] finding of fact..."[14] This standard has been described as patent unreasonablity.[15] Although certain written submissions filed prior to the oral hearing in this review appeared to raise considerations of a different standard of review applicable to alleged errors of fact,[16] at the hearing all participants agreed that the applicable standard for issues of fact was patent unreasonability.

(c) Alleged Errors of Law

All participants in this review also agreed that the standard of review for alleged errors of law within the jurisdiction of the CITT is patent unreasonability. We note that this concurrence of views occurred during the oral hearing. In written

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13 *Id.*, at 1005.

14 *Lester (W.W.)(1978) Ltd.* v. *United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at 669.

15 The Supreme Court of Canada, in *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748, at 777, has provided guidance on the difference between "unreasonable" and "patently unreasonable" saying that the difference:

> "…lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect then the decision is unreasonable but not patently unreasonable."

16 For example, the Commissioner and Gerber both alleged that the Tribunal had made errors of mixed fact and law and that the standard of review applicable to such alleged errors was simple reasonableness.

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submissions filed previously, the Commissioner and Gerber both took the position that the standard for alleged errors of law was that of "considerable deference", a position that was abandoned by the Commissioner and Gerber at the oral hearing.

Adoption of the patent unreasonability test by all participants was, in part, based on a recent decision of the Federal Court of Appeal. Reference was made to *Canadian Pasta Manufacturers' Assn.* v. *Aurora Importing & Distributing Ltd.*[17] in which the Federal Court of Appeal concurred with the agreement of the parties that the standard of review for alleged errors of law was patent unreasonableness.[18]

The Federal Court of Appeal did not refer to *Pezim* v. *British Columbia (Superintendent of Brokers)*,[19] wherein the Supreme Court of Canada discussed the spectrum of standards of judicial review and addressed the concept of "considerable deference".[20] Mr. Justice Hugeson, writing for the Federal Court of Appeal, quoted from a previous decision[21] which was a judicial review of certain alleged factual errors made by the Tribunal in which he had referred to the wording of the *Federal Court Act* dealing with the review of the Tribunal's factual determinations. He had taken note of the absence of a privative clause and referred to other factors leading to deference. He then had concluded that the wording in the *Federal Court Act* relating to findings of fact was equivalent to patent unreasonableness. This was the basis for his conclusion in the *Pasta* case that the same standard applied to errors of law within jurisdiction. The Panel notes that the operative wording of the *Federal Court Act* for such reviews is not the same as that for findings of fact.[22]

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[17] (1997) 208 N.R. 329.

[18] *Id.* at 332.

[19] [1994] 2 S.C.R. 557.

[20] Id., at 589 to 596.

[21] *Stelco Inc*. v. *Canada (Canadian International Trade Tribunal)* [1995] F.C.J. 831.

[22] With respect to findings of fact, paragraph (d) of subsection 18.1(4) states: "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", while with respect to errors of law, paragraph (c) of subsection 18.1(4) provides: "erred in law in making a decision or an order, whether or not the error appears on the face of the record."

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At the hearing in this review, there also was some reliance placed on *Canada (Attorney General)* v. *Symtron Systems Inc.*[23] wherein again the Federal Court of Appeal concurred with the agreement of the parties that the appropriate standard for alleged errors of law was patent unreasonableness.[24] A footnote reference[25] was made to the same Court's decision in *British Columbia (Vegetable Marketing Commission)* v. *Washington Potato and Onion Association*,[26] and to the Supreme Court of Canada's decision in *Pezim* to support the application of that standard, but neither decision supports the proposition that was being advanced.

In *Pezim*, the Supreme Court dealt with a spectrum of standards and the concept of considerable deference. In the *Vegetable Marketing* case the Federal Court of Appeal referred to *Pezim* and applied a standard of review "between reasonableness and patently unreasonableness" based on the CITT's expertise and the fact that its decisions are not protected by a privative clause.[27]

The Federal Court of Appeal case of *Canada (Attorney General)* v. *Corel Corp.*[28] also was relied on. Counsel in that case also agreed that the applicable standard of review was patent unreasonability. The Federal Court of Appeal simply applied its decision in *Symtron*.

