

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

In the Matter of:

Certain Hot-Rolled Carbon Steel Plate, CDA-97-1904-02
Originating in or Exported from Mexico

DECISION AND REASONS OF THE PANEL
ON REVIEW OF THE CANADIAN INTERNATIONAL
TRADE TRIBUNAL FINDING

December 15, 1999

Before: Lic. Hernán García-Corral (Chairman)
 Mr. William E. Code
 Lic. Alejandro Ogarrío Ramírez
 Lic. Loretta Ortiz Ahlf
 Professor Leon E. Trakman

Appearances:

Richard S. Gottlieb and Jeffrey Jenkins on behalf of Altos Hornos de México, S.A. de C.V.
Lawrence L. Herman and Anne Kim on behalf of Stelco Inc.
Ronald C. Cheng and Gregory Somers on behalf of Algoma Steel Inc.
Dalton J. Albrecht and Markus Koenen on behalf of IPSCO Inc.
John L. Syme and Shelley Rowe on behalf of the Canadian International Trade Tribunal

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I. INTRODUCTION

This Panel was convened pursuant to Article 1904 of the North American Free Trade Agreement (“NAFTA”). This Panel Review, CDA-97-1904-02, was constituted in response to a Request for Panel Review filed with the Canadian Secretariat by the Complainant on November 28, 1997 pursuant to Rule 34 of the Rules of Procedure for Article 1904 Binational Panel Reviews of the NAFTA (“*Rules of Procedure*”).

The Complaint in this Panel Review, was filed on December 29, 1997 by the Complainant Altos Hornos de Mexico, S.A. de C.V. (“AHMSA”), a Mexican exporter of subject goods to Canada. It alleges several errors of jurisdiction, law and fact with respect to the Final Determination (the “Determination”) of the Canadian International Trade Tribunal (“CITT”) issued on October 27, 1997 in the Canadian Gazette pursuant to section 43 of the *Special Import Measures Act*, R.S.C. 1985, Chap. S-15 (“SIMA”). The Determination held that certain Hot-Rolled Carbon Steel Plate Originating in or exported from Mexico, the People’s Republic of China, The Republic of South Africa and the Russian Federation threatened to cause injury to the domestic industry.

The subject matter of the Complaint are:

hot-rolled carbon steel plate and high strength low alloy plate not further manufactured than hot-rolled, heat-treated or not, in cut lengths, in widths from 24 inches (+/- 610 mm) to 152 inches (+/- 3,860 mm) inclusive, and thickness from 0.187 inches (+/- 4.75 mm) to 4 inches (+/- 101.6 mm) inclusive, originating in or exported from Mexico, the People’s Republic China, the Republic of South Africa and the Russian Federation, but excluding plate for use in the manufacture of pipe and tube (also known as skelp); plate in coil form; plate having a rolled, raised figure at regular intervals on the surface (also known as floor plate); and plate produced to ASTM specifications A515 and A516M/A516, grade 70, in thickness greater than 3.125 inches (+/- 79.3 mm).

The parties to the Panel Review include the Complainant, AHMSA, and the respondents, the Investigating Authority (CITT), Stelco Inc., Algoma Steel Inc. and IPSCO Inc. The Public Hearing in this matter was held in Ottawa, Canada on January 18-19, 1999.

Preliminary Decision

On May 19, 1999, this Panel issued a Preliminary Decision which included the Panel's decision on the Standards of Review applicable to its review as well as a remand in part concerning the issue of a separate order under section 43(1.01) of the SIMA. Specifically, the Tribunal was instructed to "determine whether, under section 43(1.01) of the SIMA, a separate order is required in respect of Mexico and further, whether separate reasons are also requisite".

The CITT issued its Determination on Remand ("DOR") on June 21, 1999. It accepted that it erred with respect to not issuing a separate finding for Mexico and corrected that error by issuing a Corrigendum to the Findings in Inquiry No. NQ-97-001. It also determined that there was no legislative requirement or persuasive policy rationale to support the need for separate reasons with respect to goods from Mexico.

A challenge to the DOR ("Challenge") pursuant to Rule 73 of the *Rules of Procedure* was submitted by the Complainant on July 12, 1999. Together with the Challenge, the Complainant took the procedural step of filing a second Notice of Panel Review, alleging that the Corrigendum issued by the CITT in the DOR constituted a new decision. The Canadian Secretariat opened Chapter 19 file CDA-MEX-99-1904-01 in response to that request. The Complainant then filed a motion pursuant to Rule 61 on July 15, 1999 (the "Motion"), requesting that the Panels under CDA-97-1904-02 (this Panel) and CDA-MEX-99-1904-01 be joined. Submissions in response to the Motion were filed by the Parties to the Review, the Attorney General of Canada and the Government of Mexico.

Conclusion

For the reasons set forth herein, the Panel unanimously affirms the DOR and dismisses the Challenge as well as both motions by the Parties. With respect to the Determination in NQ-97-001, the majority affirms the findings of the CITT. The minority affirms in part and would remand in part with instructions.

II. BACKGROUND

On December 27, 1996 Stelco filed a complaint before the Department of National Revenue alleging injurious dumping of certain imports of carbon steel plate originating or exported from Mexico, China, Poland, Russia and South Africa. The complaint was supported by other Canadian producers, namely Algoma, and IPSCO.

The importers of the product in question are Wirth, Canadian Klockner and Ferrostaal Metals, Ltd. Wirth imports plate from China, Mexico and South Africa, while Canadian Klockner and Ferrostaal Metals, Ltd. import plate from Russia.

On February 13, 1997, the Deputy Minister of National Revenue (Deputy Minister) initiated an investigation on dumping against imports from the countries in question. The investigation covered imports during the period of January 31 through December of 1996. The subject goods were defined as certain hot-rolled steel plate originating in or exported from Mexico, China, South Africa and Russia. The Deputy Minister specifically excluded certain steel products from the subject goods, including plate in coil form, skelp, and plate produced to ASTM specifications A515 and A516M/A516, grade 70, in thickness greater than 3.125 inches.

On April 7, 1997, the CITT rendered an advice under s. 37 of the SIMA in which it determined that there existed a reasonable indication that the goods in question exported by, inter alia, Mexico caused material injury or threat of material injury to the domestic industry. The Deputy Minister issued a Preliminary Determination of dumping on June 24, 1997 and a Final Determination on September 25, 1997. The Final Determination held that all goods imported from Mexico were being dumped at a margin of 26.2%.

On June 27, 1997, the CITT issued a notice of initiation of investigation for the period of January 1, 1994 to March 31, 1997. On October 27, 1997, the CITT issued its Determination that held that the imported goods from the countries in question were not causing injury to the domestic industry, but were threatening to cause injury.

III. STANDARDS OF REVIEW

In its Remand Order, dated May 19, 1999, this Panel outlined the standard of review to be applied in this Panel review. The majority held that there was a correctness standard to be applied to issues of jurisdiction and a “patent unreasonableness” standard to be applied to issues of law and issues of fact.¹ The concurring minority opinion held that there was a correctness standard to be applied to issues of jurisdiction and a “considerable deference” standard to be applied to issues of law and to issues of fact.²

The Panel will apply these standards in its judicial review of the issues herein. The Decision is therefore composed of three separate components. First, the Panel will deal with the issues on which there is a unanimous decision irrespective of the standard applied. Then, the Decision outlines the conclusions of the majority on the remaining issues based on the patent unreasonability standard. Finally, the Decision provides the reasons of the minority dissent remanding on the basis of the standard of considerable deference.

IV. DETERMINATION ON REMAND

In response to this Panel’s Remand Order in the Preliminary Decision, the Tribunal issued its DOR on June 21, 1999. On July 12, 1999, the Complainant filed a Challenge to the DOR together with a Second Request for Panel Review pursuant to Rule 34 of the *Rules of Procedure* with respect to the identical facts in this matter. The Canadian Secretariat opened file CDA-MEX-99-1904-01.

On July 15, 1999, the Complainant filed a Motion requesting the joinder of Panel Reviews CDA-97-1904-02 and CDA-MEX-99-1904-01 and the termination of CDA-MEX-99-1904-01 “on the basis that [it] has been joined with and transferred to the Panel Review currently underway in CDA-97-1904-02”.³ On July 22, 1999, counsel for the CITT filed a submission stating that it had complied with the Remand instructions of the Panel and that the matters relating to the Second Panel Review be heard with this Panel Review. On July 22, 1999, IPSCO Inc. filed a letter objecting to the filing of

¹Preliminary Decision of the Panel, dated May 19, 1999, Majority Opinion p. 11

²Preliminary Decision of the Panel, dated May 19, 1999, Minority Opinion p. 18

³Motion of the Complainant dated July 14, 1999

CDA-MEX-99-1904-01 on the basis that the DOR was not a definitive decision under subsection 77.01(1) of SIMA. On July 26, 1999, Stelco filed a response to the Motion as well as its own Notice of Motion requesting a dismissal of the Second Panel Review and the joinder of the two Panel Reviews to the extent necessary to deal with its motion. Algoma filed submissions stating it supported the position of Stelco. Permission to intervene was granted to the Attorney General of Canada and the Government of Mexico, each of whom filed submissions in opposition of the request to join panels.

This Panel reviewed the Determination on Remand, the Challenge, the Complainant's Motion to join the second Panel Review to the one before this Panel and the submissions of the Parties to this issue. The DOR and the Complainant's position are as follows.

(1) The Determination on Remand

In the DOR, the CITT, pursuant to section 77.016 of the SIMA, accepts that it erred in not issuing a separate finding for Mexico. This was corrected by issuing a Corrigendum to the Finding of October 27, 1997 in NQ-97-001. The Corrigendum states in relevant part as follows:

Pursuant to subsection 43(1) of the Special Import Measures Act, the Canadian International Trade Tribunal hereby finds that the dumping in Canada of the aforementioned goods originating in or exported from the People's Republic of China, the Republic of South Africa and the Russian Federation has not caused material injury to the domestic industry, but is threatening to cause material injury to the domestic industry.

In accordance with subsection 43(1.01) and pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping in Canada of the aforementioned goods originating in or exported from Mexico has not caused injury to the domestic industry, but is threatening to cause material injury to the domestic industry.⁴

With respect to whether the Tribunal should have provided separate reasons for reaching its determination in respect of imports from Mexico, it maintains that "there is no separate legislative requirement or persuasive policy rationale to support the need for separate reasons to be issued with respect to the goods from Mexico".⁵ First, it states that, while it is clear that subsection 43(1.01) and

⁴Corrigendum to the Finding of October 27, 1997 dated June 21, 1999 issued as part of the Determination on Remand in NQ-97-001 Remand dated June 21, 1999

⁵Determination on Remand of the Canadian International Trade Tribunal dated June 21, 1999

paragraph 43(2)(a) of SIMA require that the Tribunal issue a separate order or finding whenever goods of a NAFTA country are concerned, section 43(2)(b) imposes no such requirement with respect to reasons.⁶ At page 3 of the DOR it notes that

If Parliament had wanted to impose such a requirement, it could easily have done so by slightly rewording the last phrase within paragraph 43(2)(b) to read: “separate reasons for making each order or finding or reasons for making each order or finding”. Such wording would have made the alleged requirements very clear. The reasons that there is no such wording in the paragraph is, in the Tribunal’s view, because there was no such intent.

