

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

IN THE MATTER OF:

Secretariat File No.: CDA-USA-2000-1904-04

Certain Refrigerators, Dishwashers and
Dryers Originating in or Exported from
The United States of America and
Produced by, or on Behalf of, White
Consolidated Industries, Inc. and Whirlpool
Corporation, their Respective Affiliates,
Successors and Assigns

Alan S. Alexandroff, Chair
John M. Peterson
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DECISION OF THE PANEL

(January 16, 2002)

APPEARANCES:

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INTRODUCTION

This is the Panel decision of binational panel review CDA-USA-2000-1904-04 conducted pursuant to Article 1904 of the *North American Free Trade Agreement* (NAFTA) and Part I.1 of the *Special Import Measures Act* (SIMA).¹ The Request for a Panel Review of the finding made by the Canadian International Trade Tribunal (CITT) on August 1, 2000 in Inquiry No. NQ-2000-001 was filed with the NAFTA Secretariat – Canadian Section by counsel for Whirlpool Corporation (Whirlpool) and Inglis Limited (Inglis)² on September 22, 2000 in accordance with Part II of the NAFTA Rules of Procedure for Article 1904.

The products that are the subject of this panel review are described as top-mount electric refrigerators, in sizes greater than 14.5 cubic feet (410.59 litres) and less than 22 cubic feet (622.97 litres) (the “subject refrigerators”), electric household dishwashers, built-in or portable, greater than 18 inches (45.72 centimetres) in width (the “subject dishwashers”), and gas or electric laundry dryers (the “subject dryers”), originating in or exported from the United States of America and produced by, or on behalf of, White Consolidated Industries, Inc. (WCI) and Whirlpool, their respective affiliates, successors and assigns.³

The parties to this Panel review include Whirlpool, WCI, and Camco Inc. (Camco) as complainants; and Maytag Corporation (Maytag) and the CITT as respondents.

BACKGROUND

In accordance with SIMA subsection 33(1), on November 30, 1999 the Commissioner of the Canada Customs and Revenue Agency (CCRA) commenced an investigation at the request of Camco into alleged dumping by WCI and Whirlpool of the subject refrigerators, dishwashers and dryers over the period running from October 1, 1998 to September 30, 1999.

After this investigation was initiated, counsel for WCI referred to the CITT the question of whether evidence before the Commissioner disclosed a reasonable indication that the dumping of the subject goods had caused injury or retardation or was threatening to cause material injury to the domestic industry. On January 24, 2000, the CITT found that the evidence did in fact disclose a reasonable indication that the dumping of the subject goods from the named exporters had caused or was threatening to cause material injury to the domestic industry.

On April 3, 2000 the Commissioner made a preliminary determination pursuant to subsection 38(1) of SIMA finding that the subject refrigerators, dishwashers and dryers had been dumped and that there was evidence which disclosed a reasonable indication that the dumping had caused injury or was threatening to cause injury to the Canadian industry.

¹ R.S.C. 1985, c. S-15, as amended, hereinafter SIMA.

² In this decision Whirlpool and Inglis will be referred to collectively as Whirlpool.

³ CITT Statement of Reasons, Inquiry No. NQ-2000-001 at p. 3. Hereinafter SOR.

The investigation activity of the Commissioner of the CCRA with respect to the subject goods continued after the preliminary determination of April 3, 2000. At the conclusion of this further period of investigation, the Commissioner was satisfied that the margins of dumping on the subject goods were not insignificant and that the volumes of dumped goods were not negligible. Consequently, the CCRA made a final determination on June 30, 2000 that the subject goods had in fact been dumped under SIMA subsection 41(1)(a).⁴

As a result of the Commissioner's preliminary determination that the subject goods had been dumped, the CITT commenced Inquiry No. NQ-2000-001. To facilitate this inquiry, on June 26-30, 2000 and July 4 and 5, 2000 the CITT held public and *in camera* hearings in Ottawa, Ontario. Represented at the hearing were, *inter alia*, Camco, Whirlpool, Inglis, WCI, WCI Canada Inc., Maytag, Maytag Canada, Sears Canada Inc. (Sears) and the Commissioner. At these hearings the CITT also heard testimony from four witnesses who appeared at the CITT's request plus one subpoenaed witness from General Electric Appliances. The witnesses who appeared at the hearings at CITT's request appeared on behalf of The Brick Warehouse Corporation, Appliance Canada, Brault et Martineau, and Midnorthern Appliance Inc., respectively.

A number of background features to the Canadian market and the scope of the inquiries previously undertaken are worth noting. Camco, for example, is the sole domestic producer concerned with the specific appliances subject to the dumping inquiry. The investigation covered all imports of the subject goods during the period from October 1, 1998 to September 30, 1999. The inquiry, however, was limited to the American producer-exporters WCI and Whirlpool, their respective affiliates, successors and assigns⁵. In other words it did not cover all United States producer-exporters of these certain appliances into Canada. Further it did not include producers from Europe that also export to the Canadian market.

On August 1, 2000 the CITT issued its findings in Inquiry No. NQ-2000-001 and fifteen days later, on August 16, 2000, released its Statement of Reasons (SOR). The CITT's final determination stated that:

- The dumping in Canada of the subject refrigerators, excluding those with a capacity greater than 18.5 cubic feet and those destined for use in the Habitat for Humanity Program, had caused material injury to the domestic industry;
- The dumping in Canada of the subject dishwashers, excluding those with stainless steel interiors or those destined for use in the Habitat for Humanity Program, had caused material injury to the domestic industry;

⁴ There is currently a related action, CDA-USA-2000-1904-03: Certain Top-Mount Electric Refrigerators, Electric Household Dishwashers and Gas or Electric Laundry Dryers, originating in or exported from the United States of America and produced by, or on behalf of, White Consolidated Industries, Inc. and Whirlpool Corporation, their respective Affiliates, Successors and Assigns (Dumping). This is a binational panel review of the final determination of dumping in this same matter. At the time of this decision, the Binational Panel had not yet rendered its decision on the determination of dumping.

⁵ Each firm from the United States as well as Camco from Canada produces appliances under a variety of brand labels.

- The dumping in Canada of the subject dryers, excluding those with controls at the front, removable tops and chassis designed to be stacked on top of washers or those destined for use in the Habitat for Humanity Program, had caused material injury to the domestic industry;
- The requirements for a finding under SIMA subsection 42(1)(b) of massive importation had not been met; and
- The requirements under SIMA section 46 with respect to advising the Commissioner to consider undertaking an investigation into other allegedly dumped goods from the United States had not been met.

Public hearings were held before all members of this Panel on October 3, 2001 in Ottawa, Ontario, at which counsel for all parties appeared and presented oral argument.

The primary issues raised by the Complainants' briefs and oral arguments included the following:

1. What are the appropriate standards of review that should be applied by the Panel in determining whether the CITT has committed a reviewable error with respect to each of the contested issues?
2. Did the CITT commit a reviewable error in finding that injury had been caused to the domestic industry via dumping? Did post-hearing data analyses made by the CITT to the financial evidence, without providing clear guidance to the parties as to what this data transformation entailed and/or not giving the parties an opportunity to make submissions regarding this transformation, constitute reviewable error?
3. Did the CITT commit a reviewable error by not considering Camco's export performance in evaluating Camco's alleged injury?
4. Did the CITT commit a reviewable error in concluding that SIMA subsection 42(3) makes allowance for a cumulative finding of injury with respect to specific producers?
5. Did the CITT commit a reviewable error in granting exclusions to certain of the subject refrigerators, dryers, and dishwashers and not others? Did the CITT adequately disclose its reasons for granting and not granting the various exclusions requested by the parties?
6. Did the CITT commit a reviewable error by failing to advise the Commissioner of the CCRA to consider undertaking a dumping investigation under SIMA section 46 with respect to the goods of certain non-targeted US exporters of the subject goods?

For the reasons set out below, which are made on the basis of the administrative record, the applicable law, the written submissions of the participants, and the public hearing held in Ottawa, Ontario on October 3, 2001, this Panel hereby decides unanimously not to remand the decision of the CITT.

OPINION

1) STANDARD OF REVIEW

The statutory authority for panel review is found in the relevant provisions of the NAFTA and the *Federal Court Act*.⁶ Binational panels are directed pursuant to 1904(3) to apply:

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

In the present case the general legal principles of Canadian law are to be applied in this review. This Panel must apply the general jurisprudence that would be applicable to the Federal Court in its review of a decision made by the CITT.

NAFTA Annex 1911 defines the standard of review as the grounds set forth in subsection 18.1(4) of the *Federal Court Act*. Subsection 18.1(4) provides that the Tribunal's decisions will be reviewed on the grounds that it:

- a) Acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- b) Failed to observe a principal of natural justice, procedural fairness or other procedure that it was required in law to observe;
- c) Erred in law in making a decision or order, whether or not the error appears on the face of the record;
- d) Based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
- e) Acted, or failed to act, by reason of fraud or perjured evidence; or
- f) Acted in any other way that was contrary to law.

These grounds for review need to be read in the light of the standard of review developed by the Supreme Court of Canada. A determination of the appropriate standard of review in respect of a decision of an administrative tribunal such as the CITT calls for the application of the pragmatic and functional approach first adopted by the Supreme Court in *U.E.S., Local 298 v. Bibeault*⁷

⁶ R.S.C. 1985, c. F-7

⁷ [1988] 2 S.C.R. 1048

and further developed in subsequent decisions⁸. Most recently the Supreme Court has rendered a unanimous decision in *Canada (Deputy Minister of National Revenue-M.N.R.) v. Mattel Canada Inc. (Mattel)*⁹ where it once again described the standard of review. In this decision the Supreme Court was asked to review a decision of the CITT although in Mattel, it involved interpretations by the CITT of various sections of the *Customs Act*.

