IN THE MATTER OF:

Certain Dumped Integral Horsepower
Induction Motors, One Horsepower
(1 HP) to Two Hundred Horsepower
(200 HP) Inclusive, with Exceptions
Originating in or Exported from
The United States of America

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CANADA - UNITED STATES FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL

IN THE MATTER OF:	)	
	)	**CDA-90-1904-01**
CERTAIN DUMPED INTEGRAL HORSEPOWER INDUCTION MOTORS, ONE HORSEPOWER (1 HP) TO TWO HUNDRED HORSEPOWER (200 HP) INCLUSIVE, WITH EXCEPTIONS ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA	)	

DECISION OF THE PANEL
SEPTEMBER 11, 1991

BALDOR ELECTRIC COMPANY; CANADIAN ELECTRO DRIVES; AND DRYDEN AGENCIES LTD.JOHN WILSON ELECTRIC (FORDWICH) LIMITED
TOSHIBA INTERNATIONAL CORPORATION (HOUSTON, TEXAS)
Complainants

v.

CANADIAN INTERNATIONAL TRADE TRIBUNAL
GENERAL ELECTRIC CANADA INC.
WESTINGHOUSE MOTOR COMPANY CANADA LTD.; EEMAC; LEROY-SOMER CANADA LIMITÉE
Respondents

and

ATTORNEY GENERAL OF CANADA
Intervenor

Before:

E. David D. Tavender, Q.C., Chairperson
James Chalker, Q.C.
Professor William J. Davey
James A. Geraghty, Esq.
Robert J. Pitt

Appearances:

C.J. Michael Flavell, G.C. Kubrick, for Toshiba International Corporation, Complainant
William R. Herridge, Q.C., for John Wilson Electric, Complainant
Terrence A. Sweeney, for Baldor Electric et al, Complainants

Debra Steger, Clifford Sosnow for the Canadian International Trade Tribunal, Respondent
Jean G. Bertrand, Denis Gascon for Westinghouse Motor Company, et al, Respondents
Richard G. Dearden, Randall J. Hoffley for General Electric Canada Inc, Respondent

Joseph de Pencier, for the Attorney General of Canada, Intervenor.

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I. INTRODUCTION

This is a Binational Panel Review conducted pursuant to Article 1904 of the Canada-United States Free Trade Agreement ("FTA"), the Canada-United States Free Trade Agreement Implementation Act, S.C. 1988, c.65, and Part II of the Special Import Measures Act, R.S.C. 1985, c.S-15, ("SIMA"), following a Request for Panel Review filed by Toshiba International Corporation ("Toshiba"), Baldor Electric Company, Dryden Agencies Ltd., Canadian Electro Drives (1982) Ltd. ("Baldor"), and John Wilson Electric (Fordwich) Ltd. ("Wilson"), (collectively referred to as the "Complainants") seeking the remand of the Order issued on October 10, 1990 (the "CITT Decision" or "CITT Finding") by the Canadian International Trade Tribunal (the "CITT" or the "Tribunal"). The CITT Decision continued under Section 76 of SIMA, a finding of material injury of the Anti-Dumping Tribunal ("ADT") dated April 15, 1983 respecting Integral Horsepower Induction Motors, 1 HP to 200 HP inclusive, with exceptions, originating in or exported from the United States of America (the "Subject Motors," "Subject Goods" or "Small Motors").

In this Decision, the Panel outlines the matter's procedural history, identifies the issues which it must address, examines the standard of review governing binational panel reviews where Canada is the importing country and then considers the CITT Finding in light of this law. The majority of the Panel affirms the decision of the CITT. Member Geraghty

dissents in part only with respect to the exclusion of Baldor but in all other respects concurs with the majority of the Panel. The dissent on the exclusion of Baldor follows the majority decision.

II. PROCEDURAL HISTORY

Following a preliminary determination of dumping of the Subject Motors from the United States by Revenue Canada, the ADT (as predecessor of the CITT) found, on January 9, 1979, in a unanimous decision, that the dumping of Subject Motors had caused, was causing and was likely to cause material injury to the domestic production of the Subject Motors. On June 20, 1982 the initial ADT finding was set aside by the Federal Court of Appeal on the grounds that the ADT failed to allow the parties an opportunity to adduce evidence specifically directed to the class of goods under consideration which constituted a denial of natural justice. A rehearing was ordered by the Federal Court of Appeal. The ADT reheard the matter and on April 15, 1983 found that the dumping of the integral horsepower induction motors, 1 HP to 200 HP inclusive, originating in or exported from the United States, had caused, was causing and was likely to cause material injury to the domestic production of like goods (the "ADT Finding").

On March 21, 1989 the Secretary of the CITT issued a notice of expiry which was published in Part I of the Canada Gazette on April 1, 1989. In that notice the Tribunal

invited all interested parties requesting or opposing initiation of a review of the ADT Finding to file submissions with the CITT not later than May 19, 1989. On the basis of the information available, the CITT formed the opinion that a review of the April 15, 1983 ADT Finding was warranted. A notice of review from the Secretary of the CITT was issued on November 28, 1989 advising all interested parties that a public hearing relating to the review of the April 15, 1983 ADT Finding would be held in Ottawa commencing on June 4, 1990. The Tribunal held a public hearing relating to the review of the ADT Finding from June 4 to 18, 1990.

On October 10, 1990 the Tribunal, pursuant to subsection 76(4) of SIMA, made an Order and Statement of Reasons in relation to the review of the ADT Finding. The CITT continued the ADT Finding dated April 15, 1983, in respect of the goods originating in or exported from the United States of America with an amendment to exclude the Subject Goods that were imported into Canada from the United States for export from Canada to the United States, in accordance with the Inward Processing provisions of the Customs Tariff. Member Bertrand dissented from the exclusion.

Requests for Panel Review were filed by Baldor on October 31, 1990 and by Toshiba on November 5, 1990.

On December 17, 1990 Toshiba filed a Notice of Motion for disclosure of documents identified as Volume 26 of the Index for which the CITT claimed privilege. By an order dated February 4, 1991 the Panel denied this motion.

A Panel hearing was held in Ottawa, Canada on June 26 and June 27, 1991, at which the Complainants, Toshiba, Baldor and Wilson, and Westinghouse Motor Company Canada Ltd., The Electrical and Electronic Manufacturers' Association of Canada, Leroy-Somer Canada Ltée. (collectively referred to as "EEMAC"), General Electric Canada Inc. ("GE Canada"), the CITT, and the Attorney General of Canada (the "Attorney General") (collectively referred to as the "Respondents") all presented oral argument to the Panel.

Three motions were filed prior to the commencement of the Panel hearing and were addressed by the Panel during the hearing. First, on June 24, 1991 the Attorney General filed a Notice of Motion requesting permission to file additional authorities not referred to in her brief filed May 3, 1991. On June 24, 1991 GE Canada filed a Notice of Motion to strike out portions of Toshiba's Confidential Brief. On June 25, 1991 GE Canada filed a Notice of Motion requesting permission to file additional authorities not referred to in GE Canada's brief filed May 3, 1991.

With respect to the first and third motions above, the Panel ruled at the hearing on June 26, 1991 that the additional authorities could be filed. The Panel's decision regarding the second motion is addressed separately below.

On July 26, 1991 the Attorney General filed a Notice of Motion requesting permission to file an additional authority not referred to in her brief filed May 3, 1991.

On August 1, 1991 Toshiba submitted a letter to the Panel requesting permission to file an additional authority not referred to in its brief filed March 4, 1991.

On August 2, 1991 Toshiba filed a reply to the Notice of Motion of the Attorney General objecting to the filing of the additional authority.

On August 14, 1991 EEMAC submitted a concise statement in response to the Toshiba request to file an additional authority and filed a Notice of Motion for Leave to file its concise statement out of time.

On August 15, 1991 the Panel issued an Order permitting the filing by the Attorney General and Toshiba of their respective additional authorities together with a concise statement from each explaining the relevance of their additional authorities. All other parties were given an opportunity to file concise statements in response to these submissions.

III. DISPOSITION OF MOTION

By Notice of Motion dated June 24, 1991, counsel for G.E. Canada sought an order of this Panel striking out issue "E" at paragraph 148 of Toshiba's Confidential Brief and issue "K" of Toshiba's Confidential Brief and Reply Brief, including all paragraphs relevant thereto. By consent at the Panel hearing, Toshiba agreed to delete issue "K". (The Panel hearing transcript, June 26, 1991, p.17.)[1]

The grounds for this application are based on Rule 7 of the Rules of Procedure for Article 1904 Binational Panel Reviews which restricts this Panel's jurisdiction in conducting a review.

Rule 7 states:

> Panel review shall be limited to
>
> (a) the allegations of error of fact or law, including the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review; and
>
> (b) procedural and substantive defenses raised in the panel review.

G.E. Canada argues that the Complaint filed by Toshiba in these proceedings did not include allegations relating to the issues referred to above and that the Panel

[1](The Panel Hearing Transcript is hereinafter referred to as "Tr.". The Administrative Record is referrred to as "R.".)

accordingly has no jurisdiction to review them. In support of this submission, G.E. Canada referred to two Binational Panel decisions, New Steel Rails, Except Light Rails, from Canada (June 8, 1990), 3 T.C.T. 8223 at 8234 and Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada (May 24, 1991), Secretariat File No. USA-90-1904-01 at p.18. In Replacement Parts the Panel in interpreting Rule 7 held, "Objections to ITA's determination that the parties failed to articulate in their complaints are beyond the Panel's authority to adjudicate."