Second, the Tribunal refers to the wording of other provisions, specifically Articles 802 of the NAFTA and s. 20.01 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as indicative that where the NAFTA Parties intended to create special rights and obligations (such as the provision of reasons) they did so explicitly. Third, the Tribunal notes its right to cumulate goods of different nations as provided in sections 42 to 47 of the SIMA. It finds that because of this, providing separate reasons for a NAFTA Party would mean either parroting the same reasons provided for non-NAFTA Parties (therefore making them redundant) or providing a separate analysis for NAFTA Parties. The latter requirement, the Tribunal contends would prevent it from cumulating thereby circumventing the purpose of that measure and also result in the exclusion of NAFTA countries from Canadian trade laws. In addressing these contentions, the Tribunal revisits the issue of cumulation which was argued in its submissions before the Panel.

(2) The Complainant’s Challenge to the DOR

The Challenge to the DOR is based on the following grounds. First, the Complainant argues that the Tribunal failed to comply with the instructions of the Panel. It alleges that the Panel did not instruct the Tribunal to issue a Corrigendum of new orders and submits that not following a Panel’s explicit directions is reason to quash a DOR.

Second, it submits that the Tribunal was *functus officio* and erred as a matter of jurisdiction and law in issuing a Corrigendum of two new Orders to replace the previously rendered single Order. The two new orders were effectively (1) a new s. 43(1.01) separate order in respect of imports from

⁶*Ibid*, at p. 3

Mexico and (2) a new s. 43(1) group Order for the other subject countries. The Complainant alleges that in doing so, the Tribunal implied it had a right to reopen the existing order, reconsider Mexico separately and decide again. It also submits that the Tribunal was statutorily time barred from making such a new order since the statutory deadline to do so had expired 20 months previously in September of 1997.⁷ To protect its rights, the Complainant issued a Second Request for Panel Review based on the Corrigendum as a separate and definitive new decision pursuant to section 77.013(1) of the SIMA.

Third, the Complainant takes issue with the Tribunal's finding that there was no requirement for separate reasons. It submits that the provisions of the SIMA must be read consistently with each other. Section 43(2)(b) clearly requires separate reasons within 15 days of issuing an order. It argues that the intent of Parliament was that separate reasons be provided for NAFTA parties.

Fourth, the Complainant takes issue with the jurisdiction of this Panel in this Panel Review to separate out and "remand" the portion of the s. 43(1) Order that applies to Mexico to "render a new order". It is the Complainant's position that for judicial review in this matter to proceed there must be a section 43(1.01) order currently in existence. The argument is that since a s. 43(1) order has no application to Mexico, such an order cannot be corrected for Mexico. Therefore, the Review must necessarily come to an end because the Panel has no jurisdiction. Essentially, without such jurisdiction, the Panel cannot order the Tribunal to now render a s. 43(1.01) Order for Mexico for the first time.⁸ Aside from being time barred, the Complainant submits that the remand of a s. 43(1) order to the Tribunal will not permit an order to issue pursuant to that section since it should be under s. 43(1.01).

(3) The Panel's Findings

The Panel is unanimous under both the standard of patent unreasonableness and considerable deference in making the following findings with respect to the DOR and the Challenge.

⁷*Complainant's Written Submissions of AHMSA in Reply to the June 21, 1999 Determination on Remand, date July 9, 1999 at p. 14*

⁸Challenge, at para. 52

(a) Functus Officio / New Definitive Decision

The Panel finds that the issuance of the Corrigendum to the Tribunal's original finding in the Determination on Remand was consistent with the instructions given to the Tribunal by this Panel. It therefore, was not a definitive new decision which the Panel may quash. The Panel notes that it charged the Tribunal with the duty to interpret and apply the SIMA, including section 42, in a reasonable manner and that certain arguments made by the Tribunal went beyond the scope of that charge. Therefore, the Panel considered only arguments relevant to the issue of separate order and reasons in arriving at its determinations.

(b) Separate Order and Separate Reasons

In the review, the CITT claims to have analyzed imported steel from Mexico both on a cumulative basis and individually. If there was a requirement of individual analysis, this Panel would find that the CITT fell short notwithstanding its assertions to the contrary. However, as neither the SIMA nor the SIMA Regulations call for a separate analysis, the CITT need not analyze on an individual basis.

The SIMA, at s.43.1(1), does require the CITT to make a separate order or finding with respect to goods of a NAFTA country. Moreover, under s. 43(1.2), it is required to send to the parties a copy of the reasons for the making of the order. The CITT argues, however, that does not require "separate" reasons.

Having considered the arguments of the parties and having reviewed the law, this Panel finds that the pertinent wording of the SIMA and the SIMA Regulations is open to different constructions. The Panel concludes that while it might have preferred to see separate reasons for Mexico, even if not based on an individual analysis, the CITT did not commit a reviewable error. That is, this Panel will not substitute its judgement for that of the CITT when the interpretation chosen by the CITT is neither patently unreasonable nor below the standard of considerable deference in the circumstances. This Panel affirms the Tribunal's Determination on Remand in these respects.

(c) Panel's Jurisdiction to Remand Regarding the Separate Issue

The Panel further rejects the Complainant's argument that the Panel itself lacks jurisdiction to remand the s. 43(1) order. The purpose of judicial review under Canadian administrative law, and specifically under the NAFTA and the *Federal Court Act*, is to correct errors made in the first instance. Therefore, the Panel can require the Tribunal to take necessary corrective action. The issue before the Panel is whether the final determination of the Tribunal, arrived at in NQ-97-001, constitutes a finding and order consistent with SIMA section 43(1). If that finding needs to be explained and/or corrected, the Panel can issue the necessary instructions that it be done. This is exactly what the Panel did in the Preliminary Decision.

(d) Jurisdiction to Decide on CDA-MEX-99-1904-01 and the Motions

In its Motion, the Complainant requests that the Second Request for Panel Review, CDA-MEX-99-1904-01 be joined to CDA-97-1904-02, the current matter before this Panel. In its motion, Stelco requests an Order striking out CDA-MEX-99-1904-01 and the joinder of the two panel reviews for the purpose of hearing its motion and related procedural matters. The Panel dismisses both of these motion for the following reasons.

This Panel finds that its jurisdiction is limited to the review of the final determination to which it was appointed by the involved Parties under the NAFTA and under section 77.013(1) of the SIMA, specifically CDA-97-1904-02. Its jurisdiction derives from its appointment under Article 1904 of the NAFTA and Part I.1 of the SIMA. The *Rules of Procedure* do not confer substantive jurisdiction upon the Panel. They accord it authority only to regulate its own procedure in the matter before it, once appointed. It is acknowledged that, while a Panel can be appointed to more than one panel review, this may only occur if the Parties involved appoint the same Panel to those Panel Reviews. This has not been done. Therefore, this Panel cannot order a joinder of CDA-MEX-99-1904-01, a Panel Review to which it has not been appointed.

Rule 63(1) of the *Rules of Procedure* states that a Panel may decide a motion based on the pleadings filed pertaining to that motion. In light of the preceding findings, this Panel declines the request for oral submissions. It finds that it lacks jurisdiction to deal with matters relating to CDA-MEX-99-1904-01 and denies the motions for joinder. It, therefore, also finds that it cannot strike

V. ISSUES

The decision of the Panel will deal with the issues raised by the Parties in the pleadings by addressing the following questions with respect to errors of jurisdiction, law and fact. While there is consensus on the determinations of alleged errors of jurisdiction, the Panel is divided on issues of law and fact. Therefore, the decision of the majority, based on the standard of patently unreasonableness, will be followed by that of the minority based on a standard of considerable deference.

VI. THE DECISION OF THE PANEL

A. ERRORS OF JURISDICTION

The Complainant has raised a number of what it terms to be errors of jurisdiction. Having considered all the arguments on a standard of correctness, the Panel dismisses the allegations. In doing so, it notes that many were in fact those of law and fact and not jurisdiction. As such they were reviewed on the standards of patent unreasonableness and considerable deference. The primary issues dealt with herein are first, the failure of the Tribunal to require the production of interrogatories and second, whether the Mexican imports should have been the subject of a separate analysis. Included in this argument are questions concerning whether separate reasons and a separate order should have been provided (which issue has been addressed above in the DOR), whether Complainant's imports should have been cumulated or whether there was a basis to exclude it.

1. Did the Tribunal commit a reviewable error in permitting the late disclosure or non-disclosure of certain interrogatory material?

The Complainant takes issue with the Tribunal's alleged failure to require certain parties to respond to interrogatories which it had originally ruled relevant and producible. That is, the CITT initially deemed certain information relevant and requested its production, but subsequently decided to split the point and required only partial disclosure.⁹ The Complainant claims that the CITT lack the

⁹Brief of the Complainant, at p. 73

authority to do this. The Responding Parties which address this issue contend, in more detail, that any late disclosure of materials arose from the conduct of the Complainant itself.¹⁰

The Complainant argues further that it was prejudiced due to the late and non-disclosure of information.¹¹ However, the Complainant stops short of articulating how the late or non-disclosed information prejudiced it. The Complainant does not mention what specific information it was deprived of, much less which lines of inquiry were precluded. Given the CITT's broad powers with respect to the conduct of the hearing and the Complainant's inability to specify the resultant prejudice, the Panel believes that this argument must fail.

2. Did the Tribunal commit a reviewable error in not treating imports from Mexico separately from imports from other countries?

The Complainant argues that the CITT's failure to subject imports from Mexico to a separate analysis resulted in jurisdictional error. It contends that a separate analysis should have compelled the Tribunal to either not cumulate it or to exclude imports from Mexico in the final result. This Panel will treat the separate analysis arguments of the Complainant as follows: firstly, its argument concerning whether a separate decision and reasons for a determination in respect of AHMSA should have been delivered; second, whether the CITT should have cumulated imports from AHMSA; and thirdly, whether the CITT should have excluded imports from AHMSA. These arguments are in the nature of error of law, error of fact, or mixed error law and fact.

a) Did the CITT commit reviewable error in failing to give AHMSA a separate decision and reasons?

This Panel reviewed the arguments of the Parties, the SIMA and the SIMA Regulations in the Preliminary Decision and concluded that the failure of the CITT to render a separate decision was an error of law and not jurisdiction. The CITT acknowledged this error in its DOR and subsequently

¹⁰Brief of Stelco at para. 116; Brief of IPSCO at para. 87

¹¹Brief of the Complainant, at para. 244

issued a separate decision for Mexico, but held that it need not provide separate reasons. The Complainant argued, in the alternative, that the CITT's failure to issue separate reasons was a reviewable error of law. As discussed above, in the determination of the Panel with respect to the DOR, this Panel affirms the CITT's Determination with respect to not issuing separate reasons for AHMSA.

b) Did the CITT commit reviewable error in cumulating AHMSA?

The decision by the CITT to cumulate imports from Mexico with those from non-NAFTA countries is subject to review as a question of law, not as a question of jurisdiction. The CITT's decision involves the interpretation and application of SIMA section 42(3), not a legislative provision that limits its power as alleged by the Complainant. Therefore, the applicable standard of review does not reach that of correctness.

In examining the issue of cumulation, it is important to note that the SIMA was amended to accord with obligations assumed by Canada under the *WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*. The amended SIMA includes the following provision:

42(3) In making or resuming its inquiry under subsection (1), the Tribunal may make an assessment of the cumulative effect of the dumping if...the margin of dumping is not insignificant and the volumes of goods...is not negligible and an assessment of the cumulative effect would be appropriate...