Heinz referred to *Certain Hot-Rolled Carbon Steel Plate, Originating In Or Exported from Mexico*,[29] in which a previous binational panel held, with two dissenting members, that the standard of review was patent unreasonability. The majority incorrectly referred to the decision of a previous binational panel in *Certain Flat Hot-*

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23 (1999) 2 F.C.R. 514.

24 *Id*., at 533.

25 *Ibid*, at footnotes 11 and 12.

26 [1997] F.C.J. No. 1543.

27 *Id*., at 1. The Panel notes that this also was the approach taken by the binational panel in *Certain Concrete Panels from the United States*, CDA-97-1904-01. See Decision of the Panel, 26 August 1998, at 4 to 6.

28 [1999] F.C.J. No. 525.

29 CDA-97-1904-02, Decision of the Panel, 19 May 1999.

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Rolled Carbon Steel Sheet Products Originating In Or Exported From the United States (Injury), as supporting their conclusion.[30] It did not do so. The binational panel in the *Hot-Rolled Carbon Steel Sheet Products* case held that the standard of review was patent unreasonability, but it was applying the law as it was prior to a 1994 amendment to SIMA that deleted the CITT's privative clause.[31]

It is clear that the standard of review for alleged errors of law within the jurisdiction of the Tribunal is either patent unreasonability or considerable deference. The jurisprudence at the level of the Federal Court of Appeal and decisions of previous binational panels are not consistent. The Supreme Court of Canada has recognized the distinction. This Panel would not be prepared to proceed on the basis that the applicable standard of review was patent unreasonability simply because the participants before us agreed that it was so. For reasons that will become apparent, it is not necessary for this Panel to reconcile the apparent divergence of views on the applicable standard of review for errors of law, and therefore we make no specific ruling as to what the appropriate standard of review is for alleged errors of law within jurisdiction.

(d) Standard of Review Applicable to Issues Concerning Causation

The Commissioner and Gerber alleged that the CITT made a number of causation-related errors in reaching its conclusion that dumping caused material injury to Heinz, including that the CITT failed to consider the full cumulative impact of non-dumping factors, such as the overall reduction in demand. At the hearing, the Complainants both agreed that these alleged causation-related errors were all alleged errors of fact.[32] Thus, the applicable standard of review for all of these causation-related issues is patent unreasonability.

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30 *Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating In Or Exported From the United States (Injury)*, CDA-93-1904-07, Decision of the Panel, 18 May 1994, at 15.

31 See *id*. at 13 and following.

32 See Transcript of the Public Hearing, at 6 and 59.

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4. Issues Related to Alleged Errors of Fact

Considerable emphasis was placed by the Complainants on the CITT's conclusion that during the period of inquiry there had been price erosion caused by dumping. It was asserted by the Complainants that the CITT's conclusion was patently unreasonable because: first, it was contrary to the evidence on the record and second, in making such a finding the CITT failed to follow "fundamental principles of economic theory."

With respect to the first basis of the alleged error, the CITT's Reasons are replete with references to facts which the Complainants say do not support, or are contrary to the Tribunal's basic injury conclusion. Reference to a few illustrate the point. With respect to prices, the CITT noted that during its period of inquiry, Heinz managed to increase its list prices in Ontario by 10 percent.[33] With respect to sales volume, the CITT noted that:

> "The second factor, which has reduced Heinz' profitability, is declining sales volumes and related revenue declines. The Tribunal notes that, during the period of inquiry, the overall market for [the Subject Goods] declined by over 20 percent…Whatever the specific reasons for the market declines, it is evident to the Tribunal that the declines in the overall market are unrelated to dumping."[33 bis]

In the face of such findings of fact, the Complainants argue that the CITT's conclusion that dumping was a cause of material injury was patently unreasonable.

The CITT's Reasons refer to a number of factors other than dumping that were affecting the performance of the domestic industry. It is clear that it considered and weighed these factors in arriving at its decision. For example, by way of summary, the CITT concluded that:

> "In this case, there were certainly other significant causes of injury to Heinz, most notably the adverse publicity surrounding the CSPI report and the general volume decline in the market.
>
> The Tribunal has done an extensive examination of all of these other factors causing injury to Heinz and, after accounting for their effects, is still left with material injury to Heinz caused by dumping. This injury is most obviously manifested in the price erosion which occurred. However, the Tribunal also finds that Heinz suffered injury because its net net prices

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33 Reasons, at 24.