The Panel interprets issue "E" at paragraph 148 to mean issue "E" at page 26 of Toshiba's Confidential Brief and paragraph 148 of issue "H" of Toshiba's Confidential Brief. These issues deal generally with allegations arising out of data from Revenue Canada submitted on the final day of the CITT hearing. Counsel for Toshiba submitted that these allegations were anticipated by paragraphs 3, 6 and 7 of its Complaint (Tr, p.18-19). These paragraphs clearly raise complaints about the reliance by the CITT on the Revenue Canada data, although different words are employed and there is no explicit reference to a breach of natural justice. Briefs filed by the parties in these proceedings fully addressed the substantive issues raised by issue "E" and paragraph 148, including breaches of natural justice. It is to be observed that G.E. Canada's motion was filed only two days prior to the commencement of oral argument before this Panel. In these circumstances Counsel for G.E. Canada was invited to consent to an amendment to Toshiba's Complaint in order to resolve this matter. Counsel was not prepared to give his consent but did advise that he was prepared to argue the substance of issue "E" and paragraph 148. In these circumstances the

Panel directed all parties to argue the merits of the issue but reserved its decision on the Motion and Toshiba's oral application to amend its Complaint.

The Panel is mindful of the strict wording of Rule 7 as well as the absence of any explicit power in either the FTA or the Article 1904 Panel Rules permitting amendments to Complaints.

On reviewing this matter, the Panel concludes that Toshiba's Complaint, viewed broadly, adequately anticipated issues "E" and paragraph 148. The parties submitted full briefs on these issues, including the issue of breaches of natural justice, and were in no way prejudiced by any deficiency in the wording of Toshiba's Complaint. In the circumstances, the Panel dismisses G.E. Canada's application.

IV. SUMMARY OF THE CITT DECISION

In its October 10, 1990 decision the CITT unanimously ordered that the ADT Finding be continued, with an amendment to exclude the Subject Goods that are imported into Canada from the United States by Trane Canada ("Trane") for installation into the equipment manufactured by Trane for export from Canada to the United States. The CITT review was not an original inquiry of material injury, but a review of a finding of material injury such that the CITT considered two questions:

(a) Firstly, if the finding is rescinded, is dumping likely to continue or resume?

(b) Secondly, if dumping continues or resumes, is it likely to cause material injury to the domestic industry?

The CITT reviewed evidence relating to the exporter's propensity to dump and to the likelihood of any resumption of increased dumping, relying on factors such as the volume of dumped exports in recent years, the anti-dumping duty assessed by Revenue Canada, the recent behaviour of the U.S. exporters and the market conditions in the motor industry. In particular, the CITT placed weight on the following evidence:

(a) the increase since 1985 (except for the year 1988) in both the volume of dumped motors from the United States and the overall margin of dumping;

(b) the Canadian market for the Subject Motors was "price sensitive" and original equipment manufacturers appeared to purchase the lowest cost motor meeting their minimum standards, while end-users considered price to be a deciding factor in awarding their contracts;

(c) Toshiba engaged in "aggressive pricing" in the market, particularly with respect to the end-user sector;

(d) the Complainants Toshiba and Baldor (the two largest exporters) indicated that they had excess capacity or planned to increase their capacity in their manufacturing plants located in the United States; and

(e) that a significant percentage of imports of large motors from the United States was found to have been dumped in 1988 with significant margins of dumping, and these Large Motors originated from the same U.S. exporters and the same plants as those concerning the Subject Motors.

Given this evidence the CITT concluded that without the imposition of the anti-dumping duty, producers in the United States were likely to continue or resume dumping in Canada; the evidence suggested a propensity to dump on the part of the U.S. exporters. With respect of the vulnerability of the Canadian motor industry, the CITT considered such factors as the health of the domestic industry, share of the market held by imports, the marketing conditions and the emergence of the non-integrated producers. The CITT found:

(a) that the industry was still weak as it was operating under narrow profit margins and indeed had returned to an overall loss position in 1989;

(b) that, notwithstanding the Canadian manufacturers' increase in their share of the domestic market for the Subject Goods during the five year period ending in 1989, the growth of the domestic industry was attributable to new producers

which entered the industry after 1985 and the traditional integrated producers only gained one percent in the market share over that period;

(c) that imports from the United States also gained nine percent of the market share between 1984 and 1989; and

(d) that there was a forecast slow down in the market in 1990, especially in the end-user market, with a concomitant softening in prices.

As a result of the vigorous competition in the Canadian market for the Subject Goods, the CITT concluded that dumping by U.S. exporters was likely to continue and that renewed dumping would cause material injury to the domestic producers in the form of lower prices, a smaller market share, negligible or negative margins and reduced ability to invest to remain competitive. The CITT ordered a continuation of the ADT Finding.

V. SUMMARY OF THE ISSUES

The Complainants submit that the CITT Decision must be remanded by the Panel because the CITT acted beyond the limits of its jurisdiction in reviewing the case, it failed to observe principles of natural justice, and the CITT Decision contains errors of law and fact that are not supported by evidence on the record.

In this Decision the Panel will address the following issues:

1. What is the standard of review to be adopted in this Panel Review?

2. Did the CITT act beyond its jurisdiction in holding its review hearing beyond the five year limitation provision of section 76(5) of SIMA?

3. Did the CITT err in considering evidence of dumping in an earlier Revenue Canada decision respecting polyphase induction motors of an output exceeding 200 HP ("Large Motors")? Were the Complainants denied the right to challenge the evidence of the Revenue Canada findings of margins of dumping with respect to Large Motors?

4. Was Toshiba denied an opportunity to reply to the rebuttal evidence adduced by EEMAC of dumping on sales by Toshiba to end-users in Canada?

5. Was Toshiba denied an opportunity to respond to evidence provided by Revenue Canada of dumping on an exporter-by-exporter basis at the end of the CITT hearing?

6. Did the CITT err in considering other factors regarding a propensity to dump on the part of U.S. exporters?

7. Did the CITT err in failing to consider explicitly the definition of the "domestic industry" in its Decision? If the CITT did address the definition of the domestic industry in its Decision implicitly, did the CITT then err in failing to consider within that definition the impact of dumping by exporters related to Canadian producers? (Section 42(3)(a) of SIMA)

8. Did the CITT err in refusing to exclude Baldor from its Decision?

VI. STANDARD OF BINATIONAL PANEL REVIEW

This Panel derives its authority from Chapter 19 of the FTA, the Canada - United States Free Trade Implementation Act, supra., and Part II of SIMA. Chapter 19 of the FTA and Part II of SIMA collectively provide that judicial review of final antidumping and countervailing duty determinations may be replaced with binational panel review. Pursuant to Article 1904, paragraph 3 of the FTA each Panel is to "apply the standard of review described in Article 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority." In the case before us, where Canada is the "importing Party", Article 1911 provides that the standard of review to be applied is that set forth in section 28(1) of the Federal Court Act, R.S.C. 1985, c.F-7. Section 28(1) reads:

> 28(1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, on the ground that the board, commission or tribunal:
>
> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

This Panel's jurisdiction is further circumscribed by virtue of section 76(1) of SIMA. Section 76(1) provides that the final determination of the CITT as pronounced in this case is final and conclusive. That provision has been interpreted by the Supreme Court of Canada as a "privative clause": National Corn Growers Association v. Canadian Import Tribunal, [1990] 2 S.C.R. 1324 at 1370 (per Gonthier J.). Where an administrative tribunal is protected by a statutory privative clause, the Supreme Court of Canada has established two separate tests to determine whether an administrative tribunal has exceeded its jurisdiction and is subject to judicial review: U.E.S. Local 298 v. Bibeault, [1988] 2 S.C.R. 1048. In Bibeault, Mr. Justice Beetz, on behalf of the Supreme Court of Canada, stated at 1086:

> It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:

1. If the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;

2. If however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

In CAIMAW v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983 at 1003, La Forest, J. expressed the test this way:

> Where, as here, an administrative tribunal is protected by a privative clause, this Court has indicated that it will only review the decision of the Board if that Board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function; see Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227.

This means that this Panel has no jurisdiction to review or remand the decision of the CITT unless the CITT exceeded the jurisdiction conferred upon it or in reaching its decision it erred in a patently unreasonable manner.

The courts on various occasions have provided guidance as to what is contemplated by the phrase, "patently unreasonable" as established under the first test above. In CAIMAW, supra., La Forest, J. stated at page 1004:

> Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result.

In U.E.S. Local 298 v. Bibeault, supra., at 1085 Beetz, J. quoting Dickson J., as he then was, in Nipawin, cited below, stated that: "An error is patently unreasonable when 'its construction cannot be rationally supported by the relevant legislation' and 'demands intervention by the court upon review'." In Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382 Dickson, J. (as he then was) stated at 389:

> A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

This statement was cited with approval by McLachlin, J. in a recent case before the Supreme Court of Canada, Planet Development Corp. and Lester (W.W.)(1978)Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry in the United States and Canada, Local 740, (1991) 123 N.R. 241 at 260.