Section 42(3) permits the Tribunal to cumulate dumped goods from various countries in determining whether there has been material injury or a threat to the domestic industry. This is a fact specific determination within the discretion of the Tribunal. Particularly, cumulation is permitted where the 1) margin of dumping from each of the countries in question is not insignificant; 2) the volume of the goods from each of those countries is not negligible; and 3) where, in the opinion of the Tribunal, an assessment of dumping margins on a cumulative basis is appropriate taking into account the conditions of competition between the dumped goods from a given country, and (i) the dumped goods from any

other country, or (ii) like goods of domestic producers.

In arriving at its conclusion on this issue, the Panel notes the following. First, with respect to the margin of dumping, the *Final Determination of Dumping and Statement of Reasons* of the Department of National Revenue shows that the threshold for margin of dumping of subsection 42(3) have been met for each subject country.¹² It indicates that 100% of imports from Mexico were founded to be dumped during the period of investigation (January 1, 1996 to December 31, 1996).

Second, Table 14 of the Tribunal's Pre-hearing Staff Report shows that the volume threshold of subsection 42(3) of SIMA has also been met for all of the subject countries. It indicates that imports from Mexico represented 26.2% of imports from all countries. The Complainant, however, submits that the imports from Mexico were in fact negligible. Negligible is defined under the SIMA s. 2. It means:

less than 3% of the total volume of goods that are released into Canada from all countries and that are of the same description as the dumped goods except that where the total volume of dumped goods of three or more countries, each of whose exports of dumped goods into Canada is less than 3% of the total volume of goods referred to in (a) is more than 7% of the total volume of goods referred to in paragraph (a) the volume of dumped goods of any of those countries is not negligible.

The Complainant points to Algoma Steel Inc.'s Public Exhibit B-7¹³ which indicates that imports from Mexico in the second quarter of 1997 were at the de minimus level of 2.9%. However, the time period used by the Complainant in its argument is restricted to the second quarter of 1997 which is outside the period for which the Deputy Minister made the finding of dumping and therefore is not the appropriate period for assessing the extent of negligibility pursuant to the definition. Moreover, Algoma took issue with the validity of relying on Exhibit B-7, an Exhibit that it says includes both

¹²*Department of National Revenue, Final Determination of Dumping and Statement of Reasons*, September 25, 1997, Tribunal Exhibit NQ-97-001-4, Administrative Record Vol. 1, at 110.1

¹³Public Exhibit B-7, *Administrative Record*, Vol. 13C, p. 99

subject and non-subject goods. Algoma submits that the Exhibit was prepared before further information such as the public staff report became available to it and therefore predates later data.¹⁴

Lastly, Counsel for the CITT submitted that the evidence on the record clearly indicates that Mexican steel plate is competitive with steel plate from the other subject countries and with that in Canada.

Based on the information before it, the Panel therefore finds that, under either a standard of patent unreasonableness or that of considerable deference, the Tribunal's decision to exercise its jurisdiction to cumulate is not reviewable. While the Complainant's arguments that its imports were negligible in the early part of 1997 may have a certain intuitive appeal in the context of threat of injury analysis, it cannot be said that the Tribunal's decision to cumulate in the circumstances was unreasonable. In the circumstances, this Panel affirms the CITT Determination with respect to cumulation.

c) Did the CITT commit reviewable error in not excluding AHMSA?

AHMSA argues, in the alternative, that if the CITT had the right to cumulate, then imports by AHMSA should have been excluded. The essence of the Complainant's argument is that AHMSA was not similarly situated to the other countries under investigation, in terms of volumes of imports and prices.¹⁵

Counsel for the CITT argues that the Complainant failed to make an explicit request for exclusion and failed to point to evidence on the Record which would support exclusion. He goes on to argue that even if AHMSA had specifically requested the exclusion and pointed to the necessary evidence, the decision to exclude is fact specific in nature and within the discretion of the CITT.

¹⁴Brief of Algoma at para. 97 referring to Pre-Hearing Staff Report, Public Exhibit 6C, *Administrative Record, Vol 1, p. 240*

¹⁵Brief of the Complainant at p.175 - 78

As discussed in *Polyphase Induction Motors*¹⁶, the exclusion analysis involves a two part process. After analyzing the cumulated effect of imported goods, the Tribunal has the discretion to exclude those from a particular subject country or individual producers for limited and specific reasons. Exclusion is permitted where: 1) dumped subject goods from a source country in question constitutes a small proportion of the total subject goods from that country; or 2) the margins of dumping of subject goods from the source country are very low; or 3) the volume of dumped goods from the source country is very small in proportion of total dumped goods. The Tribunal has a great deal of discretion in deciding whether or not to so exclude and its decision, if reached, constitutes a determination of fact.¹⁷ It is a decision within both its mandate and expertise.

The Panel finds that this argument does not concern a jurisdictional error. It holds that there does not seem to have been an explicit request by AHMSA that it be excluded. The Panel finds that even if the Complainant had requested such exclusion, there are facts to support the Tribunal's decision not to exclude. Mexican goods were found to be 100% dumped and imports from Mexico were 26.2% of imports from all subject countries. Therefore, the finding was neither patently unreasonable nor reviewable under the standard of considerable deference. In the circumstances, this Panel affirms the CITT determination with respect to exclusion.

B. ALLEGED ERRORS OF FACT/ALLEGED ERRORS OF LAW/ ALLEGED ERRORS OF MIXED FACT AND LAW

The Investigating Authority took the position at the hearing that the majority of the Complainant's allegations in respect of errors of law and or fact are in the nature of argument, are incomplete or inaccurate, are often selective and taken out of context, or are attributable to counsel rather than witnesses and are not supported by the references cited in the Complainant's brief.¹⁸ It is the Panel's position that dealing with each issue as raised in the Complainant's brief is unnecessary on

¹⁶*Polyphase Induction Motors originating in or exported from Brazil, France, Japan, Sweden, Taiwan, U.K., U.S.A.* (April 28, 1989) Inquiry No. CIT-5-88 (C.I.T.T.)

¹⁷*Polyphase Induction Motors originating in or exported from Brazil, France, Japan, Sweden, Taiwan, U.K., U.S.A.* (April 28, 1989) Inquiry No. CIT-5-88 (C.I.T.T.)

¹⁸Brief of the CITT, at pg. 7

the basis that it has carefully reviewed the Complainant's allegations and is satisfied that in each instance, the decision of the CITT was supported by evidence on the record and does not reach the level of reviewable error. The issues of substance raised by the Complainant which the Panel finds warrant separate treatment and consideration by the Panel will be dealt with on an issue by issue basis below, by both the majority and minority factions of the Panel.

1. MAJORITY: PANEL MEMBERS CODE, TRAKMAN AND OGARRIO

The majority of Panel Members has reviewed the decision of the minority and agrees with it in certain respects and disagrees with it in part. The basis of the division is the degree of deference to be owed to the determination of the Tribunal and its findings under Canadian law. The majority will deal with the issue of deference owed to the Tribunal and the standard of patent unreasonability and then examine the specific errors alleged by the Complainant. For the reasons expressed hereafter, this Panel affirms the findings of the Tribunal.

The majority notes that despite the manner in which errors are characterized by the Complainant throughout its brief as either errors of law or jurisdiction, most are factual and as such, are errors to which the Tribunal is owed great deference. With respect to these matters, the Complainant is in essence requesting the Panel to arrive at different conclusions based on the evidence. We find that the evidence in these instances does support the findings of the Tribunal, albeit not always as strongly as the majority might have preferred.

A. Deference to the Tribunal

It is necessary, in subjecting the finding of the Tribunal to judicial review, to determine the extent to which the Panel is authorized to examine and set aside decisions of public agencies, as well as the grounds for such action. The scope of judicial review is generally tempered in Canadian Law by the doctrine of curial deference. That doctrine stipulates that courts ought not to intervene particularly when a lower Tribunal has an applicable statutory authority, expertise in applying that authority in a specific context and particular experience in doing so on the facts. In such cases, Canadian courts hold that the Tribunal is best positioned to arrive at a determination and that a reviewing court ought not to undermine the Tribunal's authority, expertise and experience.

There is also increasing legal authority in Canadian administrative jurisprudence that, if a matter falls within the areas of a Tribunal's mandate and expertise, Canadian courts are more likely to defer to that Tribunal's expertise even in respect of questions of law.

The role of the court in considering errors of jurisdiction is to interpret the enabling legislation and to determine whether that legislation permits the action taken. However, in exercising this jurisdiction, the reviewing court does not address the merits of the decision made by the public officials or agency and it is inappropriate for courts to intervene in the substance of public decision-making that is otherwise legal.¹⁹

With respect to fact-finding functions of administrative Tribunals, the standard of review is an extremely deferential one. Traditionally, administrative fact-finding was subjected to judicial scrutiny only when the Tribunal exceeded its jurisdiction or displayed such serious error that it could be characterized as an error of law. The test is whether a reasonable person in the position of the decision-maker could have reached such a conclusion on the basis of that evidence.²⁰ As a result, Canadian courts are least likely to interfere with determinations of fact. They will do so through judicial review only if there is no evidence whatsoever to support the factual finding, or if the evidence is insufficient given the nature of the power exercised, the body that exercises it, and the scope of the investigation powers available to gather the relevant evidence.

Bell Canada v. Canada (C.R.T.C.) [1989] 1 S.C.R. 1722, *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.* [1993] 2 S.C.R. 316 and *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 all stand for the clear expression of considerable judicial deference given to the decisions of administrative Tribunals on matters of material injury and causation and on matters falling within the expertise of those Tribunals.

B. The Standard of Patent Unreasonability

The majority of Panel Members in the Preliminary Decision adopted a standard of patent unreasonability. The Panel did so in light of the experience of the Tribunal in the matters before it, case law authority before Canadian courts and the absence of a right of appeal from decisions of the CITT.

¹⁹*Director of Investigation and Research v. Southam Inc. et. al.* [1997] 1 S.C.R. 748

²⁰*U.E.S. Local 298 v. Bibeault*, [1998] 2 S.C.R. 1048

The majority applies the same standard.

In doing so, it is important to briefly review the nature of the patently unreasonability test and its application to this case. In *Director of Investigation and Research v. Southam Inc. et. al.* [1997] 1 S.C.R. 748, a patently unreasonable conclusion was considered to be “one that had no basis in the evidence, or was contrary to the overwhelming weight of the evidence.” In *Canada (AG) v. PSAC* [1993] 1 SCR 941, 963-64, the Supreme Court stated that patently unreasonability involved “clearly a strict test....It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational”. An administrative tribunal, like the CITT has the right to be wrong, so long as it is possible to accord a rational basis to its interpretation and application of the applicable law. Once a reviewing court has determined that curial deference ought to be accorded to the decision of an administrative tribunal, the tribunal whose decision is subject to review has the right to be wrong. The tribunal’s right to be wrong is protected regardless of whether the reviewing judges disagree with the decision reached. The finding of an error is justified only when the decision that is subject to review lacks a rational basis. This reasoning was the basis of the opinion of the Panel majority in applying a patent unreasonability standard in its preliminary determination of May 19, 1999.

C. Errors of Law and Fact

The Complainant raises many errors of law and fact in its submissions. Most are actually requests that the Panel arrive at a different conclusion than was reached by the Tribunal in view of the applicable evidence. This Panel notes that the Tribunal, being the court of first instance, is best positioned to evaluate the facts and that this Panel should not substitute its own decision on those facts for the decision of the Tribunal.