The Supreme Court has identified the standards of review as points occurring on a spectrum of curial deference that ranges from patent unreasonableness at one end of the continuum – that of greatest deference, through reasonableness simpliciter to correctness at the other end of the spectrum where the least deference is accorded the decision of the administrative tribunal. As Mr. Justice Iacobucci stated in the Southam case:

...the standard may fall somewhere between correctness, at the more exacting end of the spectrum, and patently unreasonable, at the more deferential end.¹⁰

Further, in applying the functional and pragmatic approach a reviewing court must examine a number of factors. Mr. Justice Major speaking for the Supreme Court in Mattel stated that:

In any given case, the focus of the inquiry is on the particular provision at issue, and the central analysis is whether the question raised is one that was intended by the legislators to be left to the exclusive decision of the administrative tribunal. The factors to be considered include: the purpose and objective of the Act and provision at issue, the specific language of the provision at issue and any privative clauses in the tribunal's constitutive statute, the nature of the decision made by the tribunal, and the relative expertise of the tribunal compared to that of the courts in deciding such matters. None of these factors alone is dispositive.¹¹

To summarize, the appropriate standard of review will reside somewhere on a spectrum from 'correctness' to 'patently unreasonable' depending on the relative weight given to the factors identified by the Court:

1. the existence of a privative clause;
2. the purpose of the Act and the provision at issue;
3. the relative expertise of the tribunal; and
4. the nature of the issue under consideration.

⁸ *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, hereinafter Pezim; *Canada (Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 748, hereinafter Southam; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 hereinafter Pushpanathan; *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, 2001 SCC 31, hereinafter British Columbia College of Teachers; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] S.C.J. No. 38, 2001 SCC 37, hereinafter Minority Shareholders.

⁹ [2001] SCJ No. 37, 2001 SCC 36

¹⁰ Southam, at p. 765

¹¹ Mattel, at para. 24

While no factor is dispositive, Mr. Justice Major in *Mattel* states, (relying on the *Southam* case in part) that it is the Tribunal's 'relative expertise' that is the most important of the factors that a court must consider in settling on a standard of review.¹² In determining that expertise the court may undertake the following inquiry:

The central inquiry in an assessment of the expertise factor is whether a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act: Pushpanathan, *supra*, at para. 32. This may involve several considerations, including the specialized knowledge of its decision-makers, whether any special procedures or non-judicial means of implementing the Act apply, and whether the tribunal plays a role in policy development.¹³

Turning to such a pragmatic and functional review, a number of the factors can be examined generally, e.g. the presence or absence of a privative clause, while other factors, such as the nature of the issue raised by complainants, must be specifically examined.

i. Privative Clause

Previously, a form of a privative clause shielded the CITT but this protection was repealed by Parliament in the 1993 statutory amendments implementing NAFTA. There is a right of judicial review pursuant to SIMA section 76. The absence, or in this instance, the removal of a privative clause would seem to suggest that less deference ought to be accorded decisions of the CITT.¹⁴ Parliament did not intend that decisions of the CITT were to be left to the CITT exclusively. However, as the Supreme Court has indicated, the absence of a privative clause does not settle the question.¹⁵

ii. Purpose of the Act

SIMA is a trade statute designed to protect Canadian domestic industries from the negative effects associated with 'dumped' goods and subsidies provided to exporters who import goods into Canada. In addition the legislation is designed to implement Canada's international trade obligations under the General Agreement of Tariffs and Trade and now the World Trade Organization. Thus, the legislation bears some passing similarity to the *Competition Act*¹⁶, examined for example in the *Southam* case. As indicated in the *Southam* case the *Competition Act* includes an economic and not purely legal purpose. Parliament established the CITT to protect Canada's domestic industries from possible harm caused by foreign companies. As in *Southam*¹⁷, then, the statute and the Tribunal established for these 'economic' purposes underlines the expertise of the Tribunal and warrants some heightened degree of deference for

¹² *Mattel* at para. 28

¹³ *Mattel*, at para. 28

¹⁴ This line of analysis is followed in *Certain Malt Beverages from the United States of America (Injury)*, (1995), CDA-95-1904-01 hereinafter *Malt Beverages*.

¹⁵ Pezim at p. 591

¹⁶ R.S.C. 1985, c. C-34

¹⁷ *Southam*, at p. 772

the decisions of the Tribunal. All this would suggest, in general, that Parliament intended to grant at least some deference to CITT decisions.

iii. The Relative Expertise of the CITT

As noted above, the determination of the expertise of the CITT relative to the courts is the most important of the factors that a court must consider in settling upon the appropriate standard of review. In addition, it is evident that the relative expertise of the Tribunal and the nature of the problem are closely interrelated and close attention should be paid to the following section on the nature of the issue under consideration.

In determining the tribunal's expertise in relationship to the reviewing court, the court must examine whether the tribunal has been constituted with a particular expertise in achieving the general purposes of the Act. To do so, the Panel examined several considerations including the specialized knowledge of its decision-makers, whether any special procedures or non-judicial means of implementing the Act apply and whether the CITT plays a role in policy development.

With respect to the specialized knowledge of the members of the CITT, as noted in *Mattel*, the *Canadian International Trade Tribunal Act*¹⁸ does not require its members to be expert in any particular field. Nevertheless the tribunal members do acquire experience in trade questions they consider over the course of their appointment.¹⁹ In the abstract then the tribunal members can be characterized as experts though it is necessary to examine the closely related factor of the nature of the issue being considered by panel members. The CITT is an adjudicative body but additionally, as noted in the *Mattel* case, and by Counsel for the CITT, the CITT has a policy role:

...s. 18 of the Canadian International Trade Tribunal Act, which requires the CITT to "inquire into and report to the Governor in Council on any matter in relation to the economic, trade or commercial interests of Canada with respect to any goods or services or any class thereof that the Governor in Council refers to the Tribunal for inquiry". Although the present appeal does not implicate s. 18, the section indicates that Parliament generally considers the CITT to be expert in some economic, trade or commercial matters. As in *Pezim*, supra, this is a basis for deference, however, it is important to note that the CITT's policy-making role is limited in that its function is primarily research oriented, and the CITT cannot elevate its policy recommendations to the status of law.²⁰

In general it would appear that the CITT is recognized as a Tribunal with developed expertise of its commissioners. Again in the abstract, and without reference to the specific issues, this would point to a significant degree of deference that would need to be accorded its decisions.

¹⁸ R.S.C. 1985 (4th Supp.), c.47

¹⁹ *Mattel* paras. 29 and 30

²⁰ *Mattel*, para. 31

iv. *The Nature of the Issue under Consideration*

Thus, reflecting the analysis just examined some considerable deference would accompany decisions of the CITT, yet it still is essential to examine the particular issues before this Panel to determine the standard of review on an issue-by-issue basis. Thus, the Panel needs to assess whether the issue is a matter of fact and evidence, or a matter of mixed fact and law, or whether the issue is a matter of legislative interpretation – a matter of law alone. Matters of fact are generally given wide deference to the Tribunal by reviewing courts. Courts will not normally interfere unless the Tribunal's conclusions are patently unreasonable. However, where issues are matters of mixed fact and law or matters of law, reviewing courts will accord less deference to the Tribunal. In examining the issues of law, however, the Panel further must examine whether the issue is a matter of general statutory interpretation or a matter of law with highly technical content. Matters of general statutory interpretation are matters that courts are competent to review and less deference is accorded to the Tribunal. In general a standard of correctness would be applied to such an issue. However, where the Panel was asked to examine a question of law that was technical or scientific in nature then greater deference would be accorded the Tribunal.

In the end this Panel is required pursuant to the pragmatic and functional test, to examine all the pertinent factors in arriving at a standard of review. Where the expertise of the Tribunal is engaged and putting all the factors of the pragmatic and functional approach together, substantial deference, along the spectrum of the standard of review to 'patent unreasonableness' would be accorded the decisions of this Tribunal. If however, the issues fall outside the specific expertise of the CITT say, for example an issue that could be assessed as a pure matter of law not within the expertise of the CITT, the standard of review would shift towards correctness. The Panel has undertaken such an analysis on an issue-by-issue basis and the standard of review is identified for each issue raised by the Complainants.

2) INJURY AND CAUSATION

SIMA subsection 42(1)(a)(i), from which the Tribunal derives its authority to conduct an injury inquiry, provides that:

(1) The Tribunal, forthwith after receipt by the Secretary pursuant to subsection 38(3) of a notice of a preliminary determination, shall make inquiry with respect to such of the following matters as is appropriate in the circumstances:

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

(i) has caused injury or retardation or is threatening to cause injury, or ...

Section 37.1(1) of the *Special Import Measures Regulations*²¹, prescribes factors which the Tribunal is required to consider in determining whether the dumping of goods has caused injury. These factors are:

- (a) the volume of the dumped or subsidized goods and, in particular, whether there has been a significant increase in the volume of imports of the dumped or subsidized goods, either in absolute terms or relative to the production or consumption of like goods;
- (b) the effect of the dumped or subsidized goods on the price of like goods and, in particular, whether the dumped or subsidized goods have significantly
 - (i) undercut the price of like goods,
 - (ii) depressed the price of like goods, or
 - (iii) suppressed the price of like goods by preventing the price increases for those like goods that would otherwise likely have occurred;
- (c) the resulting impact of the dumped or subsidized goods on the state of the domestic industry and, in particular, all relevant economic factors and indices that have a bearing on the state of the domestic industry, including
 - (i) any actual or potential decline in output, sales, market share, profits, productivity, return on investments or the utilization of industrial capacity,
 - (ii) any actual or potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital,
 - (ii.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods, and
 - ...
- (d) any other factors that are relevant in the circumstances.

The Tribunal is also required to determine in SIM Regulations subsection 37.1(3)(b):

- (b) whether any factors other than the dumping or subsidizing of the goods have caused injury or retardation or are threatening to cause injury, ...

With regard to ‘injury’, Whirlpool and WCI argue that the Tribunal conducted a faulty gross margins analysis by erroneously accepting inappropriate data from Camco, by introducing errors

²¹ S-15—SOR/84-927, hereinafter SIM Regulations.

in further 'reworking' the data, and by breaching the rules of natural justice by not disclosing its calculations to the parties. With respect to price suppression/price erosion, Whirlpool and WCI claim that the Tribunal erred by using average prices as evidence of injurious dumping, and by adopting an inconsistent approach to the comparability of subject goods within model groupings.