The "patently unreasonable" test gives "curial deference . . . to the opinion of the lower tribunal on issues which fall squarely within its area of expertise": Bell Canada v. Canada (C.R.T.C.), [1989] 1 S.C.R. 1722 at 1746. When a matter falls within a tribunal's

jurisdiction, it has the ability "to make a mistake, and even a serious one": Blanchard v. Control Data Canada Ltd. [1984] 2 S.C.R. 476 at 494.

Within the CITT's jurisdiction it is clear that errors of law are subject to the patently unreasonable test: National Corn Growers Association, supra., at 1369-70; Canada (Procureur général) v. Alliance de la Fonction publique du Canada (1991), 123 N.R. 161 (S.C.C.).

The second test described by Beetz, J. above is often referred to as the "correctness test". The correctness test applies to questions concerning the limits of a tribunal's jurisdiction or what is commonly referred to as "jurisdictional errors" (see Bibeault at 1085, 1088; Syndicat des employés de production du Québec v. Canadian Labour Relations Board, [1984] 2 S.C.R. 412 at 442 (also 420 and 441)). Beetz, J. clarified the meaning of a jurisdictional error in Syndicat des employés de production du Québec, supra., at 420-421 where he stated that a jurisdictional error:

> ... relates generally to a provision which confers jurisdiction, that is, one which describes, lists and limits the powers of an administrative tribunal, or which is [translation] 'intended to circumscribe the authority' of that tribunal, as Pigeon J. said in Komo Construction Inc. v. Commission des relations de travail du Québec, [1968] S.C.R. 172 at p. 175. A jurisdictional error results generally in an excess of jurisdiction or a refusal to exercise jurisdiction whether at the start of the hearing, during it, in the findings or in the order disposing of the matter. Such an error, even if committed in the best possible good faith, will result nonetheless in the decision containing it being set aside, because it also falls within s.28(1)(a) of the Federal Court Act.

An administrative tribunal's decision is reviewable, then, where it makes but a "simple error" in considering a legislative provision which either confers or limits its jurisdiction.

In the present case the Complainants have raised two issues in which it is alleged that the CITT exceeded the limits of or failed to exercise its legislative jurisdiction. These issues, as summarized by Toshiba in its Confidential Brief, are:

> (1) Did the Tribunal act beyond its jurisdiction in holding its review hearing beyond the five year limitation provision of section 76(5) of the SIMA;
>
> (2) Did the Tribunal err in failing to consider the impact of dumping, as reported by Revenue Canada, by exporters related to the Canadian parties supporting a continuation of the finding, notwithstanding the requirements of section 42(3)(a) of SIMA.

There is general agreement amongst all the parties that section 76(5) of SIMA confers jurisdiction on the CITT. The Panel agrees. Accordingly, the CITT's interpretation and application of section 76(5) will be subject to the correctness test.

With respect to the second issue above, the Complainants allege that the CITT should have excluded the Canadian producers, Westinghouse, GE Canada, Leroy-Somer, Leeson and Lincoln from the definition of "domestic industry" as they are related to or controlled by American parent companies. The Complainants claim that in neglecting to do

so, the CITT failed to exercise its legislative jurisdiction in defining the domestic industry as required pursuant to section 42(3)(a) of SIMA.

The Respondents classify this issue as one subject to the patently unreasonable test; they characterize the issue as a question of the CITT's interpretation of a provision of a statute which at the most could be considered an error of law.

The Panel is not convinced that section 42(3)(a) of SIMA is a provision which confers jurisdiction on the CITT or limits its powers. Section 42(3)(a) requires the CITT to review Article 4 of the GATT Anti-Dumping Code in determining the nature of the "domestic industry". Article 4 of the GATT Anti-Dumping Code in turn employs permissive, not mandatory, language in providing guidance on the issue of determining the term "domestic industry". Article 4 of the GATT Anti-Dumping Code invites, but does not require, the CITT to address the relationship between exporters and importers in defining the domestic industry; an element of discretion is involved. This issue then cannot be one of failing to exercise jurisdiction. Rather it resembles an allegation of error of law which would subject it to the patently unreasonable test.

The Complainants have raised other jurisdictional issues which do not involve an interpretation of the CITT's statutory jurisdiction but rather relate to procedural issues involving allegations that the CITT failed to observe the principles of natural justice. Specifically these allegations are:

1. the Complainants were denied the right to challenge the evidence of the Revenue Canada finding of margins of dumping with respect to Large Motors, not involving the Subject Goods, in respect to both Toshiba, which was a party to Large Motors, and Baldor and John Wilson, which were not parties to Large Motors;

2. the CITT failed to observe a principle of natural justice in refusing to adjourn the hearing to give Toshiba an opportunity to recall witnesses to reply to the rebuttal evidence on end-user sales presented by Revenue Canada; and

3. the CITT did not give Toshiba a reasonable opportunity to respond to the evidence of dumping provided by Revenue Canada on an exporter by exporter basis at the end of the hearing.

As was recently stated by the Federal Court of Appeal in Canadian Cable Television v. American College Sports Collective of Canada et. al. (3 June 1991), Ottawa A-832-90 (F.C.A.), per MacGuigan, J.A. at page 9:

> The common law embraces two principles in its concept of natural justice, both usually expressed in Latin phraseology: audi alteram partem (hear the other side), which means that parties must be made aware of the case being made against them and given an opportunity to answer it; and nemo judex in sua causa debet esse (no one may be a judge in his/her own cause), a rule as to the impartiality required of deciders of issues which forbids actual bias or a reasonable apprehension of bias.

In IWA v. Consolidated Bathurst, [1990] 1 SCR 282 Gonthier, J. stated at page 339, quoting from Evans, de Smith Judicial Review of Administrative Action:

> Since its earliest development, the essence of the audi alteram partem rule has been to give the parties a "fair opportunity of answering the case against [them]"...It is true that on factual matters the parties must be given a "fair opportunity...for correcting or contradicting any relevant statement prejudicial to their view".

The Complainants argue that a breach of natural justice under s.28(1)(a) is "tantamount to a jurisdictional error". As such, they have argued that the "correctness" test should be employed in reviewing allegations of breaches of natural justice. They invite the Panel to characterize a breach of natural justice as going to the heart of the CITT's jurisdiction such that, adopting the language from Syndicat des employes de production du Québec, supra., at 441, a breach of natural justice, whether serious or slight, is fatal to the CITT's jurisdiction.

Section 28(1)(a) of the Federal Court Act draws no distinction between breaches of natural justice and other jurisdictional errors. This might, accordingly, justify the use of the "correctness test" for cases involving breaches of natural justice. There are obiter statements from the Supreme Court of Canada which arguably lend some support to this view.

In Supermarchés Jean Labrecque Inc. v. Flamand, [1987] 2 S.C.R. 219 at p. 236, L'Heureux-Dube, J. stated that "A departure from this rule of natural justice has been held to constitute want or excess of jurisdiction". She stated that at p.238 "... the absence of any real and present prejudice... can in no way remedy such an infringement", and quoted at page 238 from the decision of LeDain, J. in Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643, at 661:

> I find it necessary to affirm that the denial of a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing Court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

The Panel has already noted above that Dickson, J. (as he then was) in the Nipawin case, supra., included "breaching the provisions of natural justice" as an example of an error that takes the exercise of a CITT's power outside the protection of a privative clause. In Bibeault v. McCaffery, [1984] 1 S.C.R. 176 the Supreme Court appeared to hold, in obiter, that allegations of breaches of natural justice were subject to the "patently unreasonable" test. Lamer, J. (as he then was) stated at page 184-5:

> The complaint by the employees that the audi alteram partem rule has been infringed assumes that the law gives them the status of interested party and that, if so it has not deprived them of the characteristics of that status. Such a finding is within the authority of the commissioners, and the latter, as a consequence of the privative clause, is immune from review by the superior courts unless it is patently unreasonable.

A distinction between jurisdictional errors and breaches of natural justice was also hinted at in Harelkin v. University of Regina, [1979] 2 S.C.R. 561 at 585 where it was said:

> In the exercise of this jurisdiction, the committee of the council erred in failing to observe the rules of natural justice. While it can be said in a manner of speaking that such an error is "akin" to a jurisdictional error, it does not in my view entail the same type of nullity as if there had been a lack of jurisdiction in the committee.

For the purposes of this review the Panel believes that it is not necessary to choose between the "patently unreasonable" test and the "correctness" test in reviewing allegations of breaches of natural justice. A breach of natural justice, however slight, which is found to affect the essential fairness of the hearing under review, will render a decision invalid. This view is supported by Cardinal, supra., and would result in a remand under either the "correctness" or the "patently unreasonable" test. Under either test the question is whether there was a "fair hearing" which, as Cardinal held, "must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative tribunal is entitled to have."

What constitutes a breach of natural justice must depend on the circumstances under which the tribunal operates. In Old St. Boniface Residents Association Inc. v. Winnipeg (City) et al. (1990), 116 N.R. 46 (S.C.C.), Mr. Justice Sopinka stated, at paragraph 43, p.57:

> The content of the rules of natural justice and procedural fairness were formerly determined according to the classification of the functions of the tribunal or other public body or official. This is no longer the case and the content of these rules is based on a number of factors including the terms of the statute pursuant to which the body operates, the nature of the particular function of which it is seized and the type of decision it is called upon to make. This change in approach was summarized in Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission), [1989] 2 S.C.R. 879; 100 N.R. 241. I stated:
>
> > "Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates." (At pp. 895-896) (Emphasis added)

Using this approach, the Panel will review the allegations of breaches of natural justice in the context of the overall fairness of the proceedings before the CITT based on the particular circumstances in this case. As noted in IWA v. Consolidated Bathurst, [1990] 1 S.C.R. 282 at 324 by Gonthier, J., quoting Tucker, L.J. in Russell v. Duke of Norfolk, [1949] 1 All E.R. 109, at p.118:

> In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter which is being dealt with, and so forth."