As noted, the majority will address only particular errors alleged, below. The majority will apply the patent unreasonability standard to determine, in each case, whether there was any evidence upon which the Tribunal could have made the findings that it did. If some evidence in support of such findings does exist, it maintains that the Panel cannot look any further. In issue is not whether the

Tribunal could have arrived at a different determination on the facts, or whether the Panel may have preferred some other determination, but rather whether there was a sufficient basis on the facts for the Tribunal to decide as it did.

a. Downward Trend in Industry Prices

The Complainant alleges that the CITT erred at page 18 of the Statement of Reasons in Finding NQ-97-100 in finding that there was a downward trend in prices caused by imports.²¹ The Tribunal notes at page 18:

However, the Tribunal's review shows that, although domestic prices did increase somewhat after the first quarter of 1996, they did not reach the levels that had prevailed at the end of 1995. Subsequently, domestic industry prices followed a downward trend into 1997. Contrary to what occurred in the first quarter of 1996, there is no evidence that would lead the Tribunal to conclude that the industry caused this steady erosion of prices. The industry witness testified that, on several occasions in 1996 and early 1997, the industry tried to increase its prices. It was only in August 1997, two months after the preliminary determination of dumping, that the industry was able to increase prices in the market. The Tribunal is persuaded that this downward price trend was caused by the continued dumping of low-priced carbon steel plate in the marketplace.

The Complainant contends however, that Stelco was able to increase prices on March 5, 1997, on June 5, 1997 and that in the second quarter of 1997 Stelco was selling at prices higher those in the first quarter of 1997.²² The factual basis for the Tribunal's actual finding is found in examining Table 2, entitled the Domestic Carbon Steel Plate Market which is included on page 11 of the Statement of Reasons. Average unit prices for domestic producers show a decline from \$717 in 1995 to \$683 in 1996 to \$666 in the first quarter of 1997. In the row titled Average Domestic Unit Price, the price of subject steel in the first quarter of 1996 is \$663 which drops to \$657 in the first quarter of 1997. It is important to note two further points with respect to this allegation. First, the focus of the Tribunal's statement was on industry wide price trends and not those of Stelco alone which was the focus of the

²¹Brief of the Complainant, at para. 251

²²Brief of the Complainant, at para. 251

Complainant's argument. Moreover, there was dispute as to whether the price increases actually took effect. Second, the Tribunal statement is reasonably limited to the first quarter of 1997. The antidumping investigation with respect to imports was started in February of 1997 which would reasonably have had an effect on prices. The Tribunal notes later on in the same paragraph that prices did in fact increase in the latter part of 1997 after the determination of dumping.

Therefore, there was some evidence of a downward trend in prices in support of the Tribunal's determination of fact. While the evidence as noted may not have been strong or as definitive as the majority may have wished, in applying a patently unreasonable standard, the Tribunal committed no error of fact in reaching the conclusion it did and the Complainant points to no reasonable evidence that it did.

b. Price Gap increasing

The Complainant takes issue with the Tribunal's finding that there was a widening price gap between domestic subject goods and imports in the first quarter of 1997.²³ The Tribunal says at page 17 of the Statement of Reasons "in 1996, the price of both imported and domestic carbon steel plate declined by about the same amount, but, in the first quarter of 1997, the price of imports fell at a considerably faster rate, thereby widening the gap between the two". The Complainant submits that this is not possible since there was evidence on the Record which proved that Wirth followed Stelco pricing by a set percentage, a discount of 5%. It refers to Table 2 at page 11 of the Statement of Reasons and reproduces a chart at paragraph 259 of its Brief to support its position that there is no price gap increase.

However, the argument is flawed in two respects. As noted at the oral hearing, this allegation does not take account of the fact that Wirth was not the only importer of steel. Therefore, the fact that Wirth sets its prices with the domestic market is not conclusive. Moreover, the figures provided by the Complainant at paragraph 259 are in fact those for Discrete Plate while the Tribunal was referring to

²³Brief of the Complainant, at para. 257

changes in Average Domestic Unit Price . Therefore, in examining the figures set out in Table 2 of the Statement of Reasons, there was some evidence to support the contention that the average import prices were falling at a faster price. The average domestic unit price went from \$663 in the first quarter of 1996 to \$657 the first quarter of 1997 a difference of \$6. The average price of importers went from \$675 to \$610 during the same period of time, a difference of \$65. Stelco notes that Table 16 (dealing with all subject plate) of the Public Staff Report shows that the unit value of subject imports declined by 10% in the first quarter of 1997 over the comparable price in the first quarter of 1996 whereas domestic prices declined by only 1%. It notes that Mexican import plate prices continued to decline in 1997 over the comparable period in 1996.²⁴ Again, it is not patently unreasonable for the Tribunal to have found that there was a widening gap between domestic and importer prices.

c. Delivery System Details

The Complainant argues that the Tribunal erred in finding that, while “domestic producers generally price product for delivery within a relatively short time frame, rarely exceeding a month, importers, in contrast, sell their product at today’s prices for delivery in up to six months.” It submits that the evidence indicates that domestic producers actually deliver on a nine week time frame.²⁵ It also argues, at paragraph 263 of its Brief, that the Tribunal erred in finding that the largest importers often presold much of its imported plate and that the price quoted for such presold imports became the negotiating base in the market, unless there were subsequent sales at even lower prices. The Complainant submits that this ignores the fact that contracts for presold plate will depend on conditions of delivery and that the product is completely separate from Canadian domestic plate with separate terms and conditions. Specifically, import plate is rusted and its flatness is not up to domestic standards. Moreover, very little bargaining is done on the price since the product is needed immediately and is usually shipped out in 24 hours. Finally, the Complainant takes issue with the finding that such future sales prolong the period that any particular dumped price can influence and exert pressure on market prices. It submits that once a sale is made for future delivery it is gone and that the prices have no

²⁴Brief of Stelco, at para 150

²⁵Brief of the Complainant at para. 261

impact on Canadian prices in the future.

The Complainant may be correct that the period for the delivery of domestic steel on occasions was longer than one month. However, the Tribunal was not concerned with the exact period of time during which domestic or for that matter, foreign steel was being delivered. It was concerned with the suppressive effect upon price caused by delays in delivery of imports. The majority finds that the CITT' determination of fact in this regard was not patently unreasonable.

Wirth's policy of pricing imports close to domestic market prices indicates that regardless of the different "conditions of sale", such imports were competitive with domestic product. Further, the CITT heard experts who attested to the fact that while the price of steel was determined at time of sale, the impact of that price continued until the goods were actually delivered. Purchasers were unwilling to pay more for goods when there were accessible lower price alternatives. Further, evidence through a Wirth witness showed that 30% of goods were not presold and were there available to exert price erosion.²⁶ The Tribunal concluded that this constituted reason to find that imports had a suppressive effect on prices.²⁷ The Tribunal received and considered significant documentary evidence of the connection between import offers, import sales pricing and domestic price suppression.²⁸ Given the high standard of deference owed to it as an expert Tribunal of fact and the presence of evidence in support of its finding, its conclusion is not patently unreasonable.

d. Further increases in imports and displacements

The Complainant alleges that the Tribunal erred in fact in finding that there were increases in imports from the subject countries. It refers to Exhibit B-7 for evidence of declining imports, particularly from 1995 to 1996.²⁹ It also takes issue with the finding that increasing dumped imports

²⁶Algoma brief pg. 93

²⁷*Statement of Evidence of D. Thompson, Protected Exhibit D-2, para 13, Administrative Record, Vol. 16, p. 9*

²⁸*Statement of Evidence of R. Dionisi, Protected Exhibit B-1, Administrative Record, Vol. 14B, pp 11-33*

²⁹Brief of the Complainant, at para. 269

were displacing undumped imports from other countries.³⁰ At page 20 of the Statement of Reasons, the CITT notes:

In addition, the Tribunal is of the opinion that further increases in the volume of dumped imports could have a negative impact on the domestic industry's ability to maintain its market share. The industry witnesses testified that, in early 1996, the industry had to lower its prices to avoid losing market share to dumped imports from the named countries. The data in this inquiry show that the industry was successful in maintaining its market share and that increasing dumped imports displaced undumped imports from other countries. Faced with further increases in imports from the named countries, the industry could find itself in a position where it has to reduce its prices further, or where failing to do so, it would risk losing sales to dumped imports. In such a situation, the effects of price erosion and price suppression could be exacerbated by higher costs because of reduced production volumes.

Evidence of increased dumped imports was available to the Tribunal, as noted in Tables 14 and Table 2 in the Statement of Reasons. Table 2 post-dates Exhibit B-7 and only deals with subject goods, which B-7, as noted, does not. The evidence indicates that dumped imports from the subject countries increased from 5 to 8% of market share from 1994 to 1997.³¹ From the first quarter of 1996 to the first quarter of 1997 there was an 11% increase in imports. Table 14 also indicates that imports from non-subject countries decreased correspondingly. They went from 8% in 1994 to 5% in 1997.³² Therefore, the CITT's findings were, again, not patently unreasonable.

e. Price Erosion and Suppression

The Complainant alleges a number of errors with respect to the Tribunal's findings regarding the cause of price erosion in the industry. It alleges that the finding that imports caused price erosion was an error. It, instead, attributes price erosion to the following factors. First, it points to Stelco's price decrease to increase its market share in 1996 as the real cause of suppression and erosion. It alleges

³⁰Brief of the Complainant, at para. 270

³¹Brief of Algoma, at para. 96

³²Brief of the CITT, at para. 127

that this had a significant negative impact on the market when the domestic steel industry followed suit.³³ Second, the Complainant maintains that this was compounded by imports of steel from the United States and by the sale of Cut-To-Length Plate in Canada. It argues that the Tribunal's findings that imports from the United States were unlikely to increase and that they were uncompetitive because prices were significantly higher prior to the Preliminary Determination was a "manifestly erroneous finding of fact".³⁴ With respect to sales of CTL plate, it alleges, that the Tribunal also erred in finding that it was uncompetitive.

The Tribunal refers to the argument that Stelco and the domestic industry caused price suppression and erosion at page 18 of the Statement of Reasons. It found that while they contributed to price declines, they were not the cause of price erosion. The CITT had evidence that price declines in the first quarter of 1996 were at least in part the consequence of dumped goods and notes that it "is persuaded that this downward price trend was caused by the continued dumping of low-priced carbon steel plate in the marketplace". Evidence of price declines attributable to dumped imports in the first quarter of 1996 include the Statement of Evidence of R. Dionisi, Protected Exhibit B-1, p. 17-20, Administrative Record, Vol. 14B, p. 20-23 and Algoma Manufacturer's Questionnaire Response, Protected Exhibit 10.2. Further, the CITT found that while the argument of the Complainant dealt with the issue of price suppression it did not address the fact that prices declined even further. At page 11 of the Statement of Reasons, the CITT states:

It is submitted that Table 2 in the SOR shows that there were further declines in the price from the first quarter of 1996 to the first quarter of 1997 which was more than a year after the period in which the Tribunal concluded that "the industry had contributed to the drop in prices in the first quarter of 1996".