With regard to 'causation', Whirlpool and WCI argue that the use of average prices included goods purchased for non-dumping reasons and therefore the Tribunal had no reliable evidence linking injury to dumping; that the Tribunal failed to consider significant non-dumping factors in its analysis of injury and causation, such as the quality of Camco's goods and the effect of the bundling of products; that a proper gross margin analysis would show no connection between the injury and dumping; that in the analysis of price suppression/price erosion the elimination of "un-dumped" factors would remove support for any relationship between dumping and injury; and that further to the causal analysis of price suppression, the actual account-specific evidence of displacement of Camco product based on data provided by Camco must be shown, and not merely reduced sales volumes based on data reworked by the CITT. Finally, in the analysis of the impact of lost market share the Tribunal relied on goods purchased for non-dumping reasons and further there is not even evidence of displacement of Camco goods by imports, let alone a demonstration of causation.

The Tribunal's analysis surrounding these issues is clearly within its specialized competence. These are issues concerning the existence and cause of injury. These questions are precisely the questions that the Tribunal has been empowered to decide, and are within its expertise. Furthermore, the issues are factually driven, and the issues that the complainants raise under this heading are all issues of mixed fact and law. Where there are sub-issues of law, the issues concern the interpretation of the Tribunal's own statute, and the appropriate ways to exercise its own mandate. Thus, the Panel finds that the applicable standard of review for these issues is one of considerable deference; i.e. at least reasonableness simpliciter or higher.

Essentially, the arguments of Whirlpool and WCI can be distilled down to five issues: i) an allegedly faulty gross margin analysis; ii) the alleged duty to give reasons; (iii) the allegedly inappropriate use of average price data; iv) the failure to consider significant non-dumping factors; and v) the failure to conduct separate analyses and provide separate conclusions on each of the three categories of subject goods.

i. Gross Margin Analysis

The complainants argue that the gross margin analysis of Camco's financial statements was faulty, and was incapable of supporting a conclusion that there was injury. They take issue with the information that the Tribunal accepted as part of the financial records of Camco, the way that the Tribunal reworked the data, and the way that the Tribunal disclosed how they reworked the data. The data that Camco provided was presented to the Tribunal, and the parties had an opportunity to comment on it. The Tribunal found that the gross margin analysis was flawed. At that point, it took the data and conducted a further analysis of the numbers in the financial statements. The Tribunal employed its expert staff, some of whom are accountants, to re-work the financial information. The Tribunal chose a certain methodology to reallocate costs. Whirlpool and WCI proposed an alternative method, but before this Panel they did not make a convincing case that the method employed by the Tribunal was unreasonable.

The analysis of financial information, the appropriate allocation of costs between exports and domestic sales, and the determination of injury on the basis of the effect of dumping, are all areas within the expertise of the Tribunal as laid out in SIMA subsection 42(1). In this technical analysis, which is conducted within the Tribunal's expertise, it is clear that a reviewing court or panel would owe the Tribunal a great deal of deference. Taking all the factors of the pragmatic and functional test into account the standard of review here approaches patent unreasonableness.

The Tribunal is in a much better position than this Panel to determine the most appropriate method of allocating costs between domestic sales and exports. All that Whirlpool and WCI were able to do was to propose another, albeit plausible, method of allocating costs. Neither Whirlpool nor WCI were able to point to sufficient evidence or legal argument to sustain their argument that the Tribunal's reworking of the data was unreasonable. To do this, the complainants would have had to show that the Tribunal's method was one that a court would say was patently unreasonable. The Complainants have not succeeded in making this case.

ii. Duty to Give Reasons

Turning to the issue of giving reasons, Whirlpool and WCI have failed to show any statutory authority for a duty of the Tribunal to give reasons. The Panel, suggests that there is a statutory obligation. Where a tribunal has made a determination of injurious dumping pursuant to Section 42, it is required to make an order or finding with respect to the specified goods. In addition, pursuant to SIMA subsection 43.(2), the following must be done:

(2) The Secretary [of the Tribunal] shall forward by registered mail to the Commissioner, the importer, the exporter and such other persons as may be specified by the rules of the Tribunal

(a) forthwith after it is made, a copy of each order or finding made by the Tribunal pursuant to this section; and

(b) not later than fifteen days after the making of an order or finding by the Tribunal pursuant to this section, a copy of the reasons for making the order or finding.[Emphasis added]

In addition, the Parties in the NAFTA have underlined the commitment to give reasons. In Article 1907.3 of NAFTA:

... the Parties agree that it is desirable in the administration of the antidumping and countervailing duty laws to:

(h) provide disclosure of relevant information, including an explanation of the calculation or the methodology used to determine the margin of dumping or the amount of the subsidy, on which any preliminary or final determination of dumping or subsidization is based, within a reasonable time after a request by interested parties;

(i) provide a statement of reasons concerning the final determination of dumping or subsidization; and

(j) provide a statement of reasons for final determinations concerning material injury to a domestic industry,...threat...or...retardation...

Article 1911 provides:

For purposes of this Chapter:

administrative record means...:

(b) a copy of the final determination of the competent investigating authority, including reasons for the determination...

Although applicable in terms only to Mexican cases, further illumination of the intent of the draftsmen is to be found in the Schedule of Mexico in Annex 1904.15, Amendments to Domestic Laws. It will be recalled that when Canada and the U.S. revised the agreement to include Mexico, they found that due to differences in legal systems and traditions, various matters that were taken for granted between the original Parties needed to be spelled out. Thus the expanded pact included an undertaking by Mexico that its laws would be amended to require:

(r) a detailed statement of reasons and the legal basis for final determinations in a manner sufficient to permit interested parties to make an informed decision as to whether to seek judicial or panel review, including an explanation of methodological or policy issues raised in the calculation of dumping or subsidization...

It seems clear that this requirement was not intended to apply alone to Mexico, but rather that it was deemed already to be a part of Canadian and U.S. law.

This Panel found, without defining the extent of the duty, that the Tribunal is obligated to provide reasons at least sufficient enough to allow the Panel to review a decision of the CITT. This duty was reflected in the decision of this Panel, dated March 22, 2001, regarding the request of Whirlpool and WCI for an Order to compel the CITT to produce its working papers related to the post-hearing analysis of Camco's financial statements. In that Order, this Panel stated:

...the Investigating Agency carries the burden to fully explain what it has done and how it reached the conclusions of material injury...

Without precisely deciding on the extent of this duty in the context of the CITT and SIMA, this Panel finds that the reasons the Tribunal has given were sufficient to indicate that they found: 1) the financial statements provided by Camco were inaccurate; 2) the problem with them was clear; 3) the Tribunal chose to rework the data; and 4) the Tribunal chose a method to rework the data that it felt was reasonable and relevant to the situation. The Panel notes that the reasons of

the Tribunal for reworking the data are briefly described in the Tribunal's SOR, and are more fully elaborated in the Tribunal's brief submitted to this Binational Panel. The Panel finds that this combined explanation is sufficient to provide a reasonably detailed explanation of its actions to the parties in this case. However, the Panel would underline vigorously the importance in the Tribunal providing adequate reasoning in any initial Statement of Reasons, without the prodding provided by this Panel in this case, so any reviewing body, and more importantly the parties, can properly assess the Tribunal's decision.

Furthermore, it is clear that the reworked financial data, as long as that data were merely part of a post-hearing analysis of data that were already on the administrative record, do not form part of the administrative record and therefore do not need to be disclosed. This principle has been made very clear in *Toshiba Corp. v. Canada*.²² A previous Panel *Corrosion Resistant Steel Sheet*²³ has faced an analogous situation, and its reasoning is intrinsically persuasive:

...the analyses in question were supported by information on the record. Any tribunal must be free to do whatever analyses it requires to come to its decision, provided it does not use information not on the record and not available to the parties.²⁴

iii. Average Price Data

The Tribunal, in its analysis, used average price data in determining injury. This is a compilation of all of the prices of like goods that are sold in the marketplace. The complainants take issue with this practice because, as they argue, the use of average price data is incapable of showing the necessary causal connection between injury and dumping. It is true, as counsel for Whirlpool and WCI argue, that the Tribunal must find pursuant to the statutory requirement, that it was the dumping that caused the injury. However, the statement that the Tribunal must have evidence of account specific incidents of price-based switching, has no foundation in the legislation or the jurisprudence. Subsection 42(1) of SIMA gives the Tribunal a broad discretion in its choice of how to find injury and causation. No methodology or type of proof has been laid out in the statute or the regulations. Furthermore, Whirlpool and WCI have not been able to cite case law or legislation indicating that the use of average price data is unacceptable. The Tribunal indicated that it was an imperfect tool, but that it felt it was accurate enough in the context of the data in this case to make a finding of injury, under the head price suppression/price erosion, as well as causation.

The use of average price data in determining injury is a question of fact, or perhaps mixed fact and law. The finding is within the expertise of the Tribunal and it is strictly within the mandate of the Tribunal, as granted under SIMA. On this question also the Tribunal should be given

²² [1984] F.C.J. No. 247 (F.C.A.). That decision stated at p. 2: "Quite different considerations apply to the final staff report. It consists of summary and commentary on the evidence and submissions made at the inquiry. There is nothing whatever improper in this and it is not dissimilar to the kind of work law clerks sometimes do for judges. It is a proper part of the functions of the Tribunal's staff. Nothing requires that such reports be revealed to the parties...In my view, they should not even form part of the record of this court."

²³ CDA-94-1904-04 (July 10, 1995) hereinafter Binational Corrosion Resistant Steel Sheet.

²⁴ Binational Corrosion Resistant Steel Sheet at p. 17

considerable deference by the Panel. In looking at all the factors including that the specific issue is a matter of fact or perhaps mixed fact and law, the standard of review is at least reasonableness if not patent unreasonableness. The Panel is not persuaded by Whirlpool or WCI that the use of average price data is either illegal or inappropriate in the circumstances. Therefore this Panel will not disturb the use of average price data in the finding of injury and causation.

Whirlpool and WCI further argue that the Tribunal has included some non-dumped goods in its average pricing analysis such that the findings on gross margins, price suppression/price erosion and loss of market share are unreliable. The decision to include or not include certain goods in the average pricing analysis is a decision squarely within the expertise of the Tribunal, and again is a matter of fact or mixed fact and law. Again, the standard of review is at least reasonableness and the Panel will defer to any reasonable decision of the Tribunal on this question. Although it would certainly have been preferable, in the Panel's opinion that the prices of non-dumped goods not be included in the average price analysis, the Panel finds that the methodology of the Tribunal was reasonable. Given the standard of review the Panel will not disturb the findings of the Tribunal.

iv. Consideration of Non-Dumping Factors

Whirlpool and WCI both argue that the Tribunal failed to consider the effect of certain non-dumping factors in its analysis of injury and causation, and that in fact, much of the injury suffered by Camco was due to non-dumped goods. The Panel recognizes that the Tribunal is under a duty, as set out in SIM Regulations subsection 37.1(3), to consider whether any factors other than dumping or subsidizing may have caused the injury:

(3) For the purpose of determining whether the dumping or subsidizing of any goods has caused injury...the following additional factors are prescribed: ...