VII. ANALYSIS OF THE ISSUES

A. The CITT's Power Under Section 76(5) of the Special Import Measures Act ("SIMA")

The Complainants' first claim is that the CITT's power to issue an order continuing in effect the original material injury finding expired on November 30, 1989, which was five years after the original finding was deemed to have been made.[2] If their argument is correct, this case must be remanded to the CITT for dismissal. While the CITT initiated a review of the finding on November 28, 1989, it did not issue an order continuing the finding in effect until October 10, 1990, some ten months later.

The Complainants' argument turns on an alleged difference in meaning between the English and French versions of SIMA's provisions on review of antidumping cases. The relevant portions of the two versions read as follows:

76. (1) Subject to this section, subsection 61(3), paragraph 91(1)(g), section 96.1 and Part II, every order or finding of the Tribunal under this Act is final and conclusive.	76. (1) Sous réserve des autres dispositions du présent article, du paragraphe 61(3), de l'alinéa 91(1)(g), de l'article 96.1 et de la partie II, les ordonnances ou conclusions du Tribunal prévues à la présente loi sont définitives.
(2) At any time after the making of an order or finding described in any of sections 3 to 6, the Tribunal may, on its own initiative or at the request of the Deputy Minister or any other person or of	(2) Le Tribunal peut, de sa propre initiative ou à la demande du sous-ministre, de toute autre personne ou d'un gouvernement, réexaminer une ordonnance ou des conclusions rendues en vertu des

[2]The original material injury finding was made on April 15, 1983, but is deemed by SIMA to have been made on December 1, 1984 (SIMA's effective date). SIMA, s.108(8).

any government, review the order or finding and, in the making of the review, may re-hear any matter before deciding it.

* * *

(4) On completion of a review pursuant to subsection (2) of an order or finding, the Tribunal shall make an order rescinding the order or finding or continuing it with or without amendment, as the circumstances require, and give reasons for the decision.

* * *

(5) Where the Tribunal has not initiated a review pursuant to subsection (2) with respect to an order or finding before the expiration of five years after

(a) if no order continuing the order or finding has been made pursuant to subsection (4), the day on which the order or finding was made, or

(b) if one or more orders continuing the order or finding have been made pursuant to subsection (4), the day on which the last such order was made,

the order or finding shall be deemed to have been rescinded as of the expiration of the five years.

articles 3 à 6 et à cette fin, accorder une nouvelle audition sur toute question.

* * *

(4) À la fin du réexamen visé au paragraphe (2), le Tribunal rend une ordonnance motivée annulant ou prorogeant l'ordonnance ou les conclusions avec ou sans modification, selon le cas.

* * *

(5) À défaut de réexamen aux termes du paragraphe (2), l'ordonnance ou les conclusions sont réputées annulées après l'expiration de cinq ans suivant:

(a) la date de l'ordonnance ou des conclusions, si aucune prorogation n'a été faite en vertu du paragraphe (4);

(b) la date de la dernière ordonnance de prorogation, dans les autres cas.

The Complainants contend that the French and English versions of section 76(5) have different, irreconcilable meanings. Under the English version, they concede that the CITT had the power to do what it did because the English version requires only that a review be initiated within five years of the prior finding:

> Where the Tribunal has not initiated a review . . . before the expiration of five years after [December 1, 1984, in this case], . . . the order or finding shall be deemed to have been rescinded as of the expiration of the five years [November 30, 1989, in this case].

Under the French version, however, they claim that the words "À défaut de réexamen . . . l'ordonnance ou des conclusions sont reputées annulées après l'expiration de cinq ans suivant [December 1, 1984]" mean that the review must have been completed within five years of December 1, 1984.

It is apparent that the French and English versions of section 76(5) are different. They are clearly structured differently; one is not a direct translation of the other. The Panel understands that this is not unusual because the French and English versions of laws are often drafted simultaneously, which means that each draftsman tries to interpret the legislative goal independently. Obviously, there is close coordination, but the result may be that the same idea is expressed somewhat differently. Nonetheless, under Canadian law, the French and English versions of a statute are "equally authoritative": Official Languages Act, S.C. 1988, c. 38, section 13.

When the two linguistic versions of a statute differ, Canadian courts in the first instance try to reconcile the two versions:

> In the case of ambiguity, where there is any possibility to reconcile the two [linguistic versions], one must be interpreted by the other.

Canadian Pacific Ry. v. Robinson (1891), 19 S.C.R. 292 at 325. As expressed more recently by Lamer, J. in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at 1071:

> First of all, therefore, these two versions have to be reconciled if possible. To do this, an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the [Labor] Code.

In light of these principles — that the two linguistic versions of a statute should be reconciled, if possible, in light of the purpose and general scheme of the statute — we now turn to an analysis of the two versions of section 76(5).

The Complainants argue that the two versions cannot be reconciled. They point out that there is nothing in the French version of section 76(5) that suggests the idea of opening an investigation, which they suggest is the key concept in the English version. Yet when the French language draftsman wanted to speak of opening an investigation in other sections of SIMA, they note that the word "ouvrir" or a variant was used. See, for example, SIMA, sections 31(1), 33(2), 34, 38, 44(1)(a). On the other hand, it was claimed by the Respondents that the absence of the word "ouvrir" was not surprising because in French one just did not use "ouvrir" in combination with "réexamen".[3] Moreover, they note that both the English and French draftsmen used a different formulation than that of section 76(5)

[3]In this regard, it is instructive to note that the rules of the CITT's predecessor agency, which are still used by the CITT, use the construction "décide de procéder à un réexamen." Canadian Import Tribunal Rules, Rule 50(1).

when they clearly wanted a review to be completed by a certain date. See SIMA section 53(1).[4]

The Complainants also claim that section 76(4) supports their position. The French version of that section provides "À la fin du réexamen . . . le Tribunal rend une ordonnance motivée . . ." In their view, this means that "un réexamen" includes the order rescinding or continuing the order under review because that order is to be issued by the Tribunal at the end of the review, not after the completion of the review. The English version, on the other hand, provides that "On completion of a review . . . the Tribunal shall make an order . . . ." Since the order is to be issued on completion of the review, i.e. the order would be issued after the review was complete, they argue that the English draftsman's idea of a review did not necessarily include the issuance of an order, which again shows a divergence in the two versions. The Respondents contend that the wording in either language means essentially the same thing: it requires the CITT to issue an order when the review is complete and does not specifically deal with the question of whether the "review" or "réexamen" technically encompasses that order.

[4]Section 53(1) provides in English: "The Deputy Minister shall review an undertaking before the expiration of three years..." and in French: "Le sous-ministre réexamine tout engagement avant l'expiration des trois ans...".

In general support of their view, the Complainants note that prior to 1990, when the CITT gave notice that it was considering whether or not to initiate a review (typically done seven or eight months prior to the expiration of five years), it stated that:

> Under the Special Import Measures Act, findings of material injury and the associated special protection in the form of anti-dumping or countervailing duties expire in five years unless previously reviewed and maintained. Canada Gazette, Part I, No. 13, v.123, pp. 1632-33 (notice calling for comment on need to initiate a review in the instant case).

The CITT responds that statements in notices or other CITT publications cannot change the meaning of a statutory provision.

It is the Panel's view that it is necessary first to ask if the two versions of section 76(5) can be reconciled, in a manner consistent with the purpose and general scheme of SIMA. We are not persuaded that they are not reconcilable. The French phrase "À défaut de réexamen" is ambiguous in our view. Literally it means "failing a review," but that phrase could mean "failing a completed review" or "failing a review in progress". There is nothing in the phrase itself to require the completion of the review, although the phrase would be consistent with such a requirement expressed elsewhere. Since the English version is clear that a review need only be initiated, we believe in light of the authorities quoted above that a Canadian court would interpret the ambiguous French phrase in section 76(5) so that the two versions are consistent. See also Notrochem Inc. v. Deputy Minister of National Revenue (1984), 53 N.R. 394 at 397-398 (F.C.A.); R. v. Dubois, [1935] S.C.R.

378, 402-403; Deputy Minister of National Revenue v. Film Techniques Ltd., [1973] F.C. 76, at 79-80 (narrow French meaning chosen over broader English meaning); R. v. O'Donnell, [1979] 1 W.W.R. 385, at 389 (B.C.C.A.)(clear meaning chosen over ambiguous/multiple meanings); Cardinal v. The Queen (1979), 97 D.L.R.(3d) 402, at 405-406 (F.C.T.D.) (narrow French meaning chosen over broader English meaning). It is worth noting that in each of these cases, the court chose to follow the more specific version of the statute, rather than the more ambiguous one. We have followed the same path in this case.