33 bis Id., at 13.

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have been suppressed and because its market share could have been higher than it was during the period of inquiry but for the dumping."[34]

In the Panel's view, there was evidence that rationally supported the Tribunal's finding that dumping caused injury and the CITT dealt with the evidence that related to causes for injury other than dumping.

With respect to the second aspect of this alleged error (that the CITT failed to follow "fundamental principles of economic theory"), the Commissioner produced supply and demand curves during the oral hearing in this proceeding in an effort to illustrate the application of these "fundamental principles" and to support the Commissioner's and Gerber's contentions that the CITT's conclusions were contrary to them.

In response to questions from the Panel, counsel for the Commissioner confirmed that during the original oral hearing before the CITT there had been argument and evidence presented by the participants on both sides of this issue, but the Commissioner argued that the CITT's decision to accept one position over the other was patently unreasonable. Neither the Commissioner nor Gerber led expert evidence on the issue during the CITT's hearing. Their position before the CITT was based, in part, on the cross-examination of expert witnesses called by Heinz.

Heinz, in response, directed the panel to testimony and to other documentary material in the record that was put before the CITT for its consideration, which was contrary to or qualified the propositions advanced by the Commissioner and Gerber and to which the CITT referred in its Reasons.[35]

The Panel is satisfied that CITT's finding of injury caused by dumping is supported rationally by the evidence.

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[34] *Id*., at 25.
[35] *Id*., at 192 to 202.

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5. Issues concerning the Appropriate Injury Test

In his Complaint, the Commissioner originally alleged that the CITT "erred by concluding that imports of the subject goods constituted a threat of future injury."[36] In oral submissions before the Panel, the Commissioner specifically abandoned this line of argument and instead argued that the CITT was "required not to base its injury on a past finding and to make a positive finding with respect to current injury."[37]

In its initial Complaint, Gerber did not refer to this issue. As a result of the Panel's decision allowing it to file a Complaint out of time, Gerber added a new ground stating that "...[t]he Tribunal erred by failing to inquire into and issue a finding in respect of whether the dumping of the subject goods is threatening to cause injury to the domestic industry."[38] In its oral submissions before us, Gerber too abandoned this basis of complaint and together with the Commissioner contended that the Tribunal had an obligation to make a finding with respect to current injury.

In its original brief filed 5 July 1999, Gerber adopted the "future injury" submission of the Commissioner as its position on the issue. Subsequently, without notice, the Commissioner filed an amended brief deleting the paragraphs in its original brief dealing with the future injury matter. Gerber then, also without notice, filed an amended brief incorporating the deleted contentions and restating them in amplified form. Heinz then objected both to the inclusion in Gerber's Complaint of a new ground concerning future injury and to the unauthorized filing of amended briefs by the Complaints.

As of 5 October 1998, the date on which the Commissioner filed his original brief, Gerber knew through that brief that future injury was an issue. As of 5 May 1999 when Gerber filed its amended Complaint, the Commissioner knew that Gerber was relying on future injury. Heinz said nothing. The mere adoption by Gerber of the Commissioner's position did not prejudice Heinz. The subsequent filing of amended briefs had that potential.

In response to the unauthorized filing of the amended briefs by Gerber and the Commissioner, Heinz filed a motion requesting that, *inter alia*, the amended briefs not be permitted to form part of the record in this review. In a ruling on the Heinz motion issued 31 August 1999 the Panel, *inter alia*, directed:

> "1. the May 5, 1999 Complaint of Gerber shall stand as filed;
>
> 2. the amended briefs filed by Gerber and the Commissioner shall not be part of the record of this Panel Review;
>
> 3. Gerber's submission concerning paragraphs 'r' and 's' of its Complaint shall be confined to the portions of the Commissioner's brief

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[36] Complaint of the Commissioner, at paragraph 5(viii).

[37] Transcript of Public Hearing, at 5 and 9 to 11.

[38] The Panel notes that the Complainants originally advanced two inconsistent grounds of complaint, with the Commissioner complaining, in effect, that the Tribunal erred in making its finding of future injury, while Gerber complained that the Tribunal failed to make a finding of future injury.