(b) whether any factors other than the dumping or subsidizing of the goods have caused injury or retardation or are threatening to cause injury, on the basis of...

The section then goes on to list several factors that must be considered, to determine if injury has been caused by some factor other than the dumping. These factors include, in subsection (3)(b)(vii) "any other factors that are relevant in the circumstances." Starting at page 27 of the SOR, under the heading "Other Factors", the Tribunal does carry out the analysis that is required by the Regulations. The CITT recognizes the arguments by several of the parties that there were factors other than dumping that may have caused injury to Camco. The Tribunal also recognized its duty to not attribute injury caused by these factors to dumping. Further, the Tribunal noted that dumping need not be the only or the principal cause of injury, but the injury from dumping must be material. The Tribunal noted the following "other factors" in its decision: product quality, performance, style and innovation; selling and marketing practices; Camco's business strategies and decisions; Camco's selling directly to builders; Camco's lack of investment and later rationalization; the decision to stop producing 16 and 18 cubic foot refrigerators; and Camco's export performance for dishwashers. The Tribunal also recognized the important position that Sears played in the market, and that Camco's lack of success at that account was due to many factors.

The Panel finds that the Tribunal in fact discharged its duty under SIM Regulations subsection 37.1(3) to consider the possible injurious effect of non-dumping factors. The weight to be given to the evidence on each of these factors, and the ultimate conclusion of the Tribunal as to whether injury was caused by them, is a core element of the duties of the Tribunal, within its scope of expertise, and is a matter of fact or mixed fact and law. Again taking into account all the factors of the pragmatic and functional test, the standard of review in this issue of non-dumping factors is at least reasonableness. The Tribunal, therefore, is owed a high level of deference on the issue. The Panel holds that in this case the Tribunal's findings with regard to the non-dumping factors enumerated by Whirlpool and WCI was reasonable.

v. The Failure to Conduct Separate Analyses and Provide Separate Conclusions

The duty to make a separate analysis and finding for each of the subject goods is implicit in SIMA subsection 42(1) and in SIM Regulations subsection 37.1. The Tribunal acknowledged, at SOR, page 23 that it had to make a separate finding with respect to each of the categories of subject goods. The Tribunal goes on to say that a parallel analysis is possible, and that where there are distinctions between the subject goods, it would highlight them. Thus, the Tribunal was aware of its duty to make a separate finding for each of the categories of subject goods. The Tribunal did in places indicate that it had done a different analysis for each of the categories of subject goods. An example of the Tribunal's separate analysis can be seen in the SOR at page 26:

The Tribunal examined the evidence on the record regarding the sales volumes and prices for certain refrigerators, dishwashers and dryers to major accounts in Canada as reported in the pre-hearing staff report. The overall pricing data for dishwashers and dryers do not generally show major decreasing trends...

Furthermore, it is clear in the SOR at page 36 that the Tribunal made separate findings of injury and causation for each of the categories of subject goods. Thus, the Tribunal did do a separate analysis, and came to separate conclusions for the three categories of subject goods. These conclusions are again mixed fact and law. The standard of review is at least reasonableness simpliciter. The Tribunal did exercise its jurisdiction to make separate analyses and did make separate findings for each of the subject goods. The Tribunal conclusions are reasonable and the Panel will not disturb the Tribunal's findings.

3) EXPORT PERFORMANCE

i. Export Performance and Material Injury

The complainants assert that the Tribunal erred by failing to accord proper weight to Camco's export performance in its material injury analysis. The CITT majority found that, "all the evidence points to the conclusion that Camco is profitable and reasonably healthy with respect to

its export sales of dishwashers and dryers”, and that “Camco’s export business has aided its overall operation by helping to pay for plant and product improvements”.²⁵ However, the majority also found that “the circumstances were not normal, as the presence of dumped product resulted in Camco having to struggle in its home market”.²⁶ While acknowledging Camco’s export success, the majority held that “in this case . . . financial success in the export market should not be used to offset Camco’s injury in the domestic market and that injury cannot be judged on Camco’s worldwide operations”.²⁷

Presiding Member Close, in dissent, argued that the majority’s decision on this point resulted in a failure to consider the impact of dumped imports on the “domestic industry”, as required by the SIMA. Member Close noted that SIMA defines the “domestic industry” as those producers accounting for “a major proportion of the total domestic production of like goods”,²⁸ and that the factors listed for Tribunal consideration in SIM Regulations subsection 37.1 are not limited to factors affecting the domestic sales market.²⁹ As a result, Member Close suggested that the Tribunal majority had erred in failing to analyze the impact of dumped imports in relation to Camco’s “total production, including that production that goes to the export market”.³⁰

At the hearing, WCI’s counsel argued that the Tribunal did not include in its injury inquiry Camco’s export performance, although the Tribunal was under a statutory obligation to do so.³¹ While SIMA and its implementing regulations specify factors, which the Tribunal is to take into account in making material injury determinations, the list of factors makes clear that no single factor is dispositive.

Clearly, the SIM Regulations require that the Tribunal consider the domestic industry’s export performance. In *Certain Stainless Steel Round Bar Originating In Or Exported From Brazil And India*,³² the CITT explained that export performance is to be considered in an injury inquiry, “to ensure that injury caused by those other factors is not attributed to the dumped or subsidized imports”.³³

In *Certain Iodinated Contrast Media Originating in or Exported from the United States of America (Including The Commonwealth of Puerto Rico)*,³⁴ Member Close, in dissent, explained that:

²⁵ SOR, at p. 30

²⁶ SOR, at p. 30 (with changes)

²⁷ SOR, at pp. 30-31

²⁸ SOR, at p. 37

²⁹ SOR, at p. 38

³⁰ SOR, at p. 40

³¹ See Transcript Article 1904 Binational Panel Review in the Matter of Certain Appliances held Wednesday, October 3, 2001 at pp. 101-105, hereinafter Transcript.

³² CITT Inquiry No. NQ-2000-002 (October 27, 2000).

³³ Thus, for example, one could imagine a situation where a domestic industry’s economic condition might deteriorate by reason of a decline in its export performance. In such a case, it would presumably be difficult to attribute such a decline to the entry of dumped imports into the producer’s domestic market.

³⁴ CITT Inquiry No. NQ-99-003, (May 16, 2000) hereinafter *Iodinated Contrast Media*.

SIMA requires the Tribunal to determine whether the domestic industry has suffered material injury. The domestic industry is defined in the legislation as the domestic producers of like goods. Nothing in SIMA or the WTO Anti-dumping Agreement directs the Tribunal to determine whether dumping has materially injured only the domestic production that is related to domestic consumption. I note that section 37.1 of the SIMA Regulations prescribes a number of factors that the Tribunal is to consider in an injury inquiry. Some of these factors clearly relate only to domestic sales for domestic consumption, for example, price and market share. Others, such as export performance, productivity, return on investments, utilization of capacity, employment, inventories or the ability to raise capital, can hardly be evaluated without taking into account the domestic production of like goods in its entirety.³⁵

However, in this matter, and as further elaborated upon in the following section, the Panel finds that the Tribunal majority did in fact consider export performance in making its material injury determination in this case. The Panel also finds that the Tribunal majority correctly defined the “domestic industry” to be evaluated. The Tribunal did consider the impact of imports on the total domestic production of like goods, including production for export. It should be noted however how the Tribunal considers the export performance factor and weighs it against other statutory and regulatory injury factors is a question of fact and would require this Panel to accord to the Tribunal a considerable degree of deference.

ii. *The Proper Determination of Injury*

WCI and Whirlpool argued that in determining the extent of injury to the domestic industry, the Tribunal examined primarily the marketing and distribution of Camco’s products, Camco’s volume of sales and market share and the price erosion and price suppression experienced by Camco. According to the complainants, the Tribunal failed to consider the entire industry including the industry’s production for export and export performance. In addition, the Tribunal failed to find that injury was predicated on the impact of imports in specific sectors of the domestic market. Furthermore, the Tribunal failed to determine that the injury was causally related to dumped imports.

In the Tribunal’s discussion of “State of the Market and Industry,” the Tribunal explained the factors that it considered in determining whether Camco suffered any injury by reason of subject imports:

Subsection 37.1(1) of the *Special Import Measures Regulations* prescribes certain factors that the Tribunal may consider in determining whether a domestic industry has been materially injured by dumped imports or whether the dumping is threatening

³⁵ Iodinated Contrast Media at pp. 27-28

to cause injury. These factors include the volume of dumped goods and their effect on prices in the domestic market for like goods and the consequent impact of these imports on a number of economic factors. In this case, these economic factors include actual or potential declines in domestic sales, market share, domestic prices and financial performance. Subsection 37.1(3) of the SIMA Regulations also requires the Tribunal to consider other factors not related to the dumping, including the volumes and prices for imports of like goods that are not dumped, the export performance of domestic producers and any other factors that are relevant in the circumstances, to ensure that any injury caused by those other factors is not attributed to the dumped imports.³⁶

There is nothing in the Tribunal's opinion to suggest that the Tribunal majority limited its injury analysis to Camco's production of like goods for sale to domestic customers. Clearly, the Tribunal considered Camco's export performance, finding the company to be "profitable and reasonably healthy"³⁷ with respect to export sales of dishwashers and dryers. However, the Tribunal found that dumped imports had injured the domestic industry in specific ways and in specific market sectors.