We are also not persuaded that section 76(4) is helpful in deciding this issue. Neither the English nor the French version clearly indicates that the statute intended the order issued "on completion" or "à la fin" of a review to be considered an integral part of the review for the purposes of that subsection or other parts of SIMA. Nor do we feel that a statement describing the statute in a CITT notice can change the meaning of that statute. Had the CITT itself addressed this specific question, we might consider its view to be of some importance. But we do not consider informal descriptions of statutory provisions to be relevant to interpreting those provisions.[5]

The second question is whether our interpretation of section 76(5) is consistent with the purpose and general scheme of SIMA. The Complainants argue that it is not,

[5]As an additional reason for rejecting the Complainants' interpretation of section 76(5), the CITT noted that since it had the power to conduct a review "at any time" (section 75(2)) and since reviews of necessity take some time to conduct, section 76(5) must be interpreted as only requiring it to commence a review before the five-year period expires.

essentially for two reasons. First, they note that SIMA contains many provisions that have precise deadlines with which the investigative authorities must comply. They argue that this purpose of SIMA is thwarted if the English version is chosen since there will be no firm deadline for completion of a review. While that is true, our interpretation still contains a firm deadline: a review must be initiated by a date certain or the measures at issue will expire.[6] The Complainants note correctly that the CITT might unduly delay the completion of a review under our interpretation, but if such a delay were to be particularly significant or prejudicial, relief might be sought for an order compelling the CITT to act promptly.

The Complainants argue in addition that the review procedure was put in place to protect importers and that this purpose of SIMA will be thwarted if the English version of section 76(5) is applied. The Panel does not feel that the review procedure will be subverted under the English version of the statute, as noted in the prior paragraph. Moreover, the general purpose of SIMA was clearly to provide protection for Canadian industry. Our interpretation of section 76(5) is consistent with that general overall purpose.[7]

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[6]It is noteworthy that the European Community's sunset provision in its antidumping regulation, which also establishes a five-year limit, provides that a review may be commenced at any time before the expiration of the five-year period and that "[t]he measure shall remain in force pending the outcome of this review." Council Regulation 2423/88, art. 15, Eur. Comm. O.J. No. L 209/1 (Aug. 2, 1988). The other two main users of antidumping laws — the United States and Australia — do not have sunset procedures contingent upon reviews in the Canadian manner.

[7]Complainants argue that Parliament intended that there be a firm five-year limit on anti-dumping duties, and in support of their position, they cite a study recommending such a limit and the GATT Anti-Dumping Code. The cited study cannot be viewed as representing Parliament's intention in enacting section 76(5) and the GATT Code clearly does not require

Thus, we conclude that the French and English versions of section 76(5) are reconcilable in a manner consistent with the purpose of SIMA. Under our reconciliation, it was necessary for the CITT to commence a review by November 30, 1989, but it was not necessary for it to complete the review by that date. Accordingly, the CITT had the power to issue an order continuing the material injury finding.

The Complainants also argue that even if the CITT only had to initiate a review prior to November 30, 1989, it failed to do so. According to the Complainants, the November 28, 1989, notice only stated that the CITT (in French) "a l'intention de réexaminer" and (in English) "will review" the finding in question and not that it had actually initiated a review. In the Panel's view this argument cannot be sustained. A fair reading of the notice indicates that the CITT in fact initiated a review by that notice. For example, it set a date certain for hearing evidence and argument by interested parties.

Accordingly, the Panel concludes that the CITT had the power to issue an order on October 10, 1990, continuing the material injury finding in this case.

B. Propensity to Dump

1. Pertinence of Large Motors

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any specific time limit on duties.

a) The History of Large Motors:

(i) On December 29, 1988 the Deputy Minister gave notice of preliminary determinations of dumping respecting the importation into Canada of polyphase induction motors of an output exceeding 200 HP, originating in or exported from Brazil, France, Japan, Sweden, Taiwan, the United Kingdom and the United States ("Large Motors"). The notice was published in Part I of the Canada Gazette on January 7, 1989.

(ii) The Deputy Minister's investigation was initiated as a result of a complaint filed by Westinghouse Canada Inc. ("Westinghouse") At that time, Westinghouse had the support of two other Canadian producers, Reliance Electric Limited and General Electric Canada Inc. The investigation period regarding dumping covered sales and shipments of the subject goods made from July 1, 1987 to June 30, 1988.

(iii) The Secretary of the CITT sent a Notice of Commencement of Inquiry to the Deputy Minister, the governments of the countries of export, the Canadian manufacturers, the importers and exporters of the subject goods, and others on the CITT's mailing list. The notice was published in Part I of the Canada Gazette on January 14, 1989.

(iv) On March 29, 1989, the CITT received the Notice of Final Determination of Dumping and Subsidizing dated the same day. The notice was published in Part I of the Canada Gazette on April 8, 1989.

(v) Toshiba, pursuant to section 77.11 of SIMA, filed a Request for Panel Review with the Binational Secretariat — Canadian Section appealing the final determination of dumping made by the Deputy Minister.

(vi) Public and in camera hearings were held by the CITT in Ottawa, Ontario, commencing on April 3, 1989.

(vii) The CITT filed a Statement of Reasons dated May 12, 1989 wherein the CITT concluded that the dumping in Canada of polyphase induction motors of an output exceeding 200 HP was not causing and was not likely to cause material injury to the production in Canada of like goods.

(viii) Following the decision of the CITT of no material injury, Toshiba, with the consent of all parties, withdrew its appeal.

In its Statement of Reasons, dated October 10, 1990, respecting Small Motors, the CITT stated:

> The Tribunal is also aware of the margins of dumping and the percentages of goods found to have been dumped from the United States during the large motors inquiry last year.
>
> (p.3)
>
> Propensity to export dumped or subsidized goods on the part of specific exporters was also addressed. Toshiba has been willing to price below the market.... Additionally, in the large motors case, Toshiba in Houston and Toshiba Corporation in Japan, as well as Teco in Taiwan, were found to have high margins of dumping and a high percentage of dumped imports. Counsel argued that the large motors case is relevant as it occured last year, and the bulk of the goods (200 to 800 hp) involved the same firms, production processes, marketing channels and customers.
>
> (p.15-16)
>
> The Tribunal is aware that Toshiba Corporation was also found to have been dumping large motors in Canada, in 1988, from Japan, the United States and Brazil. The percentage of its exports that were found to have been dumped ranged from one hundred percent (Japan) to fifty-eight percent (United States), to thirty-six percent (Brazil) with the margins of dumping found to be thirty-eight percent (Japan), sixteen percent (United States) and forty-three percent (Brazil).
>
> (p.22)
>
> The Tribunal is conscious of the fact that a significant percentage of imports of large motors from the United States was found to have been dumped in 1988 with significant margins of dumping.
>
> (p.24)

The Complainants argued that the CITT relied on the Deputy Minister's affirmative finding of dumping in Large Motors to support a finding of propensity to dump in the case under review, and in so doing, committed a patently unreasonable error. Their arguments raise the following issues:

(a) Was the finding of the Deputy Minister that the United States and others were dumping motors in excess of 200 HP into Canada "similar fact" evidence, and, if so, was this "similar fact" evidence admissible?

(b) Was the CITT precluded from using the finding of the Deputy Minister by section 47 of SIMA?

(c) Was the finding of the Deputy Minister in Large Motors relevant to Small Motors?

(d) By using the finding of the Deputy Minister, did the CITT commit a breach of the rules of natural justice, in particular the audi alteram partem rule?

b) Similar Fact Evidence

The Panel does not believe that the cases on "similar fact" evidence are relevant. The evidence on which the Deputy Minister relied in Large Motors to conclude that U.S. importers were dumping large motors into Canada did not form part of the record in the Small Motors case. The CITT took notice of the Deputy Minister's affirmative

dumping decision in Large Motors to support its finding in Small Motors. The CITT noted the fact that the Deputy Minister had made a definitive dumping decision in Large Motors; it did not go behind that decision, but merely accepted it as being correct.

c) Effect of Section 47 of SIMA Dumping

Section 47 of SIMA reads as follows:

> Subject to Part II and subsections 76(2.1) and (2.2), an order or finding made by the Tribunal with respect to any dumped or subsidized goods, other than an order or finding described in any of sections 3 to 6, terminates all proceedings under this Act respecting the dumping or subsidizing of the goods.

The Complainants argued that the CITT was prevented from using the decision or finding of the Deputy Minister in Large Motors on the ground that all proceedings under SIMA respecting the dumping of large motors in Canada terminated by reason of the CITT's decision that there was no material injury to Canadian producers.

The key words in section 47 are "terminates all proceedings under this Act respecting the dumping or subsidizing of the goods." While the CITT's decision of no material injury terminates all proceedings in Large Motors, the Panel is of the view that Section 47 cannot be interpreted so as to prevent the Deputy Minister's determination of dumping in Large Motors from being used by the CITT, as a fact, in another case.

The Complainants also argue that because their request for binational review was terminated by virtue of the Tribunal's finding of no injury, the determination had no probative or juridical value. The Panel does not accept that argument. The CITT is master of its own house, and has jurisdiction to determine what weight to give to any evidence submitted to it. Where the evidence has some relevance, the weight to be given to that evidence by an administrative tribunal is entirely within the scope of the tribunal's jurisdictional authority and expertise, particularly when, as in this case, there is a privative clause. A court reviewing a decision of an administrative tribunal cannot substitute its view for that of the tribunal on the question of what weight to give to certain evidence.

d) Relevance of Large Motors

The Complainants argued that the dumping determination of the Deputy Minister in Large Motors has no relevance with respect to the propensity to dump issue in the Small Motors inquiry, as (i) some of the participants in the Small Motors inquiry were not participants in the Large Motors inquiry; and (ii) large motors were not the subject goods in the Small Motors case. The Complainants Baldor and Wilson stated that Large Motors was not relevant to them as they were not parties to that case.