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incorporated by Gerber in its July5, 1999 brief, subject to any proper reply advanced by Gerber…"[39]

As noted, before the Panel both Gerber and the Commissioner abandoned the ground of complaint concerning future injury. For the first time they took the position that, in addition to deciding whether dumping "has caused" injury, the Tribunal was obliged to make a separate finding concerning the existence of ongoing or present injury. It was contended that this obligation flowed from Canada's international obligations, most notably Article VI of the GATT 1994 and the WTO's *Agreement on Anti-dumping* and that the Tribunal had erred in construing SIMA, section 42 as not obliging it to do so.

With regard to future injury, the CITT, in its Reasons, stated that:

"…the Tribunal must…determine whether the domestic industry has suffered injury and, if so, whether there is a causal link between the injury suffered by the domestic industry and the dumping of the subject goods…**In the event that the Tribunal makes a finding of no injury, itmust go on and consider the evidence relating to threat of injury and make a finding in respect of that question**."[40] [emphasis added]

This statement was referred to specifically in the Commissioner's written submission. The CITT's position in this regard flows out of its previous decision in *Caps Lids and Jars Suitable for Home Canning, Whether Imported Separately or Packaged Together, Originating in or Exported from the United States of America*.[41] Neither that decision nor the decision under review in this case deals specifically with the contention that the Tribunal is obliged to issue separate findings concerning past and ongoing or present injury.

Rule 7 of the Panel Rules states that the review undertaken by a binational panel is limited to examining only those alleged errors specifically set out by the complainants in their complaints.[42] The only allegation made by the Complainants in

[39] Gerber subsequently applied to amend its brief, but this motion was denied by the Panel on 13 September 1999.

[40] Reasons, at 9.

[41] Inquiry No.: NQ-95-001, Decision of 6 November 1995.

[42] We find support for this conclusion in Rules 57, 59 and 67 of the Panel Rules. Rule 57 provides that a complainant's brief must be limited to allegations set out in the complaint. Rule 59, Part III, paragraphs (a) and (b) require that a complainant's brief include a concise statement of the issues in the case, while the brief of any other participant is to contain a concise statement of each participant's position

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their Complaints related to this issue (that is, related to the appropriate injury findings) specifically was abandoned by both Complainants at the oral hearing. Neither of the Complainants in their Complaints alleged that the Tribunal was in error in failing to issue a specific finding concerning present injury. In such circumstances, we would be reluctant to consider and rule on this contention and would need to be satisfied that we could do so.

More importantly, at the original hearing before the CITT neither the Commissioner nor Gerber asked the CITT to consider this issue. Consequently, it made no specific finding on the matter. It merely issued its decision relying on the precise language of SIMA, section 42. The proposition before the Panel now is that the CITT's interpretation of this language contravenes Canada's international obligations, that this reveals a latent ambiguity in section 42 and that the CITT, in issuing its decision, acted without jurisdiction or did so on the basis of a patently unreasonable interpretation of the provision.

With the CITT having neither been specifically asked to interpret the section in this context nor having done so, the Panel finds that no reviewable error has been identified by the Complainants.

It was contended that the approach taken by the CITT showed that it was concerned only with past injury. Without deciding whether it would be an error for it to do so, it is apparent that the CITT examined all of the relevant information relating to the period of 1 January 1995 to 31 December 1997. This was the CITT's period of investigation in this case. As of 30 December 1997, a provisional duty was in place. The market thereafter was changed fundamentally. As a question of fact in this case, it is the Panel's view that the CITT's decision clearly speaks to ongoing and present circumstances.

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concerning those issues. Finally, sub-rule 67(5) provides that oral argument is to be limited only to those "issues in dispute." In the Panel's view, the "issues in dispute" are only those that have been set out in the complaints and elaborated upon in the briefs.

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6. Conclusion

Guided by the standard of review applicable to the proceedings, the Panel has concluded that:

(i) the findings of fact of the CITT alleged to be in error by the Complainants are supported rationally by the evidence; and

(ii) the Complainants have failed to identify any error of law committed by the CITT to be reviewed by the Panel.

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Accordingly, the Panel affirms the CITT's determination.

SIGNED IN THE ORIGINAL BY:

EDWARD C. CHIASSON, Q.C.
EDWARD C. CHIASSON, Q.C.

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Issued on the 17th day of November, 1999

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