The Tribunal deals with the U.S. factor on pages 20 - 21 of the Statement of Reasons. This issue is raised again under errors of law as being one of the real causes of the threat of injury finding against the subject countries. First, and most importantly, there was no finding that U.S. imports were

³³Brief of the Complainant, at para. 273 and 275

³⁴Brief of the Complainant at para. 281

dumped. The issue before the Tribunal was whether dumped goods caused material injury or threat of material injury. In doing so, the Tribunal does not have to ensure that dumped goods are the only and sole cause of the threat or even the principle cause. In 1983, the Federal Court of Appeal found in *Sacilor Acieres et al. v. Anti-dumping Tribunal et al.* (1985) 9 C.E.R. 210 at 214 that it is the role of the Tribunal to weigh and balance all the factors:

Of course there may be other factors which may have contributed to the injury as a matter of common sense, it seems to me that there almost always will be. Such matters as efficiency, quality, cost control, marketing ability, accuracy in forecasting, good luck, and a host of others come to mind. It is the function of a specialized, expert Tribunal such as this one to weigh and balance these factors to decide the importance to be given to each.

In making its determination that U.S. goods were unlikely to contribute to price erosion there was evidence before the Tribunal, in Table 16 in the Public Pre-hearing Staff Report that carbon steel imported from the United States was 1) much higher in price than carbon steel exported from subject countries; 2) that steel from the United States was not dumped in Canada; and 3) that steel from the United States did not compete with subject goods in a manner comparable to that of steel from the subject countries.³⁵ Table 16 indicates that in the first quarter of 1996, U.S. steel plate was sold for \$1231 per tonne, while in the first quarter of 1997 it was sold for \$672. The evidence for imported steel from the subject countries were \$675 and \$610 and domestic prices were \$663 and \$657 respectively. In 1996, the investigation year, the Tribunal noted that the import volumes from the United States of the subject plate were lower than in previous years and were substantially below import volumes of the subject countries. It also noted the evidence that U.S. imports were increasing in the first quarter of 1997 and likely to increase in the second quarter. However, it found that evidence showed that its prices were unlikely to change in the foreseeable future and that in fact prices at that time were close to Stelco book prices in August of 1997 and significantly higher than prices for goods prior to the Preliminary Determination.³⁶

The Tribunal, in analyzing this data, concluded that while the domestic steel industry had some

³⁵*Protected Pre-Hearing Staff Report, revised September 20, 1997, Tribunal Exhibit NQ-97-001-7C (protected), Administrative Record, Vol. 2 at 131.21; Transcript of In Camera Hearing, vol 3, September 25, 1997 at 317-18*

³⁶Statement of Reasons at p. 21

impact upon the domestic price of steel, dumped imports had the major impact on domestic prices. Again, this finding is not patently unreasonable based on the evidence adduced before the CITT.

Moreover, in addressing the effect of CTL Plate on price on page 20 of the Statement of Reasons, the Tribunal found that CTL while lower in price than discrete plate, was sold within a narrow segment of the steel market, that the prices of CTL were different and stable and that such sales did not compete with the subject goods to a substantial extent. Evidence was established at the Tribunal's hearing³⁷ that the price differential was based on the fact that plate cut from coiled plate steel was primarily in narrower widths (72 inches and below) than discrete plate; while the standard width of both domestic and imported discrete steel plate was 96 inches.³⁸ In addition, there was testimony from witnesses that producers, specifically Algoma and IPSCO, sold coiled plate at levels that would not permit an undercutting or erosion of the prices of discrete plate.

f. Causation

The Tribunal found that there was no material injury and held further that imports from the subject countries threatened to injure the domestic hot-rolled steel industry. In so doing, the Tribunal found that there was a causal connection between the dumped imports and the threat of material injury.

The Tribunal articulated its methodology, in part, as follows:

Paragraph 37.1(3) (a) of the Regulations prescribes additional factors for determining whether there is a causal relationship between the dumping of any goods and the threat of injury. These factors include the following:

- (i) the volumes and the prices of undumped goods;
- (ii) contraction in demand;
- (iii) changes in patterns of consumption;

³⁷*Public Transcript (Vol. 4) Administrative Record Vol. 17A at 689-690 and 783*

³⁸*Transcript of Public Hearing, Vol. 2, p. 343, lines 18-25; p. 344, lines 1-11; p. 345, lines 12-22, Administrative Record, Vol. 17, p. 343-5*

- (iv) trade restrictive practices of, and competition between, foreign and domestic producers;
- (v) developments in technology; and
- (vi) export performance and productivity of the domestic industry.

In addition, paragraph 37.1(3)(b) prescribes the following: whether any factors other than the dumping of the goods has caused injury or retardation or is threatening to cause injury. The Tribunal must determine whether there is a causal relationship between the dumping of the goods and the threat of material injury and must ensure that injury caused by other factors is not attributed to the dumped imports.

Finally, the Tribunal notes that, in making a finding of threat of material injury to the domestic industry, subsection 2(1.5) of SIMA requires that the "circumstances in which the dumping or subsidizing of [the subject] goods would cause injury [must be] clearly foreseen and imminent".³⁹

The Tribunal further stated that it had examined the evidence on the record with respect to the following issues; *inter alia*:

- a. the growth of imports;
- b. the capacity of the named countries to continue to export to Canada;
- c. price suppression and erosion;
- d. Stelco's influence and the domestic steel industry's influence upon market prices;
- e. whether the small volume of imports directly competed in the market;
- f. the substitutionability of CTL Plate;
- g. the influence of imports from the United States upon the domestic market; and
- h. the impact of increasing capacity in the domestic market.

The Panel is obliged to refer back to the Tribunal's Statement of Reasons in order to review its findings that there was a causal connection between imports from subject countries and a threat of material injury. The Tribunal sets out those reasons on pages 13 to 22 of its Statement of Reasons. It

³⁹Statement of Reasons at p. 13

is apparent, from those reasons, that the Tribunal did consider some evidence in arriving at its determination that there was a threat of injury, and further that there is evidence on the record in support of the Tribunal's findings.

The Complainant, in arguing against the Tribunal's causation finding, takes issue with whether the Tribunal was correct in establishing a causal nexus between dumped goods and the threat of injury. The panel has carefully considered all of the Complainant's arguments with respect to whether the correct causation test was applied by the Tribunal, and whether there existed evidence in support of the causation finding and finds as follows:

There is clearly evidence on the record in support of the Tribunal's finding of causation.

The Complainant has failed to demonstrate any reviewable error on the part of the Tribunal. No cogent argument or evidence was presented to support the position that the Tribunal's methodology and/or findings were patently unreasonable.

The panel is mindful that the Tribunal is statutorily required to consider whether there is a threat of injury and, if so, whether there is a causal link between the dumped imports and any threat of injury. In considering these questions, the Tribunal stated that it was guided by subsection 37.1(2) of the *Regulations*, which prescribes factors for the purpose of determining whether the dumping of goods is threatening to cause injury. The Tribunal is therefore charged with using the evidence available at the time of the investigation to make an informed prediction as to whether there is a causal connection between a forward-looking event, namely the threat of material injury, and the established fact of dumped imports. Such a predictive exercise will necessarily be speculative in nature, and subject to attack on the basis of the uncertainty which is inherent in the process of finding of a causal relationship between a known fact and a predicted future event.

The panel finds that, in essence, the Complainant's submissions with respect to causation fall considerably short of meeting the applicable standard of review, namely that the Tribunal's findings had no basis in fact, were entirely unsupported by evidence on the record, or were otherwise patently

unreasonable, and, at best, the Complainants may have demonstrated that it would be possible, in certain instances, to arrive at different conclusions on the basis of the evidence before the panel.

There is nothing in the language of paragraph 42(1)(a)(i) of SIMA or any other provision of SIMA which specifies the exact nature of the causal relationship that must be established between the dumped imports and material injury. Accordingly, the issue of causation is a matter that comes squarely within the Tribunal's area of expertise and is further a matter where the Tribunal enjoys a broad discretion. The following extract from the *Hot-Rolled Carbon Steel Sheet Panel* decision is helpful:

SIMA itself does not specify the required degree of causal relationship between dumping and material injury or exactly what must be considered in a causal analysis. In past decisions, the Tribunal, or its predecessor, found that dumped imports constituted a "significant" or "direct" cause of injury or that a "significant proportion" of material injury was attributable to the effects of dumping. More recently, in *Machine-Tufted Carpeting*, the Tribunal found that dumped imports must be "a cause" of material injury. There is no single administrative standard against which to judge the Tribunal's analysis of causality in this case. To a certain extent, this may be inevitable because the Tribunal's analyses are driven largely by economics and market analyses of various products and industries, which may dictate that different weight must be given to different factors in different cases.⁴⁰

It is interesting to note that the primary emphasis of the Complainant on the issue of causation at the within hearing related to whether the Tribunal was obligated, under SIMA, to consider the effect of the dumped imports from Mexico separately from other dumped imports from other countries. For reasons articulated elsewhere in this decision, this argument has no basis in law and is rejected by the panel.

The Complainant also raised issues with respect to virtually each and every factual consideration referenced by the Tribunal in the context of its causation finding. Counsel for Stelco

⁴⁰*Hot-Rolled Carbon Steel Sheet*, supra, at 34-35

argued that much of this argument was in effect an attempt to have the panel rehear evidentiary matters that were before the Tribunal and to reevaluate and re-weigh that evidence. Counsel's point is well taken. The panel does not propose to deal with each and every factual issue raised by the Complainant as it relates to the issue of causation. As stated above, the panel has carefully reviewed the submissions of the Complainant in this regard, in light of the evidence on the record, and finds that the Complainant has failed to demonstrate any reviewable error under the patently unreasonable standard of review. However, certain key elements of the Tribunal's methodology relating to price suppression and erosion which were the subject of significant discussion at the within hearing will be briefly discussed below.

In its analysis of threat of injury, the Tribunal indicated that:

[a] key question in the Tribunal's analysis was whether dumped imports, or other factors, has caused downward pressures on the industry's prices, and if so, whether dumped imports were likely to continue to impact prices in the absence of antidumping duties.

The Complainant argued that the falling price of steel in the domestic market was caused by Stelco's price leadership and by declining prices in the domestic market itself. Accordingly, the Complainant argued that the Tribunal committed an error of fact in finding a causal connection between the dumped imports and the threat of injury.

The Tribunal examined steel prices from 1994 to 1997. It found that, while between 1994 and 1995 the rate of increase of import prices was less than the rate at which industry prices were rising, by 1997 the rate of increase of import prices was falling at a considerably faster rate. It concluded that this led to an increasing gap between domestic and import product. There was evidence in the record to support this finding.

The Tribunal also considered whether Stelco and the domestic industry were the cause of price erosion in the market for steel from 1995 onward. It conducted a quarter by quarter review of Stelco's selling prices of structural steel plate with those of Wirth and Ferostaal. It noted that all the imports during the crucial period were dumped. It concluded that on "balance taking into account all of the

evidence in this matter, the Tribunal is of the opinion that the industry contributed to the drop in prices in the first quarter of 1996. However, they did not rise to 1995 levels despite the domestic industry's subsequent attempts to increase". The Tribunal added: "Contrary to what occurred in the first quarter of 1996, there is no evidence that would lead the Tribunal to conclude that the industry caused this steady erosion of prices". The Tribunal noted further that it was only after its preliminary determination that increases in steel prices were possible.

The Tribunal then considered evidence to determine whether a small volume of imports could compete in the domestic market and have a significant impact on prices. It considered, among other factors, the fact that imports had a wide customer base, that Samuel expected the domestic industry to compete with Wirth's prices, that setting prices at a fixed rate below market with Wirth's prices had a negative effect on market prices and that in continuously pre-selling steel Wirth's prices would compound that negative effect upon domestic steel prices and would deplete the market share of the domestic industry.