Thus, for example, the Tribunal noted that the "channels of distribution for the subject goods consist of two main market segments, retail and builder/developer", with the retail segment accounting for about 80 percent of the total market for refrigerators, 85 percent of the total market for dishwashers and 90 percent of the total market for dryers.³⁸ The balance of the market was found to consist of the "builder/developer" segment, which "includes authorized builder-distributors (ABDs) and direct-to-builder accounts". The Tribunal found that subject imports had caused material injury in the latter market segment:

The Tribunal believes that much of the injury experienced by Camco occurred in the builder and ABD market segments. WCI came back into the Canadian market in late 1997 and early 1998, following a re-organization with some new, updated and improved products. It introduced these new products with a new approach to marketing that involved building a better relationship with its customers. The evidence shows that dumped product from WCI displaced Camco product at many important ABD accounts, as well as at retail accounts.³⁹

While the Tribunal found Camco's evidence regarding account-specific injury allegations to be "generally unreliable", it "was persuaded by the account-specific pricing evidence submitted in response to the Tribunal's questionnaires and other evidence provided at the hearing". The Tribunal also found that dumped Whirlpool products had "displaced Camco products at a

³⁶ SOR, at p. 16

³⁷ SOR at p. 30

³⁸ SOR, at p. 7

³⁹ SOR, at p. 24 (footnotes omitted)

number of the large retail accounts”, and concluded that “it is clear to the Tribunal that dumped imports displaced Camco product at both retail and builder accounts”.⁴⁰

In addition, the Tribunal’s finding of injury was based largely on its determination that the dumped imports had caused Camco to lose market share. Obviously, market share is one of the factors to be considered in a material injury determination; it is also a factor, which necessarily focuses on the domestic industry’s performance in its domestic market. The Tribunal found that Camco had suffered injury in the form of lost market share made possible by price competition from dumped imports:

Central to the case made by Camco is that the dumped imports forced it to either meet the low-priced dumped imports or to lose sales. In this regard, the Tribunal has addressed the issue of price erosion and price sensitivity of appliances in the Canadian market in order to understand the reasons for Camco’s large loss in market share for each of the separate products (refrigerators, dishwashers and dryers). While the injury suffered by Camco manifested itself primarily as lost sales volume and reduced market share during the Tribunal’s inquiry period, Camco testified that it was forced to lower prices to a certain point and, when it determined its prices could go no lower, it lost sales. In this regard, the Tribunal heard testimony from witnesses representing the retail and ABD segments of the market that verified the presence of aggressively priced imports in the market and the importance of price in terms of their overall purchasing decisions.⁴¹

The Tribunal found that the loss of market share was a severe decline, particularly “for a company like Camco that is smaller relative to its major competitors and, therefore, any loss of market share can have a significant impact on its economics of production”.⁴²

Thus, the Tribunal majority did in fact consider the domestic industry as a whole, including its export production, and evaluated its export performance, as the SIM Regulations require. Equally clear the Tribunal made specific findings that the dumped imports had damaged the domestic industry in specific market sectors, primarily the builder/ABD market, and, to a lesser extent, the retail sector. The injury suffered by the domestic industry manifested itself in the form of lost sales, lost market share, and negative price effects.

Had the Tribunal defined the domestic industry as being limited to production of like products for sale in the Canadian market, the Panel would not hesitate to set such determination aside as legally erroneous. However, careful scrutiny of the majority decision indicates that no such error was committed. The entire industry was considered by the Tribunal, including the industry’s production for export and export performance, and a finding of injury was predicated on the

⁴⁰ SOR at p. 25

⁴¹ SOR at p. 25

⁴² SOR at p. 23

impact of imports in specific sectors of the domestic market. Furthermore, the Tribunal specifically held that the injury was causally related to dumped imports.

The Tribunal majority determined that the positive export performance of the domestic industry did not extirpate the injury to the domestic industry.⁴³ We find no error in this determination. Nothing in SIMA, its implementing regulations or reported precedent suggests that the “material injury” sufficient to sustain an antidumping order must reflect injury suffered by every market sector in which domestic like product is sold, including export market sectors. Furthermore, the Tribunal majority indicated that “in this case”⁴⁴ the domestic industry’s export success should not be weighed against the injury found in sectors of the domestic market. This determination is case-specific and involves a weighing of evidence, which is the prerogative of the Tribunal, and to which this Panel will defer.

The Tribunal took note of the factors prescribed by the SIM Regulations to consider in the injury determination and gave specific attention to Camco’s export performance. Nowhere, however, does SIM Regulations subsection 37.1(3) dictate how the Tribunal must consider or weigh the domestic industry’s export performance. Obviously, the SIM Regulations, which concerns itself with non-dumping causes of injury, seeks to have the Tribunal consider whether a decline in export performance, rather than imports, might be the cause of injury to a domestic industry. However, nowhere does the regulation dictate or even suggest that positive export performance is a factor, which must be weighed against other evidence of injury. The weighing of evidence in each case is an issue of fact, to be scrutinized by the Panel under a deferential standard of review.

The complainants argue that the Tribunal erred in failing to consider the export performance of Camco in evaluating the injury suffered by Camco. They allege that the robust export performance of Camco should have been considered as a positive offsetting factor in the analysis of injury. The relevant provisions of SIMA state:

42(1) The Tribunal ...shall make inquiry with respect to such of the following matters as is appropriate in the circumstances:

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

(i) has caused injury or retardation or is threatening to cause injury;[Emphasis added]

The term ‘injury’ is then defined in subsection 2(1) in the following way:

‘injury’ means injury to a domestic industry;

In turn, ‘domestic industry’ is also defined in the following way in subsection 2(1):

⁴³ SOR at p. 31

⁴⁴ SOR at p. 30

‘domestic industry’ means ...the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods...[Emphasis added]

The complainants argue that injury must be determined in terms of the domestic production as a whole, in order to support their argument that export performance is a factor in assessing injury from dumping. This is a misreading of the definition of ‘injury’. In fact, injury must be injury to the domestic industry, which is defined as the domestic producers as a whole. It is erroneous to argue that it is domestic production as a whole that must be considered.

In statutory interpretation, there is a difference between domestic producers and domestic production. This difference must be understood in order to determine the proper meaning of subsection 42(1) of SIMA. The term ‘domestic producers’ refers to the producers in the domestic industry. The purpose in SIMA of defining ‘domestic industry’ in terms of ‘domestic producers as a whole’ is to ensure that the producers seeking relief from injurious dumping will represent the major proportion of the domestic industry. By comparison, the term ‘domestic production’ implies all of the production that happens in the country. This term would seem to include--as the complainants argue--all the production in a country, including domestic sales and exports. However, in SIMA the words ‘domestic production’ are used in the definition of domestic industry only to modify the term ‘domestic producers’. Nowhere does the section say that domestic industry is defined as all domestic production. Clearly, domestic industry is defined in reference to domestic producers, not to domestic production.

In this case, Camco is the only domestic producer. Thus, there is injury to the domestic industry from dumping to the extent that Camco is injured by that dumping. There is no indication that domestic production ‘as a whole’ must be injured; rather ‘domestic producers as a whole’ must be injured. It is possible to injure a producer by only injuring one part of its business. The Tribunal found that Camco was injured by dumping by loss of market share in the Canadian market.

With regard to subsection 37.1 of SIM Regulations, the complainants have misconstrued the import of this provision. Subsection 37.1(1) prescribes a lengthy list of factors that must be examined to determine whether dumped goods have caused injury. These factors include, for example, any actual or potential decline in market share. Further guidance in the assessment of injury is provided in subsection 37.1(3), as follows:

37.1(3) For the purpose of determining whether the dumping or subsidizing of any goods has caused injury or retardation, or is threatening to cause injury, the following additional factors are prescribed:

...

(b) whether any factors other than the dumping or subsidizing of the goods have caused injury or retardation or are threatening to cause injury, on the basis of

...

(vi) the export performance and productivity of the domestic industry in respect of like goods, and

(vii) any other factors that are relevant in the circumstances.[Emphasis added]

The purpose of subsection 37.1(3) is to ensure that the Tribunal turns its mind to other factors besides dumping that may cause injury to the domestic industry. If it is found that one of the factors enumerated in subsection 37.1(3) has caused some injury, then the Tribunal must ensure that this injury is not attributed to dumping. This step is necessary to ensure that it was in fact the dumping that caused the injury to the domestic industry and not the non-dumping factors that are the explanation for the decline in market share, or price, etc. Thus, what the Tribunal was obliged to do was to consider export performance, among other things, to ensure that these factors were not the cause of the injury suffered by the domestic industry.

The complainants are correct to argue that subsection 37.1(3) obliges the Tribunal to consider export performance in determining if there has been injury to the domestic industry. However, it is incorrect to argue, as the complainants have done, that the Tribunal must consider export performance in assessing injury from dumping, either to add to injury from dumping if export performance is poor, or to subtract from injury from dumping if export performance is good. SIMA only requires the consideration of export performance for the purposes of determining if the injury to the domestic industry was caused by factors other than the dumping. This is the only positive duty to consider export performance that exists in the relevant sections of SIMA and its regulations. Clearly, SIM Regulations 37.1(3) cannot be interpreted in a way that would create a positive obligation to include export performance in the determination of whether or not there is injury from dumping. In fact, export performance must be considered in order to separate potential injury caused by poor export performance, from injury caused by dumping.⁴⁵

The above conclusion is consistent with earlier views expressed by the CITT. For example, in *Iodinated Contrast Media* that was cited by the complainants the majority stated:

In the Tribunal's view, the effects of the domestic industry's export performance, albeit favourable, does not negate the material injury caused directly by the dumping of the subject goods through price erosion and lost sales in the domestic market.⁴⁶

The Tribunal then goes on to cite a previous case⁴⁷ where it had already addressed the issue of export performance:

⁴⁵ It is possible that in given cases a domestic industry's export performance may be such that the impact of dumped imports on the industry would be determined to be immaterial. This is not the case presented here, however, as the Tribunal specifically found the dumped imports had caused injury to the domestic industry in specific segments of the Canadian market. The Panel need not speculate concerning how export performance might be evaluated by the Tribunal in other cases.