The Respondents argued that Large Motors was relevant to the issue of propensity to dump Small Motors for the following reasons:[8]

(a) the market respecting both categories of motors is the same;

(b) the same sales force and marketing techniques are applied to both motor categories;

(c) sales of both categories of motors are made to the same customers; and

(d) both categories of motors are sometimes billed to customers on the same invoices.

A review of the CITT decisions in Large Motors and Small Motors might lead one to conclude that the determination of dumping made by the Deputy Minister in Large Motors has little relevance to the Small Motors case. However, the Panel is of the opinion that the issue is not whether there is little relevance but whether there is no relevance. The CITT might have committed a patently unreasonable error if it had based its decision on evidence which had no relevance. Such is not the case here; for the reasons advanced by the Respondents the Panel believes that the determination of dumping made by the Deputy

[8](Tr.267), (R.v.11D, pp.92-3), (R.v.11D, pp.27-8)

Minister in Large Motors has some relevance to the issue of propensity to dump on the part of U.S. exporters of Small Motors.

On the other hand, relevance is not the sole determining factor. While something may be relevant, it is possible that in certain circumstances the CITT may do something in relying on such evidence which takes the exercise of its powers outside the protection of the privative clause.

e) Breach of Natural Justice

As stated previously, the CITT in this case did not rely upon the evidence on which the Deputy Minister in the Large Motors case based his final determination of dumping, but on the fact the Deputy Minister made the final detemination of dumping.

During the course of the CITT hearing in this case, witnesses were called, examined and cross-examined. The CITT determined the relevant facts on the basis of the evidence and decided the various issues on the facts so determined. The Panel concludes that the hearing conducted by the CITT in Small Motors was a judicial or quasi-judicial proceeding. It is the Panel's opinion, therefore, that the principles of natural justice apply to

this hearing. One of these principles is the audi alteram partem rule which provides that in a judicial or quasi-judicial proceeding each party has the right to be heard; this at a minimum includes a fair opportunity to answer anything contrary to the party's interest and a right to make submissions with regard to the material on which a tribunal proposes to base its decision.

In Remington Arms of Canada Ltd. v. Les Industries Valcartier Inc., [1982] 1 F.C., 586, (F.C.A.), the Federal Court of Appeal held that the Anti-dumping Tribunal (now the CITT) had no statutory power to determine the margin of dumping and no obligation to ascertain how the Deputy Minister calculated it.

In Remington Arms, supra., where the Deputy Minister reduced the margin of dumping and the CITT privately sought information from the Department as to why this was done, there was no breach of the rules of natural justice because it was an issue to which these rules did not apply, being calculations made in the performance of an administrative act by the Deputy Minister.

SIMA establishes a bifurcated jurisdiction. The Deputy Minister has the sole authority to investigate and determine whether the subject goods were being dumped. Once the Deputy Minister makes a preliminary determination of dumping, the CITT is obligated by SIMA to conduct a hearing to determine whether the dumping of the subject goods is causing or likely to cause material injury to Canadian producers of like goods. As stated in

Remington Arms, the CITT has no statutory power to determine the margin of dumping, or an obligation to ascertain how the Deputy Minister calculated it. In this case the CITT used the determination of the Deputy Minister that large motors were being dumped into Canada to support the conclusion that there was a propensity to dump small motors into Canada.

The Panel has held that Large Motors has some relevance to the issue of propensity to dump on the part of the Complainants; however, the Panel is concerned that the evidence on which the Deputy Minister based his conclusion of dumping was not before the CITT and therefore could not be challenged or answered by the Complainants. On its face, this would raise the spectre of unfairness but based on SIMA and Remington Arms, supra., the CITT cannot go behind or question a dumping determination made by the Deputy Minister.

The Panel therefore concludes that as the CITT had no authority or statutory power to question the determination of dumping made by the Deputy Minister, there has been no breach of natural justice.

2. End User Sales

Complainants Toshiba and Baldor asserted that the Tribunal's analysis was tainted by dumping margin information concerning certain five end user sales made by Toshiba during 1988 and 1989. Specifically, the Complainants had requested an adjournment

to contest Revenue Canada's calculations which were submitted on the last day of the CITT hearing. The Tribunal denied the request but elected not to consider the information. (R.v.13, pp.31-2) Nevertheless, the Complainants argue: (1) that the sales data which underlay the Tribunal's conclusion that that company had a propensity to dump were not adjusted to exclude the challenged information, or (2) even if the Tribunal disregarded the information, insufficient evidence remained on the record concerning end user sales generally to permit the conclusion that such sales were made at a margin of dumping.

In a review pursuant to section 76 of SIMA, the Tribunal may consider whether the subject goods have been sold at a margin of dumping during the review period. However, neither the size of the margins nor proportion of sales affected are dispositive on the propensity issue. As the Respondents rightly argued (Tr.228-9), even the complete absence of sales at margins of dumping would not necessarily justify rescission since it may be presumed that an antidumping order had a prophylactic effect on such sales. Rather, the question is whether dumping would continue or resume if the order were to be rescinded. In this regard, no single factor is controlling. Nevertheless, the record contained sufficient information to show that the subject merchandise was being sold at a margin of dumping by Toshiba and others during the review period.

The Tribunal's May 11, 1990 staff report, which preceded the hearing and the attempted introduction of the challenged margin data, showed that the quantity of Subject Goods dumped as well as the dumping margins tended, during the review period, to increase

initially, decrease slightly during 1988, and increase again during 1989. (R.v.2, p.75) Also, although Toshiba might have accounted for a plurality of the subject motors shipped to Canada, other U.S. producers accounted for a majority of U.S. origin shipments. Indeed, the exporter-specific data from Revenue Canada showed that there were dumping margins attributable to sales from these companies whether or not related to Canadian importers. (R.v.2, pp.198-202, relied upon in Toshiba Confidential Reply Brief at 46) Therefore, there is no indication on the record that the Tribunal either considered the challenged Toshiba data or that its analysis was otherwise skewed by it.

During the panel hearing, counsel for Toshiba apparently conceded that the record substantiates the Tribunal's assertion that it did not consider the data introduced on the last day of the hearing. (Tr.73,74) A review of the hearing transcript indicates that the data was referenced in a Revenue Canada submission and identified unequivocally by a witness during lengthy cross-examination. (R.v.12C, pp.1498-1502) Therefore, the Tribunal, being well apprised of the information it chose to ignore, and fortified by later submitted exporter-specific data, was able to segregate it from the remaining voluminous information available. Accordingly, the Complainants have not substantiated their conclusory assertions.[9]

3. Breach of Natural Justice: Revenue Canada Evidence

[9]The Complainants alleged that they were denied natural justice by the Tribunal's failure to grant the adjournment. The Tribunal considered the data to be in the nature of reply information to which no sur-reply is required. The record substantiates this conclusion. (R.v.12C, pp.1483-4)

Toshiba submits that the CITT breached a fundamental principle of natural justice in failing to allow Toshiba an opportunity to respond to data submitted by Revenue Canada on the last day of the CITT hearing. This data breaks down dumping by exporter. Toshiba itself had requested the CITT to obtain such data and did not object to its submission to the CITT when presented. Further, Toshiba did not request an opportunity to respond to the data nor did Toshiba challenge or contest the data before the CITT (Tr.81).

The Panel has concluded that there was no breach of natural justice with respect to this issue. The issue has been examined by the Panel under the heading "End User Sales", supra.

4. Changes in U.S. Plant Capacity

In determining whether rescission of an antidumping duty order would result in a continuation or resumption of dumping, the Tribunal has considered such economic indices as import trends, pricing and marketing patterns, as well as capacity and capacity utilization in the involved and other countries. Drywall Screws From Japan, Singapore, Taiwan, the Republic of Korea and France, Review No.: RR-90-003 (January 25, 1991). The Tribunal found in this review that U.S. producers have excess capacity or are planning to increase their capacity. (R.v.13, pp.10,31) Toshiba argued that an increase in capacity per se does not evidence a propensity to dump unless other facts establish an excess. Furthermore, Toshiba submitted that the record contained no evidence of excess capacity,

and that any increase in its U.S. capacity was directed towards satisfying demand in third countries through its affiliates.

The Tribunal did not discuss changes in the rate of capacity utilization nor suggest that increases in capacity had lowered the utilization rate in the U.S.. Nevertheless, the Tribunal concluded from the information on the record that there had been excess capacity during the review period, and presumably drew an inference that the Canadian market would be the target for at least part of that excess capacity.