The Tribunal submitted materials in support of its position at the hearing which provided, in part, as follows:

It is submitted that it is not necessary to defend a dumped imports are "always or even predominantly the lowest priced imports" in order for the causal requirement to be met and that "[all that is required is a showing that dumped imports contribute, at a sufficient level, to price erosion or price suppression or to lost sales.

The panel finds that this interpretation is not patently unreasonable, and that the Tribunal's interpretation of the appropriate standard of causation is not inconsistent with SIMA and/or the anti-dumping code.

The Tribunal also examined competition in the domestic steel market arising from the market for CTL plate and from exports from mills in the United States to Canada. On reviewing this evidence, it concluded that it was unlikely that CTL sales and exports from the United States would have a

substantial effect on the Canadian market.

In assessing the causation issue the Tribunal clearly considered some of the additional factors prescribed under subsection 37.1(3) of SIMA and considered the volumes and prices of like goods that were not dumped as set out in paragraph 37.1(3)(a)(i) of the SIMA Regulations.

Further, the Tribunal considered changes in the patterns of consumption of the goods or the like goods as set out in subparagraph 37.1(3)(a)(iii) of the SIMA Regulations. The Tribunal ultimately concluded that:

Given the evidence of relatively stable prices for domestic plate cut from coil by the steel service centres, combined with the fact that the product competes in a relatively narrow segment of the market. The Tribunal is lead to the conclusion that the prices of plate cut from coil by the steel service centres have had, and are likely to continue to have, little impact on the average prices of carbon steel plate in the market (Statement of Reasons, at 20).

Further, it is clear that the Tribunal also considered developments in technology and the productivity of the domestic industry and specifically, that the Tribunal considered the domestic producer's plans to expand their capacity and improve production processes.

In summary, it is clear from the Statement of Reasons that the Tribunal performed a causation analysis and considered a vast array of factual evidence in accordance with SIMA Regulations. Some of that evidence is, on its face, supportive of the causation finding. Some of the evidence is, on its face, potentially antithetical to that finding. The Tribunal looked at all of the evidence and ascribed different weight to different evidence. This panel would exceed its jurisdiction in purporting to challenge the weight ascribed by the Tribunal to particular elements of the evidence. The Complainant has raised issues with respect to whether certain aspects of that evidence, on its face, supports the Tribunal's causation findings. With respect, the Complainant has not demonstrated any reviewable error on the part of the Tribunal, nor has it established that the Tribunal failed to consider any relevant evidence on

the record or that the Tribunal treated any such evidence in a patently unreasonable manner.

2. MINORITY OPINION: PANEL MEMBERS GARCIA-CORRAL and ORTIZ

DID THE CITT COMMIT REVIEWABLE ERROR IN FINDING THREAT OF INJURY?

The Minority has had the benefit of reading the Majority's Opinion from which we agree in part and disagree in part. While we agree, in the result, with the Majority on most issues, we have come to these conclusions on the basis of a considerable deference standard.⁴¹ We disagree with the Majority, on issues relating to the threat of injury analysis, where utilizing a standard of considerable deference, we would have remanded parts of the Decision back to the CITT for further analysis.

Part One of this Minority Opinion will outline the CITT's Decision on the threat of injury. Part Two of this Minority Opinion will proceed to review the CITT's threat of injury analysis by reviewing the three sub-issues which have been called into question. Firstly, we will review the finding of likely significant price suppression and erosion. Secondly, we will review the finding of causation. Finally, we will review the issues dealing with other non dumped factors and the threat of injury analysis.

Part One: The CITT's Decision on the Threat of Injury Determination

The CITT found that the injury suffered by the domestic industry was not of the **duration nor the extent** necessary to constitute material injury within the meaning of the SIMA.⁴² Having so found, the CITT went on to consider whether there was a threat of material injury and, if so, whether there was a causal link between the dumped imports and any threat of injury.

The requirement that the CITT carry out a causal analysis is found in SIMA s.42(1), as amended by the *WTO Agreement Implementation Act*.⁴³ The CITT has recognized, in past decisions⁴⁴, that the

⁴¹ The considerable deference standard that we will apply was articulated by the Minority in this Panel's preliminary decision on The Standard of Review and Remand Order dated May 19, 1999 at pages 12-18.

⁴² Statement of Reasons ("SOR") p. 13.

⁴³ S.C. 1994, C. 47.

⁴⁴ See Caps, Lids and Jars, Inquiry No. NQ-95-001, Finding Oct 20, 1995. Statement of Reasons, November 6, 1995, at 8-10. ("*Caps, Lids and Jars*")

purpose of amending subsection s.42(1)(a)(i) of the SIMA was to make it consistent with the WTO *Agreement on the Implementation of Article 6 of the GATT, 1994*. SIMA s.42 states:

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

(1) in the case of any good to which the preliminary determination applies, as to whether the dumping or subsidizing of goods...

(b)(1) has caused injury or retardation or is threatening to cause injury...

Section 2(1) of SIMA defines injury as material injury to the domestic industry. In making a finding of threat of material injury to the domestic industry, subsection 2(1.5) of SIMA requires that the “circumstances in which the dumping... of [the subject] goods would cause injury [must be] **clearly foreseen and imminent.**”

Even though the SIMA does not establish more details with respect to the nature of the causal relation that must be established, the SIMA Regulations prescribe certain factors for the purposes of determining whether the dumping of subject goods is threatening to cause injury. In pertinent part, it reads:

37.1 (2) for the purposes of determining whether the dumping or subsidizing of any goods is threatening to cause injury, the following factors are prescribed:

- (a) the nature of the subsidy in question and the effects it is likely to have on trade;
- (b) whether there has been a significant rate of increase of dumped or subsidized goods imported into Canada, which rate of increase indicates a likelihood of substantially increased imports into Canada of the dumped or subsidized goods;
- (c) whether there is sufficient freely disposable capacity, or an imminent, substantial increase of dumped or subsidized goods, taking into account the availability of other export markets to absorb any increase;
- (d) the potential for product shifting where production facilities that can be used to produce are currently being used to produce other goods;
- (e) whether the goods are entering the domestic market at prices that are likely to have a significant depressing or suppressing effect on the price of like goods and are likely to increase demand for further imports of goods;
- (f) inventories of goods;

- (g) the actual and potential negative effects on existing development and production efforts, including efforts to produce a derivative or more advanced versions of like goods;
- (g.1) the magnitude of the margin of dumping ... in respect of the dumped...goods; and
- (h) any other factors that are relevant in the circumstances.

As with respect to the requirement of a causal relationship between effects of dumping and the threat of injury, the SIMA Regulations go on to prescribe additional factors. It reads, in pertinent part:

37.1 (3) for the purposes of determining whether the dumping... is threatening to cause injury, the following additional factors are prescribed:

- (a) whether a causal relationship exists between the dumping ...of any goods and... threat of injury on the basis of:
 - (i) the volumes and prices of imports of like goods that are not dumped....,
 - (ii) a contraction in demand for the goods or like goods;
 - (iii) changes in patterns of consumption of the goods or like goods;
 - (iv) trade restrictive practices ...;
 - (v) developments in technology;
 - (vi) the export performance and productivity of the domestic industry in respect of like goods; and
- (b) whether any factors other than the dumping or subsidizing of the goods ...is threatening to cause injury.

In the instant review, the CITT noted that the various factors prescribed in s.37.1(2) of the SIMA Regulations were relevant to its inquiry. Specifically, it said that it reviewed:

... whether there has been a significant rate of increase of dumped carbon steel plate in Canada; whether there is sufficient freely disposable capacity, or an imminent substantial increase in the capacity of exporters in the subject countries, that indicates a likelihood of a substantial increase in exports of dumped goods, taking into account the availability of other export markets to absorb any increase; whether the goods are entering the domestic market at prices that are likely to have a **significant** depressing or suppressing effects on the price of like goods; and other relevant factors.

The CITT went on to list the additional factors prescribed in s.37(3)(a) of the SIMA Regulations for determining whether there is a causal relationship between the dumping and the threat of injury. The CITT also noted the requirements of paragraph 37.1(3)(b) which direct it to determine whether any

factors other than the dumping of the goods is threatening to cause injury. The CITT concluded that it must determine whether there is a causal relationship between the dumping of the goods and the threat of material injury and that it must **ensure** that injury caused by other factors is not attributed to the dumped imports.

The CITT noted that when making a finding of threat of material injury it was required to ensure that the circumstances in which the dumping of the subject goods would cause injury must be **clearly foreseen** and **imminent**. The Tribunal began by examining the extent to which there had been growth in imports from the named countries. The Tribunal found that the imports grew over the relevant time frame and **concluded** that the subject countries will continue to export to Canada and that “these circumstances are clearly foreseen and imminent”.

The CITT considered the increase in imports of the countries in question, and then it considered the tendency of imports in the future, in the absence of antidumping duties.⁴⁵ The CITT held that the substantial cumulative increase in import volumes of carbon steel plate from the named countries in 1994 to the first quarter of 1997 and the fact that imports continued, even increased following the initiation of the investigation by the Deputy Minister and up to the Tribunal’s inquiry, indicated that it was likely that the subject countries would continue to export to Canada. The CITT held that, in its view, these circumstances were clearly foreseen and imminent.⁴⁶

With respect to the capacity of the countries in question to continue exporting to Canada, the CITT found that the capacity of the mills to produce carbon steel plate in the subject countries was several times that of the domestic producers. The CITT further found that the freely disposable capacity in these mills was extensive, particularly in China and Russia.⁴⁷ The CITT held that, in its view, the capacity analysis showed that exporters in the named countries clearly had the capacity to continue, and even to increase, their exports to Canada. Moreover, the CITT held that the conditions which exporters in each of the countries under investigation faced, or would face, in major export markets, as

⁴⁵ SOR ,p.14

⁴⁶SOR , p.14.

⁴⁷ SOR , p. 15.

a result of antidumping or other measures limiting their access, would likely create an incentive to direct their exports to countries without these restrictions, such as Canada.⁴⁸

Having determined that dumped imports are likely to continue, the CITT eventually turned to the question of whether the dumped imports were likely to constitute a threat of injury. In this respect, the CITT purports to have assessed the extent to which there was a causal link between the dumped imports and the price erosion, price suppression and financial performance and, if there was, whether it was likely to continue in future. The CITT noted that a key question in its analysis was whether dumped imports, or other factors, have caused the downward pressure on prices and, if so, whether dumped imports were likely to continue to impact prices in the absence of antidumping duties.

The CITT compared prices of imported and domestic carbon steel plate during the period from 1994-1997. The CITT concluded that the gap between the two widened due to the downward trend into 1997 of domestic industry prices. The CITT determined that although initially the domestic industry may have contributed to the price decline, the downward price trend was caused by the continued dumping of low priced carbon steel plate into the market place.⁴⁹ The CITT held that the pressures exerted on prices and the low priced dumped imports made it difficult for the industry to move prices back up. The CITT held that these were foreseen and imminent price pressures and that they would continue with the consequent negative effect on gross margins and net revenues leading to threat of material injury.⁵⁰

The Complainant challenges the CITT's determination of threat of injury on several different grounds. These grounds have been divided into three questions: a) Did the CITT commit reviewable error in finding likely significant price suppression and erosion?; b) Did the CITT commit reviewable error in finding causation?; c) Did the CITT commit reviewable error in failing to ensure that other non-dumped factors did not enter the threat of injury analysis? Unless we state otherwise, we have found that the grounds raised by the Complainant are, for the most part, questions of mixed fact and law. As such, we will subject the determinations of the CITT to a standard of considerable deference.