⁴⁶ *Iodinated Contrast Media* at p.20

⁴⁷ *Cars Produced by or on Behalf of Hyundai Motor Company, Seoul, Republic of Korea, or by Companies with which it is Associated, CIT Statement of Reasons CIT-13-87* (April 7, 1988)

In that case, exports “in the view of the Tribunal, [were] unrelated to the issues of dumping into Canada and of injury to domestic production. Moreover, and notwithstanding repeated statements that the car industry is a North American industry which encompasses exports and imports on the basis of rationalized production, GM Canada, and Ford Canada centred their case on, and counsel argued that the complainants were concerned with injury to domestic production for domestic consumption. The Tribunal agrees with this position.” The Tribunal adopts this position in the present case, a position that reflects the Tribunal’s practice and established jurisprudence since the Cars case.⁴⁸

Two conclusions can be drawn from the above analysis. First, the Tribunal did not err in considering domestic production for domestic consumption in determining if there was injury caused by dumping. Having found that there was injury caused by dumping, the Tribunal correctly went on, as it is obliged to do in SIM Regulations subsection 37.1(3), to consider whether the injury was caused by some other factor, including export performance. The Tribunal discharged its duty under SIMA subsection 42(1) and SIM Regulations subsection 37.1(3). It committed no error.

The Panel finds that the Tribunal majority properly examined Camco’s export performance and that its conclusions associated therewith are sufficiently grounded in law and fact such that the Panel, applying a deferential standard of review, upholds the Tribunal’s decision.

4) CUMULATION PURSUANT TO SIMA SUBSECTION 42(3)

Whirlpool claims that the Tribunal committed reviewable error in making a “cumulative” determination of material injury in respect of appliances exported to Canada by Whirlpool and WCI. According to Whirlpool, “cumulation”, as prescribed under SIMA subsection 42(3) and Article 3.3 of the *WTO Anti-Dumping Agreement*, is only permitted where the Tribunal is conducting simultaneous investigations of goods from two or more countries. It follows that where, as here, the Tribunal is investigating exports from a single country, it cannot “cumulate” exports by two or more producers in assessing material injury. Furthermore, Whirlpool claims that because this is a “producer specific” or “targeted” investigation - involving fewer than all exports from a country - it is particularly inappropriate to consider “cumulatively” the goods exported by two or more subject producers.

In effect, Whirlpool asserts that the Tribunal was required to make separate findings respecting material injury with respect to each foreign producer subject to the investigation. At the same time, Whirlpool readily admits that it has been able to “find no case . . . where in a producer-

⁴⁸ Iodinated Contrast Media at p. 20

specific situation there has been discussion of cumulation”⁴⁹ and cannot point to any authority for its position.⁵⁰

The Panel finds no basis in law for Whirlpool’s contention. The concept of “cumulation”, as used in subsection 42(3) of SIMA and Article 3.3 of the *WTO Anti-Dumping Agreement*, is only relevant in cases where the Tribunal is conducting simultaneous investigations of dumped goods from more than one country. Thus, SIMA subsection 42(3) provides:

(3) In making or resuming its inquiry under subsection (1), the Tribunal shall make an assessment of the cumulative effect of the dumping or subsidizing of goods to which the preliminary determination applies that are imported into Canada from more than one country, if the Tribunal is satisfied that

(a) the margin of dumping or the amount of subsidy in relation to the goods from each of those countries is not insignificant and the volume of the goods from each of those countries is not negligible; and

(b) An assessment of the cumulative effect would be appropriate taking into account the conditions of competition between goods to which the preliminary determination applies that are imported into Canada from any of those countries and

(i) goods to which the preliminary determination applies that are imported into Canada from any other of those countries, or

(ii) like goods of domestic producers.[Emphasis added]

Unquestionably, the decision concerning whether or not the Tribunal should engage in “cumulation” is only relevant where goods from two or more countries are involved. Moreover, the comparisons called for in SIMA can only be conducted when goods from more than one country are under investigation.

Similarly, the *WTO Anti-Dumping Agreement* only speaks of “cumulation” in terms of assessing the impact of imports for more than one country. Article 3.3 of the *Agreement* provides that:

Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more

⁴⁹ Transcript at p. 61, lns. 20-23

⁵⁰ Transcript at p. 69, lns. 5-6

than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible, and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.[Emphasis added]

Like SIMA subsection 42(3), the *WTO Anti-Dumping Agreement* speaks of investigations involving products “from more than one country”, when those goods are “simultaneously subject to antidumping investigations”.

Further, both SIMA and the *WTO Anti-Dumping Agreement* specify the threshold tests, which must be applied before determining whether cumulation is appropriate. These tests require an examination of margins of dumping for goods from each country as well as the volume of imports from each country. These tests are, by their terms, inapplicable in an antidumping investigation involving goods from a single country. Indeed, prior Panels⁵¹ have recognized that “The so-called principle of cumulation refers to a common practice of many of the signatories to the *Anti-dumping Code* whereby dumped imports from all subject countries are considered cumulatively for the purpose of establishing their impact on domestic production.”⁵²

Nothing in the *WTO Anti-Dumping Agreement* or SIMA suggests that the Tribunal should not aggregate all imports from a given country, for injury analysis purposes. Indeed, Article 3 of the *WTO Anti-Dumping Agreement* requires an examination of the volume “of dumped imports”, the effect “of dumped imports” on prices for domestic like products and the consequent impact “of these imports” on domestic producers.⁵³ The *WTO Anti-Dumping Agreement* requires an evaluation, *inter alia*, of the increase or decrease in the volume of “dumped imports”, and the impact of “dumped imports” on the domestic industry concerned. Similarly, SIM Regulations subsection 37(1) requires the Tribunal to consider the volume and impact of “dumped or subsidized goods”. Nothing whatsoever suggests that the Tribunal is required to make separate determinations with respect to “dumped imports” on a producer-specific or exporter specific basis and, as Whirlpool readily admits, it has not been the practice of the Tribunal to make such separate determinations.

Finally, Whirlpool’s argument suffers from an internal inconsistency. Whirlpool admits that in a single-country investigation, the Tribunal may properly consider the aggregate impact of all the imports from the country concerned,⁵⁴ but suggests that a different analysis must be employed in a “producer specific” or “targeted” case.⁵⁵ Yet Whirlpool offers no logical reason for the

⁵¹ See *Hot-Rolled Carbon Steel Sheet*, CDA-93-1904-07, (May 18, 1994) hereinafter *Hot-Rolled Carbon Steel Sheet*.

⁵² *Hot-Rolled Carbon Steel Sheet* at p. 44

⁵³ Article 3.1

⁵⁴ Transcript at page 61: “At the legal level, of course they look at the goods as a whole if it is a country case - no problem.”

⁵⁵ See Transcript at p. 70. Indeed, Whirlpool suggests that individual producer injury determinations would be required in a “non-targeted” investigation, if some of the producers in a given country were found not to be dumping, and the Tribunal was asked to evaluate the impact of the remaining “dumped imports”.

distinction, and admits it is not grounded in precedent. Rather, Whirlpool merely seeks a remand of this case to the Tribunal, so that the Tribunal can explain its supposed decision to “cumulate” the impact of Whirlpool and WCI exports.⁵⁶ However, it is abundantly clear that the Tribunal did not, and could not, perform a cumulation in this case as prescribed by SIMA subsection 42(3). The Tribunal did nothing more than consider the impact of the “dumped imports” from a single country on the domestic industry, as SIMA instructs the CITT to do.

In conclusion both SIMA and the *WTO Anti-Dumping Agreement* limit “cumulation” to cases involving two or more countries. Whatever term is used to describe the Tribunal’s practice of considering the aggregate impact on domestic industry of all dumped imports from a single country, “cumulation” is not appropriately used in this particular context.

5) EXCLUSIONS

Complainants Whirlpool and Inglis requested exclusions with respect to six product categories.⁵⁷ WCI argued for two others, one of which (large refrigerators) essentially overlaps one of Whirlpool’s requests.

The Tribunal granted exclusion to three products, which are at issue, namely large refrigerators, stainless steel tub dishwashers, and stackable dryers. Complainant Camco asserts that the Tribunal erred in granting the three exclusions.

In addition, Whirlpool contends that the Tribunal committed an error in failing to furnish reasons for the denial of its claims for exclusion for Kitchen Aid brand products, dryers sold to the builder trade, private label dryers, and certain specialty dryers.

It is necessary for the Panel to determine the standard of review with respect to these exclusions under the “pragmatic and functional” test examined in the first section of this opinion. It is evident that the determinations regarding these exclusions are largely findings of fact, and as noted in the opening section, taking all the other factors into account under the pragmatic and functional test the standard naturally devolves along the continuum to patent unreasonableness where the issue is a matter of evidence. There can be no question that the responsibility for findings under SIMA subsection 43(1) has been devolved by the Parliament to the CITT. The statute charges that the CITT:

... shall make such order or finding with respect to the goods to which the final determination applies as the nature of the matter may require, and shall declare to what goods, including, where applicable, from what supplier and from what country of export, the order or finding applies.

⁵⁶ See Transcript at p. 68: “I would urge you to remand it and to ask the Tribunal where they find the authority to cumulate in a producer-specific case.”

⁵⁷ In addition to several categories not in issue—such as appliances earmarked for the Habitat for Humanity Program.

In no manner is the mandate circumscribed so as to fetter the discretion of the CITT in making proper factual findings to carry out this responsibility. Thus, in a matter so fact-specific as this, it must be clear that the CITT has wide discretion to analyze the facts developed in order to determine to which goods the injury finding applies.⁵⁸ Indeed, the Tribunal is far better able than the courts or a reviewing binational panel as in this case to make these determinations, due to its intimacy with the factual record and experience in making decisions in this area.

i. Exclusions granted by the Tribunal

The complainant Camco argues that the Tribunal committed a reviewable error in excluding certain products from the injury determination, namely refrigerators with a capacity of 18.5⁵⁹ cubic feet and above, dishwashers with stainless steel tubs, and dryers with controls at the front, removable tops and chassis designed to be stacked on top of washers.

Camco has asserted that the exclusion of a product is to be made only in “exceptional circumstances” or on “rare occasions”, and cites a number of cases to support the proposition⁶⁰. However, a review of these cases does not support the idea that the Tribunal has set a particularly high threshold for the consideration of product exclusions. Indeed, in *Corrosion-Resistant Steel Sheet*, notwithstanding the recitation of the proposition that product “...exclusions will only be granted in exceptional circumstances”,⁶¹ the Tribunal proceeded to analyze each request and to exclude a number of specific products from its injury determination on the ground that like goods were not produced in Canada, or dumped goods did not compete with goods produced in Canada.