The record on capacity utilization is not extensive. The Tribunal issued no questionnaires to U.S. producers,[10] and the point was not discussed in the staff report. However, testimony received during the hearing indicated that Toshiba had sought to achieve a higher capacity utilization rate. (R.v.12C, p.1336; v.11B, p.856) Also, there was some equivocal testimony on the record from which it could be deduced that since U.S. producers conform to NEMA and EEMAC specifications, that Canada would be the natural target market for any excess capacity in the United States. (R.v.12C, pp.1354-8) Although the parties apparently disputed whether an increase in U.S. production capacity indicated a propensity to dump, it was for the Tribunal to weigh the significance of the testimony and to infer, as it apparently did, that there was or soon would be at least some excess capacity

[10]Toshiba International Corporation answered the importers' questionnaire submitted to its Vancouver, B.C. affiliate which contained no inquiry concerning production capacity. (R.v.6, pp.87 et seq.).

which suggested a propensity to increase sales to the Canadian market. The Complainants have not demonstrated satisfactorily that the Tribunal's subsidiary factual finding on this issue was not supported by evidence on the record or that the inferences drawn therefrom were patently unreasonable. More to the point, even if there were no evidence of excess production capacity in the United States, this Panel could not conclude that there would not otherwise be evidence on the record to support the Tribunal's ultimate finding of propensity to dump. Accordingly, the finding was reasonable as a matter of law.

5. Miscellaneous Issues

Toshiba raises three additional issues relating to the CITT's Finding that there was a propensity to dump on the part of U.S. exporters of Small Motors.

First, it argues that the CITT erred in finding a propensity to dump because there was uncontroverted evidence in the record that prices in the United States were lower than in Canada. Indeed, the CITT noted that the participants in the hearing "generally agreed that domestic [Canadian] prices were higher than U.S. prices, but would decline over time to reach US levels as Canadian tariffs declined under the Canada-United States Free Trade Agreement." (CITT Decision at 19). The Panel believes that Toshiba's argument is irrelevant. Under Canadian and international practice, the existence of dumping is established by comparing the price of an individual export shipment with the normal value of

the like product in the exporter's domestic market. Dumping may occur in individual transactions, even if average domestic prices in the exporting country are below average export prices. Accordingly, average price levels are not even determinative of whether dumping has occurred in the past, let alone of whether it will occur in the future. Thus, it was not patently unreasonable for the CITT to find a propensity to dump even if average price levels in the United States were below average Canadian prices.

Second, Toshiba claims that the CITT erred in referring to a dumping margin in percentage terms where Revenue Canada had calculated that margin by dividing the dollar value of the margin of dumping by the dollar value of the dumped exports. In Toshiba's view the dumping margins should have been calculated by dividing the dollar value of the margin of dumping by the dollar value of all exports, whether dumped or not. Toshiba asserts that its position is supported by current Revenue Canada practice, which is disputed by the CITT. In the opinion of the Panel, this claim is irrelevant to the matter at hand. The CITT has the discretion to express dumping margins in either manner and its choice in this regard was not patently unreasonable. What may be important in determining propensity to dump are the underlying facts — the volume and value of total exports, the volume and value of dumped exports and the amount of dumping duties collected (which represents the

dumping margin). Those facts are not in dispute. How the CITT chooses to express dumping margin percentages in light of those facts does not affect the facts themselves.[11]

Finally, Toshiba argues that the CITT erred in finding a propensity to dump on the part of Toshiba in the face of uncontroverted evidence that Toshiba endeavoured to comply with the normal values set by Revenue Canada. Toshiba excuses its actual dumping despite its best intentions as accidental and de minimis. The Panel would note at the outset that the propensity to dump finding was made against the U.S. industry as a whole and the fact that one or more U.S. exporters was not dumping or did not have a propensity to dump would not necessarily vitiate that finding.[12]

In any event, there was evidence in the record to support a CITT finding that Toshiba had a propensity to dump. It appears from the record that Toshiba competed on the basis of price in some instances, that it usually set its export prices on the basis of Revenue Canada's normal values and that its dumping was largely due to the fact that the normal values had changed. This, and other evidence before the CITT, means that it was not patently unreasonable for the CITT to conclude that Toshiba was an aggressive pricer and

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[11]The CITT's discussion of dumping margins has nothing to do with the assessment of antidumping duties. Revenue Canada is responsible for calculating the duties owed in respect of a particular transaction.

[12]If a particular U.S. exporter was in fact not dumping, then in theory it would pay no antidumping duties because its export prices would be above the normal values calculated by Revenue Canada.

that it would dump in the future, just as it had in the past, by trying to price "too close" to normal values and ending up dumping by pricing below them.

The fact that Toshiba and Baldor, as well as a number of other U.S. exporters, had consistently engaged in some dumping (whether intentional or not) during the preceding five years, leads the Panel to conclude that the CITT was not patently unreasonable in finding a propensity to dump on the part of U.S. exporters as a whole. While the expected amount of future dumping, based on the evidence before the CITT, might not be great, there was clearly evidence before the CITT to suggest dumping would continue.

C. Industry Vulnerability: Consideration of Section 42(3)(a) of SIMA

The Complainants allege that the CITT erred in failing to review the scope of the term "domestic industry" as required under section 42(3)(a) of SIMA and paragraph 1 of Article 4 of the GATT Anti-Dumping Code.

Section 42(3)(a) of SIMA states:

> (3) The Tribunal, in considering any question relating to the production in Canada of any goods or the establishment in Canada of that production, shall take fully into account the provisions of
>
> a) in a dumping case, paragraph 1 of Article 4 of the Agreement signed at Geneva, Switzerland, on December 17, 1979 on Implementation of Article VI of the General Agreement on Tariffs and Trade;

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

> 1. In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that
>
> (i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the industry may be interpreted as referring to the rest of the producers;

The Complaint by Toshiba alleges that the CITT "neglected to consider the impact of dumping, as reported by Revenue Canada, by the U.S. parents of the Canadian parties supporting a continuation of the material injury finding." In its Brief, the Complainant Toshiba refers to the requirements of section 42(3)(a) of SIMA and states that the evidence on the record is that the four Canadian companies that purported to seek a continuation of the finding in respect of the United States (i.e. Westinghouse, GE, Leroy and Leeson) were all related to and/or controlled by American parent corporations. Toshiba argues that while the wording of the said GATT Code is permissive, the requirement that the CITT turn its attention to the question is mandatory and that neglecting to do so is a failure to exercise its jurisdiction and an error in law. Toshiba relies on the statement made by the CIT in Photo Albums and Leaves that "... the Tribunal must address the question of defining the domestic industry for purposes of determining injury in the present case" (1985), 9 C.E.R. 108, at 113-114 (C.I.T.).

None of the Complainants had requested the CITT to review or re-examine the scope of the term "domestic industry" nor requested the exclusion from the Canadian domestic industry of those Canadian producers which are related to American corporate exporters.

In its Statement of Reasons dated October 10, 1990 the CITT clearly indicated that the American ownership of Westinghouse, GE, Leroy and Leeson were factual matters before the CITT. The review by the CITT (Review No. RR-89-013) covered earlier findings of material injury from exports not only from the United States but also from Brazil, Japan, Mexico, Poland, Taiwan and the United Kingdom. The finding of the Anti-Dumping Tribunal dated April 15, 1983 (United States of America exports) reviewed the domestic industry at that time but did not specifically refer to American ownership of Canadian producers. The finding of the CITT dated October 11, 1985 (Brazil, Japan, Mexico, Poland, Taiwan and the United Kingdom) again reviewed the domestic industry and included an analysis of the American ownership of certain of the Canadian producers.

A Tribunal does not err in law by "failing to make an explicit written finding on each constituent element of its decision." (MacLean Hunter Ltd. v. Deputy Minister of National Revenue (Customs and Excise) (1988), 15 C.E.R. 340 at 343 (F.C.A.). The constituent element in the present case is a continuation of the scope of the term "domestic industry" without any exclusion for Canadian producers related to American exporters. While arguably not specifically addressed by the CITT there appears to be adequate evidence

on the record to the effect that the domestic industry in Canada is largely comprised of Canadian subsidiaries of American corporations.

Photo Albums and Leaves, supra., was a decision of the CIT under section 42(1) of SIMA pursuant to a Notice of Commencement of Inquiry. The case was an original inquiry by the CIT into a determination of dumping and held that such dumping caused material injury. The CIT did address the issue of defining the domestic industry under section 42(3) of SIMA and paragraph 1 of Article 4 of the GATT Code on the basis that one of the Canadian producers was an importer of the subject goods. The CIT redefined the domestic industry to exclude the Canadian producer which was benefitting from its own importation of the dumped goods and concluded that the domestic industry was the one remaining Canadian manufacturer.

The Panel is of the opinion that the obligation imposed on the CITT by Section 42(3)(a) of SIMA and Paragraph 1 of Article 4 of the GATT Code is to interpret the term "domestic industry" as referring to the "domestic producers as a whole ..." which was done by the CITT in this case. Consideration of an exception for related parties is purely a permissive and non-mandatory aspect of these anti-dumping provisions. The purpose of Paragraph 1 of Article 4 of the GATT Code and the exception clause for related parties or for domestic producers importing the dumped product is to allow the CITT to more narrowly define the domestic industry as being less than the whole of the domestic producers.

In the present case, none of the Complainants requested nor sought a review of the term "domestic industry" by the CITT during the review hearings held in June 1990. As the CITT continued to interpret the term "domestic industry" as referring to the domestic producers as a whole, the Panel has concluded that there is nothing patently unreasonable with the CITT's decision in this case.

D. Baldor Exclusion

Baldor argued that the CITT abused its discretion by not excluding Baldor from the scope of the CITT Finding because, inter alia, GE Canada consented to its exclusion and it offered evidence that it was a responsible pricer, it did not have a propensity to dump and its past dumping was relatively small and of a technical nature.