⁴⁸ SOR , p. 17.

⁴⁹ SOR, p.18.

⁵⁰ SOR, p. 19

The considerable deference standard which we will apply was articulated in our preliminary decision and is incorporated herein by reference.⁵¹ Suffice it to say that as the issues raised by the Complainant are, for the most part, questions of mixed law and fact, we will accord the CITT considerable deference at the higher end of the spectrum. That is, as questions of mixed fact and law draw closer to questions of fact, the deference that we will accord to the CITT will increase. In applying this standard of review, we will be looking to ensure that the CITT reasonably interpreted the law and that there was a rational connection between the facts and the CITT's findings. The standard is not whether there is any evidence at all which would uphold the CITT's determination, but whether there is evidence which, if reasonably reviewed, is capable of supporting the CITT's findings in light of the record evidence.

Part Two: Review

1. Did the CITT commit reviewable error in finding likely significant price suppression and erosion?

The CITT determined that the pressures exerted on prices by the low priced dumped imports have made it difficult for the industry or any one company in the industry to move prices back up. The CITT was of the view that, in the absence of antidumping duties, these pressures would continue and that the domestic industry was likely to continue to suffer price erosion and price suppression with the consequent negative effects on gross margins and net revenues. The CITT was persuaded that these downward pressures were clearly foreseen and imminent and that the domestic industry could not continue to sustain such downward pressure indefinitely “without suffering material injury”.⁵² In addition, the Tribunal went on to speculate that further increases in the volume of dumped imports could have a negative impact on the domestic industry’s ability to maintain its market share and speculated on the industry’s position in the face of further increases in imports.⁵³

⁵¹ The considerable deference standard that we will apply was articulated by the Minority in our preliminary decision on The Standard of Review and Remand Order dated May 19, 1999 at pages 12 - 18.

⁵² SOR p.19.

⁵³ We find this latter part of the analysis to be particularly unsatisfactory as it is in the nature of speculation and conjecture.

AHMSA argued that the CITT committed error of law and error of fact in finding price suppression. It was alleged that these errors led the CITT to fail to distinguish between evidence of price erosion and price suppression. The Complainant further alleges that the CITT committed error of fact with respect to its finding that industry prices were on a downward trend and that there was a widening of price gaps. AHMSA argued that there were five price increases, one of which came in early 1997, and then argued that this suggests that the price trend was up, that there was not a widening of the price gap, that there was no consequent price erosion or suppression, and that it was unlikely to change in the near future. The Complainant then argues that these factual inaccuracies lead the CITT to error of law in finding significant price suppression on the part of AHMSA.⁵⁴

In reviewing the arguments of the parties, the record evidence and the reasoning of the CITT, we are inclined to affirm in part and remand in part. For reasons already mentioned, this Panel has already found no merit in the Complainant's argument that the CITT failed to distinguish between evidence of price suppression and erosion. Further, we believe that AHMSA misapprehends the nature of the analysis needed to be undertaken by the CITT, in so far as this Panel has affirmed the CITT's decision to cumulate AHMSA in the injury analysis and not to exclude it from the result. This Panel has affirmed the approach of the CITT in not analyzing the per se contribution of AHMSA to the price suppression and erosion suffered by the domestic industry. However, while this Panel affirms this part of the CITT's analysis, we have reservations with respect to other parts of its analysis.

There is record evidence to the effect that the average domestic unit price was \$611 in 1994, \$700 in 1995, \$663 in 1996 and \$657 in 1997.⁵⁵ Moreover, record evidence suggests that Stelco, the acknowledged price leader, increased prices at various times in 1996 and 1997.⁵⁶ It would appear that the finding of price suppression or erosion, and more importantly in this case -to what extent, depends on the period of time that the CITT chooses to analyze. We find that the CITT does not adequately explain which time frame it chose to analyze nor why it is the more appropriate in the circumstances. Moreover, the CITT does not explain how the price suppression or erosion it found was significant in the circumstances, especially in light of the relatively low volume of imports. We

⁵⁴ AHMSA's Brief, p. 78 -80, 111-146.

⁵⁵ SOR, p. 11.

⁵⁶ Administrative Record, Vol. II (Protected) at 131.23, Administrative Record Vol. III (Public), p. 241 and 264.

believe that this information is particularly important given that present injury, within the meaning of the SIMA, was not found because the injury was not of the requisite duration and extent.

In the circumstances, we would **Remand** as follows:

- i) That the CITT explain what the relevant time period for the price comparison was and explain why it was the appropriate time frame in light of threat of material injury analysis.
- ii) That the CITT explain what is significant, in terms of duration and extent, about the price erosion or suppression that it finds.

2. Did the CITT commit reviewable error in finding causation?

Having determined that the dumped imports from the named countries were likely to continue and even increase, the CITT eventually turned to the question of whether these imports were likely to constitute a threat of injury to the domestic industry. In so doing, the CITT claims to have assessed the extent to which there was a causal link between the dumped imports and the price erosion, price suppression and the consequent negative impact on the domestic industry's financial performance and whether it was likely to continue in to the future.⁵⁷

AHMSA alleges that the CITT committed reviewable error in finding causation. The Complainant argues that the evaluation of causation, in the context of the threat of the material injury analysis, goes beyond mere identification of dumped goods in the market and that the CITT's analysis fails to establish causation. In response, counsel for the CITT denied these allegations and argued that the causation standard is within the discretion of the CITT. They argued that in evaluating causation, the CITT's discretion is guided by the SIMA and the SIMA Regulations. The argument held that as neither the SIMA nor the SIMA Regulations set out a specific standard that the CITT needs to apply to the causation standard, the CITT was free to establish the relevant standard.⁵⁸ Counsel for the CITT cited the Federal Court of Appeal decision in *Sacilor Acieres*⁵⁹ for the proposition that causation is largely a

⁵⁷ SOR p 17.

⁵⁸ CITT Brief p. 69

⁵⁹ *Sacilor Acieres v. Anti-dumping Tribunal* (1986), 9 CER 210 (F.C.A.)

matter of fact and that the relevant standard which is to be applied lies in the discretion of the CITT .

The Complainant's arguments against the causation finding effectively fall into three categories. Firstly, the Complainant claims that the CITT failed to establish a sufficient link between dumped goods and the threat of injury as is required by Canada's international obligations. Secondly, the Complainant claims that even if such a nexus could be found, the evidence that the CITT relied upon was not of the nature and extent required. Finally, the Complainant argues that the CITT's past practice of interpreting and applying s.37.1(3)(a)(vi) of the SIMA Regulations should preclude a finding of causation under these circumstances. We will analyse these questions below.

a. Sufficient Link

The Complainant argued that Canada's international obligations compel the CITT to establish a sufficient link between the threat of injury and the per se dumping of AHMSA. The Complainant points to Canada's international obligations under the GATT and argues that these obligations impose a definite cause and effect standard that the CITT is obligated to follow. Specifically, it refers to article 3(4) of the GATT Antidumping Code which states that "it must be **demonstrated** that the dumped imports are, through the effects of dumping, causing injury within the meaning of this code".

The role of Canada's international obligations, and the GATT in particular, in shaping the CITT's practice was affirmed in *Grain Corn*.⁶⁰ The Supreme Court in *Grain Corn* approved the CITT's practice of looking at Canada's international obligations in fulfilling its mandate under the SIMA. However, while the Court was unanimous in the result, the Judges of the Court differed as to what the appropriate role of the GATT should be in determining the practice of the CITT.

Justice Wilson, writing for the minority of the Court, called for a stricter approach to the use of

⁶⁰ National Corn Growers Association v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 ("*Grain Corn*").

Canada's international obligations. She held that while it was permissible for the CITT to look at the GATT for interpretative guidance, courts should not attempt to enforce the GATT in its review of the CITT. She held:

I do not think that it is this Court's role on an application for judicial review to look beyond the Tribunal's statute to determine whether the Tribunal's interpretation of that statute is consistent with Canada's obligations... Until such time as the Courts in this country are given the responsibility of enforcing the GATT, I do not think that they should begin to analyse the merits of a Tribunal's interpretation of the Act in light of the GATT.⁶¹

Justice Dickson, writing for the majority of the Court, held that the GATT played a much larger role in shaping the practice of the CITT. He held that it was reasonable for the CITT to refer to Canada's international obligations under the GATT not only to clarify uncertainty, but also as an aid to interpretation in cases where the ambiguity was not patent. He held that the CITT should strive to expound an interpretation which is consonant with the relevant international obligation.⁶² He reasoned:

I do not understand how a conclusion can be reached as to the reasonableness of a tribunal's interpretation of its enabling statute without considering the reasoning underlying it.⁶³

While the Supreme Court held that the GATT was relevant to determining the practice of the CITT, it was not in agreement as to the extent of the GATT's influence. In determining the precise role of the GATT on the CITT's practice, we find the reasoning of *Concrete Panels* instructive. That Panel noted that the CITT applies Canada's GATT obligations always and when they are incorporated in the SIMA and its Regulations. In interpreting the legislation that was passed in order to implement international obligations, it is reasonable that the CITT examine the domestic legislation in the context of international obligations. The interpretation which must be arrived at must be congruent with the relevant international obligations.⁶⁴

⁶¹ *Grain Corn*, p.1349.

⁶² *Grain Corn*, p.1371.

⁶³ *Grain Corn*, p.1383.

⁶⁴ *Certain Concrete Panels*, CDA-97-1904-01 ("*Concrete Panels*"), p. 10.

We have reviewed the applicable law and find that the law, as it presently stands, does not assume the causal relation or the degree to which dumping must cause material injury. In this regard, we find the reasoning of the *Hot Rolled*⁶⁵ Panel instructive. That Panel held that:

SIMA itself does not specify the required degree of causal relationship between dumping and material injury or exactly what must be considered in a causal relationship. In past decisions, the Tribunal, or its predecessor, found that dumped imports constituted a “significant” or “direct” cause of injury or that a “significant proportion” of material injury was attributable to the effects of dumping. More recently, in *Machine –Tufted Carpeting*, the Tribunal found that dumped imports must be “a cause” of material injury. There is no single administrative standard against which to judge the Tribunal’s analysis of causality in this case. To a certain extent, this may be inevitable because the Tribunal’s analysis is driven largely by economics and market analysis of various products and industries, which may dictate that different weight must be given to different factors and different cases.⁶⁶

It was argued that the Panel decision in *Carpets* is instructive on how we should review the CITT with respect to the sufficient link question. In dealing with the issue of causation, that Panel could not agree on what constitutes a sufficient link. The majority found that, taking into account the GATT Code standard that causation be “demonstrated”, the rational nexus between the evidence and the required conclusion on causation mandates an analysis of how the dumping has affected price levels. The majority in *Carpets* went on to Remand the CITT to determine whether the dumping in and of itself caused material injury and to demonstrate the rational basis for such a determination by detailed analysis.⁶⁷ The minority opinion in *Carpets* found that the standard of review limited the type of review which the Panel could undertake. Dissenting Panelist Ward held:

...although I find myself in agreement with many of the observations of the majority and I believe they have set forth the **better practice** for the CITT to follow when rendering a decision, I am constrained...⁶⁸

⁶⁵ Certain Hot Rolled Steel, CDA-93-1904-07 (“*Hot Rolled*”)

⁶⁶ *Hot Rolled*, p. 33-34

⁶⁷ In the Matter of Machine Tufted Carpets Originating in or Exported from the United States of America, (January 21, 1994), CDA-92-1904-02. (“*Carpets*”).