With respect to producer and country exclusions, however, the Tribunal recognized that the exclusion principle ran into conflict with the principle of cumulation, and therefore declined to grant those exemptions from its injury determination. In sum, it is obvious that the Tribunal was of the opinion that the fact that a product was not produced in Canada, or that it did not compete with goods produced in Canada, was a sufficiently “exceptional circumstance” to warrant a product exclusion.⁶² The Panel accordingly, is of the view that it is more proper to apply the “exceptional circumstances” rule to claimed exporter or country exclusions.

⁵⁸ *Sacilor Acieries v. Canada (Anti-Dumping Tribunal)* (1985), F.C.J. No. 531, hereinafter *Sacilor*.

⁵⁹ The Panel notes that Whirlpool had requested an exclusion for refrigerators of 18 cubic feet and above, and that WCI sought exclusion of 17.7 cubic feet refrigerators. The Tribunal did not offer an explanation of why it exempted only 18.5 cubic feet and above. In this proceeding, WCI and WCI Canada continue to argue for exclusion of 17.8 cubic feet refrigerators. In view of the Panel’s treatment of the issue, we are not distinguishing their merchandise from that of Whirlpool.

⁶⁰ *Corrosion-Resistant Steel Sheet*, CITT Inquiry No. NQ-93-007, (August 15, 1994) hereinafter *Corrosion-Resistant Steel Sheet*; *Flat Hot-Rolled Carbon and Alloy Steel Sheet*, CITT Inquiry No. NQ-98-004, (July 19, 1999) hereinafter *Flat Hot-Rolled*; *Refined Sugar*, CITT Inquiry No. NQ-95-002, (November 21, 1995) hereinafter *Refined Sugar*; *Hot-Rolled Carbon Steel Plate*, CITT Inquiry No. NQ-97-001 (November 10, 1997) hereinafter *Hot-Rolled Plate* and *Cold-Rolled Steel Sheet*, CITT Inquiry No. NQ-92-009 (August 13, 1993) hereinafter *Cold-Rolled Steel Sheet*.

⁶¹ *Corrosion-Resistant Steel Sheet*, at p. 39

⁶² See *Hetex Garn A.G. v. Antidumping Tribunal* (1978), 2 F.C. 507 at p. 508

Likewise, in Flat Hot-Rolled the CITT rejected a request for country exclusions. Nevertheless it considered each request for product exclusion based, essentially on whether the imports competed with domestically produced goods. In this Inquiry, the Tribunal's analysis led it to the conclusion that the subject goods did, in fact, compete with domestic hot-rolled steel sheet, and accordingly declined to exempt the claimed merchandise from its injury determination.

In Refined Sugar the Tribunal rejected certain product exclusion claims, not citing any general principle of "exceptional circumstances", but solely upon the factual finding that the imports were, "...goods which the domestic industry currently produces and which are readily substitutable for, and compete directly with, domestically produced goods."⁶³ Finally, Camco also cites Cold-Rolled Sheet Steel,⁶⁴ for the proposition that the granting of exclusion is an anomaly. However, an examination of that Panel's decision reveals that the Panel was dealing essentially with producer exclusions, and the law concerning cumulation.

It is therefore the opinion of the Panel that the law demonstrates no bias for or against the granting of product exclusions, but rather envisions a case-by-case consideration of the factors militating in favor of, or against, exclusion.

What then are the factors, which the Tribunal should consider in the granting of product exclusions? Although the rules are variously formulated, it is apparent that the principal consideration is whether the domestic industry produces the product, or, alternatively, a product with which the imports compete. As a corollary proposition, the Tribunal considers "...whether the domestic industry is an 'active supplier' of the product and whether the requested exclusion was to fill a market niche or was unique."⁶⁵

The Tribunal excluded top-mount refrigerators with a capacity greater than 18.5 cubic feet and above on the grounds that these refrigerators are not produced in Canada, are sold in a different segment of the market, and that, thus, they do not compete with refrigerators made by Camco. It was further noted that Camco, itself, imports refrigerators of this size. Camco counters by arguing that this result was incorrect because it lost market share of refrigerators, in general, and that large size refrigerators were capturing an increasing share of the market for refrigerators. The Panel is of the view that these factors are not relevant in view of the lack of domestically produced appliances of the same size.

More to the point is the contention that in some cases Whirlpool and WCI's large size refrigerators were priced at or below smaller domestic models, and that therefore they competed with smaller models. Furthermore, in some cases the standard size cavity for refrigerators in Canadian homes will accommodate large size ones. However, there was also evidence, to the contrary. The Tribunal found that large size refrigerators were not sold in the same segment of the market as smaller models, and therefore did not compete with them. There was also testimony that consumers did not regard the two as the same product. In addition, since Camco itself imported large size refrigerators, the Tribunal discounted the idea that the two were

⁶³ Refined Sugar, at p. 40

⁶⁴ *Binational Panel Review, CDA-93-1904-09 (13 July 1994)*.

⁶⁵ *Waterproof Footwear from China, CITT Statement of Reasons, NQ-2000-004 (December 22, 2000)*, at pp. 15-16

substitutable. The Panel is therefore of the view that there was, at best, conflicting evidence that large size refrigerators could be substituted for smaller ones. Under the patent unreasonableness standard to be applied here, it will not substitute its evaluation of the evidence for the Tribunal's.

Camco sold tub dishwashers with plastic interiors. Both Whirlpool and WCI produced stainless steel tub washers, which were excluded by the CITT from the injury determination. Camco argues that the exclusion was improper because the dumping margins were substantial, Camco lost considerable market share in dishwashers as WCI and Whirlpool's imports increased substantially, and the imports were priced in some cases at, or below Camco's. Further, Camco cites evidence that the two are physically interchangeable, and that they are sold in the same segment of the market.

The Tribunal recognized that there is, "...a degree of interchangeability"⁶⁶ between the two, but concluded:

...there are major differences between plastic and stainless steel tub dishwashers with respect to their price, appearance and performance characteristics. The evidence also shows that stainless steel tub dishwashers are clearly sold in a different segment of the market, fill a particular market niche, are unique, are not produced in Canada and do not compete directly with the domestically produced like goods.⁶⁷

The Panel recognizes the appeal of the argument that the dishwashers are competitive with each other in the broadest sense, as both will get dishes equally clean. But that is not enough. There is considerable evidence in the record to support the determination that stainless tubs are not perceived by the customer as the same product as plastic ones, and that the two don't compete directly in the marketplace. Given that the stainless tub product is not produced in Canada, and is unique, the Panel is not persuaded that the economic factors cited by Camco make the products interchangeable. In sum, the Panel is of the view that there is evidence in the record to support the CITT finding on tub dishwashers.

Likewise, the Panel will not disturb the Tribunal's finding on front control stackable dryers. These dryers are designed to be used in conjunction with matching washers, and Camco did not produce a similar product. Its argument against granting the exclusion is therefore solely based upon the economic factors that it lost market share, for its own dryers, and that there was a significant dumping margin found. It would seem evident that the Tribunal found sufficient evidence to counter Camco's contention that the imported dryers are interchangeable or substitutable for domestically produced dryers.

⁶⁶ SOR at p.35

⁶⁷ SOR at p.35

ii. *Exclusions denied*

The complainant Whirlpool, in addition to its request for exclusion of stainless steel dishwashers and large size refrigerators, both of which were granted, made a request in regard to all Kitchen Aid brand appliances, to dryers sold to private label brand distributors and to builders, and, lastly, with respect to specialty dryers (compact, “smart card” and coin-operated machines). The gist of the Kitchen Aid brand argument is that Kitchen Aid is a premium brand, which competes only with a premium General Electric line, which is imported by Camco. As to private label and builders’ dryers, they are always sold in pairs or “bundled” with washers (which are not made by Camco), with the washer choice driving the sale. For the category of specialty dryers, it is also asserted that they are not produced in Canada by Camco, and that they therefore do not compete with goods made by Camco. Whirlpool asserts that it submitted substantial evidence on these points before the Tribunal.

The Tribunal, however, dismissed these claims as follows:

As noted earlier, the Tribunal has considered, in its injury analysis, the overall effects of the dumped imports on the domestic industry. Having conducted such an assessment and considered Whirlpool’s participation in the Canadian market and, in particular, its volume of sales of dumped product in Canada, the Tribunal is of the view that there are no valid reasons to generally exclude Whirlpool from its findings.⁶⁸

It is Whirlpool’s position that the Tribunal committed an error of law by not furnishing reasons for the denial of its claim. Reliance is placed principally upon *Via Rail Canada Inc. v. National Transportation Agency*.⁶⁹ Whirlpool points to this decision as standing for the proposition that an administrative agency is required to give reasons for its decisions and is particularly obligated to do so where it is performing a function where the agency is to be granted a high degree of deference. The complainant notes that the Tribunal specifically recognized Whirlpool’s requests in its Statement of Reasons and that, notwithstanding, there was no indication of the details of the basis for rejecting them.

It certainly would have been appropriate for the Tribunal to deal with the specifics of Whirlpools’ claims. The Tribunal now asserts that since the denial of exclusion is tantamount to finding that there is injury with respect to that product, it is not obligated to furnish the reasons for the denial. Further, the CITT argues that it is not obligated to address every issue raised by the parties, and that it is reasonable to infer that the Tribunal did not feel that the exclusions were warranted. Interestingly, Camco, in challenging the exclusions, which were made, argues that while it is necessary to furnish the reasons for granting an exclusion, there is no obligation on the part of the CITT to explain a denial.

The Panel believes that it is a reasonable inference that the Tribunal considered all of the requests for exemption. After all, the Tribunal did exclude certain refrigerators, washer, and

⁶⁸ SOR at p.35

⁶⁹ [2001] 2 F.C. 25 (FCA), hereinafter *Via Rail Canada*.

dryers imported by Whirlpool and WCI. The Panel could dispose of this matter easily by finding that the Statement of Reasons did, in fact, indicate the reason for the denial of the claim, i.e., the substantial volume of dumped goods sold by Whirlpool. However, it is difficult to read the Statement of Reasons as adequately addressing the specific products in issue. The statement that Whirlpool was only requesting a “general” exclusion insufficiently characterizes its claims. Therefore the question must be answered as to whether the Tribunal is obligated to state the reasons for every decision subsumed in its conclusion.