In considering this issue, we note at the outset that the applicable test is whether it was patently unreasonable for the CITT not to exclude Baldor from its finding. It is clear under Canadian law that a decision not to exclude an individual company is committed to the discretion of the CITT as it is fact-specific in nature. See Hitachi v. Anti-dumping Tribunal, [1979] 1 S.C.R. 93; Sacilor Aciéries v. Anti-dumping Tribunal, (1985), 9 C.E.R. 210 (F.C.A.). Second, the CITT is not required to "relate its finding to each exporter.": Hitachi, supra. Thus, even if Baldor was not itself causing injury, it could be included within the CITT Finding. Of course, if it did not dump, it would not have to pay duties. Third, only two examples of producer exclusions from findings made by

predecessors of the CITT were brought to the Panel's attention. Thus, given the substantive law, the broad discretion of the CITT in this area and the infrequency of such exclusions, we think that Baldor bears a heavy burden of persuasion on this issue.

The CITT declined to exclude Baldor from its finding in light of the following facts: (i) Baldor is one of the largest U.S. exporters of the Subject Motors to Canada, (ii) only one Canadian producer indicated its agreement to exclude Baldor (the rest of the Canadian industry participating in this case opposes exclusion), and (iii) Baldor's "margin of dumping and the percentage of its exports that are dumped are not negligible." (CITT Decision at 24)

In order to evaluate the CITT's Decision, it is instructive to consider the two cases brought to the attention of the Panel where exclusions of individual producers have been granted. In Carbon and Alloy Steel Plates, (1983), 6 C.E.R. 21 (A.D.T.), one French producer was excluded on the grounds that its sales in Canada represented only a small percentage of French exports, that most of its sales (80%) were of excluded products, and that the remaining products "were in grades commanding prices in the market place that were higher than those of the domestic product." Id. at 34. In Countertop Microwave Ovens (1982), 4 C.E.R. 92 (A.D.T.), a Japanese producer was excluded from the finding of material injury on the grounds that its dumping was negligible, that there was no evidence of unfair or predatory pricing, that there was no evidence of lost sales or price suppression and that the exclusion was acceptable to the Canadian industry. The facts in this case are not

identical to these other cases. In particular, there is opposition to Baldor's exclusion, Baldor is a major exporter and the CITT concluded that Baldor's dumping was "not negligible".

Since Baldor's situation is not directly comparable to exporters that have been excluded in past cases, the CITT's Decision cannot be criticized as inconsistent with its past actions. Moreover, we would note that Baldor admits that it was dumping, and it is for the CITT to weigh the significance of that dumping. We cannot second-guess the CITT's conclusion that Baldor's dumping was not negligible (CITT Decision at 24) and that dumping by U.S. exporters (including Baldor) was likely to cause material injury (CITT Decision at 26). Accordingly, since the reasons cited by the CITT for its decision on Baldor's exclusion request are not patently unreasonable, the majority declines to remand to the CITT on this point.

The basis of the dissent on this issue is that the CITT did not have evidence before it that would enable it to conclude that Baldor was underselling Canadian producers. It did, of course, have before it Baldor's claim that it was not underselling (i.e. that no one had lost sales to it) and it did not reject that evidence. The importance of that evidence is, however, open to question. Under Hitachi, supra., it is clear that proof of a lack of injury due to Baldor (which the dissent equates with a lack of underselling) would not automatically

entitle Baldor to an exclusion as a matter of law.[13] The exclusions granted to individual exporters in the two cases described above turned on factors other than the absence of underselling, which means that Baldor cannot claim that it was entitled to an exclusion under CITT practice. Since the presence or absence of underselling does not determine whether an exclusion must be granted, we are unwilling to say that the CITT had to gather more evidence on the underselling issue.

VIII. DISSENTING VIEWS OF PANELIST GERAGHTY AS TO WHETHER THE DECISION SHOULD BE REMANDED TO THE CITT TO AUGMENT THE RECORD AND RECONSIDER THE EXCLUSION OF BALDOR

Baldor argued that the Tribunal abused its discretion by not excluding it from the scope of the antidumping order because, among other things, there was no evidence that any Canadian producer lost sales to Baldor. The record shows that domestic producers and importers sold to original equipment manufacturers (OEM), end users, and distributors at a range of prices. (R.v.2, p.63) The Tribunal found that, "Baldor does not compete directly with G.E. Canada in the end-user market segment, but does compete with Westinghouse and Leroy-Somer in the other market segments." (R.v.13, p.31) The record substantiates that Baldor sold to unrelated distributors in Canada. (R.v.5A, p.80 et. seq.) However, the

[13]It is not even clear that a lack of underselling proves a lack of injury. Given that most of Baldor's sales were to distributors, it may be that it was not competing with Canadian producers for those sales. Nonetheless, those sales could injure Canadian industry, which has to compete, directly or indirectly, with sales by Baldor's distributors.

Tribunal declined to exclude Baldor because the magnitude of its exports, margin of dumping, and percentage of its exports that were dumped were not negligible.

The threshold issue is to identify the criteria upon which the Tribunal may exclude a party from the scope of an antidumping order. In the instant proceeding the Tribunal excluded imports made by Trane Canada solely for assembly into equipment for export under the Inward Processing provisions of the Customs Tariff on grounds that such imports were not sourced from Canadian suppliers because of certain U.S. market requirements. (R.v.13, pp.33,4) The exclusion was not U.S. producer specific. During the panel review hearing, counsel for the Tribunal explained that in a prior proceeding the Tribunal had excluded a producer which was no longer manufacturing the subject goods. (Tr.,343) Also, in the case of Carbon and Alloy Steel Plates, supra., the Tribunal excluded a French company, Creusot-Loire, because its sale prices exceeded those prevailing in the domestic market. (Tr. 343, 392-3, 420) The Carbon and Alloy Steel Plates decision is apropos. If there is no evidence of underselling, that is, if the prices for the imported product exceeded the prices for the domestically produced product, price as such could not have been the reason for any lost sales. In other words, without underselling there could have been no causal link between the purportedly injurious lost sales and the dumping margin inasmuch as dumping is a price oriented phenomenon. Underselling is the sine qua non of

injury by reason of dumping.[14] Therefore, if the record shows that Baldor did not undersell the domestic producers, the Tribunal failed to follow its own precedent on exclusion despite evidence of the dispositive criterion.

At the panel hearing, counsel for Baldor insisted that Baldor did not compete based on price but could not respond categorically that there was no price underselling. (Tr. 395,6) Baldor's prices were reported in the questionnaire responses of its unrelated distributors, Dryden Agencies Ltd. and Canadian Electro Drives (1982) Ltd. (R.v.6A, p.99) The price terms were delivered to the distributors' warehouses and stated for each year of the review period in the aggregate by product category (horsepower). The number of units sold annually by category likewise were reported so that average unit prices were calculable. The Tribunal's producer questionnaires too sought annual aggregate prices and number of units sold during the review period by product category. Therefore, a domestic producer's average unit prices similarly could be determined. However, producers did not report prices by level of trade, that is, to OEM, end users, and distributors. (R.v.3, pp.9, 16) Also, there was no legend on the questionnaire sales price schedule or in the instructions stating whether the prices should be reported ex-factory or delivered.[15]

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[14]The principle is recognized and known as "technical dumping" in the United States. See, S. Rpt. No. 1298, 93d Cong., 2d Sess. 179 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 7316. However, it may be noted that the United States International Trade Commission has never made a company specific exclusion in an antidumping "changed circumstances" review proceeding conducted under 19 U.S.C. § 1675(b).

[15]Westinghouse reported prices "at the customer level" for 1985 and 1986 and provided a factor to permit customer level prices to be determined from warehouse level prices for 1987

A sample comparison of the Baldor and Westinghouse sales data indicates that there was underselling. A comparison of Baldor and Leroy-Somer sales shows underselling in certain product ranges. However, the comparisons are not meaningful since the Westinghouse and Leroy-Somer figures include end user and OEM sales. The Tribunal could not have known from the record before it whether Baldor had undersold the domestic producers at the distributor level. Once the Tribunal discovered from the questionnaire responses that the prices varied materially at different levels of trade, it should have sent the domestic producers supplementary questionnaires so that the proper comparisons could be made. When the Tribunal found that Baldor did not compete in the end user market segment, it could not properly evaluate the exclusion request against its own criteria as in Carbon and Alloy Steel Plates, supra.. Therefore, the denial of Baldor's exclusion request was not based on relevant evidence on the record and was a capricious abuse of direction. For this reason, the Panel should remand the finding to the Tribunal. Since the Tribunal did not marshal sufficient evidence to evaluate the issue, it would be appropriate for it to augment the record on remand accordingly.

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through 1989. (R.v.4, p.53).

IX. DECISION OF THE PANEL

For all of the foregoing reasons, and pursuant to Article 1904.8 of the FTA, the majority of the Panel affirms the October 10, 1990 CITT Decision which continued the April 15, 1983 ADT finding of material injury respecting Integral Horsepower Induction Motors, 1 HP to 200 HP inclusive, with exceptions, originating in or exported from the United States of America.

SIGNED IN THE ORIGINAL ON SEPTEMBER 11, 1991 BY:

E. David D. Tavender, Q.C.
Chairperson

James Chalker, Q.C.

Professor William J. Davey

James A. Geraghty, Esq.

Robert J. Pitt