⁶⁸ *Carpets*, p. 78

The opinions in Carpets are indicative of the two approaches urged on Panels in these decisions. In trying to determine what the exact nexus between the dumped imports and the threat of injury should be in the causation analysis, we find the reasoning of the Panel in *Baler Twine*⁶⁹ instructive. The *Baler Twine* Panel found that it is not necessary to find that dumped imports are always or even predominantly the lowest priced imports. It held that, in order for the causation requirement to be met, all that is required is a showing that dumped imports contribute, at **a sufficient level**, to price erosion, price suppression or to lost sales.⁷⁰

Having determined that the applicable causation standard is that contained within the SIMA and the SIMA Regulations, to be read in light of Canada's international obligations, we believe that the specific link which the CITT must establish between the dumping and the threat of injury is a flexible one which varies on the circumstances. In the instant review, we believe that the CITT should, at least, demonstrate how the dumping contributed, at a sufficient level, to price erosion or suppression. Such a demonstration should include an analysis of what is "sufficient" about the contribution in the circumstances, but need not be limited to the effects of AHMSA's dumping.

b. Quality of Evidence

Having articulated the link between the threat of injury and the dumping in the circumstances, we move to the related question pertaining to the quality of the evidence required to ground a causation finding. With respect to the nature and extent of the evidence required, we find that this is a matter which is factually laden and within the expertise of the CITT. In these circumstances, the deference which is afforded to the CITT, on a considerable deference standard, is very high.

The CITT has articulated its practice on evidentiary findings, in the context of threat of material injury, in

⁶⁹ Synthetic Baler Twine With A Knot Strength of 200 Lbs or Less Originating in or Exported from the United States of America, CDA-94-1904-02 (April 10, 1995) ("*Baler Twine*")

⁷⁰ *Baler Twine*, p. 28

the *Caps, Lids and Jars* case.⁷¹ It stated that its practice has been to analyse material injury and threat of material injury as separate findings. In describing its methodology, the CITT has recognised the importance of Canada's international obligations and has drawn on the *Agreement for the Implementation of Article 6 of the GATT, 1994* (ADA). In distinguishing the injury analysis from the threat of injury analysis, the CITT has noted that the ADA makes separate references to injury and threat of injury determinations in the definition of injury. Secondly, the CITT noted that it is directed to consider factors for injury that are different from factors for threat of injury, necessitating a distinct evidentiary basis for each. Thirdly, it noted that a finding of threat of injury, unlike injury, may only be made where the circumstances in which the dumping would cause injury are clearly foreseen and imminent. Fourthly, it recognised the admonition found in the *WTO Agreement on the implementation of Article VI of the GATT 1994* s. 3.8 which states:

... with respect to cases where injury is threatened by dumped imports, the application of antidumping measures shall be considered and decided with **special care**.⁷²

In considering the quality of evidence required, we also find the reasoning of *Concrete Panels* instructive. That Panel reviewed previous Panel decisions and held that what is required is reliable evidence establishing a causal nexus between dumped imports and injury. Reliable evidence is not just any evidence. Rather, it is evidence which when viewed in the context of the record reasonably upholds the CITT's determination. The CITT has considerable discretion with respect to what evidence it accepts and what weight it attaches to the evidence and we will not sit to reweigh the evidence nor substitute our opinion for that of the CITT. However, while we will defer to reasonable findings of the CITT, we will not permit assumptions to stand in place of evidence.⁷³ What is required is positive evidence beyond conclusory findings which, when viewed in the context of all the evidence, reasonably supports the causation finding.

⁷¹ Inquiry No. NQ-95-001, finding October 20, 1995. Statement of Reasons, November 6, 1995. ("*Caps, Lids and Jars*")

⁷² See, *Caps, Lids and Jars* p.9-10

⁷³ *Baler Twine*, p. 33

In the instant review, the CITT has, at times, substituted conclusory findings in place of evidence. Specifically, and important in the context of this review, we believe that the CITT does not address evidence which speaks to what is sufficient about the level to which the dumped imports contributed to the price erosion and suppression.

c. The CITT's Past Practice

The Complainant argued that the CITT committed error of law in misapplying s.37.1(3)(a)(vi) of the SIMA Regulations which directs the CITT to consider “the productivity of the domestic industry in respect of like goods”. In this respect, the Complainant alleges that the CITT erred in not considering the productivity problems of the domestic industry with respect to high demand and allocation. The Complainant cites *Tomato Paste*⁷⁴ for the proposition that when evidence exists to show that the domestic producers are not prepared to offer product to customers, who must source outside Canada, the dumping is not the cause of material injury.⁷⁵ For the reasons discussed below, we uphold the CITT in this regard.

As with respect to s.37.1(3)(a)(vi) of the SIMA Regulations, we find that it is one of the factors that the CITT should look at in performing its analysis. However, it is one factor among many that the CITT should look at. While we believe that productivity concerns are important factors to consider in this case, neither the law nor the circumstances compel the conclusion that s.37.1(3)(a)(vi) is dispositive.

As with respect to the *Tomato Paste* decision, this Panel finds that it is very fact specific and not meant to lay down a rule for general application nor describe CITT practice. In fact, in that case, while the CITT determined that there was no threat of injury, it did so on the basis that “the evidence of the Complainants concerning future injury was not convincing”.⁷⁶

In the circumstances, we would **Remand** as follows:

⁷⁴ NQ-92-006, SOR, March 30.1993, p.14.

⁷⁵ Complainant's Brief, p.53-4.

⁷⁶ *Tomato Paste*, p. 15

That the CITT cite record evidence and demonstrate how dumped imports contributed, at a sufficient level, to price erosion or price suppression, in the circumstances.

3. Did the CITT commit reviewable error in failing to ensure that other non dumped factors did not enter the threat of injury?

In cases where the presence of various factors cause the erosion or suppression of prices, the CITT is obligated to follow s.42(1)(a)(i) of the SIMA and s.37.1 (b) of the SIMA Regulations. These requirements compel the CITT to assure itself that the injury was not caused by factors other than those of the dumped goods.

AHMSA argued that factors other than its specific dumping caused the threat of injury. It argues that the price erosion was caused by other factors including the pricing behaviour of Stelco and the domestic industry, new domestic capacity, U.S. steel imports, and plate from coil. In response, Counsel for the CITT argued that the CITT considered the factors raised by the Complainant and concluded that they were not the cause of the threat of injury.

The CITT noted the existence of other factors and stated that a key question in its analysis was whether dumped imports, or other factors, have caused a downward pressure on the industry's prices.⁷⁷ The CITT found that Stelco may have over reacted to certain market pressures and contributed to price decline in the first quarter of 1996, but concluded that there was no evidence that would lead to the conclusion that the industry caused the steady erosion of prices. The CITT appears to have preferred the evidence of industry witnesses who testified that on several occasions in 1996 and early 1997, the industry tried to increase its prices, but that it was only in August 1997, two months after the preliminary determination of dumping, that the industry was able to increase prices in the market.

The CITT also concluded that although domestic prices increased after the first quarter of 1996, they did not reach the levels that had prevailed at the end of 1995 and that subsequently prices followed a

⁷⁷ SOR, p.17

downward trend into 1997. The CITT was persuaded that this downward trend was caused by the continued dumping of low-priced carbon steel plate in the market place.⁷⁸

The Complainant points to record evidence to suggest that the domestic industry may have contributed to price declines at various times in an attempt to gain or keep market share.⁷⁹ The Complainant recognizes the conflicting evidence on the record, but argues that in coming to its conclusions, the CITT incorrectly preferred the evidence of the industry witnesses over that of other witnesses. The arguments presented on pricing behaviour appear to be disagreements over factual findings which afford the CITT considerable deference at the high end of the spectrum. Absent cogent record evidence that the CITT's findings were unreasonable in the circumstances, we will not reweigh this sort of evidence as the CITT was in the best position to assess the competing evidence proffered by the witnesses.

With respect to domestic capacity, the CITT held that this could be a mitigating as well as an exacerbating factor. The CITT noted the expansion plans of the domestic producers and concluded that the demand for carbon steel plate and other products will depend largely on the general performance of the economy at the time that the capacity comes on stream. The CITT went on to caution that there **“is no evidence on the record forecasting what those conditions may be”**.⁸⁰ The CITT stated that even if it were in a position to forecast that the new capacity would become an other factor having a negative impact on carbon steel plate prices, it still considered that the continued dumping of carbon steel plate from the named countries would, nonetheless, threaten to cause material injury to the domestic industry.⁸¹

With respect to imports from the U.S., the CITT noted that the import volumes of the U.S. subject plate in 1996 were lower than in previous years and were substantially below those from the other countries under investigation. The CITT also found that imports from the United States increased in the first quarter of 1997 and that there was evidence that these imports would increase in the second half of 1997 into 1998. However, the CITT determined that the evidence indicated that these imports were supplying

⁷⁸ SOR, p. 18.

⁷⁹ Complainant's Brief, p.86.

⁸⁰ SOR, p.22.

⁸¹ SOR, p.22.

shortfalls in domestic production and were being imported at prices at, or above, import prices for the subject plate from the named countries.⁸²

With respect to sales of Plate from coil by Steel service centres, the CITT similarly held that it was not a relevant factor. The CITT noted evidence of relatively stable prices for the domestic plate cut from coil by the steel service centres. The CITT also noted the fact that the product competes in a relatively narrow segment of the market. The CITT therefore concluded that the prices of plate cut from coil by the steel service centres have had, and are likely to continue to have, little impact on the average prices of carbon steel plate in the market.⁸³

In this case, given the existence of other factors which may cause threat of injury, the effects caused by each of them must be separated and it must be demonstrated that the dumped goods were the cause of the threat of injury. This obligation does not compel the quantification of weight to be attached to each factor, but seeks to ensure that other non dumped factors are kept out of the analysis. This can not be accomplished by a mere showing of the existence of dumped goods.

The CITT appears to have considered the other factors urged by the Complainant and analysed them individually. It concluded that none of these factors individually have had a **significant** impact on the price of the subject goods. However, the CITT did not consider them on an aggregate basis nor explain their combined relevance in the threat of injury analysis. We believe that this further analysis would be especially pertinent in the context of this threat of injury determination given the CITT's findings of shortfalls in domestic production and a lack of record evidence forecasting the general environment of the economy in the future, which is an important factor in determining the demand of the subject goods.

In the circumstances, we would **Remand** as follows:

i) That the CITT analyse the effects of the non dumped factors on an aggregate basis and explain their combined effect in the threat of injury analysis.

⁸² SOR, p. 19- 20.

⁸³ SOR, p. 28.

ii) That the CITT explain how its finding of shortfalls in the domestic production and the lack of evidence forecasting the general performance of the economy in future, an important factor in determining the demand of the subject goods, affected its analysis on threat of material injury.

Signed in the original by:

Hernán García-Corral (Chairman)

Hernán García-Corral (Chairman)

William E. Code

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Loretta Ortiz Ahlf

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