At issue in *Via Rail Canada* was a provision in the carrier’s fare schedule which authorized a free ticket for attendants to disabled persons who were capable of providing assistance to the disabled in boarding and deboarding the train. The issue arose as to whether it would be sufficient for attendants to merely assist the disabled in other ways. The National Transportation Agency found that as it was the Railroad’s responsibility to aid in boarding, the tariff was invalid as too narrow. The Agency was acting under a statute⁷⁰ authorizing it to approve fares, which required that fares do not constitute, “an undue obstacle to the mobility of persons, including those persons who are disabled.”⁷¹

The Court concluded that the Agency’s failure to state the reasons why the fare represented an “undue obstacle” rendered invalid the Agency’s decision to reject the tariff. Since the Agency was required to balance the interests of the disabled and the carrier in reviewing the tariff, the Court held that it should have given the reasons for its decision. The Panel finds interesting that among the virtues of providing reasons, as found by the Court, is the idea that reasons would help to guide the conduct of other carriers in the future. That, in the Panel’s view, points to the distinguishing feature of the Agency’s action from that of the CITT in this case. In *Via Rail Canada* the Agency in construing this standard was performing a quasi-judicial function, and not just fact-finding. Indeed, that is arguably the reason for the application of the standard of “reasonableness” in that case, rather than “patent unreasonableness”, as in this case. Accordingly, we do not find *Via Rail Canada* to be controlling in this matter.

At the same time the Panel is very reluctant to seemingly adopt the view expressed by the Tribunal’s Counsel that the Tribunal is never required to set forth the reasons for the rejection of an exclusion request. However, there is an inference, where there is injury, that all dumped goods contributed to the injury, and bearing in mind that the Tribunal obviously did grant some of the complainant’s requests, and that the CITT is entitled to wide discretion in its fact specific determinations, the Panel will decline to remand the Tribunal’s decision and require further explanation.

6) REQUEST FOR REFERENCE PURSUANT TO SIMA SECTION 46

The Complainant Whirlpool requested the Tribunal to advise the Commissioner pursuant to SIMA section 46 regarding a possible investigation of dumping of similar goods by Maytag and other third-party exporters from the United States. Section 46 provides as follows:

⁷⁰ *National Transportation Act, 1987*. R.S.C. 1985 (3rd Supp.), c.28. Repealed by S.C. 1996, c.10, s.183, effective July 1, 1996 (SI/96-53).

⁷¹ *Via Rail Canada*, at p. 33

46. Where, during an inquiry referred to in section 42 respecting the dumping or subsidizing of goods to which a preliminary determination under this Act applies, the Tribunal is of the opinion that

(a) there is evidence that goods the uses and other characteristics of which closely resemble the uses and other characteristics of goods to which the preliminary determination applies have been or are being dumped or subsidized, and

(b) the evidence discloses a reasonable indication that the dumping or subsidizing referred to in paragraph (a) has caused injury or retardation or is threatening to cause injury,

the Tribunal, by notice in writing setting out the description of the goods first mentioned in paragraph (a), shall so advise the Commissioner.

The Tribunal denied Whirlpool's request, saying:

In addition to its earlier comments to the effect that Maytag and other unnamed U.S. exporters' goods not being injurious to the domestic industry, the Tribunal is not persuaded, with respect to Maytag, that the evidence indicates that Maytag's refrigerators, dishwashers and dryers are being dumped in the Canadian market. The Tribunal notes and agrees with Camco that there is no evidence that Maytag's marketing and pricing practices have been injurious to the domestic industry. As for the goods from the unnamed exporters, the Tribunal is of the opinion that the evidence before it is insufficient to support a conclusion that the goods produced by these exporters have been or are presently being dumped in Canada and that their presence has been injurious to the domestic market. The Tribunal, therefore, declines to advise the Commissioner to investigate these exporters.⁷²

Whirlpool complains that this ruling of the Tribunal constituted a reviewable error. Maytag and the Tribunal defend the Tribunal's decision. Camco and WCI take no position on the issue, but WCI points out that any injury caused by a third party must be excluded in determining whether relief against the original respondents is warranted.

The following section reviews the standard of review and then the three elements of inquiry under section 46: dumping, injury, and threat of injury. Prior to 1994, the task of the Tribunal

⁷² SOR at p. 34

under section 46 was to make findings on the above issues, which, if affirmative, obligated the Commissioner to initiate an investigation of the alleged third party dumping. A 1994 amendment resulted in the revised text of section 46 set forth above, pursuant to which the Tribunal only conveys to the Commissioner its “opinion” that the conditions for an investigation exist, leaving to the Commissioner the final decision as to whether to initiate. While the earlier statute automatically triggered an investigation by the Commissioner, pursuant to SIMA today, it requires the concurrence of both agencies.

Whirlpool here argues in essence that under the current Statute any evidence of dumping is sufficient to satisfy section 46(a):

The Tribunal may only determine that the requirements of subsection 46(a) of SIMA have not been met where it is of the opinion that there is no evidence that the excluded goods have been or are being dumped.⁷³

On this reading of SIMA, the task of the Tribunal under section 46(a) is ministerial, it has no discretion, and the ‘correctness’ standard of review would apply. This Panel reads section 46(a) otherwise. The text calls for an “opinion” of the Tribunal that there is evidence of dumping. Whirlpool would in effect read this language out of the statute. The Tribunal’s “opinion” under section 46(a) necessarily involves an element of judgment and discretion. This would be an issue of mixed fact and law, and an examination of all of the factors in the pragmatic and functional test would indicate that a reasonableness simpliciter standard of review would apply.

In the present case the matter is especially clear. A dumping investigation of Maytag and other third party exporters was requested when the proceeding was before the Commissioner. It was rejected. The earlier ruling should be regarded as the law of the case, and a remand on this issue would appear to the Panel to be an exercise in futility.

Under section 46(b) the language is clear, calling for a finding that “the evidence discloses a reasonable indication” of causation of injury (or retardation). Plainly a determination of what is reasonable involves an element of judgment and discretion and thus once again and in light of the functional and pragmatic test attracts a reasonableness standard of review before this Panel.

Finally, in examining the last statutory element - ‘threat of injury’, it is by its very nature an inference as to future events and thus largely a matter of judgment. Again the standard of review would be reasonableness simpliciter.

i. Alleged Maytag and Third Party Dumping

Whirlpool introduced in evidence before the Tribunal two Maytag dealer price lists showing higher list prices to dealers in the United States than to dealers in Canada for the same models. On cross-examination before the Tribunal, Whirlpool’s witnesses conceded that they did not know what prices were actually charged for these Maytag products in either country. Whirlpool argued that its evidence was “the most that could possibly be expected of a party in [this]

⁷³ Whirlpool Reply Brief, at para. 202 (emphasis in original)

situation”⁷⁴, citing *Stainless Steel Round Bars*⁷⁵, where the Tribunal accepted indirect evidence of dumping by a Korean exporter. The surrounding facts, however, were different in that case: the complaining party does not appear to have been active in the Korean market, and so could not be expected to know the prices in that market, whereas Whirlpool was active in both markets involved in this matter. Whirlpool also points to evidence that some Maytag prices in Canada were below those of Whirlpool and WCI for comparable appliances, but this is hardly evidence of dumping by Maytag. In the end, however, since a SIMA section 46 notice is sent by the Tribunal to the Commissioner only if both the dumping standard of section 46(a) and the injury standard of section 46(b) are met, Whirlpool’s failure to clear the first hurdle is dispositive.

ii. Injury

Whirlpool also asserts that “it was at the suggestion of the Commissioner (following its refusal to properly expand the scope of its investigation) that the complainants brought the section 46 issue before the Tribunal.”⁷⁶ On the contrary, what the Commissioner said was:

The CCRA analyzed the evidence provided in support of the allegations and is satisfied that the scope of the investigation was appropriate. Ultimately, evidence of injury must be presented to the Tribunal to support why the injury has been caused by the named companies and not by other companies in the named country.⁷⁷

In other words, it was open to Whirlpool to show in the present proceeding what if any injury to Camco the non-party imports were causing, so that Whirlpool would not be held responsible for such injury. WCI argued that this was the proper context for a showing by Whirlpool that Maytag had caused injury. But Whirlpool does not argue here that it was held responsible for injury caused by Maytag or other non-parties.

iii. Threat of Injury

The Tribunal made no express finding as to a threat of injury. But Whirlpool does not claim to have presented evidence as to any anticipated developments that would give rise to new dumping or injury. There being insufficient showing of past or present dumping by the non-parties, and no claim of such prospects, it is clearly implicit that the Tribunal did not deem there to be a threat that would warrant notice to the Commissioner. While it would have been better practice for the Tribunal to make an express finding on the point, in the circumstances a remand is not warranted.

⁷⁴ Whirlpool Complainant’s Brief at para. 261

⁷⁵ *CITT Inquiry Number NQ-98-001 (September 21, 1998)*.

⁷⁶ Whirlpool Complainant’s Brief at para. 243

⁷⁷ CCRA Preliminary Determination - Certain Household Appliances. File No. 4246-106, Case No. AD/1235 at pp. 14-15

CONCLUSION

In view of the foregoing, the Panel hereby orders that the decision of the Tribunal in this matter be and is hereby affirmed. The Panel directs the Canadian Secretary of the NAFTA Secretariat to issue a Notice of Final Panel Action pursuant to Rule 77 of the NAFTA Rules of Procedure for Article 1904.

Signed in the Original by:

Alan S. Alexandroff (Chair)
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Prof. Gilbert R. Winham
Prof. Gilbert R. Winham

Issued on the 16th day of January 2002.

CONCURRING OPINION OF PANELIST SHERMAN

Panelist Sherman agrees with the decision but is troubled by some implications and omissions he finds in the Panel's reasoning. He would credit reviewing courts and attorneys with considerably more expertise in financial and regulatory matters than does the Panel and thus would shift the balance of "relative expertise" somewhat more toward the reviewing body. He would interpret SIMA, the intent of Parliament, and the CITT's mission not only as protection of domestic producers but also in the light of the reciprocal international limitations on antidumping measures laid down in the NAFTA and the WTO/GATT Agreements the protection of importers and exporters and, indirectly, consumers.

Signed in the Original by:

Saul L. Sherman, Esq.
Saul L. Sherman, Esq.

Issued on the 16th day of January 2002.